

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES E. PAYTON,

Defendant-Appellant.

UNPUBLISHED

December 21, 2006

No. 264704

Wayne Circuit Court

LC No. 04-010421-01

Before: Borrello, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to concurrent terms of 18 to 40 years' imprisonment for the second-degree murder conviction, and 4 to 10 years' imprisonment for each of the assault with intent to do great bodily harm convictions, to be served consecutive to a term of two years' imprisonment for the felony-firearm conviction. We affirm.

I

Defendant first argues that there was insufficient evidence of first-degree murder, and therefore, the trial court erred in denying his motion for a directed verdict on this charge. Further, there was insufficient evidence to support a conviction of second-degree murder. We disagree.

A trial court's decision on a motion for directed verdict is reviewed de novo to determine whether, when viewed in the light most favorable to the prosecution, the evidence presented by the prosecutor could persuade a rational jury that the essential elements of the charged crime were proved beyond a reasonable doubt. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Likewise, in reviewing the sufficiency of the evidence, this Court must view the evidence de novo, in the light most favorable to the prosecutor, 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 Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). Questions of credibility and intent should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999); *People v Queenan*, 158 Mich App 38, 55; 404 NW2d 693 (1987).

The elements of first-degree murder are that the defendant killed the victim and that the killing was willful, deliberate, and premeditated. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002); MCL 750.316. Defendant challenges whether there was sufficient evidence to show premeditation and deliberation. “Premeditation and deliberation require sufficient time to allow the defendant to take a second look.” *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). “Premeditation and deliberation may be established by evidence of ‘(1) the prior relationship of the parties; (2) the defendant’s actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant’s conduct after the homicide.’” *People v Abraham*, 234 Mich App 640, 656-657; 599 NW2d 736 (1999), quoting *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992).

“The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.” *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (internal quotations omitted). “Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). The prosecution is not required to prove that the defendant actually intended to harm or kill. Instead, the prosecution must prove “the intent to do an act that is in obvious disregard of life-endangering consequences.” *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999).

In this case, defendant admits to shooting the decedent. While defendant claims that the shooting was in response to reasonable provocation and in self-defense, numerous witnesses testified that defendant shot the decedent in the back and buttocks after their argument had stopped and as the decedent was walking away. The autopsy confirmed that the decedent was shot in his back and buttocks. One witness heard defendant say, “I told you that you needed to leave” as defendant fired. Viewing that evidence in the light most favorable to the prosecution, the evidence could have persuaded a rational jury that the essential elements of first-degree murder were proven beyond a reasonable doubt, and thus the trial court did not err in denying defendant’s motion for a directed verdict.

Viewing the evidence in a light most favorable to the prosecution and leaving questions of credibility and intent to the jury, we also conclude that sufficient evidence was presented for a rational trier of fact to convict defendant of second-degree murder. Accordingly, defendant’s argument that there was insufficient evidence of a predicate felony to support his felony-firearm conviction fails.

II

Defendant argues that there was insufficient evidence to convict him of two counts of assault with intent to do great bodily harm less than murder. The elements of assault with intent to do great bodily harm less than murder are (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder. *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). In this case, defendant challenges only whether he had the requisite intent. As discussed above, questions of intent should be left to the trier of fact to resolve. *Queenan, supra* at 55. Moreover, considering the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient to infer intent. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

In this case, viewing the evidence in a light most favorable to the prosecution, evidence was presented to show that defendant fired a gun at one victim as she walked away from the argument and from defendant. She was shot in the back. A witness heard defendant say, “I told you that you needed to leave” as defendant fired. Outside the house, defendant placed a gun to another victim’s face and fired as defendant fled the scene. While defendant claims that he fired his gun only inside the house and in self-defense, the trail of blood found outside the house suggested that the victim was outside when he was shot. The questions of credibility and intent were properly left to the jury, and we conclude that sufficient evidence was presented for a rational trier of fact to convict defendant of two counts of assault with the intent to do great bodily harm less than murder. Given our above analyses, defendant’s remaining arguments concerning the sufficiency of the evidence also fail.

III

Defendant also argues that the trial court erred by refusing the jury’s request for clarification of instructions. A party must object in the trial court to an instruction that was given in order to preserve the issue for appeal. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000); *People v Fletcher*, 260 Mich App 531, 558; 679 NW2d 127 (2004). Defendant failed to object to the trial court’s instruction to the jury so this issue is unpreserved for appeal.

Unpreserved issues are reviewed for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, three requirements must be met: (1) the error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights. *Id.* The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. The defendant bears the burden with respect to prejudice. *Id.* Once the defendant establishes those three elements, the appellate court must still exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant’s innocence. *Id.*

Jury instructions are read as a whole rather than extracted piecemeal to determine whether error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Jury instructions must clearly present the case and the applicable law to the jury. *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003). The instructions must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence. *Id.* at 162-163.

In this case, the jury requested that the trial court clarify the difference between second-degree murder and voluntary manslaughter. The trial court instructed the jury to reread the jury instructions and refused to differentiate between the two crimes further because the instructions were already in plain English. The trial court first instructed the jury: “The crime of murder may be reduced to voluntary manslaughter if the defendant acted out of passion or anger, brought about by an adequate cause and before the defendant had a reasonable time to calm down.” The trial court also expressly instructed the jury that the law does not say what events constitute adequate cause and that it is for the jury to decide whether such events occurred. While the trial court declined to clarify the instructions, it did instruct the jury to reread the jury instructions and it did note that the instructions were in plain English and used the plain English meanings of the

words. On the basis of the clear language of the instructions and the trial court's reiteration that the instructions were in plain English, we conclude that the trial court clearly presented the applicable law of the case to the jury, and no plain error occurred in this regard.

IV

Defendant argues that his convictions must be vacated because the prosecution failed to use due diligence in producing a known *res gestae* witness. This issue is unpreserved because defendant failed to raise it below. *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004). As discussed above, unpreserved issues are reviewed for plain error. *Carines, supra* at 763.

"The 1986 amendments of MCL 767.40a altered a prosecutor's duty to produce witnesses at trial. Before 1986, the statute plainly imposed on a prosecutor the duty to list all *res gestae* witnesses on the information and to produce them at trial." *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). "With the amendments, the Legislature replaced the prosecutor's duty to produce *res gestae* witnesses with 'an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request.'" *Id.* at 418-419. The prosecution is now required to give initial and continuing notice of all known *res gestae* witnesses, identify witnesses the prosecutor intends to produce, and provide law enforcement assistance to investigate and produce witnesses the defense requests. *Id.* at 419.

Defendant asserts that there was a known *res gestae* witness that the prosecution did not locate. Nothing in the record indicates that the prosecution ever intended to call him or that defendant ever requested law enforcement assistance in producing him. Defendant's claim of error therefore fails.

V

Defendant argues that he was denied the effective assistance of counsel on several grounds. Although defendant moved this Court to remand for a *Ginther*¹ hearing, his motion was denied and a hearing was not conducted. Therefore, this Court's review of defendant's ineffective assistance of counsel claim is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

To prevail on a claim of ineffective assistance of counsel, a defendant must make two showings: 1) that counsel's performance was deficient, and 2) the deficient performance prejudiced the defense. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 600.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "This Court

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

will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Id.* at 76-77. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *Id.* at 76.

Defendant argues that trial counsel was ineffective for failing to call three witnesses to support defendant's claim of self-defense. Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *Rockey, supra* at 76. Nothing in the record indicates the nature of the testimony or that it would have been advantageous to the defense. Moreover, defendant's claim of self-defense was presented through defendant's own testimony and another witness's testimony. Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *Id.* at 76. We conclude that defendant cannot meet this burden on the basis of trial counsel's failure to call witnesses.

Defendant also argues that trial counsel was ineffective for failing to call his mother as a witness to refute one of the victim's claims that she took care of defendant's mother. Once again, nothing in the record indicates the nature of the testimony, and defendant cannot overcome the presumption that counsel's decision was a matter of trial strategy. Furthermore, this testimony was clearly unimportant, and defendant was not prejudiced by the failure to call his mother to refute those claims.

Defendant argues that trial counsel was ineffective for failing to impeach the two surviving victims with their prior inconsistent statements. Defendant, however, fails in his brief on appeal to identify any such inconsistent statements. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis of his argument. *Kelly, supra* at 640-641. Defendant has not met the burden of showing counsel's performance was deficient.

Lastly, defendant argues that trial counsel was ineffective with respect to the clarification of the jury instructions. Trial counsel, however, never objected to the trial court clarifying the jury instructions. The objection cited by defendant was made in response to the prosecution's request that the jury be provided with a copy of the jury instructions. In any event, having found no error with regard to the clarification, we find this claim without merit because counsel cannot be faulted for failing to raise an objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 803 (1998).

Affirmed.

/s/ Stephen L. Borrello

/s/ Janet T. Neff

/s/ Jessica R. Cooper