STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 20, 2001
v	No. 217915 Macomb Circuit Court
PREKA LULGJURAJ, Defendant-Appellant.	LC No. 96-003019-FC

Before: Owens, P.J., and Holbrook, Jr., and Talbot, JJ.

PER CURIAM.

Defendant was convicted of second-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b, for the shooting death of Paljo Durasevic. He was sentenced to consecutive prison terms of ten to fifteen years for the second-degree murder conviction and two years for the felony-firearm conviction. He appeals as of right. We affirm.

I

Defendant argues that there was insufficient evidence of first-degree murder to justify submitting that charge to the jury and that he was therefore likely convicted of second-degree murder as the result of juror compromise. Defendant argues that the weight of the evidence suggests a sudden struggle that unexpectedly resulted in a death, rather than an intentional, premeditated killing.

To prove first-degree, premeditated murder, the prosecution must establish that defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). Premeditation and deliberation require sufficient time to allow the defendant to reconsider his actions, to take a "second look." *Id.; People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation and deliberation may be inferred from the circumstances surrounding the killing. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Ortiz-Kehoe*, 237 Mich App 508, 520; 603 NW2d 802 (1999).

Viewing the evidence in a light most favorable to the prosecution, as we must, *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified 441 Mich 1201 (1992), we conclude

that the jury properly could have found premeditation and deliberation to convict defendant of first-degree murder. A reasonable factfinder could have found that defendant made a measured and deliberate choice to move closer to the victim, to ready his gun to shoot the victim, and to provoke a fight with the victim for the purpose of shooting and killing him at close range. Because there was sufficient evidence by which the jury could have convicted defendant of first-degree murder, the trial court did not err in denying defendant's motion for a directed verdict on this charge. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

II

Next, defendant claims that the prosecution failed to present evidence to support a finding that he was guilty beyond a reasonable doubt of second-degree murder. Specifically, defendant maintains that there was insufficient evidence to establish the element of causation because no one saw him shoot the decedent and because the evidence could not establish which gunshot wound actually killed the decedent. Defendant also asserts that, even if the evidence was sufficient to establish that his actions caused the death of the decedent, the evidence was insufficient to refute his claim of self-defense.

Second-degree murder is: (1) a death, (2) caused by an act of the defendant, (3) absent circumstances of justification, excuse, or mitigation, (4) done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably would cause death or great bodily harm. *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996). The intent to do an act in obvious disregard of life-endangering consequences is a malicious intent; the defendant need not actually intend the harmful result. *People v Goecke*, 457 Mich 442, 466; 579 NW2d 868 (1998). Circumstantial evidence and the reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). We resolve all conflicts in the evidence in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Viewed in a light most favorable to the prosecution, the evidence was sufficient to establish the causation element of second-degree murder beyond a reasonable doubt. *Wolfe, supra*; *Goecke*, *supra*; *Bailey*, *supra*. The evidence established that the victim died as the result of one large caliber noncontact gunshot wound and three contact .25 caliber gunshot wounds, each of which, standing along, would have been fatal. The jury could have rationally found that defendant inflicted the three fatal contact gunshot wounds because the evidence showed that defendant was the only person who was close enough to inflict those wounds on the victim. Therefore, it did not matter that another person may have also inflicted a fatal wound where any of the three contact gunshot wounds or the fatal noncontact wound alone would have killed the victim.

In addition, sufficient evidence was presented to disprove defendant's claim of self-defense. The evidence, viewed in the favor of the prosecution, *Wolfe, supra*, enabled the jury to find that defendant, not the victim, was the aggressor, that defendant was not in imminent danger or under a threat of serious bodily harm when the fight broke out with the victim and three fatal shots were fired into the victim at close range, and that retreat was available to defendant to

avoid using deadly force. *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990) (Riley, C.J.); *People v Bright*, 50 Mich App 401, 406; 213 NW2d 279 (1973).

Ample evidence was presented to support the jury's verdict of second-degree murder. *Bailey, supra.*

III

Third, defendant contends he was denied the effective assistance of counsel because trial counsel purportedly failed to preclude or impeach gunshot residue testimony presented by plaintiff's expert, failed to call defendant as a witness to substantiate his claim of self-defense, and failed to call two other witnesses to corroborate defendant's theory of self-defense.

To establish ineffective assistance of counsel, defendant must show (1) that his trial counsel's performance was objectively unreasonable and (2) that defendant was prejudiced to the extent that it denied him a fair trial, i.e., that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). We agree with the trial court that defendant has not demonstrated that he was denied the effective assistance of counsel.

Defendant has not overcome a strong presumption that counsel's failure to call an expert witness regarding the gunshot residue evidence constituted sound trial strategy, nor has defendant shown that counsel's failure to call a defense expert witness on gunshot residue deprived him of a substantial defense. *People v Carbin*, 463 Mich 590, 604-605; 623 NW2d 884 (2001); *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Moreover, defendant has not shown prejudice resulting from trial counsel's failure to interview the prosecution expert prior to trial where defense counsel successfully impeached her testimony at trial. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990).

Defendant also has not demonstrated that he was deprived of a substantial defense due to counsel's failure to call defendant or two other witnesses to testify regarding defendant's claim of self-defense. Defendant's testimony proffered at the hearing on this issue showed that his own testimony regarding self-defense would have been consistent with and merely cumulative to that of Tonin Zefi, an eyewitness to the shooting. Defendant has thus not shown that a different result would have been reasonably likely at trial if he had testified in his own behalf. *Strickland*, *supra*; *Pickens*, *supra*. Further, defendant failed to demonstrate any prejudice from counsel's failure to call Kola Ivezaj and Gjergj Lumaj at trial, where they were not eyewitnesses to the shooting and could not offer evidence relevant to the self-defense claim. *Id.*

IV

Finally, defendant takes issue with the trial court's instruction that the jury could return a verdict on second-degree murder without first considering a verdict on voluntary manslaughter. Because defendant did not object to this instruction below, our review is limited to plain error that adversely affected defendant's substantial rights. *Carines*, *supra* at 764-765, 773-774.

The instruction at issue comports with CJI2d 3.11(5) and with our Supreme Court's recommendation in *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982), regarding use of this instruction. Therefore, no "plain" error has been shown. Furthermore, we are satisfied that the court's instruction did not prejudice defendant's substantial rights, because the jury was not precluded from considering the offense of voluntary manslaughter, i.e., the jury's consideration of the voluntary manslaughter charge was not conditioned upon a finding that defendant was not guilty of murder. See *Handley, supra* at 360.

Affirmed.

/s/ Donald S. Owens
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Talbot