STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHANNON DECOLE GRIMMETT,

Defendant-Appellant.

UNPUBLISHED
September 12, 2000

No. 217447
Saginaw Circuit Court
LC No. 98-016185-FC

Before: Owens, P.J., and Jansen and R. B. Burns*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, carrying a concealed weapon, MCL 750.227; MSA 28.424, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and felon in possession of a firearm, MCL 750.224f; MSA 28.421(6). He was sentenced to life without parole in prison for the conviction of first-degree murder, three to five years for the convictions of carrying a concealed weapon and felon in possession of a firearm, to be served consecutively with the mandatory sentence of two years' imprisonment for the conviction of felony firearm. Defendant appeals as of right and we affirm.

Defendant first argues that there was insufficient evidence to support his conviction of first-degree murder beyond a reasonable doubt. Defendant specifically attacks the premeditation and deliberation element of first-degree murder. When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 730 (1999), quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to prove the elements of a crime. *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998).

The elements of first-degree murder are 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

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

NW2d 780 (1995). Premeditation and deliberation require sufficient time to allow the defendant to "take a second look." *Id.* Premeditation may be established through evidence of the following factors: (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. *Id.*

Taken in a light most favorable to the prosecution, the evidence at trial showed that during the evening of July 31, 1998, defendant and Jerry "Junior" Wilkins met Leffie Magee and discussed attending a community party. Magee did not wish to go because he believed that the party would be dangerous; however, defendant gestured to Magee implying that defendant was carrying a gun. Defendant, Wilkins, and Magee then began to walk to a store and shared a forty-ounce beer on the way. Magee testified that during this walk, defendant and Wilkins discussed a planned robbery involving themselves, Jerry Lee Burnside, and "Little Billy" Lackey. Defendant and Wilkins both mentioned Burnside during this conversation and both stated, "Well, when we see Burnside, we gonna get him."

The three men did not go to the store, but went to a house. Defendant saw Lackey on the street and asked if Burnside was in the house. Lackey replied that he was, so defendant and Wilkins went inside the house with Lackey. They found Burnside inside the house and defendant and Wilkins got into an argument with Burnside. They attempted to get Burnside to admit to talking to Lackey about the robbery; however, Burnside apparently did not answer to their satisfaction. Burnside also refused to leave the house with them as asked. Defendant then left the house while Wilkins began beating Burnside. Magee testified that he saw defendant pull out a gun and cock it. Magee told defendant to not do that; however, defendant ran back into the house when a crash was heard and defendant drew his gun. Magee also testified that Wilkins beat Burnside nearly senseless as he lay unmoving in a chair. Defendant then pointed his gun at Burnside and shot him five times in the torso. Defendant and Wilkins then left the house and defendant dropped his gun down a sewer; the gun was later recovered by police. The medical examiner also testified that the gun shots caused Burnside's death.

Contrary to defendant's argument, we find that the evidence, taken in a light most favorable to the prosecution, was sufficient to sustain defendant's conviction of first-degree murder beyond a reasonable doubt. Magee's testimony established that defendant had a gun before going to the house, that defendant and Wilkins discussed Burnside and stated, "We gonna get him." During the argument with Burnside, although defendant left the house while Wilkins proceeded to physically beat him, defendant returned shortly thereafter with his gun drawn and then shot Burnside five times as Burnside lay defenseless in a chair. Any issues concerning factual conflicts or witness credibility were for the jury to consider and resolve. *Wolfe, supra,* pp 514-515. Similarly, whether defendant's use of alcohol could have clouded his judgment, as defendant maintains, was for the jury to consider and determine. The evidence at trial was clearly sufficient to show that defendant acted with premeditation and deliberation in killing Burnside.

Defendant next argues, in his supplemental brief, that admission of his prior convictions was unfairly prejudicial and denied him the right to a fair trial. The admission of the prior convictions was relevant to the charge of felon in possession of a firearm. The prosecution, however, correctly states that this issue is waived for appellate review because, on the first day of trial, defendant himself stated

on the record that he wanted to have the nature of the prior convictions admitted so that the jury would not speculate as to the nature of his prior convictions. This was a strategic decision made by defendant and trial counsel.

Because defendant agreed to admit the nature of his prior convictions as a matter of trial strategy, this issue is waived for appellate review. A defendant who waives his rights under a rule may not later seek appellate review of a claimed deprivation of those rights because the defendant's waiver has extinguished any error. *People v Carter*, 462 Mich 206, 215; ___ NW2d ___ (2000). Consequently, this issue is waived for appellate review.[1]

In this same vein, defendant also argues that the trial court erred in failing to instruct the jury that his prior convictions must constitute a specified felony as defined in MCL 750.224f(6); MSA 28.421(6)(6). Defendant did not object to the trial court's instructions in this regard; therefore, this issue is forfeited for appellate review. We consider only whether this constituted plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

The trial court did not err here. The evidence at trial was that defendant pleaded guilty to maintaining a drug house and second habitual offender on June 26, 1997, and was sentenced to nine months in the county jail. Defendant had previously been convicted of resisting and obstructing a police officer on December 7, 1995, and was sentenced to two years' imprisonment. The judgments of sentence relative to both convictions were introduced into evidence. The trial court instructed the jury in the following manner with respect to the charge of felon in possession of a firearm:

> To prove [the charge of felon in possession of a firearm], the prosecutor must prove each of the following elements beyond a reasonable doubt.
>
> First, that the defendant knowingly carried and/or possessed a firearm in this state.

