STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 3, 2000
v	No. 214700 Wayne Circuit Court
RODNEY D. TRUITTE, Defendant-Appellant.	LC No. 98-001409

Before: Bandstra, C.J., and Saad and Meter, JJ.

PER CURIAM.

The court convicted defendant of second-degree murder, MCL 750.317; MSA 28.549, assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The court sentenced defendant to thirty to fifty years' imprisonment for the second-degree murder conviction and to five to ten years' imprisonment for the assault with intent to do great bodily harm conviction, the sentences to run concurrently with each other but consecutive to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant argues that there was insufficient evidence to support his conviction for second-degree murder. We disagree. When reviewing a claim of insufficient evidence, we view the evidence in the light most favorable to the prosecution and determine whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, mod on other grounds 441 Mich 1201 (1992); *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

Defendant says that he acted in self-defense when he shot and killed Charles Pigram. Lawful self-defense requires both an honest and reasonable belief that the defendant's life was in immediate danger or that he was threatened with serious bodily harm. *People v Heflin*, 434 Mich 482, 502, 508; 456 NW2d 10 (1990); *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995); *People v Wilson*, 194 Mich App 599, 602; 487 NW2d 822 (1992).

The fact finder could have rationally concluded that defendant did not reasonably believe that his life was in immediate danger because he was not threatened with immediate harm, and his actions were not immediately necessary to fend off the perceived threat. *Heflin, supra* at 502, 508; *George, supra* at 634-635; *Wilson, supra* at 602. Defendant did not start shooting at Pigram until Pigram had left defendant's home. Although defendant testified that he thought that Pigram was going to get a gun and return to the house, Pigram was merely standing next to Henry Reed, Jr.'s, car talking to Reed and another individual known as "Bone," when defendant began firing at him. Defendant did not see Pigram with a gun in his hands at any time that day. Defendant chased Pigram around the car, continuing to shoot at him, and then chased him into a field. Because Pigram never pulled out a gun and returned fire, defendant could not have reasonably felt that he was threatened with immediate harm, regardless of how threatened he felt while inside his house. Moreover, when Pigram was shot, he got back up, and defendant shot him again. Defendant could not have felt that shooting Pigram a second time was necessary because Pigram clearly presented no threat to defendant at that point. Therefore, the circumstances showed that defendant was not threatened with immediate harm, he was not in immediate danger, and his actions were not immediately necessary to protect himself. *Heflin, supra* at 502, 508; *George, supra* at 634-635; *Wilson, supra* at 602. Accordingly, defendant's claim of self-defense was appropriately rejected.

Alternatively, defendant argues that his actions were motivated by adequate provocation so as to reduce the offense to voluntary manslaughter. Voluntary manslaughter requires that: (1) the defendant kill in the heat of passion, (2) the passion was caused by an adequate provocation, and (3) there was no lapse of time during which a reasonable person could control his passions. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998); *People v Wofford*, 196 Mich App 275, 277; 492 NW2d 747 (1992). The provocation necessary to mitigate a homicide from second-degree murder to voluntary manslaughter is that which causes the defendant to act out of passion rather than reason. *Sullivan, supra* at 518. Furthermore, the provocation must be such that it would cause a reasonable person to lose control. *Id.*

Here, there was evidence that the provocation was insufficient to have caused a reasonable person to lose control. *Sullivan, supra* at 518. Although Pigram entered defendant's home without permission and violently attacked defendant, Pigram left the house shortly thereafter. While defendant heard Pigram talk about getting a gun and shooting him, defendant did not see Pigram with a gun at any time that day. Instead of leaving the area or calling the police, defendant chose to chase Pigram and shoot at him until he was hit twice and was unable to get up. Notwithstanding the altercation between defendant and Pigram inside the house, the provocation was not such that it would have caused a reasonable person to lose control. *Id.* Consequently, the fact finder rationally concluded that defendant's actions were not motivated by adequate provocation sufficient to reduce the offense to voluntary manslaughter.

