

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MARCUS HUNT,

Defendant-Appellant.

UNPUBLISHED

April 12, 2002

No. 228038

Wayne Circuit Court

LC No. 99-006826

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316, assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment for the first-degree murder conviction, twenty to forty years' imprisonment for the assault with intent to commit murder conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first claims that the evidence was insufficient to support the verdict of first-degree murder. We disagree. When reviewing a claim that there was insufficient evidence to support the jury verdict, we view the evidence in the light most favorable to the prosecution and determine whether there was sufficient evidence to permit a rational trier of fact to find that the essential elements of the offense were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992); *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

To convict a defendant of first-degree murder, the prosecutor must prove that the killing was intentional and that the act of killing was accompanied by premeditation and deliberation on the part of the defendant. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995); MCL 750.316(1)(a). Premeditation and deliberation can be inferred from the surrounding circumstances, but the inferences cannot be merely speculative and must have support in the record. *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998); *Anderson, supra* at 537. Premeditation may be established through evidence of such factors as the prior relationship of the parties, the defendant's actions before the killing, the circumstances of the killing, and the defendant's conduct after the victim's death. *Id.*

The evidence at trial established that defendant approached the street from behind the side of a house and then stood in a shared driveway with a gun concealed under a towel. Defendant saw the van passing in the street and took the towel off the gun and pointed the gun at the van. Then, after the van continued past him, defendant shot five to eight times at the van with his automatic weapon, and ran away from the scene. As he ran, defendant dropped his gun in the yard of a vacant house. This evidence was sufficient to permit a reasonable trier of fact to conclude that elements of first-degree murder were proven by the prosecution beyond a reasonable doubt.

Defendant next argues that he was denied a fair trial when the trial court did not instruct the jury on the elements of the crime of voluntary manslaughter. A defendant must request a jury instruction in the lower court in order to preserve for appeal a challenge to the trial court's decision not to give the instruction. *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995); MCL 768.29. While apparently desiring that the trial court instruct the jury on the elements of voluntary manslaughter, defendant actually requested an instruction on *involuntary* manslaughter. The trial court then stated its intention, without objection from the defendant or the prosecution, to instruct the jury on voluntary manslaughter. However, when the trial court actually instructed the jury, it repeated the elements of second-degree murder to the jury rather than instructing the jury on the elements of voluntary manslaughter. Defendant did not object to the trial court's apparently inadvertent omission of the voluntary manslaughter instruction, and repeating of the second-degree murder instruction therefore this issue is not properly preserved for this Court's review. Thus, defendant must show a plain error that effected his substantial rights in order to prevail on this issue. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Jury instructions are to be read as a whole instead of extracted piecemeal to establish error, and even if somewhat imperfect, no error exists if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995); *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). The instructions must include all elements of the charged offense and must not exclude relevant issues, defenses, or theories, if there is evidentiary support. *Daniel, supra*, at 53.

A cognate lesser offense is one that shares some common elements with and is of the same class as, the greater offense, but also has elements not found in the greater offense. *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999). If the defendant requests an instruction regarding a cognate lesser offense, the court must give the instruction, but only if the evidence supports it. *People v Veling*, 443 Mich 23, 36; 504 NW2d 456 (1993); *People v Sullivan*, 231 Mich App 510, 517-518; 586 NW2d 578 (1998). The court must examine the specific evidence to determine whether it would support a conviction of the lesser offense before it instructs on a cognate lesser offense, *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991); *People v Heflin*, 434 Mich 482, 495; 456 NW2d 10 (1990), since the giving of an instruction on a lesser offense which has no evidentiary basis detracts from the rationality and reliability of the factfinding process. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991).

To prove the elements of voluntary manslaughter, the evidence must establish that (1) the defendant killed in the heat of passion, (2) the passion was caused by an adequate provocation, and (3) there was no lapse of time during which a reasonable person would have been able to control his passions." *Sullivan, supra* at 518. Here, the evidence establishes that the

circumstances of the shooting are not consistent with voluntary manslaughter. There was no evidence of provocation. Defendant stated to police that he had seen the occupants of the van with guns earlier in the day and that they had their hands in the air and had waved the guns. However, defendant admitted that they never pointed the guns at him. Further, defendant said specifically that the reason he shot at the van was that he thought the occupants of the van were going to do something to him. He said nothing about seeing guns pointed at him, being part of an altercation, or hearing threats immediately before he shot. Because the evidence does not support a verdict of voluntary manslaughter, the court was not required to give the instruction and no plain error occurred when the court failed to give the instruction. *Carines, supra*; see also *Velting, supra*, and *Sullivan, supra*.

In any event, any error in the instructions would be harmless since the jury convicted defendant of first-degree murder and rejected the lesser offense of second-degree murder. *People v Raper*, 222 Mich App 475, 483-484; 563 NW2d 709 (1997).

Defendant next argues that if this Court determines that the claimed jury instruction error was not preserved for appeal, then he was denied effective assistance of counsel. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that because of such representation, he was prejudiced to the extent that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate prejudice, a defendant must show that, but for trial counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Moreover, an unpreserved constitutional error only warrants reversal when it was a plain error affecting defendant's substantial rights. *Carines, supra* at 764, 774.

Assuming without deciding that defense counsel's performance fell below an objective standard of reasonableness in failing to preserve this alleged error for appeal, *Stanaway, supra*, *Pickens, supra*, nevertheless, the evidence at trial supports the jury's verdict of first-degree murder. Furthermore, because the jury rejected the option of convicting defendant of another lesser offense, second-degree murder, defendant cannot demonstrate prejudice or show that, but for trial counsel's alleged error, there is a reasonable probability that the result of the proceeding would have been different. *Stanaway, supra* at 687-688.

Defendant's final claim is that the trial court denied him a fair trial by allowing the prosecutor to impeach a character witness with defendant's prior acts. We disagree. The decision to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *People v Williams*, 240 Mich App 316, 320; 614 NW2d 647 (2000).

MRE 404 states in pertinent part:

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same....

MRE 405 states in pertinent part:

(a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into reports of relevant specific instances of conduct.

On direct examination, defendant's character witness, Pearl Fowler, testified that defendant did not have a hostile personality. This opinion was "evidence of a pertinent trait of character" and was properly admitted under MRE 404(a)(1). *People v Lukity*, 460 Mich 484, 497-498; 596 NW2d 607 (1999). Once a defendant has placed his character in issue, however, it is proper for the prosecution to introduce evidence that the defendant's character is not as impeccable as is claimed. *People v Leonard*, 224 Mich App 569, 594; 569 NW2d 663 (1997).

On cross-examination, the prosecutor asked Fowler if she had ever heard that defendant had hit his former girlfriend with his car, threatened her, thrown glass bottles at her, harassed her while she was at work, and thrown bricks through her windows. This cross-examination was permitted because it inquired about specific instances of conduct to rebut Fowler's testimony that defendant did not have a hostile personality, *Lukity, supra*; MRE 405(a), and the trial court did not abuse its discretion when it allowed the prosecutor to ask these questions on cross-examination.

We reject defendant's further contention that the trial court erred in permitting the prosecutor to cross-examine Fowler about these incidents because they constituted "bad acts" evidence under MRE 404(b), which would require the trial court to first conduct an evidentiary hearing to determine foundation or relevance. Since the prosecutor's cross-examination of Fowler rebutted testimony admitted under MRE 404(a)(1), MRE 404(b) is not implicated. *Lukity, supra* at 499. Under these circumstances, the prosecutor had no obligation to demonstrate "a purpose under which such [bad acts] evidence would be admissible or to provide notice." *Id.*

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder