

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON KIMBER,

Defendant-Appellant.

UNPUBLISHED

May 2, 2000

No. 206358

Recorder's Court

LC No. 96-008776

Before: Doctoroff, P.J., and Holbrook, Jr. and Kelly, JJ.

KELLY, J. (concurring in part and dissenting in part).

I concur in the majority opinion I - III, but dissent as to IV. I do not believe that there was sufficient evidence of premeditation and deliberation presented to sustain a conviction for first-degree premeditated murder.

Premeditation and deliberation must be shown to sustain a conviction for first-degree murder. Premeditation is different in quality and kind from malice and is often referred to as cold-blooded planning as opposed to the hot-blooded activity characteristically connected with a process like the one proven in this case. *People v Morrin*, 31 Mich App 301, 329-331; 187 NW2d 434 (1971). The circumstances of the killing show a victim with thirty-seven knife wounds and four different bloody knives found at the scene. This Court has stated:

When the evidence establishes a fight, and then a killing, there must be a showing of “a thought process undisturbed by a hot blood” in order to establish first-degree premeditated murder. *Morrin, supra* at 329-330. The critical inquiry is not only whether the defendant had the time to premeditate, but also whether he had the *capacity* to do so. [*People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998).]

Furthermore, the premeditated murder conviction was vacated by the trial court at sentencing. The court, on the prosecution's motion, vacated the first-degree premeditated murder conviction on double jeopardy grounds and sentenced Mr. Kimber to mandatory life in prison on the felony murder

conviction. See *People v Bigelow I*, 225 Mich App 806; 571 NW2d 520 (1997) and *People v Bigelow II*, 229 Mich App 218; 581 NW2d 744 (1998).

I would affirm the judgment of conviction of felony murder and the sentence of life imprisonment on that count only. I see no need for a remand.

/s/ Michael J. Kelly