Defendant also contends correctly that the trial court erred when it determined that he had the burden of proving his defense of self-defense. Whether a trial court erred in its conclusions of law at a bench trial is a question of law which we review de novo. *People v Levandoski*, 237 Mich App 612, 617; 603 NW2d 831 (1999).

When presiding over a bench trial, a judge must decide the facts from the evidence presented and apply the law to those facts. *People v Cazal*, 412 Mich 680, 689; 316 NW2d 705 (1982). A judge must articulate the facts on the record along with conclusions of law in determining the outcome. *Id.*; MCR 2.517(A). The trial court incorrectly stated that defendant had the burden of proving self-defense. This Court has previously held that when a defendant introduces evidence of self-defense, the prosecutor bears the burden of disproving the defense beyond a reasonable doubt. *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). While the prosecutor argues that the trial court simply misspoke, the record shows that the court was actually under the misimpression that defendant had the burden of proof on this issue.

Although the trial court misconstrued the law with respect to which party had the burden of proving self-defense, this error does not require reversal. Unpreserved claims of error are reviewed under the "plain error rule." *People v Carines*, 460 Mich 750, 763-767, 774; 597 NW2d 130 (1999). In order to avoid forfeiture under the plain error rule, a defendant must show that: (1) an error occurred; (2) the error was plain, i.e., clear or obvious; and (3) the plain error affected substantial rights. *Id*. at 763. Establishing that the plain error affected substantial rights requires a showing of prejudice such that the error affected the outcome of the lower court proceedings. *Id*. The defendant bears the burden of persuasion with respect to prejudice. *Id*. Reversal is warranted only when the plain, forfeited error results in the conviction of an actually innocent defendant or when the error seriously affects the fairness, integrity, or public reputation of judicial proceedings irrespective of the defendant's guilt or innocence. *Id*. at 763-764.

Defendant has not shown that he was prejudiced to the extent that the error affected the outcome of the proceeding. As stated previously, there was ample evidence that defendant did not act in self-defense when he shot Pigram. The evidence showed that he was not threatened with immediate harm, he was not in immediate danger, and his actions were not necessary to protect himself. *Heflin, supra* at 502, 508; *George, supra* at 634-635; *Wilson, supra* at 602. The trial court incorrectly determined that the burden of proof of self-defense was defendant's. However, there is nothing in the record to show that that this error made any difference in the outcome of this matter. Defendant has not proven that, had the burden been placed properly on the prosecutor, the outcome of the proceedings would have been affected, and, therefore, reversal is not required. *Carines, supra* at 763-764.

Defendant further alleges that the trial court erred when it determined that defendant was required to present evidence of specific acts evidencing Pigram's violent character. However, the record shows that the trial court did not make such a legal conclusion; rather, the court simply stated as a finding of fact its reasoning for disbelieving that defendant acted in self-defense. The trial court's challenged remarks, when viewed in the context of the court's factual findings, could not be considered a legal conclusion. As such, the record clearly shows that the contested remarks merely constituted the trial court's reasoning for disbelieving defendant's theory of self-defense.

Defendant also argues that his thirty-year minimum sentence for his second-degree murder conviction was disproportionate. We disagree. Our review of sentencing decisions is limited to whether a trial court abused its discretion. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999), citing *People v Phillips (On Remand)*, 203 Mich App 287, 290; 512 NW2d 62 (1994). An

abuse of discretion occurs when a sentence violates the principle of proportionality, which requires that a sentence be proportionate to the seriousness of the offense and to the particular offender. *Id.*

Sentences imposed within the recommended guidelines range are presumptively proportionate. *People v Broden,* 428 Mich 343, 354-355; 408 NW2d 789 (1987). A sentence within the guidelines range may, however, be disproportionate in unusual circumstances and constitute an abuse of discretion. *People v Hadley*, 199 Mich App 96, 106; 501 NW2d 219 (1993). A defendant must present any unusual circumstances justifying a downward departure to the trial court at the time of sentencing. *People v Kennebrew*, 220 Mich App 601, 611-612; 560 NW2d 354 (1996); *People v Clark*, 207 Mich App 500, 502; 526 NW2d 357 (1994).

