STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MIGUEL ANGEL BARRON, JR.,

Defendant-Appellant.

UNPUBLISHED
December 15, 2000

No. 214637
Genesee Circuit Court
LC No. 98-002689-FC

Before: Saad, P.J., and White, and Hoeksta, 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, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment for the first-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right, and we affirm.

Defendant, who was charged with alternative theories of first-degree premeditated murder and first-degree felony-murder, first claims that the evidence was insufficient to support a conviction under either theory. In considering this issue, we review the evidence in a light most favorable to the prosecution to determine whether a rationale trier of fact could find that the essential elements were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992)

The evidence was sufficient to establish a premeditated and deliberate killing. MCL 750.316(1)(a); MSA 28.548(1)(a). To premeditate is to think about before hand. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). There must be more than the amount of thought necessary to form the intent to kill. *Id.* at 301. Although no specific time is required, the interval between the initial thought and ultimate action must be sufficient for a reasonable man to subject the nature of his response to a "second look." *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979); *Plummer, supra* at 300. To "deliberate" is to measure and evaluate the major facets of a choice or problem. *Id*. at 300. Here, there was evidence that defendant went to his ex-girlfriend's apartment to do the victim harm, either out of jealousy over the ex-girlfriend, or because he believed the victim had stabbed him. Defendant kicked the door open and confronted the victim, who was standing on the inside of the door, and then grabbed the gun from

his accomplice's hand and shot the victim in the chest and back. Viewing the evidence most favorably to the prosecution, a rational trier of fact could find beyond a reasonable doubt that defendant committed a premeditated and deliberate killing.

Although defendant also asserts that there was insufficient evidence to support the alternative theory of first-degree felony-murder, he has failed to address the merits of this issue in his brief. A mere statement of position is insufficient to bring an issue before this Court. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). Accordingly, we deem this issue abandoned. *People v Kent*, 194 Mich App 206, 211; 486 NW2d 110 (1992). We have, however, considered defendant's due process, instructional and double jeopardy challenges asserted in connection with this theory.

Defendant claims that he was denied due process because he was charged with open murder and the prosecution failed to elect a theory of prosecution for first-degree felony murder until the end of the trial. However, defendant failed to preserve this issue because he did not object in the trial court to any alleged defect in the information, *People v Covington*, 132 Mich App 79, 86; 346 NW2d 903 (1984), or move for a bill of particulars before the trial, *People v Syakovich*, 182 Mich App 85, 88; 452 NW2d 211 (1989); *People v Mast*, 128 Mich App 613, 614; 341 NW2d 117 (1983). Further, giving due regard to the fact that the information is presumed to be framed with reference to the facts at the preliminary examination, *People v Fortson*, 202 Mich App 13, 16; 507 NW2d 763 (1993), and because the record unequivocally demonstrates that the prosecution provided defense counsel specific notice of its theories of first-degree felony-murder, we find that defendant has not shown a plain due process error. *People v Darden*, 230 Mich App 597, 601; 585 NW2d 27 (1998). Hence, this unpreserved issue affords no basis for relief. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant's first claim of instructional error does not challenge any specific instruction on the felony murder theory, but rather, is based on defendant's claim that a charge of murder during the commission of home invasion committed with an intent to murder will necessarily constitute a premeditated murder. However, defendant has not shown that this renders a charge of felony-murder based on home invasion with intent to commit murder improper. Premeditation is not a necessary element of felony murder. MCL 750.316(1)(b); MSA 28.548(1)(b); *In re Robinson*, 180 Mich App 454, 462; 447 NW2d 765 (1989). Further, premeditation is not a necessary element of the predicate offense of home invasion in the first degree, MCL 750.110a(2); MSA 28.305(a)(2),[1] which requires only that the person break and enter a dwelling "with intent to commit a felony." There is no reason to suppose that the Legislature intended that home invasion with intent to commit murder be excluded from the types of home invasion in the first degree offenses that can support a charge of felony murder.

The relevant question, for purposes of determining the propriety of the trial court giving an instruction on the felony murder theory, is whether there was evidence to support it. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). The fact that the same evidence may

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[1] We note that MCL 750.110a; MSA 28.548(a) was amended by 1999 PA 44. However, the amendments are not applicable to this case.

support both the premeditated-murder and felony-murder theories does not preclude the trial court from instructing on felony-murder. Because defendant has not shown that the proofs were insufficient to establish the felony-murder theory of first-degree murder, we reject his claim that the inclusion of this theory in the jury instructions constituted error.

