

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES HARRY KLEIN,

Defendant-Appellant.

UNPUBLISHED

December 26, 2000

No. 215674

Macomb Circuit Court

LC No. 98-001803-FH

Before: Cavanagh, P.J., and Talbot and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for second-degree murder, MCL 750.317; MSA 28.549. Defendant was sentenced to twenty-five to fifty years' imprisonment. We affirm.

Defendant's first issue on appeal is that the trial court erroneously denied defendant's request for an instruction on the cognate lesser included offense of voluntary manslaughter. We disagree.

When reviewing whether a trial court erred in failing to give an instruction on a cognate lesser included offense, we examine the record to determine if there was sufficient evidence to support a conviction of the cognate lesser included offense. If the evidence presented could not support a conviction of the lesser offense, then the trial court was not required to give the requested instruction and there is no error. *People v Pouncey*, 437 Mich 382, 386-387; 471 NW2d 346 (1991).

The offense of voluntary manslaughter requires proof that (1) the defendant killed in the heat of passion, (2) the passion was caused by an adequate provocation, and (3) before a reasonable time had passed for the blood to cool or during which a reasonable person could control his passions. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason or that which would cause a reasonable person to lose control. *Pouncey, supra* at 389-390.

A review of the evidence in this case establishes that there was insufficient evidence presented to satisfy the elements necessary to convict defendant of voluntary manslaughter;

therefore, no such instruction was necessary. There was no evidence that defendant killed Patrick Hart in the heat of passion caused by adequate provocation without a reasonable time for the blood to cool. There was no evidence in the record of provocation. There was evidence that Hart owed defendant over \$2,000 in back rent and that defendant was not happy about Hart's failure to pay him the back rent. There was no evidence that a fight or other mitigating circumstance took place between defendant and Hart the night Hart was killed. The only evidence presented regarding the circumstances of Hart's death was the testimony of Dr. Werner Spitz which indicated that Hart was struck in the left side of his head a minimum of three times with possibly a fist or a piece of board. Defendant had to do more than invite the jury to engage in "pure speculation" that the blows to Hart's head were committed out of the heat of passion, with adequate provocation. *People v Bailey*, 451 Mich 657, 674; 549 NW2d 325, amended on other grounds 453 Mich 1204 (1996). In this case, there was no such evidence and, as a result, the trial court was justified in refusing defendant's request for an instruction on the cognate lesser included offense of voluntary manslaughter.

Defendant's second issue on appeal is that he was denied due process of law when the trial court failed to instruct the jury on involuntary manslaughter as a cognate lesser included offense. We disagree.

Jury instructions on cognate lesser included offenses may be given if there is a proper request and if there is record evidence to support the proposed instruction. *People v Beach*, 429 Mich 450, 480, 482; 418 NW2d 861 (1988) (quoting *People v Stephens*, 416 Mich 252, 261-262; 330 NW2d 675 (1982)). A defendant is required to inform the trial court of the exact lesser included offenses that are being requested. *Id.* at 482. The issue is not preserved by a general request for an instruction on lesser included offenses, but rather, "requests for instructions must be sufficiently definite and unequivocal to apprise the trial court of what instructions it is being asked to give." *People v Bashans*, 80 Mich App 702, 705; 265 NW2d 170 (1978). Absent such a request for an instruction, failure of the trial court to instruct on a lesser included offense will not be regarded as reversible error. MCL 768.29; MSA 28.1052

In the present case, defendant requested an instruction on "manslaughter." The trial court responded by asking defendant "what supports that instruction on voluntary manslaughter?" Defendant responded with an argument and concluded by stating that "the jury should at least have this opportunity to decide on this lesser-included offense." However, the court declined to give the instruction and defendant made no further requests. From the face of the record, it appears that only voluntary manslaughter was specifically requested by defendant and denied by the trial court. Defendant did not request an involuntary manslaughter instruction; therefore, this issue was not preserved for our review. Even if defendant had made a sufficient request for the instruction, there was no error in failing to instruct the jury on involuntary manslaughter because, after reviewing the existing record, we conclude there was insufficient evidence to support such a conviction.

Defendant next claims that he was denied the effective assistance of counsel because his trial counsel failed to specifically request an instruction on the cognate lesser included offense of involuntary manslaughter. We disagree. Because defendant failed to preserve this issue for appeal by moving for a new trial or evidentiary hearing before the trial court, our review is

limited to mistakes apparent on the existing record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999).

