

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESUS RUIZ HERNANDEZ,

Defendant-Appellant.

UNPUBLISHED

July 21, 2009

No. 284565

Wayne Circuit Court

LC No. 07-004709-01-FC

Before: Talbot, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment without parole for the murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the shooting death of Jesus Amaro, who died from a single gunshot wound that entered his left forehead. The evidence indicated that defendant and Amaro were friends, and that defendant and another unidentified male were with Amaro at his house on the afternoon of the shooting. Amaro's roommate was in his bedroom when he heard a loud noise; he looked out his window and saw defendant and the unidentified male running away from the house. Amaro's roommate then went into the living room and observed Amaro sitting in a chair; he had been shot in the head. Shortly after the shooting, defendant made a series of telephone calls to Amaro's roommates and their cousin in which he admitted killing Amaro, remarked that he "did what he had to do," told them not to tell the police that he was responsible, and that he would see them in Mexico. A police officer was present and heard some of the telephone calls over a speakerphone. Defendant was arrested several months later while attempting to reenter the United States from Mexico.

I. Failure to Instruct on Specific Intent

Defendant first argues that the trial court erred by failing to instruct the jury that first-degree murder is a specific intent crime. Because defendant did not request a specific intent instruction at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Gomez*, 468 Mich 636, 643; 664 NW2d 159 (2003). Defendant also argues that defense counsel was ineffective for not requesting a specific intent instruction. To establish ineffective

assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied his right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996).

"This Court reviews jury instructions in their entirety to determine whether there is error requiring reversal." *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). "The instructions must clearly present the case and the applicable law to the jury" and "include all elements of the charged offenses and any material issues, defenses, and theories, if supported by the evidence." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). This Court "will not reverse a conviction if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Gonzalez, supra* at 225. Error requiring reversal only occurs from the omission of a requested instruction if the omitted instruction "(1) [was] substantially correct, (2) [was] not substantially covered by the trial court's charge to the jury, and (3) concerned an important point in the trial so that the failure to give [it] seriously impaired the defendant's ability to present a defense." *People v Huffman*, 266 Mich App 354, 372; 702 NW2d 621 (2005).

In this case, the trial court properly instructed the jury on the elements of first-degree premeditated murder, including the necessary mens rea to convict defendant of that crime. As our Supreme Court explained in *People v Maynor*, 470 Mich 289, 295-297; 683 NW2d 565 (2004), further instruction on specific intent is not necessary where, as here, the trial court properly instructs the jury on the intent necessary to convict a defendant of a given crime. Indeed, CJ12d 3.9, the former standard jury instruction on specific intent, has been deleted from the standard criminal jury instructions in light of *Maynor*.

The record does not support defendant's argument that the jury may have been confused by the trial court's instructions differentiating first-degree murder from the lesser offense of second-degree murder, because both instructions referred to an intent to kill. First, the jury never expressed confusion with the court's instructions. Second, a review of the court's instructions reveals that the jury was properly instructed on the necessary intent for each crime. The court instructed the jury that, to be guilty of first-degree murder, the prosecutor was required to prove beyond a reasonable doubt that defendant intended to kill Amaro, and that "this intent to kill was premeditated" and also deliberate. Conversely, to be guilty of second-degree murder, the prosecutor was required to prove beyond a reasonable doubt that defendant killed Amaro

with one of these three states of mind: he intended to kill, or he intended to do great bodily harm to Jesus Amaro, or he knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions

Thus, the jury was properly instructed that, unlike second-degree murder, the intent to kill necessary for first-degree murder was required to be premeditated and deliberate.

For these reasons, the trial court's failure to give a specific intent instruction with respect to first-degree murder was not plain error. Further, because the trial court properly instructed the

jury on the elements of first-degree premeditated murder, including the necessary mens rea to convict defendant of that crime, defense counsel was not ineffective for failing to request a specific intent instruction.

II. Sufficiency of the Evidence

Defendant next argues that there was insufficient evidence of premeditation and deliberation to convict him of first-degree premeditated murder. We disagree.

An appellate court's review of the sufficiency of the evidence to sustain a conviction should not turn on whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence must be viewed in a light most favorable to the prosecution. *Id.* at 514-515. Circumstantial evidence and any reasonable inferences that can be drawn from the evidence may be sufficient to prove the elements of the crime. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999).

"In order to convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

To show first-degree premeditated murder, "[s]ome time span between [the] initial homicidal intent and ultimate action is necessary to establish premeditation and deliberation." *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979), quoting *People v Hoffmeister*, 394 Mich 155, 161; 229 NW2d 305 (1975). The interval between the initial thought and ultimate action should be long enough to afford a reasonable person time to take a "second look." *People v Vail*, 393 Mich 460, 469; 227 NW2d 535 (1975), quoting *People v Morrin*, 31 Mich App 301, 328-330; 187 NW2d 434 (1971). See also *People v Johnson*, 460 Mich 720, 733; 597 NW2d 73 (1999) (applying a "second-look" analysis). [*Gonzalez, supra* at 641.]

Premeditation and deliberation may be inferred from the circumstances surrounding the killing, including (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide. *Anderson, supra* at 537. Generally, there must be evidence of "a thought process undisturbed by hot blood" to prove first-degree murder. *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998), quoting *Morrin, supra* at 329-330.

The evidence indicated that defendant brought a gun with him to Amaro's house and was accompanied by a person who was unknown to Amaro's roommates. After the shooting, defendant made several telephone calls in which he admitted shooting Amaro and remarked that he "did what he had to do." Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant armed himself with a gun and brought an accomplice with him who was unknown to Amaro's roommates

because he intended to kill Amaro. There was sufficient evidence of premeditation and deliberation to support defendant's conviction of first-degree murder.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra