

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TODD RENE HARRIS,

Defendant-Appellant.

UNPUBLISHED

December 13, 2002

No. 234686

Genesee Circuit Court

LC No. 20001-007388-FC

Before: Jansen, P.J., and Holbrook, Jr., and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and unlawfully driving away an automobile, MCL 750.413, and was sentenced, as a third habitual offender, to concurrent terms of sixty to ninety years' imprisonment and four years and nine months to ten years' imprisonment, respectively. Defendant now appeals as of right. We affirm.

On appeal, defendant first claims that he is entitled to a new trial because the trial court improperly submitted the charges of first-degree murder, MCL 750.316, and carjacking, MCL 750.529a(1), to the jury. Specifically, defendant argues that the trial court erred in submitting the charge of first-degree murder and carjacking to the jury because the prosecution failed to present sufficient evidence to establish each element of these charged offenses beyond a reasonable doubt. *People v Graves*, 458 Mich 476, 487-488; 581 NW2d 229 (1998). Thus, according to defendant, he was subject to a compromised jury verdict because the jury considered these unwarranted charges.

Because defendant failed to object below, we review this issue for plain error affecting substantial rights. In *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999), the Court noted:

To avoid forfeiture under the plain error rule, three requirements must be met: (1) error must have occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its

discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error “‘seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocence.” [460 Mich 763 (citation omitted)].

Here, defendant cannot establish, under the plain error rule, that he is entitled to a new trial.

“[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). To convict a defendant of first-degree murder, the prosecution must show that the “defendant intentionally killed the victim and that the killing was premeditated and deliberate. Premeditation and deliberation require sufficient time to allow the defendant to take a second look.” *People v Marsack*, 231 Mich App 364, 370-371; 586 NW2d 234 (1998). Premeditation and deliberation need not be established by direct evidence. *People v Hoffmeister*, 394 Mich 155, 158-159; 229 NW2d 305 (1975). “The requisite state of mind may be inferred from defendant’s conduct judged in light of the circumstances. Such an inference, however, must have adequate basis in record evidence.” *Id.* at 159. A reviewing court looks to the “totality of the circumstances” to determine whether sufficient evidence of premeditation and deliberation was presented. *People v Tilley*, 405 Mich 38, 44; 273 NW2d 471 (1979).

In this case, defendant stabbed the victim, Mr. Aaron Smith, to death after the latter attempted to break up an argument between defendant and his wife outside a bar in Flint. At trial, the prosecution introduced eyewitness testimony that after Smith intervened to stop defendant’s quarrel with his wife, defendant stumbled back momentarily and then lunged at Smith with a knife, stabbing him repeatedly in the back and chest before fleeing in Smith’s car. The testimony established that after defendant swung at Smith, he then chased the victim. When Smith, who was unarmed, fell near his car, defendant continued to stab him. Viewed in a light most favorable to the prosecution, there was sufficient evidence introduced to allow a rational trier of fact to infer premeditation and deliberation from all the facts and circumstances. Here, sufficient time elapsed to allow defendant to take a “second look” before stabbing the victim to death. *People v Plummer*, 229 Mich App 293, 299-301; 581 NW2d 753 (1998). Thus, we conclude that defendant failed to show that the trial court committed clear error in submitting the charge of first-degree murder to the jury.

However, even assuming that the trial court committed plain error in this regard, defendant cannot establish that the presumed error was prejudicial by showing evidence of a jury compromise with regard to his conviction for second-degree murder. Here, the trial court specifically instructed the jury against compromising merely “for the sake of arriving at a verdict.” Further, we note that defendant was acquitted of first-degree murder. Finally, as discussed below, there was sufficient evidence to support his conviction for second-degree murder. See *People v Moorer*, 246 Mich App 680, 682; 635 NW2d 47 (2001). Accordingly, defendant cannot establish, under the plain error rule, that he is entitled to a new trial on the ground that the trial court improperly submitted the charge of first-degree murder to the jury.

In addition, defendant cannot show that the trial court committed plain error by submitting the charge of carjacking to the jury. According to defendant, the trial court should not have submitted the charge of carjacking to the jury because the prosecution failed to present evidence that he used violence against the victim for the purpose of stealing his car. To convict a defendant of carjacking, the prosecution must prove “(1) that the defendant took a motor vehicle from another person, (2) that the defendant did so in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle, and (3) that the defendant did so either by force or violence, or by putting the other person in fear.” *People v Davenport*, 230 Mich App 577, 579; 583 NW2d 919 (1998). Here, defendant, after repeatedly stabbing the victim, drove away in the victim’s car as he lay on the ground bleeding to death. Viewing the evidence in a light most favorable to the prosecution, the prosecution presented sufficient evidence to establish each element of carjacking beyond a reasonable doubt. Thus, the trial court did not err in submitting this charge to the jury.

