

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS LAMONT DILLARD,

Defendant-Appellant.

UNPUBLISHED

August 20, 1996

No. 180445

LC No. 93-008258

Before: Jansen, P.J., and Reilly and M.E. Kobza,* JJ.

PER CURIAM.

Following a bench trial in the Detroit Recorder's Court, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and third habitual offender, MCL 769.11; MSA 28.1083. He was subsequently sentenced to life in prison as a third habitual offender, consecutive to a two-year prison term for felony-firearm. Defendant appeals as of right and we affirm.

Defendant first argues that the trial court erred in admitting the former testimony of Francis Bradley because the prosecution failed to establish due diligence in its efforts to locate the witness.

In order to admit the former testimony of a witness pursuant to MRE 804(b)(1), the witness must be unavailable to testify. A witness may be considered unavailable if the proponent of the former testimony has been unable to procure the attendance of the witness by process or by other reasonable means after exercising due diligence. MRE 804(a)(5). The test for due diligence is whether diligent good-faith efforts were made to procure the testimony rather than whether more stringent efforts would have been able to produce the witness. *People v James (After Remand)*, 192 Mich App 568, 571; 481 NW2d 785 (1992).

In the present case, the prosecution's investigator conducted a computer search to determine whether Francis Bradley had been issued a driver's license or a personal identification card by the state, contacted the county morgue, local hospitals, utility companies, and Bradley's former employer. The

* Circuit judge, sitting on the Court of Appeals by assignment.

investigator also visited, on two occasions, an address at which Bradley was apparently receiving food stamps. The investigator also testified that Bradley's former boyfriend told him that a subpoena addressed to Francis Bradley came to his address, and that he personally delivered the subpoena to Bradley. These efforts were sufficient to satisfy the due diligence requirement of MRE 804(a)(5). *People v Conner*, 182 Mich App 674, 681; 452 NW2d 877 (1990).

Defendant next argues that the trial court's refusal to allow a continuance for further efforts to locate Francis Bradley violated his constitutional right to present a defense.

The factors to be considered when reviewing the denial of a continuance include 1) whether the defendant asserted a constitutional right, 2) whether the defendant had a legitimate reason for asserting the right, 3) whether the defendant was negligent, 4) whether the defendant requested previous adjournments, and 5) whether the defendant demonstrated prejudice. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). The denial of a continuance is reviewed for an abuse of discretion. *Id.*

In the present case, defendant failed to show that he was prejudiced by the trial court's denial of his request for a continuance. Defendant's objection to the introduction of Francis Bradley's former testimony was that Bradley was not cross-examined at the former trial concerning the fact that she was unable to identify defendant at his preliminary examination. The trial court in the present case noted defendant's objection. Furthermore, in its findings of fact, the trial court stated that it would take into consideration the fact that Bradley failed to identify defendant at the preliminary examination when considering her testimony. Furthermore, Sergeant Lee's testimony was sufficient to identify defendant as the shooter. Because defendant failed to show prejudice, the trial court did not abuse its discretion in denying the request for a continuance.

Defendant next argues that there was insufficient evidence to find him guilty of second-degree murder.

When determining whether sufficient evidence was presented to sustain a conviction, the evidence must be viewed in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

To establish the crime of second-degree murder, the prosecution must prove that defendant caused the death of the victim and that the killing was done with malice and without justification or excuse. *People v Harris*, 190 Mich App 652, 659; 476 NW2d 767 (1991). Malice is the intent to kill, the intent to do great bodily harm, or the intent to create a high risk of death or great bodily harm with knowledge that such is the probable result. *Id.* Malice may be inferred from the facts and circumstances of the killing. *Id.*

In the present case, Detroit Police Sergeant Lee and Francis Bradley, both eyewitnesses to the shooting, identified defendant as the shooter. There was testimony that the victim was shot several times in the head and neck areas while he was sitting on his front porch and this is sufficient evidence of malice. Defendant presented no evidence of justification or excuse. There was sufficient evidence for the trier of fact to find that the elements of second-degree murder were proven beyond a reasonable doubt.

Defendant next argues that his case should be remanded to the trial court for an evidentiary hearing on his claim that the individual who testified at his jury trial as Vengell Hamilton was not the same person who testified as Vengell Hamilton at defendant's earlier bench trial. This issue is not properly preserved for review. Although defendant was aware of this issue at trial, he failed to raise the issue until after the trial court's verdict. Defendant should have raised this issue when Hamilton testified to allow the trial court to fashion an appropriate remedy, if necessary, or to create an adequate record for appellate review. *People v Hyland*, 212 Mich App 701, 709; 538 NW2d 465 (1995). Accordingly, this issue is not preserved for appellate review and we note that Hamilton testified to the same basic facts at both trials and, therefore, any error was harmless.

Defendant's final argument is that his life sentence as a third habitual offender violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

As an habitual offender, third offense, defendant was eligible for a sentence of any term of years to life imprisonment. MCL 769.11(1)(b); MSA 28.1083(1)(b). Further, appellate review of habitual offender sentences using the sentencing guidelines completed for the underlying felony is inappropriate. *People v Gatewood*, 450 Mich 1021 (1996); *People v Gatewood (On Remand)*, 216 Mich App 559; 560 NW2d ___ (1996). The victim in this case was shot in the head, and he died of multiple gunshot wounds. The trial court noted at sentencing that defendant's only motive for the shooting was apparently that the victim was preventing defendant from selling drugs from Nancy Hamilton's apartment. Additionally, defendant's prior record includes two felony convictions and one misdemeanor conviction. Defendant's sentence does not violate the principle of proportionality.

Affirmed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Michael Eugene Kobza