The trial court followed the sentencing guidelines when it sentenced defendant to a thirty-year minimum term for his second-degree murder conviction. Therefore, the sentence is presumptively proportionate. *Broden, supra* at 354-355. Defendant asked the trial court to consider his background of foster care and abuse and to depart below the guidelines range in determining his sentence. While the trial court properly considered defendant's background when it determined his sentence, *Noble*, *supra*, the court did not believe that this is a case which warrants a downward departure. Defendant argues that the circumstances of the shooting and the information in the presentence investigation report should have mitigated defendant's sentence. However, the lower court properly considered the severity and nature of the crime as well as the circumstances of the case in determining defendant's sentence. *People v Rice (On Remand),* 235 Mich App 429, 446; 597 NW2d 843 (1999). The court found that notwithstanding defendant's childhood, the killing in this case should not have occurred, and that defendant seemed to be unable to control his anger. Because the sentence was within the guidelines range, and defendant failed to present any unusual circumstances justifying a downward departure, defendant's thirty-year minimum sentence for his second-degree murder conviction is proportionate to the offense and offender.

Additionally, defendant says that the district court erred in binding defendant over on the charges of first-degree murder and assault with intent to commit murder. We disagree. We review a district court's determination that the evidence was sufficient to warrant a bindover on a particular charge for an abuse of discretion. *People v Justice (After Remand),* 454 Mich 334, 344; 562 NW2d 652 (1997). An abuse of discretion occurs when an unbiased person, considering the facts upon which the trial court relied, would conclude that there was no justification for the decision. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997).

A district court must bind a defendant over for trial if, at the conclusion of the preliminary examination, the court finds probable cause to believe that the defendant committed the crimes charged. MCL 766.13; MSA 28.931; *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989); *Orzame, supra* at 558. Probable cause exists where there are reasonable grounds for suspecting that the defendant committed the crimes charged, supported by sufficiently strong circumstances to warrant a cautious person in believing that the defendant is guilty of the charged offenses. *Orzame, supra* at 558.

Defendant contends that there was no evidence to support his bindover on the first-degree murder charge. First-degree murder requires premeditation and deliberation on the part of the

defendant. MCL 750.316(1)(a); MSA 28.548(1)(a); *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation and deliberation can be inferred from the surrounding circumstances, but the inferences cannot be merely speculative and must have support in the record. *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998); *Anderson, supra* at 537. Factors evidencing premeditation are: (1) the prior relationship between the parties, (2) the defendant's actions before the killing, (3) the circumstances of the killing, and (4) the defendant's conduct after the victim's death. *Id*. When the evidence establishes that a fight occurred prior to a killing, there must exist "a thought process undisturbed by hot blood" in order to support a charge of first-degree, premeditated murder. *Plummer, supra* at 301. Without such a thought process, the evidence is as consistent with an unpremeditated killing as with a deliberate and premeditated killing. *Id*. at 302.

Here, the evidence presented at defendant's preliminary examination supported defendant's bindover on the charge of first-degree murder. Lena Truitte, defendant's mother, testified that defendant and Pigram were fighting inside the house and that, afterward, defendant came out of the house, carrying a shotgun. Pigram started running, and defendant pointed the gun at Pigram and fired. Defendant then chased Pigram while he continued to shoot at him. When Pigram fell after he had been hit, defendant shot Pigram again. After the shooting, defendant grabbed her, made her get into a car, and they left the area. Furthermore, Reed testified that defendant was loading the gun as he came out the door. Defendant shot one time at Pigram, but the bullet hit the ground. Reed asked defendant what was wrong, and defendant replied that he wanted to kill Pigram. Pigram then ran around Reed's car while defendant fired at him, and Reed was struck by the gunfire. Pigram ran into a field and was running around while defendant continued to shoot at him. Pigram was hit in the chest and fell to the ground, but he stood up and defendant shot him again.

