

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL E. FRYER,

Defendant-Appellant.

UNPUBLISHED

June 28, 2002

No. 232252

Wayne Circuit Court

LC No. 00-001101

Before: Kelly, P.J., and Murphy and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to twenty-five to fifty years' imprisonment for the second-degree murder conviction, twenty-five to fifty years' imprisonment for the assault with intent to commit murder conviction, and two years' imprisonment for the felony-firearm conviction. Defendant now appeals as of right. We affirm in part and reverse in part.

Defendant first argues that the trial court erred in allowing the charges of premeditated murder and assault with intent to commit murder to go to the jury when the prosecution failed to present sufficient evidence to sustain such convictions. We disagree. Due process requires that, when determining whether sufficient evidence has been presented to sustain a conviction, this Court must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Specifically, defendant contends that the trial court erroneously instructed the jury on the charge of first-degree murder when there was insufficient evidence presented to sustain such a conviction, resulting in a compromise verdict of second-degree murder. To sustain a conviction of first-degree murder, the prosecution was required to prove defendant intentionally killed the victim and that the killing was premeditated and deliberate, rather than from a split-second, impulsive decision. MCL 750.316; *People v Dykhouse*, 418 Mich 488, 495; 345 NW2d 150 (1984); *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000). Premeditation, which requires sufficient time to permit the defendant to take a second look, may be inferred from the

circumstances surrounding the killing, including the weapon used and the location of the wound. *People v Coy*, 243 Mich App 283, 315-316; 620 NW2d 888 (2000).

In this case, premeditation and deliberation may be inferred from the defendant's actions before the killing and the circumstances of the killing itself. See *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). Defendant's shooting at the driver of the departing vehicle, and his beating of the murder victim for a short period before firing the fatal shot present a question of fact whether the elapsed time was sufficient for defendant to form the intent to kill after premeditation and deliberation rather than a split-second impulsive decision. *Dykhouse, supra*. Notwithstanding the jurors' failure to find defendant guilty of first-degree murder, the question of proof of the disputed element of specific intent was properly left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). This Court will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *Wolfe, supra* at 514-515. Accordingly, there was sufficient evidence to support such a conviction, and therefore, the trial court did not err in permitting the jury to consider the charge of first-degree murder.

Likewise, defendant's charge of assault with intent to commit murder was properly submitted to the jury as there was sufficient evidence presented to sustain such a conviction. To establish the offense of assault with intent to commit murder, the prosecution must prove each of the following elements beyond a reasonable doubt: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). "A conviction for assault with intent to commit murder must be premised upon the defendant's specific intent to kill." *People v Edwards*, 171 Mich App 613, 620; 431 NW2d 83 (1988). The requisite intent to kill may be proven by inference from any facts in evidence. *McRunels, supra* at 181. Moreover, because of the difficulty in proving a defendant's state of mind, the showing of even minimal circumstantial evidence is sufficient. *Id.* Specifically, this Court has held that the intent element of an assault with intent to commit murder charge "may be proven indirectly by inference from the conduct of the accused and surrounding circumstances from which it logically and reasonably follows." *People v Johnson*, 54 Mich App 303, 304; 220 NW2d 705 (1974). The jury may take into consideration "the nature of the defendant's acts constituting the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, [the defendant's] conduct and declarations prior to, and all other circumstantial evidence calculated to throw light upon the intention with which the assault was made." *People v Taylor*, 422 Mich 554, 567-568; 375 NW2d 1 (1985) (citations omitted).

After a review of the record in this case, defendant's actions may be construed as reflecting the specific intent to kill. As the victim was backing out of the club, defendant pulled a gun from his waistband. The victim ran to his car and while pulling away, defendant opened the passenger door and "tried to shoot" the victim. When the victim drove away, defendant fired two shots at the fleeing vehicle, breaking the rear window. This evidence and its reasonable inferences, when viewed in the light most favorable to the prosecutor, could allow a rational trier of fact to find that the essential elements of the crime charged were proven beyond a reasonable doubt. *Wolfe, supra* at 515.

Defendant next claims his counsel was ineffective for failing to move for a directed verdict. Because sufficient evidence was presented to survive a motion for a directed verdict and

allow submission of the charges to the jury, defendant has failed to rebut the strong presumption that counsel's failure to move for a directed verdict fell within a wide range of reasonable professional assistance, and that his assistance was effective. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001). Furthermore, an attorney is not ineffective for failing to bring a futile motion. *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001).

Defendant also argues that the trial court's decision to admit defendant's custodial statements was clearly erroneous when defendant unequivocally requested an attorney. We disagree. Once a defendant asserts the right to have counsel present during a custodial interrogation, the police must cease their interrogation and any further interrogation may only take place after counsel has been made available or new and adequate warnings have been given and there is a reasonable basis for inferring that the suspect has voluntarily changed his mind. *People v Adams*, 245 Mich App 226, 237; 627 NW2d 623 (2001); *People v Kowalski*, 230 Mich App 464, 473; 584 NW2d 613 (1998) (citations omitted). The preliminary consideration is whether the defendant actually invoked the right to counsel, which constitutes an objective inquiry. *Adams, supra*. "If the accused makes a reference to an attorney and the reference is ambiguous or equivocal in that a reasonable police officer in light of the circumstances would have understood only that the accused might be invoking the right to counsel, the cessation of questioning is not required." *Id.* at 237-238.

In this case, there was a factual dispute and credibility contest between the investigating officer and defendant regarding whether defendant requested counsel. In making the assessment, deference is given to the trial court's assessment of the weight of the evidence and the credibility of the witnesses, and its factual findings will not be reversed unless they are clearly erroneous. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). The factual dispute regarding whether defendant requested an attorney was resolved by the trial court in the prosecutor's favor. The trial court's determination that defendant did not make an unequivocal statement requesting counsel is supported by the record. Therefore, we find no error.

Defendant also challenges the scoring of his sentencing guidelines, arguing that offense variable (OV) 1 for the second-degree murder conviction should have been scored twenty-five points because there was only one victim. We disagree. The trial court is allowed considerable discretion to allocate points to individual offense variables where, as here, there is record evidence to support a particular score. *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000); *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). While the incidents were principally directed at individual victims, the crimes occurred as part of a contemporaneous act that began when both victims returned to the lounge. Accordingly, it is irrelevant that each charged action was directed at only one individual because the actions were part of a continuing criminal enterprise involving multiple victims. Thus, defendant's sentencing guidelines were properly scored.¹

¹ Regardless, even if this Court were to find that OV 1 was erroneously scored, defendant's corrected OV score remains at OV level II and, therefore, does not change the recommended minimum sentence guideline range of 225 to 375 months. Thus, resentencing is not required.

Last, defendant contends that he is entitled to resentencing on the assault with intent to murder conviction because the trial court improperly departed from the sentencing guidelines without complying with statutory departure requirements. We agree. A trial court may depart from the appropriate sentencing guidelines range only when it finds on the record that there is a substantial and compelling reason for that departure. *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001), quoting MCL 769.34(3). In this case, it appears the trial mistakenly believed it was sentencing defendant within the guidelines range when it sentenced defendant to twenty-five to fifty years' imprisonment for the assault with intent to commit murder conviction. However, defendant's recommended minimum guidelines range for that conviction was 135 to 225 months. Nonetheless, the trial court failed to articulate on the record a substantial and compelling reason for the departure. Therefore, remand to the trial court for resentencing on this count is required. MCL 769.34(11); *Hegwood, supra* at 440; *People v Babcock*, 244 Mich App 64, 74, 80; 624 NW2d 479 (2000). On remand, the trial court is free to impose any sentence within the appropriate guidelines range or to depart from that range if it finds on the record a substantial and compelling reason for such a departure. *Id.* at 80.

Defendant's convictions are affirmed, but his sentence for the assault with intent to commit murder conviction is vacated and remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ Christopher M. Murray