To establish a denial of effective assistance of counsel, a defendant must demonstrate that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that, but for counsel's error, the result of the proceedings would have been different. *Id.* at 662. However, because there was insufficient evidence in the record to support the giving of an involuntary manslaughter instruction, defendant has failed to show that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by his counsel's performance. Thus, defendant has failed to establish that he received ineffective assistance of counsel. *Id.* at 662.

Defendant's final issue on appeal is that the trial court erroneously denied his motion for a directed verdict on the charge of first-degree murder. We disagree.

When reviewing a trial court's decision regarding a motion for a directed verdict, we review the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime were proved beyond a reasonable doubt. *People v Crawford*, 232 Mich App 608, 615-616; 591 NW2d 669 (1998). To establish the offense of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. MCL 750.316; MSA 28.548, *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995). Premeditation and deliberation require sufficient time to allow the defendant to think about and evaluate a choice beforehand or take a "second look." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation and deliberation may be inferred from the facts and circumstances surrounding the killing, including such relevant factors as: (1) the parties' prior relationship, (2) the defendant's actions before the killing, (3) the circumstances of the killing itself, and (4) the defendant's actions after the killing. *Haywood*, *supra* at 229.

Defendant argues that the prosecution specifically failed to prove the elements of premeditation and deliberation, and therefore, it was reversible error for the trial court to submit the charge of first-degree murder to the jury. However, there was sufficient evidence presented by the prosecution from which the jury could have found that the elements of premeditation and deliberation were proved beyond a reasonable doubt. First, there was evidence presented regarding defendant and Hart's relationship before the killing. There was testimony that Hart had been living with defendant in defendant's trailer home for four or five months before Hart was killed. There was further testimony that Hart owed defendant \$2,104.59 in back rent and that defendant had unsuccessfully attempted to evict Hart two weeks prior to the killing. There was also testimony that defendant threatened Hart just weeks before the killing. Robert Mathews testified that on April 12, 1998, he witnessed defendant and Hart arguing over money Hart owed defendant for rent. Mathews heard defendant tell Hart, "don't f--k with me over the money or you will regret it." In January 1998, another witness heard defendant make threatening remarks about Hart over rent money. Patrick Kent testified that defendant told him that if Hart did not start paying rent, defendant was "going to kill that mother f---r." Based on the evidence, the jury could have inferred that the relationship between Hart and defendant had gone sour, that

defendant had been angry for months about the rent money Hart owed him, and that defendant possibly wanted to kill Hart. Looking at the dates the threats were made by defendant, the jury could find sufficient time for defendant to take a second look and reevaluate his proposed actions with regard to Hart. From the time the threats were made in January and April 1998, there was more than enough time for defendant to premeditate and deliberate about killing Hart.

Second, from the circumstances surrounding the killing and the evidence of defendant's conduct after the killing, the jury could have found the elements of premeditation and deliberation satisfied. The evidence of the circumstances surrounding the killing indicated that Hart was struck a minimum of three times in the left side of his head with a smooth, blunt instrument, which caused internal bleeding and brain swelling. Premeditation may be inferred from 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). If the jury accepted Dr. Spitz's testimony regarding the type of instrument that was used to beat Hart numerous times on the side of his head, a vital part of the body that, if injured, would cause death, then premeditation could properly be inferred from this evidence.

In addition, there was evidence regarding defendant's actions after the killing from which the jury could have found premeditation and deliberation. The jury could have inferred from the fiber and fingerprint evidence that after defendant killed Hart, he stripped him naked, covered him with plastic and a green blanket, put him in the back of his van, and dumped him in an empty field. There was testimony that defendant was seen by another witness in the area where the body was found. There was testimony from investigating police officers that defendant admitted stopping on the service drive next to the field where the body was found, the night before the body was found. Police officer testimony also indicated that there was a vacuum cleaner found on defendant's premises that contained blood and water. An inference which could have been drawn, based on the evidence, was that defendant acted with a plan when he killed Hart and then went about disposing of the evidence.

The rather hostile relationship between defendant and Hart, considered together with the threats defendant made in the months and weeks leading up to the killing, the circumstances surrounding Hart's death, and the way defendant went about disposing of the body and covering up the killing provided sufficient evidence from which a jury could find that the elements of first-degree murder were proved beyond a reasonable doubt. Viewed in the light most favorable to the prosecution, there was sufficient evidence from which a jury could find that defendant intentionally killed Hart with premeditation and deliberation. Therefore, the trial court was justified in submitting the first-degree murder charge to the jury and there was no error in denying defendant's motion for a directed verdict.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael J. Talbot
/s/ Patrick M. Meter