STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE H. CARTER,

Defendant-Appellant.

UNPUBLISHED
November 22, 2002

No. 233203
Wayne Circuit Court
LC No. 00-006656

Before: O'Connell, P.J., and White and B.B. MacKenzie*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced to mandatory life in prison for the first-degree murder conviction, two years for the felony-firearm conviction, and two to five years for the felon in possession of a firearm conviction. We affirm.

Defendant first argues that there was insufficient evidence to support his conviction of first-degree premeditated murder because there was no evidence to establish premeditation or deliberation. We disagree.

In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). To prove first-degree premeditated murder, the prosecution must establish that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation and deliberation require sufficient time to allow the defendant to take a "second look." *Id.* To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Premeditation and deliberation characterize a thought process undisturbed by hot blood. *Id.* The elements of premeditation and deliberation may be inferred from all the facts and circumstances surrounding the killing, but the inferences must have support in the record and cannot be arrived at by mere speculation. *Id.* at 301. Premeditation may be established through evidence of: (1) the prior relationship of the parties;

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

(2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the killing. *Anderson, supra* at 537.

We conclude that there was sufficient evidence to establish premeditation and deliberation. The victim and defendant were not strangers encountering each other by chance. The evidence showed that the victim had been at defendant's house earlier that evening, the two were apparently involved in a disagreement about a washing machine, and the victim allegedly shot at defendant's house and robbed defendant. Defendant then obtained a baseball bat and a gun, and enlisted the assistance of two other men. They sought out the victim. Defendant admitted that he shot the victim, and that he went looking for the victim "to get [his] money back and to kick his ass." While defendant asserted that he shot the victim by accident, the jury was not obliged to accept this explanation, and was free to conclude, based on the evidence, that defendant went after the victim in anger, and deliberately shot him in retaliation for his attack on defendant earlier that evening. A rational trier of fact could have found that, when defendant asked for the baseball bat and gun, he wanted revenge, had thought about killing the victim to get that revenge, and when he went out looking for the victim with two weapons and two other men, defendant had decided to do just that.

Defendant next argues that the trial court erred in refusing to give an instruction on self-defense. While defendant initially requested the instruction, counsel did not pursue the issue when given the opportunity to do so. Because defendant failed to preserve this issue by objecting to the exclusion of the self-defense instruction from the final instructions, our review is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999).

Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). The instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is evidence in support. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). When a jury instruction is requested on any defense and is supported by the evidence, the instruction must be given to the jury. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995). If the theory is not supported by the evidence, the requested instruction need not be given. *Id.*

In Michigan, the killing of another in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm. *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). A defendant is not entitled to use any more force than is necessary to defend himself. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993).

The evidence did not support an instruction on self-defense. Defendant based his request for the instruction on his statement to police. While defendant asserted in that statement that the victim had his hands in his pockets, and defendant thought he still had a "gun or something," defendant described the shooting as occurring accidentally when the victim rushed him. Thus, we find no error in the court's declining to give the self-defense instruction.

Defendant next asserts that the trial court violated his due process rights by instructing the jury that, pursuant to CJI2d 16.21, defendant's state of mind could be inferred from the use of

a deadly weapon. Because defendant did not object to the instruction, our review is limited to plain error affecting substantial rights, *Carines, supra* at 761-764.

The state of mind instruction given to the jury was almost a verbatim reading of CJI2d 16.21. The trial court instructed the jury that they "*may* infer that the defendant intended to kill if he used a dangerous weapon in a way that was likely to cause death." (Emphasis added.) Defendant objects that the jury was not expressly told that it was not required to make the inference. However, the instruction by its terms did not require or direct the jury to find an intent to kill from defendant's use of a gun; rather, it simply instructed that it was permissible for the jury to infer intent based on the circumstances of the shooting. It is well established under Michigan law that a jury may infer intent to kill from any facts in evidence, including the use of a deadly weapon. See *People v Dumas*, 454 Mich 390, 403; 563 NW2d 31 (1997); *People v DeLisle*, 202 Mich App 658, 672; 509 NW2d 885 (1993); *People v Turner*, 62 Mich App 467, 470; 233 NW2d 617 (1975). Defendant's substantial rights were not prejudiced.

Defendant further asserts that the prosecutor violated his due process rights by arguing conflicting versions of the facts in her closing argument to defendant's jury and codefendant's jury. Because defendant failed to timely and specifically object to the prosecutor's conduct, our review of defendant's claim is for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence in the case, but may argue the evidence and all reasonable inferences in order to support his theory of the case. *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992). In assessing the propriety of prosecutorial conduct, a prosecutor's comments must be considered as a whole and in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Schutte, supra* at 721.

Here, defendant challenges statements the prosecutor made during her rebuttal closing argument relating to the sequence of the shooting and beating of the victim. Our review of these statements, in the context in which they were made, reveals that the statements were made in response to defense counsel's argument that the shooting did not occur after the beating. The record indicates that, although the prosecutor does suggest on rebuttal that the shooting followed the beating, there is no indication that she was arguing as "fact" something she believed to be untrue or that she argued it as a fundamental part of her case against defendant. Rather, the prosecutor, in response to defense counsel's argument that there was no shooting after the beating, essentially argued that the sequence of the beating and shooting was irrelevant to the determination whether defendant committed the offense charged and that, under either theory, there was evidence of defendant's intent to kill the victim. In addition, the trial court instructed the jury that the statements and arguments of the lawyers were not evidence and could not be considered in discussing and deciding the case.

Lastly, in a brief filed in propria persona, defendant asserts that his trial counsel provided ineffective assistance because she failed to obtain a firearms expert to testify regarding how defendant might have accidentally discharged the gun. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms; and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and that the resulting

proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Because defendant did not move below for a new trial or a *Ginther*[1] hearing, this Court's review is limited to mistakes apparent on the record. *People v Milstead*, 250 Mich App 391, 399; 648 NW2d 648 (2002). We find no ineffective assistance. Although counsel did not secure a firearms expert as a defense witness, she inquired of the prosecution's witness regarding the weapon that was recovered. She elicited testimony that the gun, which was a semi-automatic, would fire easily. Thus, we are unable to conclude that counsel's failure to secure a defense firearms expert had any impact on the outcome of the trial.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Barbara B. MacKenzie

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).