

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN EDWARD EVANS,

Defendant-Appellant.

UNPUBLISHED

December 30, 1996

No. 189368

Recorder's Court

LC No. 95-000941-FC

Before: Taylor, P.J., and Markman and P. J. Clulo,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to twenty-eight to sixty years imprisonment for the murder conviction and the mandatory two-year prison term for the felony-firearm conviction. We affirm.

First, defendant argues that there was insufficient evidence adduced during the preliminary examination to satisfy the probable cause criteria on the element of premeditation and that, therefore, defendant was denied his right to due process and a fair trial when the trial court denied his motion to amend the information to charge the commission of second-degree murder rather than first-degree murder. We disagree. Premeditation may be established through evidence of the following factors: (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself, including the type of weapon used and the location of the wounds inflicted; and (4) the defendant's conduct after the homicide. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995); *People v Thomas Berry (On Remand)*, 198 Mich App 123, 128; 497 NW2d 202 (1993). At the preliminary examination, the prosecutor is not required to prove each element beyond a reasonable doubt. *People v Woods*, 200 Mich App 283, 288; 504 NW2d 24 (1993). Instead, there need only be reasonable grounds for suspicion, supported by circumstances sufficiently

* Circuit judge, sitting on the Court of Appeals by assignment.

strong to warrant a cautious man in the belief that the accused is guilty of the offense charged. *Id.* at 288. In this case, there was evidence presented at the preliminary examination from which the elements of premeditation and deliberation could be inferred. There was testimony that defendant had a gun in his possession on the night of the victim's death, that one of defendant's friends was upset with the victim that evening, that the victim was shot nine times in the back after he was first physically assaulted and rendered helpless and that defendant admitted to another person that he shot the victim twice. Accordingly, we conclude that the magistrate did not abuse his discretion in binding over defendant on the charge of first-degree murder.

Next, defendant contends that the trial judge's refusal to instruct the jury on manslaughter was prejudicial and deprived him of his right to due process and to a fair trial. We disagree. The elements of voluntary manslaughter, MCL 750.321; MSA 28.553, are as follows: (1) the defendant must kill in the heat of passion; (2) the passion must be caused by adequate provocation; and (3) there must be no lapse of time during which a reasonable person could control his passions. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). In order to transform a homicide from murder to manslaughter, the provocation must be such as to cause the defendant to act out of passion rather than reason. *Id.* at 389. The trial court should not give a requested instruction on manslaughter if the evidence presented could not support a conviction of this offense. *Id.* at 387. Upon a review of the record, we conclude that the evidence adduced at trial could not support a finding that defendant was guilty of voluntary manslaughter. There is no evidence that defendant was in an inflamed state of mind on the evening of the killing, that he had any grievances against the victim or that there was any provocation.

Defendant further asserts that he was denied his right to due process and a fair trial based on three errors in the jury instructions. First, defendant maintains that the trial court's instructions on the law of aiding and abetting were incomplete and misleading. Next, defendant argues that the trial court failed to clearly instruct the jury regarding the elements of aiding and abetting with respect to the felony-firearm offense. Finally, defendant maintains that the trial court erroneously failed to instruct the jury on aiding and abetting during the supplemental instructions. However, because defendant failed to object to the instructions given to the jury, our review is precluded unless relief is necessary to avoid manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Jury instructions must be reviewed in their entirety in order to determine if reversal is necessary. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995). If the instructions, taken as a whole, fairly present the issues to be tried and sufficiently protect defendant's rights, then there is no error. *People v Welford*, 189 Mich App 478, 481; 473 NW2d 767 (1991). The aiding and abetting instructions given here comported with the elements of aiding and abetting set forth in *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). While the trial court did not give CJI2d 11.35 regarding aiding and abetting felony firearm, the use note to this instruction states that it is only to be used "if it is unclear whether defendant personally possessed the firearm." Here, the evidence demonstrated that defendant had a gun in his possession the night of the murder. The supplemental instructions were given in response to a jury request for clarification of the distinction between first-degree and second-degree murder. The supplemental instructions given addressed this distinction; there was no need to reiterate the aiding and abetting instructions in response to this request. Additionally, we

note that there was substantial evidence indicating that defendant was a principal, not an aider and abettor, in the victim's shooting. We conclude not only that no manifest injustice resulted from these alleged instructional errors but further that the trial court properly instructed the jury.

Finally, defendant argues that he was denied effective assistance of counsel when trial counsel failed to move for a directed verdict on the first-degree murder charge or to object to the erroneous jury instructions on aiding and abetting. Because sufficient evidence, viewed in a light most favorable to the prosecution, was presented for a rational factfinder to find the elements of first-degree murder proven beyond a reasonable doubt, a motion for directed verdict would have been futile. See *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). As discussed above, there was no basis for trial counsel to object to the court's instructions to the jury. We accordingly conclude that defendant has not demonstrated that defense counsel's performance fell below an objective standard of reasonableness or that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

Affirmed.

/s/ Clifford W. Taylor

/s/ Stephen J. Markman

/s/ Paul J. Clulo