STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN E. PASHA a/k/a ERIC PASHA,

Defendant-Appellant.

UNPUBLISHED
April 16, 1999

No. 205965
Recorder's Court
LC No. 96-007941

Before: MacKenzie, P.J., and Gribbs and Wilder, JJ.

PER CURIAM.

Defendant was charged with first-degree murder, MCL 750.316; MSA 28.548, assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Following a jury trial, defendant was convicted of the lesser offense of second-degree murder, MCL 750.317; MSA 28.549, assault with intent to murder, and possession of a firearm during the commission of a felony. The trial court sentenced defendant to concurrent terms of fifteen to thirty years' imprisonment for the second-degree murder conviction and eight to fifteen years' imprisonment for the assault with intent to murder conviction, and five years' imprisonment for the felony-firearm conviction preceding and consecutive to the other offenses. Defendant now appeals as of right. We affirm.

Defendant argues that the trial court committed error requiring reversal by denying his motion for directed verdict on the charge of first-degree murder. We disagree.

When reviewing a trial court's denial of a motion for a directed verdict, this Court must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Warren*, 228 Mich App 336, 345; 578 NW2d 692 (1998). Circumstantial evidence and reasonable inferences drawn from the evidence may be sufficient to prove the elements of an offense. *Id.*

To prove first-degree murder, the prosecution must establish 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). 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.*

The record in this case reveals that defendant had been the target of a drive-by shooting, and that after the shooter had driven away and defendant was no longer in danger, he retrieved his gun from his car and fired it, shooting and killing the victim. Numerous witnesses to the event testified that by the time defendant had fired his gun, the vehicle from which the shooting originated had already begun driving away. Furthermore, all of the witnesses testified that there was a lapse of time, ranging from thirty seconds to a few minutes, between the initial gun shots directed at defendant and the time defendant returned fire. This evidence suggests that defendant had sufficient time to realize that he was no longer in imminent danger of the gunman, and thus, the retrieval of his gun and subsequent shooting was a premeditated and deliberated act. Therefore, viewed in the light most favorable to the prosecution, there was sufficient evidence to permit a rational trier of fact to find that the elements of first-degree murder were proven beyond a reasonable doubt. Accordingly, the trial court properly submitted the charge to the jury. See *People v Graves*, 458 Mich 476, 486-487; 581 NW2d 229 (1998).

Defendant also submits that the theory of imperfect self-defense applies to this case and should operate to reduce his murder charge to manslaughter. He contends that the evidence of premeditation was vague and inconsistent, and a reasonable view of the events establishes that there was actually one continuing transaction, with no meaningful lapse of time between the initial gunshots and his return shots. We are not persuaded by defendant's claim of imperfect self-defense. According to defendant's theory of the case, he acted in self-defense by responding to the drive-by shooting; however, defendant was not the initial aggressor in that incident, and thus, the theory of imperfect self-defense does not apply. See *People v Heflin*, 434 Mich 482, 509; 456 NW2d 10 (1990). Furthermore, we are satisfied that the prosecution's presentation of the case was sufficient to establish the requisite elements of first-degree, premeditated murder.

Defendant next argues that the trial court improperly failed to sua sponte instruct the jury on the lesser offense of involuntary manslaughter from a firearm intentionally aimed, and improperly failed to sua sponte give a cautionary instruction on flight. However, because defendant failed to object to the instructions as given by the court, and failed to request an instruction on the lesser offense of involuntary manslaughter from a firearm intentionally aimed or request a cautionary instruction on flight, he has not preserved this issue for appellate review. We are not obliged to review unpreserved instructional error unless failure to do so would result in manifest injustice. *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994); *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995).

In every case of first-degree murder, the jury must be instructed, sua sponte, on the necessarily included offense of second-degree murder. *People v Curry*, 175 Mich App 33, 40; 437 NW2d 310 (1989). The instruction must be given even in the absence of a request from the parties. *Id*. In all other cases, the trial court may, but need not, sua sponte instruct on other lesser included offenses. *People v Stephens*, 416 Mich 252, 261; 330 NW2d 675 (1982). Here, the court instructed the jury on first-degree murder, as well as the lesser included offenses of second-degree murder, voluntary manslaughter, and careless, reckless or negligent use of a firearm resulting in death. Defendant did not object to the instructions as given, and did not request an instruction on involuntary manslaughter from a firearm intentionally aimed. The trial court was not required to give a sua sponte instruction on that offense. *Id.*

Furthermore, the trial court is generally not required to sua sponte give a limiting or cautionary instruction to a jury absent a request to do so. *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994); *People v Shepherd*, 63 Mich App 316, 321; 234 NW2d 502 (1975). In this case, defendant did not request a cautionary instruction on flight. Accordingly, the trial court did not err in failing to sua sponte give the instructions, and defendant did not suffer manifest injustice.

Alternatively, defendant argues that defense counsel rendered ineffective assistance by failing to object to the instructions as given, failing to request that the court instruct on involuntary manslaughter from a firearm intentionally aimed, and failing to request a cautionary instruction on flight. First, we note that defendant did not identify a claim of ineffective assistance of counsel in his statement of the questions presented on appeal, and therefore, this issue is not properly before this Court. MCR 7.212(C)(5); *People v Yarger*, 193 Mich App 532, 540, n 3; 485 NW2d 119 (1992). Additionally, defendant did not move for a new trial or request an evidentiary hearing before the trial court on the ground that he received ineffective assistance of counsel. Therefore, review of this issue is limited to any errors on the existing record. *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973); *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Upon review of the record, we find no support for defendant's claim that he received ineffective assistance of counsel and we decline to further review the issue.

Defendant next argues that the prosecutor committed several instances of misconduct during his opening statement and closing argument. Defendant failed to object at trial to any of the prosecutor's challenged remarks. Therefore, because defendant raises this issue for the first time on appeal, review of the allegedly improper remarks is precluded unless a curative instruction could not have eliminated any prejudicial effect, or where failure to consider the issue would result in a miscarriage of justice. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997). After a thorough review of the record, we are not convinced that the challenged statements were improperly interjected by the prosecution, that they were based on evidence not introduced at trial, or that the remarks unduly appealed to the emotions and sympathies of the jurors. Moreover, any potential prejudice that arose from the remarks could have been adequately cured by a prompt instruction from the court. Therefore, we find that there was no manifest injustice to defendant by virtue of the challenged statements, and we decline to further review the claim. See *People v Bahoda*, 448 Mich 261, 287; 531 NW2d 659 (1995).

Finally, defendant argues that he is entitled to resentencing because the trial court sentenced him on the mistaken belief that his felony-firearm conviction only mandated two years' imprisonment, rather than the five-year mandatory sentence where it was defendant's second felony-firearm conviction. Defendant contends that the only reason the trial court sentenced him to a lengthy fifteen-year minimum term for the second-degree murder conviction was because he presumed defendant would only be serving a two-year sentence for the felony-firearm conviction. Defendant submits that had the trial court been aware of the five-year mandatory sentence for felony-firearm at the time of sentencing, it would have adjusted his fifteen-year minimum sentence for second-degree murder downward to reflect the difference. On this basis, defendant argues that he is entitled to resentencing. We disagree.

We do not find any evidence in the record to support defendant's position that the trial court based defendant's sentence for his second-degree murder and assault with intent to commit murder convictions on the length of defendant's sentence for his felony-firearm conviction. In fact, at sentencing, the trial court stated that it would be willing to take direction from this Court regarding the proper felony-firearm sentence under these circumstances. Yet, the court did not otherwise mention that a change in the felony-firearm sentence would affect the length of defendant's other sentences. Further, defendant's sentences are within the sentencing guidelines range, and are appropriately based on the nature of the offense and the behavior and history of the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990); *People v Kennebrew*, 220 Mich 601, 609; 560 NW2d 354 (1996). Accordingly, we find no basis for resentencing.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Roman S. Gribbs
/s/ Kurtis T. Wilder