# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DUNCAN JAMAL MCCRAY,

Defendant-Appellee.

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UNPUBLISHED
June 10, 2004

No. 247046
Wayne Circuit Court
LC No. 02-005102

Before: Smolenski, P.J., and White and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of first-degree premeditated murder, MCL 750.316(1), two counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm in the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of life in prison without eligibility for parole for the first-degree murder conviction and life in prison for each of the assault with intent to murder convictions. A consecutive two-year sentence was imposed for the felony-firearm conviction. We affirm.

Defendant first contends that the prosecution presented insufficient evidence of premeditation and deliberation to sustain his first-degree murder conviction. We review de novo a defendant's claim that the evidence presented at trial was insufficient to support a conviction as a matter of law. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). The prosecution must introduce evidence sufficient to justify a rational trier of fact in concluding that all of the essential elements of the crime were proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). When reviewing a challenge to the sufficiency of the evidence, courts must examine the evidence in the light most favorable to the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

In order to prove that a defendant committed first-degree murder, the prosecution must present evidence establishing that "the defendant intentionally killed the victim and that the killing was premeditated and deliberate." *People v Marsack*, 231 Mich App 364, 370-371; 586 NW2d 234 (1998). In *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003), our Supreme Court explained as follows:

> To show first-degree premeditated murder, some time span between the initial homicidal intent and ultimate action is necessary to establish premeditation and deliberation. The interval between the initial thought and ultimate action should

> be long enough to afford a reasonable person time to take a "second look." [Citations omitted.]

This Court has stated that premeditation and deliberation characterize a thought process undisturbed by hot blood. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). A sufficient opportunity for a second look may be seconds, minutes, or hours, depending on the totality of the circumstances surrounding the killing. *People v Meier*, 47 Mich App 179, 191-192; 209 NW2d 311 (1973).

In the instant case, the testimony concerning the totality of the circumstances provided the jury with sufficient evidence to infer that defendant acted with premeditation and deliberation. Although a confrontation occurred between a group that included defendant and a second group that included decedent, witnesses from both sides described it as a conversation that was neither heated nor violent. Further, there was testimony that the conversation had ended, and the decedent's brother was returning to the car when defendant began shooting. Further, the decedent's boyfriend, Samuel Crowder, testified that, during the conversation, he got out of the car when he observed defendant attempting to sneak up on the decedent's brother. Crowder testified that he stepped in front of defendant and said, "You don't want to do that because you don't want any of me," and that defendant responded by staring at him for a minute and then backing up and whispering something to one of his companions. As Crowder walked back to the car, defendant shot and wounded him before firing at the decedent's brother and the decedent. Finally, one of defendant's companions, Frederick Martin, testified that after the discussion ended, the matter appeared to be settled, and the decedent's brother started to return to his car, Martin heard defendant ask someone to pass him his "heater," a slang term for a gun, saw defendant fire a shot at the driver, and heard more shots as Martin was running away.

Based on the testimony, a rational jury could have inferred that defendant initiated the shooting following a thought process undisturbed by hot blood. Additionally, a jury could have reasonably concluded that defendant's pause after being confronted by Crowder and the time he took to obtain the weapon constituted a sufficient period to afford a reasonable person time to take a second look. Further, there was evidence that, after the shooting began, defendant had an opportunity for a second look before firing at the decedent. Decedent's brother testified that after defendant fired at him, defendant went to the rear door of the car where decedent was sitting, reached in through the window, and shot decedent twice. And one of defendant's companions, Darrell Gladden, testified that he observed defendant fire several shots and then walk back towards the rear door of the driver's side of the car. Although Gladden then fled, he heard two more shots as he ran away. A rational jury could have determined that the time it took defendant to walk over to the car provided him with sufficient opportunity for a second look before he shot decedent.

Defendant next asserts that the trial court erred in refusing to grant his motion to quash his bindover on the charge of first-degree murder because the prosecution failed to present any evidence of premeditation and deliberation at the preliminary examination. We review de novo a circuit court's evaluation of a magistrate's decision to bind a defendant over for trial. *People v Crippen*, 242 Mich App 278, 282; 617 NW2d 760 (2000), citing *People v Flowers*, 191 Mich App 169, 174; 477 NW2d 473 (1991).

While we would apply the same analysis to the evidence presented at the preliminary examination, we need not address this issue because even if there was insufficient evidence to support a bindover on the first-degree charge, a magistrate's erroneous conclusion that sufficient evidence was presented at the preliminary examination is rendered harmless by the presentation at trial of sufficient evidence to support a conviction. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002).

Defendant also contends that the trial court erred in instructing the jury concerning flight because the prosecution presented no evidence showing that he purposely fled or hid from the police. He asserts that, but for the instruction, it is more likely than not that the jury would have found that he did not act with premeditation and would have convicted him of an offense less than first-degree murder.

We review a defendant's claims of instructional error de novo. *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002), citing *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). But the determination of whether a jury instruction is applicable to the facts of a particular case "lies within the sound discretion of the trial court." *Heikkinen*, *supra* at 327.

This Court has noted, "it is well established that evidence of flight is admissible to show consciousness of guilt." *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001), citations omitted. "The term 'flight' has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody." *Id.*, citing 29 Am Jur 2d, Evidence, § 532, p 608.

The only evidence presented at trial concerning flight consisted of defendant's testimony. He stated that he knew the police were searching for him in connection with the shooting and that they had impounded his car. Defendant further testified that he never attempted to get his car back, and admitted that he avoided the police because he was scared. But defendant denied running from the police and testified that he continued to live openly in Detroit the entire time that investigators were looking for him.

We conclude that any error in giving this instruction was harmless. We presume that the jury applied the instruction[1] to the actual evidence presented at trial, and did not assume from the instruction that defendant fled or hid, as opposed to simply avoiding the police by not retrieving his car. The jury was then free to determine whether defendant's conduct in not retrieving his car was innocent because he was scared of the police, or whether it showed he had a guilty state of mind.

[1] The jury was instructed:

> There has been some evidence that the defendant fled or hid after the alleged crimes he was accused of. This evidence does not prove guilt. A person may run or hide for innocent reasons, such as panic, mistake, or fear. However, a person may also run or hide because of consciousness of guilt. You must decide whether the evidence is true, and, if true, whether it shows that the defendant had a guilty state of mind.

In any event, we are confident that the jury would have regarded this evidence as marginally probative in light of the extensive eye-witness testimony that defendant was the shooter. We fail to see how the evidence could have been regarded as pertinent to the issue whether defendant was guilty of first- or second-degree murder.

Affirmed.

/s/ Michael R. Smolenski
/s/ Helene N. White
/s/ Kirsten Frank Kelly