STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY JACKSON, JR.,

Defendant-Appellant.

UNPUBLISHED
January 12, 2006

No. 258195
Wayne Circuit Court
LC No. 04-003384-01

Before: Murray, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment without the possibility of parole for the first-degree murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant's first issue on appeal is that there was insufficient evidence to support his conviction for first-degree murder. We disagree. When reviewing a claim of insufficient evidence, this Court must view the evidence de novo, in the light most favorable to the prosecutor, and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). Questions of credibility and intent should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

To prove first-degree premeditated murder, the prosecution must establish that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000). Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation can be inferred from the surrounding circumstances, but the inferences cannot be merely speculative and must be supported in the record. *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998). Factors evidencing premeditation are: (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing, including the weapon used and the location of the wounds; and (4) the defendant's conduct after the victim's death. *Id.* at 301.

Defendant first argues that the evidence was insufficient to prove that he killed decedent. We disagree. In this case, decedent, unarmed, answered the door to the apartment. Two witnesses saw defendant in the living room with a rifle. According to one of them, the rifle was pointed at decedent. Soon after decedent opened the door, shooting started in the living room. The fired casings, the police found in the living room, most likely came from an assault rifle. Those casings were all fired from the same weapon. A witness also observed codefendant in the apartment, but codefendant was armed with a handgun, not a rifle. A third witness observed defendant in the living room with a rifle after the shooting stopped. Decedent was found bleeding by the door that he had opened for defendant. Viewing the evidence in a light most favorable to the prosecution, we conclude that sufficient evidence was presented to support the finding that defendant killed decedent.

Defendant also argues that insufficient evidence was presented to show premeditation. In this case, defendant knew the people with decedent when he was shot, but there is nothing in the record to suggest that defendant had any problems with decedent or would want to kill him. Defendant did, however, come to the apartment with a rifle and, almost immediately, started shooting. Decedent was shot seven times, but it is possible that some of those wounds may have been from another gun. Decedent was found by the door that he had opened for defendant. After the shooting, defendant left decedent bleeding on the ground. Defendant was arrested at his work without incident. Viewing the above evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence presented for a rational trier of fact to conclude that defendant premeditated before killing decedent.

Defendant's second issue on appeal is that the trial court erred in ruling that the prosecution and the police used due diligence in attempting to produce two endorsed witnesses, LaRhonda Mims, also known as Roselyn Mims, and Melvin Burton, and thus, erred by denying defendant's request for a missing witness instruction. This Court reviews a trial court's determination of due diligence and the appropriateness of a missing witness instruction for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004). An abuse of discretion is found when the trial court's decision is so grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, or when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *People v Callon*, 256 Mich App 312, 326; 662 NW2d 501 (2003).

A prosecutor who endorses a witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial. *Eccles, supra* at 389. A prosecutor who fails to produce an endorsed witness may show that the witness could not be produced despite the exercise of due diligence. *Id*. The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced the witness. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). If the trial court finds a lack of due diligence, the jury should be instructed that it may infer that the missing witness' testimony would have been unfavorable to the prosecution's case. *Eccles, supra* at 389; CJI2d 5:12.

Defendant first challenges whether the prosecution exercised due diligence in attempting to produce Mims. Mims initially gave the police an incorrect name. The prosecutor tried to serve a subpoena on her through two other witnesses, including Mims' mother, but they had not

seen Mims for weeks. They also told the prosecutor that Mims was bipolar. Officer Jones went to the apartment where the shooting occurred in an attempt to locate Mims, but it was vacant. He also went to her work, but she had been fired. Officer Jones went to the apartment and the workplace before the trial, but he could not say when. During the trial, he went to a number of different addresses looking for Mims. Defendant's sister provided some of those addresses during the trial, but no one there had heard of Mims. Another was found through a reverse lookup of a phone number Mims had listed in her witness statement. No one knew Mims at that address either. Officer Jones also went to a bar Mims was known to frequent, but she was not there.

As noted above, the test for due diligence is one of reasonableness and depends on the facts and circumstances of each case. In this case, the prosecution and police had little information upon which to conduct an investigation for Mims and only a few leads regarding her whereabouts. The police did follow up every lead they had on Mims' location. Not all of those leads, however, were followed quickly. Most of his searching for Mims was conducted while the trial was going on. Some of that searching was prompted by new information given by defendant's sister. Other searching could have been done earlier. Outside of following the slim leads in this case, the prosecution did nothing.

Due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of a witness. *Beason, supra* at 684. In this case, the prosecution did attempt to look for Mims. The prosecution had very little information to work with. Its attempts were partly late and partly incomplete. They were not so lacking, however, that we can conclude that the trial court's decision was so lacking that it was so grossly contrary to fact and logic, that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, or when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. Therefore, we conclude that the trial court did not abuse its discretion in finding due diligence.

Defendant also challenges whether the prosecution exercised due diligence in attempting to locate Burton. The prosecution knew for almost three months before the trial that Burton was missing. Both the prosecutor and police spoke with Burton's grandmother on several occasions. Burton's grandmother claimed that Burton had moved first to Tennessee and then to Atlanta, Georgia, during that time. She did provide a phone number for Burton in Tennessee, but the number was not correct. Burton's grandmother later refused to answer her door when the police came by.

We conclude that the trial court did not abuse its discretion in finding that those actions constituted due diligence. As was the case with Mims, the prosecution had very little information to work with and, once again, it seemed to follow the slim leads it had while ignoring other avenues of searching. Due diligence does not, however, require that the prosecution do everything possible. The prosecution acted reasonably based on the little information it had and the trial court did not abuse its discretion in ruling that the prosecution was diligent.

Affirmed.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly