

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY L. DAVIS,

Defendant-Appellant.

UNPUBLISHED

July 17, 1998

No. 196255

Genesee Circuit Court

LC No. 95-052703

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND E. MURRAY,

Defendant-Appellant.

No. 196256

Genesee Circuit Court

LC No. 95-052702

---

Before: Cavanagh, P.J., and Doctoroff and Saad, JJ.

PER CURIAM.

Defendant Davis was charged with two counts of open murder MCL 750.316; MSA 28.548 and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). In a separate information, defendant Murray was charged with one count of unarmed robbery MCL 750.530; MSA 28.798. The cases were consolidated for trial. After a jury trial, defendant Davis was convicted of two counts of first-degree premeditated murder and two counts of possession of a firearm during the commission of a felony. He was sentenced to two terms of life in prison without parole and two terms of two years' imprisonment. Defendant Murray was convicted of unarmed robbery. He subsequently pleaded guilty to being an habitual offender, fourth offense, MCL

769.12; MSA 28.1084. He was sentenced to life in prison without parole. Defendants now appeal as of right. We affirm.

Defendants' convictions arose out of an incident that occurred in the early morning of August 6, 1995 in the parking lot of a 7-11 store that resulted in the shooting deaths of Jason Carrizales and Robert Martinez. Several witnesses testified to substantially the same series of events. Defendants and a group of their friends encountered the victims with their friends in the parking lot of the store. After an argument concerning gang colors, defendant Davis shot Carrizales and Martinez. During the same incident, several witnesses saw defendant Murray and Russell Thompson chase Casey Smith across the street. Smith fell, and Thompson and Murray held him to the ground, beat him and stole some personal property and money from him.

### *People v Davis*

Defendant Davis first argues on appeal that the trial court committed error requiring reversal by failing to instruct the jury on the doctrine of imperfect self-defense. Because defendant failed to object to the jury instructions at trial, any error is waived unless relief is necessary to avoid manifest injustice. *People v Swint*, 225 Mich App 353, 376; 572 NW2d 666 (1997). Manifest injustice results, and an error is not waived, where the trial court improperly instructed the jury on the law of the case. *People v Curry*, 175 Mich App 33, 39; 483 NW2d 430 (1989). The instructions to the jury must include all elements of the crime charged and must not exclude from jury consideration material issues, defenses and theories if there is evidence to support them. *Id.*

In the present case, Defendant was charged with two counts of open murder, and two counts of felony-firearm. The trial court instructed the jury on first-degree premeditated murder and the lesser included offenses of second-degree murder and voluntary manslaughter. The court also instructed the jury on lawful self-defense. The jury convicted defendant of two counts of first-degree murder and two counts of felony-firearm. Defendant argues on appeal that manifest injustice resulted from the trial court's failure to instruct the jury on the doctrine of imperfect self-defense. We disagree.

Imperfect self-defense is a qualified defense that can mitigate second-degree murder to voluntary manslaughter by negating the element of malice. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993). A defendant is only entitled to invoke the doctrine of imperfect self-defense if he would have been entitled to invoke the theory of self-defense had he not been the initial aggressor. *Id.*; *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). Here, defendant's theory of the case was that he acted in lawful self-defense. Defendant testified that he was engaged in friendly conversation with the two victims when they began to harass him about the blue bandanna that he was wearing. Defendant saw one of the men carrying a gun, and the other man said "shoot the mother f'er." Defendant testified that he shot Carrizales in the stomach because he feared for his life, and that he did not recall firing any shots after that. Defendant never alleged that he was the initial aggressor. Therefore, the evidence did not support a jury instruction on imperfect self-defense. See *People v Amos*, 163 Mich App 50, 57; 414 NW2d 147 (1987). Accordingly, no manifest injustice resulted from the trial court's failure to instruct the jury on the doctrine of imperfect self-defense.

