STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MYRON LOTT BROOKS,

Defendant-Appellant.

UNPUBLISHED
December 19, 2000

No. 212737
Wayne Circuit Court
Criminal Division
LC No. 97-500882

Before: Wilder, P.J., and Holbrook Jr., and McDonald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to consecutive terms of life imprisonment for the murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant argues that the district court abused its discretion in denying defendant's request for a lineup before the preliminary examination where identification was a material issue. We disagree. The purpose of a preliminary examination is to determine if probable cause exists to believe that an offense has been committed and that the defendant committed it. MCR 6.110(E); *People v Goecke*, 457 Mich 442, 469; 579 NW2d 868 (1998). A defendant is not constitutionally entitled to a preliminary examination, and the harmless error standard set forth in MCL 769.26; MSA 28.1096 applies to errors at the preliminary examination. *People v Hall*, 435 Mich 599, 603, 613; 460 NW2d 520 (1990).

It is within a court's discretion to determine whether fundamental fairness requires a lineup. *People v Gwinn*, 111 Mich App 223, 249; 314 NW2d 562 (1981). The right to a lineup should arise when eyewitness identification has been shown to be a material issue and when there is a reasonable likelihood of mistaken identification which a lineup would tend to resolve. *Id.* at 249. However, where an adequate, independent basis for an in-court identification has been provided, there is little chance of mistaken identification and, therefore, a court does not abuse its discretion in refusing to conduct a live lineup. *Id.* at 250.

Here, the district court did not articulate on the record its reasons for denying defendant's motion for a line-up, despite the fact that identification was a material issue in the case.[1] However, even if the district court abused its discretion in denying defendant's request for a lineup without investigating whether there was a reasonable likelihood of mistaken identification, *Gwinn, supra* at 249, we find that any error was remedied by the trial court's subsequent finding, following an evidentiary hearing, that an independent basis existed for the in-court identifications of each of the three witnesses who testified at the preliminary examination.[2] Accordingly, reversal is not warranted.

Defendant next argues that the trial court erred in denying his pre-trial motion to suppress in-court identification testimony. We disagree. This Court will not reverse a lower court's decision to admit identification testimony unless, under the totality of the circumstances, it is clearly erroneous. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998); *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996). To warrant reversal, the reviewing court must be left with a definite and firm conviction that a mistake has been made. *McElhaney, supra.*

Defendant filed a pre-trial motion to suppress identification testimony of three witnesses, Thomas Carter, Creacy Shepard, and Roberto Enriquez, on the basis that their preliminary examination identifications of defendant were unduly suggestive and their trial identifications lacked an independent basis. When ruling on the motion, the trial court focused solely on whether there was an independent basis for the witnesses' in-court identification, an issue that arises only after it has been determined that a pretrial identification was tainted by an improper or unduly suggestive identification procedure. *Gray, supra* at 114-115; *McElhaney, supra* at 286. However, although the issue of an improper or suggestive identification procedure was never squarely decided by the trial court, we conclude after reviewing the record that defendant has not demonstrated any basis for appellate relief because, considering the totality of the circumstances, the trial court's finding that there was an independent basis for each of the witnesses' in-court identifications at trial was not clearly erroneous. See *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977). Accordingly, the trial court properly denied defendant's motion to suppress the testimony.

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[1] The district court denied defendant's request for a line-up, noting simply that the constitution does not require a line-up, and that it has never been held that an accused has a right to participate in a line-up.

[2] We note that defendant fails to identify the particular witnesses whom he believes should have been present at a lineup. To the extent defendant argues that witnesses other than those who identified him at the preliminary examination should have been ordered to participate in a lineup, we deem the issue abandoned because it is insufficiently briefed. See *People v Kent*, 194 Mich App 206, 209-210; 486 NW2d 110 (1992). Moreover, given the absence of any record evidence that defendant properly moved for a lineup in the trial court with regard to witnesses other than those who identified him at trial, we find no basis for relief. Defendant had no entitlement to a lineup as of right, *People v Emanuel*, 98 Mich App 163, 183; 295 NW2d 875 (1980), and he has not shown plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Next, defendant contends that there was insufficient evidence of premeditation to support his first-degree murder conviction. We disagree. When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the nonmoving party and determine whether any rational trier of fact could have found that the essential elements of the offense were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 730 (1999); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to prove the elements of the crime. *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998). Premeditation and deliberation require sufficient time to allow the defendant to take a "second look" and 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. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

Testimony at trial revealed that defendant first mentioned killing the victim at Shepard's home where defendant announced more than once "that nigger need to be popped." There was also evidence that while defendant was trying to open the motel door, he turned away from the victim in a manner suggesting that he was trying to hide his face and not be recognized. The evidence further showed that after defendant initially fired the gun at the victim unsuccessfully, he tried again, firing four or five additional gunshots, fatally striking the victim. Viewing this evidence in a light most favorable to the prosecution, we conclude that sufficient time elapsed for defendant to take a "second look" before shooting the victim. *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979); *Plummer, supra* at 300-301. Any issues concerning factual conflicts or witness credibility were for the jury to consider and resolve. *Wolfe, supra* at 514-515. Accordingly, a rational trier of fact could find that the element of premeditation was proven beyond a reasonable doubt.

