

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OSCAR RAMIREZ,

Defendant-Appellant.

UNPUBLISHED

July 12, 2002

No. 225979

Wayne Circuit Court

LC No. 98-004884

Before: Holbrook, Jr., P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, in connection with the shooting deaths of his friend's mother and aunt. He was sentenced to life imprisonment for the murder convictions and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant argues that the jury was improperly instructed during voir dire on the prosecution's burden of proof. Specifically, defendant argues the court erred when it told the prospective jurors that the reasonable doubt standard is "a little bit higher standard than by a preponderance," and that "[i]f the defendant offers the defense of insanity or diminished capacity, that's a little bit lower burden of proof and its by a preponderance of the evidence." When coupled with the court's charge to the jury that preponderance of the evidence means "evidence that outweighs the evidence against it," defendant argues that the court left the jury with an erroneous understanding on the high level of proof the prosecution carries.

Because defendant did not object to the jury instructions below, we review this matter for plain error affecting defendant's substantive rights. *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. . . . The third requirement generally requires a showing of prejudice" *Carines, supra* at 763. Further, if the three elements of the plain error rule are established, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence." *Id.*, quoting *United States v Olano*,

507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

As our Supreme Court recently reaffirmed, “The right to a jury trial in a criminal felony prosecution is fundamental. . . . Interrelated with the right to a jury trial is the requirement that the prosecutor prove guilt beyond a reasonable doubt.” *People v Allen*, 466 Mich 86, 90; 643 NW2d 227 (2002). The prosecution concedes on appeal that the trial court erred in characterizing the reasonable doubt standard as being a little bit more than a preponderance of the evidence. However, the prosecution argues that this error was harmless in light of the accurate instruction given at the conclusion of trial. We agree. After the close of proofs, the court instructed the jury as follows on the prosecution’s burden:

Every crime is made up of parts called elements. The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove his innocence or to do anything. If you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty.

A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely a speculative, imaginary or possible doubt but is a doubt which is based upon reason and common sense. A reasonable doubt is just that, a doubt that is reasonable after a careful and considered examination of the facts and circumstances of this case.

We believe that this instruction, which defendant does not challenge as being in any way deficient, alleviated any possible confusion arising from the court’s early comments. Accordingly, we believe that defendant was not prejudiced by the court’s earlier comments. Further, after examining the entire record, we do not believe that the “error resulted in the conviction of an actually innocent defendant or when an error “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings” independent of the defendant’s innocence.” *Carines, supra* at 763, quoting *Olano, supra* at 736-737 (quoting *Atkinson, supra* at 160).

Defendant also argues that the jury was improperly instructed on the defense of diminished capacity. No objection to this part of the jury charge was raised below. We agree that the trial court erroneously instructed the jury that second-degree murder is a specific intent crime. However, there is no evidence that the jury rejected defendant’s diminished capacity defense because of this erroneous instruction. Further, in light of the overwhelming evidence of defendant’s guilt, we again do not believe that the “error resulted in the conviction of an actually innocent defendant or when an error “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings” independent of the defendant’s innocence.” *Carines, supra* at 763, quoting *Olano, supra* at 736-737 (quoting *Atkinson, supra* at 160).

Moreover, contrary to defendant’s argument, diminished capacity is no longer a basis for avoiding or reducing his criminal responsibility by negating specific intent. *People v Carpenter*, 464 Mich 223, 239, 241; 627 NW2d 276 (2001). Therefore, this unpreserved issue does not warrant appellate relief. *Carines, supra*.

Finally, defendant argues that the evidence was insufficient to establish the premeditation and deliberation necessary for a conviction of first-degree murder. We disagree. This Court reviews the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). The standard of review is deferential and this Court is required to draw all reasonable inferences and make credibility choices in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Premeditation and deliberation can be inferred from defendant's actions before and after the killing and from the circumstances of the crime. *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995). Proof of motive, although relevant, is not essential to a finding of premeditation. *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999). The evidence established that defendant took a loaded gun with him to the decedents' home, he concealed the gun from decedents while they talked, he waited until the first victim was walking past him and then shot her in the back of the head, and he told at least one examining doctor that he killed the second victim because she could identify him. When defendant left the scene, he worried about getting caught, thought about what he would tell the police if he was questioned and planned to deny killing the women. Viewed most favorably to the prosecution, the evidence was sufficient to enable a rational trier of fact to find the elements of premeditation and deliberation beyond a reasonable doubt.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Hilda R. Gage

/s/ Patrick M. Meter