STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 19, 1999
v	No. 206313 Washtenaw Circuit Court
GLENN ELLIOTT GREEN, Defendant-Appellant.	LC No. 96-7453 FC

Before: Smolenski, P.J., and Saad and Gage, JJ.

PER CURIAM.

On December 27, 1996, the Washtenaw County Prosecutor charged defendant Glenn Elliott Green with: (1) one count of first-degree felony murder in violation of MCL 750.316(1)(b); MSA 28.548(1)(b) and (2) one count of first-degree premeditated murder in violation of MCL 750.316(1)(a); MSA 28.548(1)(a). Following a four-day trial, the jury found defendant guilty on both counts. The trial court subsequently sentenced defendant to life in prison without the possibility of parole and simultaneously vacated that sentence as to premeditated murder on double jeopardy grounds. Defendant appeals as of right. We affirm.

The prosecution of defendant arose out of a fatal stabbing that occurred on December 21, 1996, in the city of Ann Arbor. Kenneth Schneider was apparently returning some bottles to the West Gate Kroger on Jackson Avenue when defendant stabbed him in the abdomen, chest, and neck and stole his wallet. Schneider died four days later and the prosecutor filed charges against defendant.

I

Did the trial court commit error requiring reversal when it denied defendant's motion for a directed verdict of acquittal on the charge of first-degree premeditated murder? We review the evidence presented by the prosecutor in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Though a close question, we find that the trial court did not err when it found that the record contained evidence sufficient to prove the element of premeditation beyond a reasonable doubt. To convict a defendant of premeditated

murder, the prosecutor must prove that the defendant intentionally killed another person and that the killing was premeditated and deliberate. MCL 750.316(1)(a); MSA 28.548(1)(a); *People v Saunders*, 189 Mich App 494, 496; 473 NW2d 755 (1991). The essence of premeditation and deliberation is "sufficient time to allow the defendant to take a second look." *Anderson*, *supra*, 537.

We find that the record contains sufficient evidence from which to infer the element of premeditation. The prosecutor presented ample evidence from which it is possible to infer that defendant formed an intent to kill Schneider, and from which it is possible to infer that defendant formed such intent in advance of the multiple stabbing. See *People v Morrin*, 31 Mich App 301, 330; 187 NW2d 434 (1971) (stating that "the interval *between [the] initial thought and [the] ultimate action* should be long enough to afford a reasonable man time to subject the nature of his response to a 'second look'") (emphasis added).

Further, had the trial judge erred on the issue of premeditation, we conclude the trial court's error would not require reversal. Defendant's reliance on *People v Vail*, 393 Mich 460; 227 NW2d 535 (1975), overruled in *People v Graves*, 458 Mich 476; 581 NW2d 229 (1998) is misplaced. The concern in *Vail* and its progeny was the possibility that the jury impermissibly compromised its verdict. *People v Doyan*, 116 Mich App 356, 361; 323 NW2d 397 (1982). The possibility of a compromise verdict is not present when the case goes to the jury on more than one count, even if one of those counts is supported by insufficient evidence. *People v Schwartz*, 171 Mich App 364, 379; 485 NW2d 905 (1988). A defendant does not suffer prejudice as a result of the erroneous consideration of an offense where the jury returns a verdict on two separate offenses. *Id*. In the instant case, the prosecutor charged defendant with two separate counts of first-degree murder, the trial court instructed the jury that the counts constituted separate charges on which it must return separate verdicts, and the jury found defendant guilty of first-degree murder on both counts. Had the court granted defendant's motion for a directed verdict of acquittal as to premeditated murder, the jury would still have had the option to find defendant guilty of first-degree murder. Accordingly, we hold that the trial court did not commit error regarding premeditation and had the trial court committed error, it would not require reversal because the dual nature of the charges would render any error harmless.[1]

II

Did the trial court err when it failed to instruct the jury that it could find defendant guilty of the lesser included offense of robbery? We find defendant's claim that the trial court erred to be wholly without merit. First, MCL 768.29; MSA 28.1052 provides, in relevant part, that

> [t]he failure of the court to instruct on any point of law shall not be grounds for setting aside the verdict of the jury unless such instruction is requested by the accused.

Second, we have consistently held that although a trial court may sua sponte instruct a jury that it is free to convict a defendant of a lesser included offense where the evidence supports such an instruction, it is not required to do so absent a request for such an instruction. *People v Till*, 115 Mich App 788, 798; 323 NW2d 14 (1982); *People v Hawkins*, 114 Mich App 714, 730; 319 NW2d 644 (1982). Neither is the trial court required to instruct the jury in accordance with the theory of defense absent a

request from the defendant. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995), modified and remanded on other grounds 450 Mich 1212 (1995). Defendant never requested that the trial court instruct the jury that it could find him guilty of the lesser included offense of robbery. Accordingly, we conclude that there was no error. [2]