Next, defendant claims that the prosecution failed to present sufficient evidence to establish the elements of second-degree murder beyond a reasonable doubt. In particular, defendant maintains that “the evidence . . . was legally insufficient evidence to prove beyond a reasonable doubt that the killing did not occur under circumstances that reduced the crime to manslaughter.” We disagree.

To be convicted of second-degree murder, the prosecution must prove “(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.” *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). For purposes of second-degree murder, malice is defined as “the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *Id.* To support a conviction for voluntary manslaughter, the prosecution must establish three elements: “First, the defendant must kill in the heat of passion. Second, the passion must be caused by an adequate provocation. Finally, there cannot be a lapse of time during which a reasonable person could control his passions.” *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991).

In this case, the prosecution established the element of malice by presenting testimony that defendant repeatedly stabbed the victim even after the victim attempted to run away. Because the question of whether there was adequate provocation so as to reduce the crime from murder to voluntary manslaughter was left to the trier of fact, the jury was free to reject this claim and find defendant guilty of second-degree murder. *People v Lange*, 251 Mich App 247, 252; 650 NW2d 691 (2002).

Defendant also argues that he was denied the effective assistance of counsel on the basis that his defense counsel failed to move for a directed verdict on the charges of first-degree murder and carjacking. To show ineffective assistance of counsel, a defendant has to establish that counsel’s performance was deficient and that there was a reasonable probability that this deficiency affected the outcome of the trial. *People v Pickens*, 446 Mich 298, 327; 521 NW2d 797 (1994). Specifically, a defendant must show a “reasonable probability [that defense counsel’s error] would undermine confidence in the outcome of the trial. . . .” *Id.* Because

defendant did not move for a new trial or for a *Ginther*¹ hearing on the issue of ineffective assistance of counsel, our review is limited to mistakes apparent from the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). Because there was sufficient evidence to establish the elements of both first-degree murder and carjacking, defense counsel's failure to move for a directed verdict on these charges did not amount to error. Accordingly, defendant was not denied the effective assistance of counsel on this basis.

In a supplemental appellate brief, defendant, in propria persona, raises three additional issues, none of which has any merit. First, defendant argues that his due process right to a fair trial was violated when the trial court denied his pretrial request to have his appointed trial counsel replaced by new counsel. In Michigan, an indigent defendant is not entitled to select or change appointed counsel upon request. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973); *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). To obtain the replacement of appointed counsel, a defendant must demonstrate good cause and no unreasonable disruption in the judicial process. *Id.* "Good cause" may exist when the defendant's appointed counsel "is not adequate or diligent or . . . is disinterested." *Ginther, supra* at 442. "Good cause" may also be established by showing the existence of a legitimate difference of opinion between a defendant and his appointed counsel regarding a fundamental trial tactic. *Traylor, supra* at 462. In this case, the trial court did not abuse its discretion in denying defendant's request to replace his appointed trial counsel on the basis that counsel failed to challenge the bindover on the first-degree murder charge, to file any discovery motions or to call a defense witness in behalf of defendant's claim of self-defense. Here, the trial court noted that defendant failed to provide "any reason" to support his dissatisfaction with appointed counsel.

Defendant also claims in his supplemental brief that his counsel rendered ineffective assistance for failing to raise these issues. Specifically, defendant argues that he was prejudiced by trial counsel's failure to call Anthony Raymond as a defense witness in support of his self-defense theory. Even assuming arguendo that trial counsel erred by failing to call Mr. Raymond, there is nothing in the record to indicate that counsel's presumed error would have undermined our confidence in the jury verdict.

Defendant also contends that he was denied the effective assistance of counsel because his trial counsel failed to file a pretrial motion in limine seeking to exclude alleged "bad acts" evidence. However, even assuming for the sake of argument that trial counsel's performance was deficient in this regard, there was no reasonable probability that this presumed deficiency affected the outcome of the trial. *Pickens, supra*, 446 Mich 327. Nor was counsel ineffective for failing to object or request a cautionary instruction or a mistrial when the prosecutor questioned defendant whether he was "upset that your wife and your step-daughter were with a black man." Here, defendant has failed to show that defense counsel committed error or that there was a reasonable probability that the alleged error altered the outcome of the trial. Finally, there is no merit to defendant's assertion that he was denied a fair public trial or that trial counsel rendered ineffective assistance of counsel by not objecting or asking for a mistrial on the basis of the denial of defendant's right to a public trial.

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Affirmed.

/s/ Kathleen Jansen

/s/ Donald E. Holbrook, Jr.

/s/ Jessica R. Cooper