Defendant raises four additional issues in a supplemental brief, none of which we find warrant relief. First, defendant claims that prior bad acts evidence was erroneously admitted under MRE 404(b) without reference to the prejudicial effect of the evidence under MRE 403. Specifically, defendant complains that the trial court erred in admitting testimony from Sims, Shephard and Gunn that defendant committed other drug-related criminal acts unrelated to the shooting in this case. Because defendant failed to object to the evidence at trial, we review this issue for plain error affecting substantial rights. MRE 103(d); *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Evidence may be relevant under MRE 401 and admissible at trial without reference to MRE 404(b). *People v Hall*, 433 Mich 573, 580-583; 447 NW2d 580 (1989) (Boyle, J.). In this case, the testimony from these witnesses regarding defendant's participation in a drug sale was probative on the issue of identification and to reveal the "complete story" of what occurred at the time of the shooting. *People v Sholl*, 453 Mich 730, 742; 566 NW2d 851 (1996). The witnesses' testimony regarding the arrangement to sell drugs on the day of the shooting was introduced to show that defendant was in the City of Inkster at the time of the shooting and to explain why he was present at the motel at the time of the murder. Contrary to defendant's contention, the evidence was not introduced to show that defendant had a "bad character" or a propensity for

committing crime. "[I]t is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." *Id.* at 741. Moreover, it is not clear or obvious from the record that the probative value of the challenged evidence was substantially outweighed by the danger of unfair prejudice as defined in MRE 403. Accordingly, we find no plain error affecting substantial rights. *Carines, supra* at 774.

Second, defendant claims that he was a denied a fair trial because the trial court failed to instruct the jury on specific intent in accordance with CJ2d 3.9. We disagree. Defendant did not request the CJ2d 3.9 instruction at the trial court and did not object to the trial court's instructions as given; thus, we review this claim for plain error affecting substantial rights. *Carines, supra* at 766-767. Jury instructions are reviewed in their entirety, rather than extracted piecemeal, to determine whether they fairly presented the issues to be tried to the jury and sufficiently protected defendant's rights. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992).

The trial court instructed the jury on the issue of intent as follows:

> The second element with respect to first-degree premeditated murder is that Mr. Brooks intended to kill Mr. Thomas at the time he caused the act of shooting him.
>
> ***
>
> As I indicated to you, with respect to the crime of murder in the first degree premeditated, one of the elements that must be proven beyond a reasonable doubt is that at the time of committing the act, the defendant must have intended to kill Mr. Thomas. . . .
>
> Now, when we talk about an individual state of mind, obviously, one can't get inside another person's head and know precisely what they were thinking at a particular time. However, you can think about all the evidence in deciding what Mr. Brooks, if you find that Mr. Brooks was the person who committed this act, what his state of mind was at the time of the alleged killing.
>
> Now, that can be inferred by a jury from the kind of weapon that was used, the type of wounds inflicted and any acts or words of the defendant or any other circumstances surrounding the alleged killing. You may infer that Mr. Brooks intended to kill if he used a dangerous weapon in a way that was likely to cause death. Likewise, you may infer that Mr. Brooks intended the usual results that follow from the use of a dangerous weapon. And under the law, a gun is a dangerous weapon.

Further, when instructing the jury on the elements of second-degree murder, the trial court reiterated the element of intent needed for first-degree murder, stating in pertinent part, "unlike first degree pre-meditated *which requires an intent to kill to be proven to you beyond a reasonable doubt . . . .*" [Emphasis added.]

The trial court is not required to use standard jury instructions. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). Although not identical to the standard jury instruction on specific intent set forth in CJI2d 3.9,[3] the trial court's instructions fairly presented the specific intent issue to the jury and sufficiently protected defendant's rights. *Caulley*, *supra* at 184. We find no instructional error.

Third, defendant contends that the trial court violated MCR 2.511(F) by requiring defense counsel to use multiple peremptory challenges before seating new prospective jurors. Defendant failed to object to the jury selection procedure in the trial court and expressed satisfaction with the jury. Accordingly, this issue is waived and we decline to review the claim. *People v Schmitz*, 231 Mich App 521, 526; 586 NW2d 766 (1998); *People v Colon*, 233 Mich App 295, 300; 591 NW2d 692 (1998).

Finally, defendant claims that his sentence of life imprisonment without parole for first-degree murder is constitutionally invalid because it is a determinate sentence and it constitutes cruel and unusual punishment. We disagree. "[W]hile the constitutional provision 'plainly authorizes indeterminate sentencing, it includes no *prohibition* against a statute *requiring* determinate sentencing as a punishment for crime.'" *People v Snider*, 239 Mich App 393, 426; 608 NW2d 502 (2000), lv pending, quoting *People v Cooper*, 236 Mich App 643, 661; 601 NW2d 409 (1999); emphasis in original. "[T]here is nothing in Const 1963, art 4, § 45, requiring indeterminate sentencing for particular crimes, such as [defendant's] first-degree premeditated murder[]." *Snider*, *supra*. Further, defendant's sentence is not cruel or unusual punishment under Const 1963, art 1, § 16. *People v Hall*, 396 Mich 650, 657-658; 242 NW2d 377 (1976); *People v Launsburry*, 217 Mich App 358, 363-365; 551 NW2d 460 (1996).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald

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[3] CJI2d 3.9 on specific intent states as follows:

> (1) The crime of [first-degree murder] requires proof of a specific intent. This means that the prosecution must prove not only that the defendant did certain acts, but that [he/she] did the acts with the intent to cause a particular result.
>
> (2) For the crime of [first-degree murder] this means that the prosecution must prove that the defendant intended to [*state the required specific intent*].
>
> (3) The defendant's intent may be proved by what [he/she] said, what [he/she] did, how [he/she] did it, or by any other facts and circumstances in evidence.