Regarding defendant's double jeopardy and instructional error claims concerning the jury's being permitted to render guilty verdicts on both the premeditated and felony-murder theories of first-degree murder, we find no error. Contrary to defendant's claim, this Court's holding in *People v Bigelow*, 229 Mich App 218, 220-222; 581 NW2d 744 (1998), does not preclude a jury from rendering verdicts on multiple theories of first-degree murder. Rather, the holding protects a defendant's rights against double jeopardy by requiring that the judgment of conviction and sentence specify that the conviction is for one count and one sentence of first-degree murder supported by two theories, premeditated murder and felony murder. *Id.* at 220-221. Hence, we reject defendant's claim that allowing the jury to render a unanimous verdict of guilt on both theories constituted legal error.

Based on *Bigelow, supra*, we conclude that defendant's right against double jeopardy was protected by the trial court's entry of a judgment reflecting a single conviction and sentence of first-degree murder. We find no merit to defendant's request that any record existing in the circuit court or Department of Corrections that mentions both theories be stricken. Further, because the judgment of sentence only mentions the premeditation theory of first-degree murder, we remand for the limited purpose of correcting the judgment to accurately reflect that defendant's first-degree murder conviction is supported by two alternative theories, consistent with *Bigelow, supra*.

We next consider defendant's claim that he was denied a fair trial by the prosecution's failure to produce Roman Ortiz for trial. Ortiz was listed as a witness the prosecutor would call at trial. Defendant stated his desire that Ortiz be produced. However, when Ortiz failed to appear, even after the trial court issued a warrant, and the prosecutor rested without introducing his testimony, defendant did not object, did not request that police make additional efforts to produce him, and did not request a "due diligence" hearing. Nor did defendant raise the issue by seeking a post-trial evidentiary hearing or a new trial. *People v Cooper*, 236 Mich App 643, 655; 601 NW2d 409 (1999); *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). Further, because it does not plainly appear that good cause was lacking for the prosecution's failure to produce Ortiz and there is no prejudice to defendant apparent from the record, we conclude that this claim affords no basis for relief. *Carines, supra* at 763; *People v Snider*, 239 Mich App 393, 422-423; 608 NW2d 502 (2000). Limiting our review to record, we also conclude that defendant has failed to establish that he was prejudiced by defense counsel's failure to request either a due diligence hearing or a missing witness jury instruction. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999).

Next, defendant claims that he was denied a fair trial because of the prosecutor's misconduct throughout the trial and during closing and rebuttal arguments. We have examined the challenged remarks and questioning of witnesses, and giving due consideration to the trial court's admonishment of both the prosecutor and defense counsel for arguing in front of the jury about evidentiary issues, we do not find that defendant was denied a fair trial. *People v Bahoda*,

448 Mich 261; 531 NW2d 659 (1995); *People v Allen*, 351 Mich 535, 544; 88 NW2d 433 (1958). See also *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999); *Cooper*, *supra* at 650-652; *People v Badour*, 167 Mich App 186, 197; 421 NW2d 624 (1988), rev'd on other grounds 434 Mich 691 (1990).

We also conclude that defendant has not shown that the prosecutor's closing argument deprived him of a fair trial. There was no objection to the closing argument at trial, and no plain impropriety has been shown. *Bahoda, supra*; see also *People v Schutte*, 240 Mich App 713, 720-721; 613 NW2d 370 (2000), lv pending; *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). We are also satisfied that the prosecutor's rebuttal argument did not deprive defendant of a fair trial. *Bahoda, supra*.

Finally, we have considered defendant's unpreserved claim that the trial court's failure to give CJI2d 4.4 or its equivalent regarding evidence of flight and concealment requires reversal, and are not persuaded that defendant has shown plain error affecting his substantial rights. *Carines, supra* at 763. Such evidence is properly viewed as circumstantial evidence and is admissible to show consciousness of guilt. *People v Cutchall*, 200 Mich App 396, 401; 504 NW2d 666 (1993). Although the trial court did not give a specific instruction explaining how the jury should treat evidence of flight or concealment, the jury was instructed generally on the use of circumstantial evidence. Further, the record does not show that evidence of flight or concealment was a controlling issue in the case. Under these circumstances, the trial court's failure to sua sponte give a specific instruction on the use of such evidence affords defendant no basis for relief. MCL 768.29; MSA 28.1052, *Carines, supra*; cf. *People v Rice (On Remand)*, 235 Mich App 429, 443-444; 597 NW2d 843 (1999).

Affirmed as modified, and remanded for the ministerial task of correcting the judgment of sentence consistent with *Bigelow, supra.* We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Helene N. White
/s/ Joel P. Hoekstra