

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DELANGELO RAYMONNE JOHNSON,

Defendant-Appellant.

UNPUBLISHED

November 30, 2004

No. 249497

Wayne Circuit Court

LC No. 03-001298-01

Before: Meter, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a life term for the murder conviction and to 1 to 5 years in prison for the felon in possession conviction; these were to be served consecutively to a mandatory two-year term for felony firearm. Further, the sentences were to be served consecutively to sentences for which defendant was on escape status at the time of this offense. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted of killing Ayanna May, who apparently had gotten into an argument with defendant's girlfriend. Defendant first argues that the trial court erred when, over objection, it instructed the jury on second-degree murder, in addition to the charged offense of first-degree premeditated murder. A trial court may instruct on a lesser offense if the charged offense involves a *disputed* factual element that is not an element of the lesser offense and a rational view of the evidence would support the lesser offense instruction. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002); *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

Defendant maintains that identity was an issue but that no one seriously disputed that the murder was premeditated. In support, he recites the prosecutor's closing argument. She began by saying that identity was the real issue and that "[t]here's no doubt that the person who killed her did so with premeditation and deliberation." The prosecutor went on to state that she had to prove four elements for first degree premeditated murder, including premeditation. With respect to that element, she stated that defendant had time to reflect when inside his girlfriend's house, when stepping onto the porch, when walking down two steps and across the sidewalk to the

driver's seat of a van, when he turned the key of the van, when he accelerated, when he stopped the car, and when he took his arm out and pointed the gun.

At one point defense counsel requested an involuntary manslaughter instruction, asserting that the killing happened quickly while there was an argument going on and "this jury could conclude that it was a hot mud situation and he didn't have cause to think and he acted recklessly and with total disregard for human life." If, as defense counsel asserted, this happened quickly and apparently in response to an argument the victim was having with defendant's girlfriend, the jury could (and apparently did) find that it did not involve prior planning and thought. The evidence provided a basis for finding that premeditation and deliberation was a *disputed* factual element, and the jury could rationally conclude that there was no premeditation and deliberation. Accordingly, the instruction was proper.

Defendant next argues that there was an insufficient showing of due diligence in finding Dantonette Anderson such that her preliminary examination testimony should not have been introduced at trial. MRE 804(a)(5) provides that a witness is unavailable when "absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." Due diligence requires that everything reasonable, but not everything that is possible, be done to obtain the presence of the witness. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). Review of a due diligence determination is for an abuse of discretion. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

We find no abuse of discretion. The prosecutor had met with Anderson before trial and did not anticipate that she would fail to appear. Bench warrants were issued on the first day of trial when Anderson and two other witnesses did in fact fail to appear, despite subpoenas, and the prosecutor learned that Anderson was "choosing not to be here." An adjournment was granted until the next morning to allow authorities to search for these witnesses and execute the bench warrants. The following day, the prosecutor noted that one of the missing witnesses, but not Anderson, had been arrested. Further, Anderson's mother was present and advised that Anderson was fearful and had absconded with her two children. It was established that the police had gone to Anderson's home several times and that the preceding evening, the police heard that she was staying in a hotel on Telegraph Road and thus sought her at twenty-seven motels and hotels. They also contacted the schools attended by Anderson's children, but the children were absent. These were reasonable efforts and constituted due diligence.

Affirmed.

/s/ Patrick M. Meter
/s/ Kurtis T. Wilder
/s/ Bill Schuette