

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS DAVID OLIVER,

Defendant-Appellant.

UNPUBLISHED

November 25, 1997

No. 197718

Branch Circuit Court

LC No. 96-026084-FC

Before: Fitzgerald, P.J., and Markey and J.B. Sullivan*, JJ

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment for the first-degree murder conviction, and two years imprisonment for felony firearm. He appeals as of right, and we affirm.

On December 22, 1995, Randy Bradley was found murdered on his front lawn. Bradley's wife had previously lived with defendant for approximately two years. The cause of death was determined to be a gunshot wound to the head. A 9-millimeter Smith & Wesson pistol was found in a cornfield near the shooting. Defendant had purchased this gun from a doctor in Indiana. The bullet recovered from Bradley's head was fired from the gun, and four cartridges that were also fired in the gun were recovered approximately twenty three feet from Bradley's body. Additionally, there was other circumstantial evidence connecting defendant to the shooting.

Defendant first argues that the trial court abused its discretion by failing to excuse a juror who was related to the victim. Specifically, defendant maintains that a juror was related to the victim within the ninth degree of consanguinity, in violation of MCR 2.511(D)(9). This Court reviews a trial court's decision to excuse a juror for cause for an abuse of discretion. *People v Walker*, 162 Mich App 60, 64; 412 NW2d (1987). When the juror brought the relationship to the trial court's attention, he stated that he "believed" that the victim's grandmother and his grandfather were cousins. However, on the last day of trial, defense counsel indicated that the juror's grandmother was a sister of the grandmother of the victim. Thus, the exact nature of the relationship is not clear from the record. Because this Court's

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

review is limited to the record on appeal, allegations not supported by the record presented will not be considered. *Hawkins v Murphy*, 222 Mich App 664, 670; 565 NW2d 674 (1997). Because there is no way for this Court to determine the exact nature of the relationship, we will not consider defendant's claim. We note that, although defendant called the juror's impartiality into question on the last day of trial, defendant had previously acquiesced to this person remaining as a juror.

Defendant next argues that the trial court abused its discretion by excluding evidence that the Michigan State Police heard that the victim was involved in the sale of marijuana. We disagree. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Coleman*, 210 Mich App 1,4; 532 NW2d 885 (1995). Citing *People v Brooks*, 453 Mich 511; 557 NW2d 106, defendant specifically argues that this evidence should have been admitted because it was relevant to his defense that the victim's death was related to the victim's involvement in the sale of marijuana. However, *Brooks* addresses the erroneous exclusion of evidence that the victim of a homicide had cocaine in her system at the time of her death, which supported the defendant's testimony at trial that the victim had large quantities of cocaine in her home. In the present case, evidence was admitted that the victim had ingested marijuana within forty-eight hours of his death.

More importantly, defendant confuses the nature of the trial court's ruling. The court did not rule that the evidence was irrelevant. Rather, the court ruled that it would allow evidence relating only to whether the victim was arrested or convicted of a drug offense. This ruling was directly in response to the form of the evidence that defendant sought to introduce. Defendant sought to elicit testimony that the state police were informed that the victim was involved in the sale of marijuana. Such evidence would constitute hearsay. MRE 803. Hearsay, although relevant, is inadmissible. MRE 802. The trial court did not abuse its discretion by excluding this evidence.

Finally, defendant argues that the trial court erred by instructing the jurors on lying-in-wait. We disagree. Jury instructions are reviewed de novo to determine whether the issues to be tried were fairly presented and the defendant's rights were adequately protected. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). Jury instructions must include all elements of the charged offense, and must not exclude material issues, defenses and theories if there is evidence to support them. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Contrary to defendant's contentions, the lying-in-wait instruction given to the jury was supported by the evidence. MCL 750.316; MSA 28.548 provides that murder perpetrated by means of lying-in-wait is a type of willful, deliberate, and premeditated killing. Premeditation and deliberation may be inferred from circumstantial evidence. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

In the instant case, evidence was presented that the victim's bedroom window was broken by rocks. The prosecutor argued that defendant threw the rocks through the window to lure the victim outside. The victim was found in his front yard, lying on the ground with a bat in his right hand. He had sustained three gunshot wounds. Footprints and shell casings were found near a bush, approximately twenty-three feet from the victim's body, indicating that the gun was discharged from this location. Based on the foregoing, a reasonable juror could infer that defendant broke the victim's window to lure him outside, waited in the bush, and then when the victim came outside, shot him. There was sufficient evidence to support the lying-in-wait instruction.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Joseph B. Sullivan