[1] Further, we note that the trial court gave the following limiting instruction:

> If you believe this evidence [that defendant was convicted of prior felonies], you must be very careful only to consider it for certain purposes.
>
> You may only think about whether this evidence tends to prove the elements of . . . felon in possession of a firearm. You must not consider this evidence for any other purpose. For example, you must not decide that it shows that the defendant is a bad person or that he is likely to commit crimes.
>
> You must not convict the defendant here on the other [charged] counts . . . because you think the defendant is guilty of other bad conduct. All the evidence must convince you beyond a reasonable doubt that the defendant committed the alleged crimes, or you must find the defendant not guilty.

> Second, that at the time the defendant was convicted, to-wit: resisting and obstructing police officer, and/or maintaining drug house.
>
> Third, that less than five years had passed since the defendant had served all terms of imprisonment or incarceration imposed for the said felony convictions.

The trial court's instruction in this regard is consistent with CJI2d 11.38.

The crux of defendant's argument appears to be that the trial court erred in deciding itself that defendant's convictions constituted specified felonies as defined in MCL 750.224f(6); MSA 28.421(6)(6), rather than instructing the jury that it must determine whether defendant's prior convictions constituted specified felonies. However, the use note following CJI2d 11.38 indicates that the judge, and not the jury, determines whether the prior felony is a felony as defined in MCL 750.224f(5); MSA 28.421(6)(5), or whether it is a specified felony as defined in MCL 750.224f(6); MSA 28.421(6)(6). Accordingly, it was not error for the trial court to initially determine whether defendant's prior convictions constituted specified felonies as defined in § 224f(6).

Lastly, we address defendant's argument that trial counsel was ineffective. Because defendant did not move for a new trial or evidentiary hearing on this matter below, our review is limited to the record before us. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). In order to prove a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient, which requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *People v Johnson*, 451 Mich 115, 121; 545 NW2d 637 (1996). A defendant must also prove that the deficient performance was prejudicial, which requires a showing that counsel's error were so serious so as to deprive the defendant of a fair trial. *Id.*

Defendant first contends that trial counsel was ineffective for failing to stipulate to defendant's prior criminal convictions as an element of the felon in possession of a firearm charge and for failing to object to the prosecution's introduction of his prior convictions. As has been stated, defendant himself stated on the record that he wished to have the nature of the prior convictions admitted and that this was a strategic decision to not allow the jury to speculate as to the nature of those convictions. In other words, defendant did not want the jury to simply be informed that he had prior unnamed felonies such that the jury might speculate that those felonies were murder, robbery, or assault. Therefore, contrary to defendant's assertion, trial counsel did not fail to stipulate or fail to object to the introduction of his prior convictions as elements of the charge of felon in possession of a firearm. Counsel's decision to admit this evidence was clearly in furtherance of sound trial strategy to which defendant consented.

Defendant also contends that trial counsel was ineffective for failing to object to the prosecutor's use of the word "murder" while questioning witnesses. However, the issue in this case was not *whether* a murder occurred, but *who* shot Jerry Burnside, and the degree of the murder. As aptly stated in the prosecution's appellate brief, "the fact that Jerry Burnside was murdered was hardly in dispute." Indeed, Burnside was shot in the torso five times. Trial counsel's strategy was to attack the credibility of the prosecution's witnesses and to introduce evidence that Wilkins was the person who

shot Burnside. Therefore, the fact that trial counsel did not object to the prosecutor's use of the word "murder" was neither deficient nor prejudicial.

Defendant also contends that trial counsel was ineffective for failing to object to certain hearsay testimony. First, we agree with the prosecutor that this issue is inadequately briefed. Defendant simply cites five pages in the transcript without setting forth what the alleged hearsay testimony is at those citations. The only quotation actually provided is the following testimony of Magee:

> When he did – when they got through shooting Jerry, I was standing at the door. I heard Carlos[2] came out the house and said, "Man, let me use the telephone, Little Billy, because Shannon done shot Jerry," like that.

Defendant contends that this testimony is hearsay as hearsay is defined legally under MRE 801(c), but fails to consider any of the hearsay exceptions. Even if trial counsel had objected to Magee's testimony, the record indicates that this testimony is admissible under either MRE 803(1) (a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter) or under MRE 803(2) (a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition). Consequently, trial counsel's failure to object to any alleged hearsay did not prejudice defendant.

We find no basis for concluding that trial counsel was ineffective based on the record before us.

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Robert B. Burns

---

[2] This reference is to Carlos Jones who was at the house the night of the shooting. Jones was a witness at trial.