III

Did the prosecutor present evidence sufficient to support defendant's conviction for first-degree felony murder? We review the trial court record in the light most favorable to the prosecution to determine whether a rational finder of fact could have found the essential elements of the crime proved beyond a reasonable doubt. *People v Reeves*, 222 Mich App 32, 34; 564 NW2d 476 (1997), rev'd on other grounds 458 Mich 236 (1998). To convict a defendant of felony murder, the prosecutor must prove: (1) the unlawful killing of another person; (2) the intent to kill, the intent to do great bodily harm, or the creation of a high degree of risk of bodily harm coupled with the knowledge that such an outcome is likely; and (3) as relevant to this case, the commission of a robbery. MCL 750.316(1)(b); MSA 28.548(1)(b); *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995). It is not necessary that the murder occur contemporaneously with the robbery. *People v Brannon*, 194 Mich App 121, 125; 486 NW2d 83 (1992). If the murder and the robbery constitute constituent parts of a continuous transaction, the order in which they occur is irrelevant. *People v Hutner*, 209 Mich App 280, 284; 530 NW2d 174 (1995). The only requirement is that the defendant intended to commit a robbery at the time he committed the murder. *Brannon, supra*, 125.

The prosecutor presented ample evidence to support a conclusion that defendant intended to rob Schneider at the time of the fatal assault. Specifically, the prosecutor presented evidence that defendant armed himself with a butcher knife, spent approximately half-an-hour riding his bicycle around the area in front of Kroger, attacked Schneider once before being interrupted, subsequently followed Schneider to his car, proceeded to stab him in the abdomen, chest and neck, and stole his wallet. We believe a rational factfinder could have reasonably inferred from this evidence that defendant rode to Kroger in search of a suitable robbery victim. Viewing the evidence in the light most favorable to the prosecution, a rational factfinder could conclude beyond a reasonable doubt that defendant intended to rob Schneider at the time of the murder. Accordingly, we conclude that the prosecutor presented evidence sufficient to support defendant's conviction for felony murder.[3]

IV

Did the trial court err when it instructed the jury that it could infer that defendant acted with malice from evidence that he used deadly force? To preserve a claimed instructional error for review, the aggrieved party must object on the record before the jury retires to deliberate. MCR 2.516(C). Defendant did not object when the trial court instructed the jury that it could infer malice from evidence that he used deadly force and, thus, we review this issue for manifest injustice. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). We review jury instructions de novo in their entirety to determine whether they accurately informed the jury of the applicable law. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997).

The trial court instructed the jury as follows:

> you must think about all the evidence in deciding what defendant's state of mind was at the time of the alleged killing. The defendant's state of mind may be inferred from the kind of weapon used, the type of wounds inflicted, the acts and words of the defendant and any other circumstances surrounding the alleged killing.
>
> [Furthermore, y]ou *may infer that the defendant intended to kill if he used a dangerous weapon in a way that is likely to cause death. Likewise, you may infer that the defendant intended the usual results that follow from the use of a dangerous weapon.* A dangerous weapon is any instrument that is used in a way that is likely to cause serious physical injury or death. [Emphasis added.]

Defendant cites a number of cases in which, he maintains, similar instructions were held impermissible as creating a presumption that the defendant acted with a certain state of mind. Each of these cases, however, involved an instruction to the jury that the law presumes a defendant intends the natural consequences of his conduct. Defendant's argument simply confuses inferences with presumptions.[4]

Moreover, we have consistently held that a jury may infer that a defendant acted with malice from evidence that he "intentionally set in motion a force likely to cause death or great bodily harm," *People v Reeves*, 202 Mich App 706, 712; 510 NW2d 198 (1993); *People v Flowers*, 191 Mich App 169, 177; 477 NW2d 473 (1991), or from evidence that he used a deadly weapon, *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995). A trial court does not err when it accurately informs the jury of the applicable law. *Piper*, *supra*, 648. Although defendant maintains that the court should also have instructed the jury "that this exact same conduct could lead to the inference that [defendant] acted only in and under the passion of the moment," a trial court is not required to instruct a jury in accordance with the theory of the defense in the absence of a request from the defendant. *Mills*, *supra*, 81. Accordingly, we hold that no manifest injustice results from the failure to review this issue because the trial court did not err when it instructed the jury that it could infer malice from other evidence produced at trial.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Hilda R. Gage

[1] We note also that our Supreme Court recently overruled *Vail* in *People v Graves*, 458 Mich 476; 581 NW2d 229 (1998). Under the new rule, reversal may be appropriate in those cases in which: (1) the jury returns "logically irreconcilable verdicts," (2) the record contains clear evidence of unresolved jury confusion, or (3) the jury convicts the defendant of the "next lesser included offense after the

improperly submitted greater offense." *Id*., 488. None of these factors is present in the instant case and, thus, *Graves* does not apply.

[2] We have reviewed the cases defendant cites in support of his argument and find that each of them involves the trial court's failure to properly instruct the jury on all of the elements of the offense charged. Defendant does not claim that the trial court failed to properly instruct the jury as to the elements of robbery and, thus, these cases are inapplicable.

[3] Defendant's position that the prosecutor failed to present evidence sufficient to support his conviction for first-degree premeditated murder is meritorious. Because the trial court vacated defendant's sentence, however, there remains nothing for this Court to do.

[4] *The American Heritage Dictionary: Third College Edition* (1985) defines an 'inference' as the "process . . . of deriving a conclusion from facts" and defines a 'presumption' as the "act of . . . accepting [something] as true in the absence of proof to the contrary."