STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 22, 2009
v	No. 280319 Wayne Circuit Court
GREGORY WATTS, Defendant-Appellant.	LC No. 07-004469-01

Before: Owens, P.J., and Sawyer and Markey, 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 possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the murder conviction and a concurrent term of three to five years' imprisonment for the felon-in-possession conviction, to be served consecutive to a five-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I. Jury Instructions

Defendant argues that the trial court erred by denying his request to instruct the jury on self-defense, and also by failing to instruct the jury on voluntary manslaughter.

As this Court explained in *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007):

> Claims of instructional error are generally reviewed de novo by this Court, but the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion. A defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or her. The trial court's role is to clearly present the case to the jury and to instruct it on the applicable law. Jury instructions must include all the elements of the offenses charged against the defendant and any material issues, defenses, and theories that are supported by the evidence. Jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury. [Citations omitted.]

A. Self-Defense

The killing of another person in self-defense, or in defense of others, 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 Kurr*, 253 Mich App 317, 320-321; 654 NW2d 651 (2002). However, the defense is not available when the defendant is the initial aggressor, unless he withdraws from any further encounter with the victim and communicates such withdrawal to the victim. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993).

Two witnesses to the shooting incident testified at trial, Darryl Satterwhite, who was with the victim, and Lester Adams, who was with defendant. According to Adams, defendant observed the victim along the street and made a statement indicating that he intended to assault the victim. According to Satterwhite, defendant approached the victim, said something, and then shot the victim. Satterwhite stated that, after the victim was shot, the victim pulled out his own gun and shot toward defendant. Adams testified that he observed both defendant and the victim with a gun, but he did not see who produced or fired the gun first. Because the evidence established that defendant was the initial aggressor, and there was no evidence that the victim was the first person to either pull out a gun or fire it, defendant was not entitled to an instruction on self-defense. Accordingly, the trial court did not err in denying defendant's request for an instruction on that defense.

B. Voluntary Manslaughter

Defendant also argues that the trial court erred by failing to instruct the jury on voluntary manslaughter. Defendant did not request a manslaughter instruction at trial and informed the court that he was satisfied with the instructions as given. Therefore, any claim of error is waived. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004). Even if we were to review this issue for plain error affecting defendant's substantial rights, *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001), relief would not be warranted because an instruction on manslaughter was not supported by a rational view of the evidence. *People v Gillis*, 474 Mich 105, 137; 712 NW2d 419 (2006); *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). There was no evidence of reasonable provocation to support a manslaughter instruction. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). Furthermore, because the jury had a choice to convict defendant of an intermediate offense, second-degree murder, but refused to do so, the failure to instruct on manslaughter did not affect defendant's substantial rights. *People v Cornell*, 466 Mich 335, 365 n 19; 646 NW2d 127 (2002); *People v Wilson*, 265 Mich App 386, 396; 695 NW2d 351 (2005).

II. Defendant's Standard 4 Brief

Defendant raises two issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-4, Standard 4, neither of which have merit.

First, defendant argues that the district court erred in binding him over on first-degree murder. We disagree.

This Court reviews for an abuse of discretion the district court's decision whether to bind a defendant over for trial. *People v Harlan*, 258 Mich App 137, 144; 669 NW2d 872 (2003).

"Because the legal issue presented is whether the magistrate abused his or her discretion, this Court gives no deference to the circuit court's decision regarding a motion to quash a bindover order." *Id*. at 145.

In *Harlan, id.* at 145, this Court explained:

> The prosecutor is required to demonstrate at the preliminary examination that a crime has been committed and that there is probable cause to believe the defendant committed the crime. MCL 766.13; MCR 6.110(E). This probable cause standard is not a very demanding threshold. As our Supreme Court observed in [*People v*] *Justice* [*(After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997)], a magistrate may bind a defendant over for trial even "while personally entertaining some reservations" regarding his guilt. It is sufficient that the prosecutor presents some evidence with respect to each element of the offense charged, "or evidence from which the elements may be inferred." [Citations omitted.]

First-degree premeditated murder requires proof that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2002). To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem. Premeditation and deliberation characterize a thought process undisturbed by hot blood. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *People v Marsack*, 231 Mich App 364, 370-371; 586 NW2d 234 (1998). Premeditation and deliberation may be established by evidence of the prior relationship of the parties, the defendant's actions before the killing, the circumstances of the killing itself, and the defendant's conduct after the homicide. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999).

The evidence at the preliminary examination indicated that defendant observed the victim on the street and expressed an intent to harm the victim. Defendant then confronted the victim and shot him repeatedly with a gun. The evidence was sufficient to establish probable cause to believe that defendant acted with premeditation and deliberation to justify binding him over on first-degree murder. Accordingly the district court did not abuse its discretion.

Second, defendant argues that defense counsel was ineffective for failing to challenge his identification at a pretrial lineup. Because defendant did not raise this issue in an appropriate motion in the trial court, our review is limited to errors apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). To establish ineffective assistance of counsel, defendant must show that counsel made an error so serious that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment, and must further show that the deficient performance prejudiced the defense. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Although defendant argues that he was improperly identified by Adams at a pretrial lineup, there is no indication in the record that Adams ever participated in a lineup. Assuming that defendant intended to refer to Satterwhite instead of Adams, the record fails to support defendant's argument that there was an improper identification procedure involving Satterwhite.

At trial, Satterwhite testified that he attended a lineup and was asked if he could identify anyone, and he responded, "Yes." He was then asked, "Who did you see?" and he identified the person in position number five, which was defendant. The police then asked Satterwhite, "What did you see number five do?" and Satterwhite responded, "Pulled out a gun and shoot." Satterwhite was also asked, "How many times did you see him shoot," and he answered "four." This record fails to disclose anything improper or suggestive about the lineup procedure that Satterwhite attended. *People v Carter*, 415 Mich 558, 598; 330 NW2d 314 (1982), overruled in part on other grounds in *People v Robideau*, 419 Mich 458, 494-495; 355 NW2d 592 (1984). Further, contrary to what defendant asserts, there is nothing in the record to indicate that Satterwhite was unable to identify defendant at a lineup "the first time," or that defendant was asked to read a prepared statement before Satterwhite identified him.

Defendant also asserts that the lineup was improper because the perpetrator was described to the police as "light-skinned," and he did not fit that description. At trial, however, Satterwhite described defendant as "light complected." In any event, while differences in the description of the perpetrator and defendant's appearance might be relevant to the weight and credibility of Satterwhite's identification testimony, they would have no bearing on whether the lineup itself was improper.[1] Defendant also asserts that there was no attorney present at the lineup, but he does not cite any factual support for this claim. No testimony on this subject was presented at trial, so it is not apparent from the record that an attorney was not present.

In sum, the record does not factually support defendant's argument that there was an improper pretrial lineup. Accordingly, there is no basis for concluding that defense counsel was ineffective for failing to challenge the lineup. Counsel was not required to file a meritless motion. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Jane E. Markey

[1] Defendant does not assert that his appearance was dissimilar to the other lineup participants, so as to render the lineup unduly suggestive.