This evidence was more than sufficient to support defendant's bindover on the first-degree murder charge. The evidence showed that defendant and Pigram had gotten into a fight just prior to the shooting and that defendant did not stop shooting at Pigram until Pigram was no longer able to get up. During the altercation, defendant voiced his intent to kill Pigram. Furthermore, after the shooting, defendant left the area and forced Lena to leave the area as well. Therefore, the evidence presented at defendant's preliminary examination supported his bindover on the first-degree murder charge. *Plummer, supra* at 301; *Anderson, supra* at 537.

Defendant further alleges that there was no evidence to support his bindover on the charge of assault with intent to commit murder. The elements of assault with intent to commit murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996); *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995). The intent to kill may be proven by inferences drawn from the facts in evidence. *Davis, supra* at 53. The evidence presented at the preliminary examination was sufficient to support defendant's bindover on the charge of assault with intent to commit murder. Reed testified that when he was shot in his legs, Pigram had run behind him. Reed did not know that Pigram was behind him at that time, but when defendant shot in their direction, Reed, instead of Pigram, was struck. It can be inferred that defendant shot with the intent to kill Pigram, but that the intent transferred to Reed when Reed was hit instead of Pigram. *Plummer, supra* at 305-306. Therefore, the evidence presented at defendant's preliminary examination supported his bindover on the assault with intent to commit murder charge.

Defendant also contends that he was denied the effective assistance of counsel. We disagree. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that because of such representation, he was prejudiced to the extent that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate prejudice, a defendant must show that but for trial counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Id*. at 687. Because defendant did not move for a new trial or an evidentiary hearing in the trial court, our review is limited to errors apparent on the record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

Defendant argues that counsel was ineffective for failing to investigate and assert an insanity defense. A defendant is entitled to have his attorney prepare, investigate, and assert all substantial defenses. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). A defense attorney's failure to raise a substantial defense, where there is evidence to support the defense, may amount to ineffective assistance of counsel. *People v Moore*, 131 Mich App 416, 418; 345 NW2d 710 (1984). When a claim of ineffective assistance of counsel is asserted based on the failure to present a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial. *Ayres, supra* at 22. A substantial defense is one which may have made a difference in the outcome of the trial. *Id*.

Defendant has not shown that he made a good-faith effort to avail himself of the right to present an insanity defense at trial. *Ayres, supra* at 22. Indeed, the record is devoid of any evidence whatsoever that defendant attempted to avail himself of the right to present an insanity defense at trial. Therefore, defendant's claim of ineffective assistance of counsel fails in this respect. *Id*. at 23; *Wilson, supra* at 612.

Furthermore, defendant has failed to show that the defense of insanity was substantial and may have made a difference in the outcome of the trial. *Ayres, supra* at 22. To support an insanity defense, a defendant must establish that, at the time of the criminal act and as a result of mental illness, he lacked the substantial capacity either to appreciate the nature and quality or wrongfulness of his conduct, or to conform his conduct to the requirements of law. MCL 768.21a; MSA 28.1044(1); *People v Stephan*, 241 Mich App 482, 490; 616 NW2d 188 (2000). The evidence showed that defendant was able to appreciate the nature and quality or wrongfulness of his conduct at the time of the offense. Reed tried to talk to defendant while defendant was shooting at Pigram. Defendant simply responded that he wanted to kill Pigram and fired a shot at Reed After defendant had shot Pigram twice and Pigram was not able to get up, defendant fled the area. Defendant's flight clearly evidenced his intent to elude the police and showed that he understood the wrongfulness of his actions. *Id*. Furthermore, defendant admitted himself at Grace Hospital under the name of Ollie Palmer shortly after the shooting. The use of a fictitious name also evidenced that defendant appreciated the nature and quality of his actions or the wrongfulness of his conduct at the time of the shooting. *Id*. Because an insanity defense was not a substantial defense which would have made a difference in the outcome of the trial,

defendant has failed to meet his burden of proving that he was denied the effective assistance of counsel at trial. *Ayres*, *supra* at 22.

Affirmed.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Patrick M. Meter