STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 20, 2005
v	No. 256840 Oakland Circuit Court
ROBERT ANTHONY BURGESS, Defendant-Appellant.	LC No. 2004-194379-FC

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Before trial, defendant pleaded guilty to possession of marijuana, MCL 333.7403(2)(d), in connection with the same offense. He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of life without parole for the murder conviction, two to ten years for the felon in possession conviction, and thirty days for the possession of marijuana conviction, to be served consecutive to two concurrent two-year terms of imprisonment for the felony-firearm convictions. He appeals as of right. We affirm.

I

This action arose from the fatal shooting of the decedent, Mitchell Butler, outside the Paradise Club in Southfield where defendant worked as a doorman or "bouncer." On the day in question, a fight broke out after several men outside the club intervened in an altercation between a male and female. Defendant exited the club, contrary to his employer's policy that bouncers were not to go outside and break up fights. Once the fight subsided, the male who was involved in the initial altercation with the female sustained several injuries including a broken cheekbone. Witnesses differed whether defendant was involved the fight; however, defendant was observed with blood on his face. Defendant went to his minivan, opened the door, and proceeded to go back inside the club. Within a few minutes, defendant walked out of club with a .38 revolver and approached the unarmed decedent. Witnesses testified that defendant shot the decedent at point-blank range. At trial, defendant claimed that, because the decedent reached for the gun, he acted in self-defense or in defense of others. Following deliberations, the jury convicted defendant. This appeal ensued.

II

In reviewing a challenge to the sufficiency of the evidence, we review 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 Hardiman*, 466 Mich 417, 420-421; 646 NW2d 158 (2002).

Preserved claims of instructional error and the applicability of jury instructions are reviewed de novo. *People v Gonzalez*, 468 Mich 636, 641-643; 664 NW2d 159 (2003); *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). Jury instructions are reviewed in their entirety to determine whether error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.* Jury instructions must include all elements of the charged crime and must not exclude material issues, defenses, and theories if the evidence supports them. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

Unpreserved error is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

III

Defendant first argues that he was unduly prejudiced by a stipulation informing the jury that he had a prior unspecified felony conviction. Defendant's claim lacks merit. It is well established that a defendant may not "harbor error as an appellate parachute." *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). Defendant cannot stipulate to an action and then claim error on appeal. A party may not seek appellate relief based on an evidentiary error to which he contributed by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003).

Defendant next argues that there was insufficient evidence of premeditation and deliberation to support his first-degree murder conviction. We disagree.

To establish the requisite premeditation to support a conviction of first-degree premeditated murder, there must be "'[s]ome time span between [the] initial homicidal intent and ultimate action.'" *Gonzalez, supra* at 641. "The interval between the initial thought and ultimate action should be long enough to afford a reasonable person time to take a 'second look.'" *Id.*

Viewed in a light most favorable to the prosecution, there was sufficient evidence to sustain defendant's conviction. Defendant admitted shooting the decedent. Further, defendant testified that he was initially involved in the altercation, but removed himself from the conflict. According to witnesses, defendant walked over to his van, where he opened the door sufficient enough to activate the dome light, and then he proceeded to go back inside the club. An empty holster was later recovered from defendant's van. The evidence indicated that the fight was "basically dying down," or even over, when defendant reemerged from the club with a gun. Patrons followed defendant as he left the club, calling his name, telling him to come back inside and stop what he was doing, and to "put it away." Although he admitted that he heard them, defendant did not respond. According to witnesses, the decedent tried to explain to defendant

why he had been fighting, but defendant only looked at him disinterestedly. Witnesses claimed that the decedent was "just standing there" when defendant pulled out his gun and shot him in the chest. The gun required a "trigger pull" of between four and twelve pounds. Witnesses also testified that, contrary to defendant's claim at trial, the decedent never made any move toward defendant's gun before he was shot. Defendant subsequently ran from the scene and discarded his gun under a tree. Given this evidence, the jury could reasonably find beyond a reasonable doubt that defendant had sufficient time to contemplate his actions and take a "second look" before shooting the victim. The evidence was sufficient to support defendant's conviction of first-degree premeditated murder.

Defendant additionally argues that the jury's verdict was against the great weight of the evidence. Although defendant raised this issue in a motion for a new trial as required under MCR 2.611(A)(1)(e); see also *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003), defendant concedes he withdrew the motion before it was heard or decided by the trial court. Therefore, defendant has waived this issue. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997) (failure to raise an issue below in a motion for a new trial constitutes waiver). A defendant who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Waiver is defined as the intentional relinquishment or abandonment of a known right. *Id*. Nevertheless, even if defendant had not withdrawn the motion, we would decide, based on the evidence cited, *supra*, that the evidence did not preponderate heavily against the jury's verdict resulting in serious miscarriage of justice. *People v Lemmon*, 456 Mich 625, 639, 642; 576 NW2d 129 (1998).

Defendant also argues that the trial court erred by denying his request for a jury instruction on defense of others. We disagree.

A trial court is required to give a defendant's requested instruction except where the theory is not supported by the evidence. *People v Rodriguez*, 463 Mich 466, 472-473; 620 NW2d 13 (2000). When a requested instruction is not given, the defendant has the burden of establishing that the trial court's error resulted a miscarriage of justice or was outcome determinative. *Id*. at 473-474; MCL 769.26.

Here, the evidence did not support the giving of an instruction on defense of others. According to witnesses at trial, the fight had basically ended, defendant was talking to the decedent, and the decedent was "just standing there" when defendant pulled out his gun and shot him in the chest. Defendant claimed that he shot his gun because the decedent reached for it. This evidence did not support an instruction on defense of others. Further, even if there was some evidence to support such a defense, it is not probable than not that any error in failing to instruct on defense of others affected the outcome. *Rodriguez, supra* at 472-473; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The jury was instructed that it could find defendant guilty of first-degree premeditated murder only if the killing was "premeditated, that is, thought out beforehand," and only if the jury concluded that "defendant considered the pros and cons of the killing and thought about and chose his actions before he did it." The jury was told that defendant was not guilty of first-degree murder if he acted on "sudden impulse without thought or reflection," or if the killing was "justified, excused or done under circumstances that reduce it to a lesser crime." The jury is presumed to follow the court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). If the jury believed

defendant's testimony that he was trying to protect others, and shot the decedent on impulse because of his concern for the safety of others, it would not have convicted him of first-degree premeditated murder. Therefore, any error was harmless. *Rodriguez, supra*.

Finally, defendant argues that he was denied a fair trial because the prosecutor introduced evidence of flight. We review this issue for plain error affecting defendant's substantial rights because defendant did not object to the flight evidence at trial. *Carines, supra* at 763. The evidence indicated that after defendant shot the decedent, he left the scene on foot and discarded his gun. This evidence was admissible as evidence of flight, *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995), and the prosecutor was free to argue the inferences from the evidence, *People v Pegenau*, 447 Mich 278, 299; 523 NW2d 325 (1994). The evidence was not error, plain or otherwise.

Affirmed.

/s/ Helene N. White
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder