STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEONARD ONEIL TURNER, a/k/a EUGENE TURNER, a/k/a LARRY HANSEND,

Defendant-Appellant.

UNPUBLISHED
March 26, 1999

No. 203767
Recorder's Court
LC No. 96-001973

Before: Neff, P.J., and Kelly and Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to consecutive prison terms of two years for the felony-firearm conviction and twenty-five to fifty years for the second-degree murder conviction. We affirm.

I

Defendant's first claim of error on appeal concerns statements he made to the police. Defendant contends that statements he made to the police at his home shortly after they arrived should not have been allowed into evidence because the statements were made before defendant was advised of his constitutional rights. We disagree.

Absent clear error, we defer to the trial court's findings of historical fact when reviewing suppression hearing findings. *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997). "A finding of historical fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *Id.*

The trial court did not err in allowing defendant's statements to the police into evidence because the statements were in response to the police officers' on-the-scene questions, which are admissible and do not violate a defendant's constitutional rights. See *People v Dunlap*, 82 Mich App 171, 174-175;

266 NW2d 637 (1978). Therefore, defendant's claim that his statements to the police officers at his home should have been suppressed must fail.

Defendant also argues that his statements made at police headquarters should have been suppressed because they were the product of improper police conduct, namely the failure to advise defendant of his constitutional rights when he was questioned at his home. In support of his argument, defendant relies upon the "cat out of the bag" theory, discussed in *People v Bieri*, 153 Mich App 696, 706; 396 NW2d 506 (1986). This theory states that an otherwise proper statement to the police should be excluded if it is "solely derivative" from a statement found to be involuntarily made to the police. However, because the statements defendant made to the police at his home did not run afoul of defendant's constitutional rights, defendant cannot succeed under the "cat out of the bag" theory. Defendant's statements at police headquarters were not the fruit of an improperly obtained statement.

II

Defendant next claims that the trial court erred in failing to grant defendant's motion to quash. Again, we disagree.

We review a district court magistrate's decision to bind over a defendant and a trial court's ruling on a motion to quash an information to determine whether the district court abused its discretion. *People v Hamblin*, 224 Mich App 87, 91; 568 NW2d 339 (1997). After the conclusion of a preliminary examination, if it appears to the magistrate that a felony has been committed and that the defendant committed it, the magistrate shall bind the defendant over for trial. MCL 766.13; MSA 28.931. "Probable cause signifies evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997), quoting *Coleman v Burnett*, 155 US App DC 302, 316; 477 F2d 1187 (1973). "The prosecutor need not prove each element beyond a reasonable doubt but must present some evidence from which each element of the crime may be inferred." *Hamblin*, *supra* at 92.

The elements of first-degree murder are: (1) that the defendant intentionally killed the victim; and (2) that the act of killing was deliberate and premeditated. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Defendant claims that no evidence was presented on the element of premeditation and deliberation. However, evidence that defendant threatened the victim sometime prior to killing her was presented to the magistrate. Defendant argues that "threats alone do not make out a case of premeditation," citing *People v Gill*, 43 Mich App 598, 606; 204 NW2d 699 (1972). We find that *Gill* is distinguishable from the present case. Summing up the evidence in *Gill*, this Court found that "the sequence of events establishes a threat, a fight, and a killing." *Gill*, *supra* at 606. The killing in *Gill* was not premeditated because it was missing "the time factor between the threat and the fight and any showing that there was an opportunity for cool-headed reflection on [the defendant's] part." *Id.* In the present case, however, there was a time lapse between the threat and the killing, affording defendant an opportunity to "take a second look." *Anderson*, *supra* at 537. We find the magistrate was presented with sufficient evidence to bind defendant over on the charge of first-degree murder.

Defendant also argues that even though he was not convicted of first-degree murder, it was still reversible error to present this charge to the jury if there was no evidence to support the charge. In support of this contention, defendant relies upon *People v Vail*, 393 Mich 460, 463-464; 227 NW2d 535 (1975). However, the Michigan Supreme Court has overruled *Vail*'s automatic reversal rule in *People v Graves*, 458 Mich 476; 581 NW2d 229 (1998). Therefore, defendant's argument must fail, as it has been expressly rejected by the Michigan Supreme Court. Moreover, there was sufficient evidence of premeditation and deliberation to warrant instructing the jury on first-degree murder.

III

Finally, defendant argues that he was denied the effective assistance of counsel. In order to prevail on an ineffective assistance of counsel claim, defendant must show that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Defendant must also overcome the presumption that counsel's action might be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant argues that his trial counsel failed to impeach a witness at trial. However, our review of the record reveals that defendant's argument is based upon an erroneous interpretation of the witness' testimony. Notwithstanding this, however, decisions regarding the impeachment of witnesses is a matter of trial strategy which we will not second-guess. *LaVearn, supra* at 216; *People v Caballero*, 184 Mich App 636, 639-640; 459 NW2d 80 (1990).

Affirmed.

/s/ Janet T. Neff
/s/ Harold Hood