Defendant next argues that the evidence was insufficient to convict him of first-degree murder because the evidence was not sufficient to prove beyond a reasonable doubt that defendant acted with premeditation and deliberation. We disagree. In reviewing a claim of insufficient evidence, this Court views the evidence in a light most favorable to the prosecution to determine if a rational factfinder could find the essential elements of the crime proven beyond a reasonable doubt. *People v McCoy*, 223 Mich App 500, 501; 566 NW2d 667 (1997).

In order to convict a defendant of first-degree murder, the prosecution must prove that the defendant 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). Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *Id.* The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. *Id.* 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; and (4) the defendant's conduct after the homicide. *Id.* Premeditation may be inferred from, among other things, the type of weapon used and the location of the wounds inflicted. *People v Berry (On Remand)*, 198 Mich App 123, 128; 497 NW2d 202 (1993). Evidence establishing premeditation may be entirely circumstantial. *People v Lewis*, 95 Mich App 513, 515; 291 NW2d 100 (1980). Prior threats or ill feelings between the defendant and the deceased may indicate premeditation. *Id.*

Taken in a light most favorable to the prosecution, the evidence showed that both victims were facing away from the parking lot where the confrontation occurred toward the store when they were shot. Both victims had been shot in the back of the neck, and Carrizales had also been shot in the abdomen and through the top of his head. According to the medical examiner, these wounds were consistent with someone shooting Carrizales in the abdomen, Carrizales falling to the ground, and the assailant shooting him in the head. The medical examiner testified that the wound to the top of the head appeared to be inflicted from very close range or in contact, and the gun shot wound to Martinez appeared to be inflicted at close range and at an angle. Joe Laury testified that he saw defendant shoot the victims from behind as they were turning around. Witnesses testified that there was a pause between the first shot and the subsequent shots. Neither victim was carrying a weapon. Evidence was presented indicating that the victims and defendant belonged to different gangs. Defendant was carrying a weapon before the incident occurred. Based on this record, the evidence was sufficient to allow the jury to find beyond a reasonable doubt that defendant acted with premeditation and deliberation.

#### *People v Murray*

Defendant Murray first argues on appeal that the trial court erred in sua sponte ordering consolidation of defendant's trial with that of defendant Davis. Defendant contends that the consolidation resulted in the jury being exposed to irrelevant and prejudicial evidence regarding alleged gang activity and the murder charges against Davis, which prejudiced defendant's substantial rights at trial. Because defendant did not move for separate trials, this issue is not preserved for appellate review. Furthermore, because the charges against both defendants arose out of the same incident, and both cases involved the same witnesses and much of the same evidence, the trial court did not abuse its

discretion in consolidating the two cases for trial. See *People v Stricklin*, 162 Mich App 623, 630; 413 NW2d 457 (1987).

Defendant next argues that the trial court abused its discretion in admitting evidence of defendant's alleged gang affiliation because it was irrelevant and substantially more prejudicial than probative. Because defendant did not object at trial, this issue is not preserved for appeal. *People v Kilbourn*, 454 Mich 677, 685; 563 NW2d 669 (1997). Furthermore, error in the admission of evidence only requires reversal if the error was prejudicial. *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). The inquiry focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence. *Id.* Based on the overwhelming evidence against defendant, any error in the admission of evidence concerning gang activity was harmless.

Defendant next argues that he was denied a fair trial by prosecutorial misconduct. Specifically, defendant argues that the prosecutor improperly asked defendant to comment on the credibility of other witnesses. Again, defendant failed to object at trial. Appellate review of prosecutorial remarks is generally precluded absent an objection because the trial court was deprived of an opportunity to cure the error. *People v Messenger*, 221 Mich App 171, 179; 561 NW2d 463 (1997). An appellate court will reverse in the absence of an objection if a curative instruction could not have eliminated the prejudicial effect of the remarks or where failure to review the issue would result in a miscarriage of justice. *Id.*

It is improper for a prosecutor to ask a defendant to comment on the credibility of another witness. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985); *Messenger*, *supra* at 181. However, any prejudice that might have been caused by the prosecutor's remark could have been cured by a limiting instruction. See *Buckey*, *supra* at 17; *Messenger*, *supra* at 181. Therefore, no manifest injustice will result from this Court's failure to review this issue.

