STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

TERRELL LEE EMBRY,

Defendant-Appellant.

UNPUBLISHED
July 25, 2000

No. 216505
Eaton Circuit Court
LC No. 98-020228 FC

Before: Gage, P.J., and Gribbs and Sawyer, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316; MSA 28.548, discharging a firearm at a dwelling, MCL 750.234b; MSA 28.431(2), possession of a firearm in the commission of a felony, MCL 750.227b; MSA 28.424(2), and felon in possession of a firearm, MCL 750.224f; MSA 28.421(6). The trial court sentenced defendant to concurrent terms of life without parole for the first-degree murder conviction, forty-eight to seventy-two months' imprisonment for the discharging a firearm at a dwelling conviction, and sixty to ninety months' imprisonment for the felon in possession conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant first contends that the evidence presented was insufficient to establish the premeditation element of the first-degree murder charge. In considering a sufficiency of the evidence claim, this Court reviews the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

To establish first-degree murder, MCL 750.316; MSA 28.548, the prosecutor must prove that the defendant intentionally killed the victim and that the killing was premeditated and deliberate. *People v Wofford*, 196 Mich App 275, 278; 492 NW2d 747 (1992). Premeditation and deliberation require sufficient time to permit the defendant to take a second look. The defendant's intent and the elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing, including the defendant's actions before the killing, the circumstances of the killing, and the defendant's behavior

after the killing. *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992); *People v Rotar*, 137 Mich App 540, 549; 357 NW2d 885 (1984). Because a defendant's state of mind is difficult to prove, minimal circumstantial evidence is sufficient. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

Here, evidence indicated that after defendant got into an argument at a party inside an apartment building, he and two others went to defendant's sister's home where defendant produced a gun clip. When defendant discovered that neither of his companions possessed a gun, defendant returned to his sister's home and retrieved his gun. Despite his companion's counsel and protests to the contrary, defendant demanded to return to the apartment building. On arriving again at the building, defendant ignored his companion's advice not to use the gun, and shot several times at the occupied apartment where the dispute occurred. After the shooting, defendant returned to his sister's home and hid the gun, then instructed his companions to lie regarding their whereabouts at the time of the shooting. The next day, defendant threw the gun into a river. Under these circumstances we find sufficient evidence for the jury rationally to have concluded beyond any reasonable doubt that defendant shot with intent to kill someone, acted deliberately and had ample opportunity to reflect on his actions before he opened fire at the apartment full of people. *Jolly*, *supra*; *Schollaert*, *supra*.

Defendant also argues that he did not specifically intend to kill party attendee Michelle Cox, whom he did not know. We note, however, that defendant's use of a lethal weapon supports an inference of his intent to kill, and that defendant's intent to kill may be transferred from one victim to another. *People v Plummer*, 229 Mich App 293, 305-306; 581 NW2d 753 (1998); *People v Ray*, 56 Mich App 610, 615; 224 NW2d 735 (1974).

Defendant next asserts that the trial court erred in refusing to instruct the jury regarding the lesser included misdemeanor of reckless, heedless, willful or wanton use, carrying, handling or discharge of a firearm without due caution. We review for an abuse of discretion the decision whether to give a requested jury instruction. *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993).

In *People v Stephens*, 416 Mich 252; 330 NW2d 675 (1982), the Supreme Court set forth five conditions for determining whether a lesser included misdemeanor jury instruction should be given. First, a party must make a proper request. *People v Steele*, 429 Mich 13, 19; 412 NW2d 206 (1987); *Stephens*, *supra* at 261-262. Second, an appropriate relationship must exist between the charged offense and the requested misdemeanor, to the extent that both the greater and lesser offenses (1) relate to the protection of the same interests, and (2) are related in an evidentiary manner so that proof of the misdemeanor is necessarily presented as part of the proof of the greater charged offense. *Steele*, *supra*; *Stephens*, *supra* at 262. Third, the misdemeanor must be supported by a rational view of the evidence presented at trial. Proof of the elements differentiating the greater offense and requested misdemeanor must be in dispute so that the jury rationally could find the defendant innocent of the greater offense but guilty of the lesser offense. *Steele*, *supra* at 20-21; *Stephens*, *supra* at 262-264. Fourth, if the prosecutor requests the instruction, the defendant must have adequate notice of it as a charge against which he may have to defend. *Steele*, *supra* at 21; *Stephens*, *supra* at 264. The fifth condition requires that the instruction not cause undue confusion or injustice. *Steele*, *supra* at 21-22;

Stephens, *supra* at 264-265. Even when these conditions are met, a trial court retains substantial discretion to approve or deny a request. *Steele*, *supra* at 22.; *Stephens*, *supra*.

In this case, the first condition is met because defense counsel properly requested a reckless discharge of a firearm instruction. The second condition is unmet, however, because reckless discharge of a firearm, MCL 752.a863; MSA 28.436(24), does not prohibit the same type of behavior as first-degree murder, MCL 750.316 MSA 28.548, and the proof used to establish first-degree murder generally is not the same proof used to establish reckless discharge of a firearm.[1] The third condition is also unmet because the misdemeanor instruction must be supported by a rational view of evidence. *People v Ramsdell*, 230 Mich App 386, 403; 585 NW2d 1 (1998). While defendant argues that the testimony of Antoine Benson suggested that defendant recklessly discharged a firearm into the air, significant other evidence established that several bullets fired from a gun matching defendant's struck the apartment building where the party occurred. This overwhelming evidence demonstrates that defendant not only recklessly fired the gun, but intended to harm people attending the party. Evidence of defendant's actions both before and after the shooting, including hiding and disposing of his gun, further indicates defendant's understanding that he had committed a serious crime. Accordingly, we find no abuse of discretion in the trial court's refusal to instruct the jury with respect to reckless discharge of a firearm. *Steele*, *supra*; *Stephens*, *supra*.

Defendant further claims he was denied his right to a fair trial because the trial court failed to read a cautionary accomplice testimony instruction regarding Antoine Benson's credibility. Where a defendant requests a cautionary instruction regarding an accomplice's testimony, a trial court generally is required to give that instruction. A trial court need not read requested instructions, however, that are not supported by the evidence or facts of the case. *People v Ho*, 231 Mich App 178, 188-189; 585 NW2d 357 (1998). Thus, the trial court need not instruct on the inherent dangers of accomplice testimony when no evidence indicates that the witness "knowingly and willingly help[ed] or cooperat[ed] with someone else in committing a crime." *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993), quoting CJI2d 5.5. Here, Benson did not encourage defendant, but instead advised him against using the gun. The record does not indicate that Benson was ever charged with any crime for involvement in the victim's murder. In the absence of evidence that Benson acted as defendant's accomplice, we conclude that the trial court did not abuse its discretion in refusing to read an accomplice testimony instruction regarding Benson. *Ho*, *supra* at 189.

Lastly, defendant contends that the prosecutor's solicitation of irrelevant hearsay statements, specifically defendant's family members' threats to potential witnesses, denied defendant due process. In reviewing alleged prosecutorial misconduct, we must determine whether the defendant was denied a

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[1] First-degree murder represents a specific intent crime. *People v Thomas*, 126 Mich App 611, 623; 337 NW2d 598 (1983). Furthermore, the intent to kill in first-degree murder must be premeditated and deliberated. *People v Dykhouse*, 418 Mich 488, 495; 345 NW2d 150 (1984). Reckless discharge of a firearm involves discharging a firearm without care, not intentionally discharging a firearm with the intent to kill someone. Thus, the two statutes prohibit different acts, and the proof required to show first-degree murder differs to the extent that it is necessary to establish specific intent.

fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). The statements elicited by the prosecutor do not represent inadmissible hearsay. The challenged testimony concerning defendant's mother's, brother's and uncle's advice or threats to Benson and Terrence Hill to indicate defendant's innocence were not offered to prove that these threats in fact occurred. MRE 801(c), 802. The prosecutor properly solicited testimony concerning defendants' family members' statements to explain Benson's and Hill's states of mind, specifically to explain the basis for their initial false statements to the police. MRE 803(3); *People v Flaherty*, 165 Mich App 113, 122; 418 NW2d 695 (1987) ("A statement offered to show the effect of the statement on the hearer is not hearsay and may be properly admitted."); *People v Kozlow*, 38 Mich App 517, 531-533; 196 NW2d 792 (1972). Because the prosecutor's questioning intended a permissible purpose, we find no prosecutorial misconduct.

Affirmed.

/s/ Hilda R. Gage
/s/ Roman S. Gribbs
/s/ David H. Sawyer