Defendant next argues that the trial court abused its discretion in admitting evidence of defendant's two prior convictions of unlawful driving away of an automobile and the plea negotiations involved in those cases, and evidence concerning defendant's parole and alleged threats to a prosecution witness.

On direct examination, defense counsel asked defendant about his two prior convictions of UDAA. Defense counsel asked defendant whether he had pleaded guilty to those charges, and defendant replied that he had. Defense counsel asked why, and defendant replied "because I did 'em." When asked why he went to trial on the present charge, defendant replied, "because I didn't do this." On cross-examination, the prosecutor asked defendant whether any plea negotiations were involved in his prior convictions, and defendant answered affirmatively. Defense counsel objected on the grounds of relevance, and the trial court sustained the objection. Defendant now argues that the admission of evidence of his prior convictions denied him a fair trial. We disagree.

Defendant may not assign error on appeal to something that his own counsel deemed proper at trial. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). In the present case, defense counsel introduce evidence regarding defendant's prior convictions. The prosecution's

questioning concerning plea negotiations was in response to defense counsel's implication that defendant's going to trial in the present case rather than pleading guilty is indicative of his innocence. Furthermore, the trial court sustained defense counsel's objection to the prosecution's questioning regarding defendant's plea negotiations. Therefore, no error occurred.

Defendant also argues that the trial court erred in admitting evidence concerning his parole status and concerning threats allegedly received by a prosecution witness. Because defendant did not object at trial, this issue is not preserved.

Next, defendant argues that he was denied the effective assistance of counsel by his trial counsel's failure to preserve the errors alleged above. In reviewing a claim of ineffective assistance of counsel, this Court must determine (1) whether counsel's performance was objectively unreasonable, and (2) whether the defendant was prejudiced by counsel's defective performance. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997). In order to demonstrate prejudice, defendant must show that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). Because of the overwhelming evidence of defendant's guilt, we find defendant has not demonstrated any prejudice caused by counsel's actions. Therefore, he was not denied the effective assistance of counsel.

Defendant also argues that the cumulative effect of the errors denied him a fair trial. Because we find that no errors occurred, the cumulative effect of the errors did not deny defendant a fair trial. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995).

Finally, defendant argues that he is entitled to resentencing before a different judge because his sentence of life in prison was an abuse of discretion and amounted to cruel and unusual punishment. We disagree.

This Court reviews a sentencing court's decision for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990). An abuse of discretion occurs when the sentence violates the principle of proportionality. *Id.* A sentence must be proportionate to the nature of the offense and the background of the offender. *Id.* Where a given case does not present a combination of circumstances placing the offender in either the most serious or least threatening class with respect to the particular crime, then the trial court is not justified in imposing the maximum or minimum penalty. *Id.* at 654. To facilitate appellate review, a sentencing court must articulate on the record the criteria considered and the reasons for a sentence imposed. *People v Newcomb*, 190 Mich App 424, 427; 476 NW2d 749 (1991).

Unarmed robbery carries a maximum sentence of fifteen years' imprisonment for a first offense. MCL 750.530; MSA 28.798. If a person is convicted of three or more felonies and is subsequently convicted of a felony that is punishable by a maximum prison term of five years or more, he may be sentenced to imprisonment for life or a lesser term. MCL 769.12; MSA 28.138

At defendant's sentencing hearing, the trial court stated on the record that it based its sentence on defendant's five prior felony convictions, his poor performance on probation, his leaving the state

with a felony pending, and his 1992 escape from the Michigan Department of Corrections. The court also stressed the fact that the incident giving rise to defendant's present conviction occurred while defendant was on parole, the incident involved an assault, and defendant lead police on a high-speed automobile chase and then fled on foot. On this record, we are confident that the trial court did not abuse its discretion in imposing the maximum sentence. See *People v Houston*, 448 Mich 312, 319; 532 NW2d 508 (1995). Furthermore, because defendant's sentence is proportionate, it is not cruel and unusual. *People v Terry*, 224 Mich App 447, 456; 569 NW2d 508 (1997).

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Martin M. Doctoroff  
/s/ Henry William Saad