

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID DOUGLAS MCCLOY,

Defendant-Appellant.

UNPUBLISHED

March 24, 2005

No. 252189

Oakland Circuit Court

LC No. 2002-187962-FC

Before: Owens, P.J., and Sawyer and White, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree home invasion, MCL 750.110a(2), first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1). Defendant's convictions stem from the shooting death of John Polish, defendant's former coworker. Defendant was sentenced to concurrent prison terms of life without parole on both first-degree murder convictions, to be preceded by three concurrent terms of two years' imprisonment on the felony-firearm convictions. The court vacated defendant's first-degree home invasion conviction. We affirm the trial court with respect to defendant's claims of evidentiary error, but remand for modification of the judgment of sentence to specify a single conviction of first-degree murder supported by two theories and to vacate two of defendant's felony-firearm convictions.

At one point, both the victim and defendant worked as loan officers for a mortgage company. According to the men's supervisor, defendant had grown increasingly frustrated with his job before he abruptly quit in September 1998. Subsequently, defendant began to send threatening faxes to the business offices. At first, the faxes were aimed at both the victim and the supervisor. Eventually, however, the victim became the sole target of defendant's anger. Defendant also began to make threatening phone calls to the victim's home. The police departments in the areas where the victim lived and worked were contacted. At one point, the victim attempted to obtain a personal protection order (PPO) against defendant. The victim also installed a home security system and apprised his neighbors of the situation so that they could be on the look out for defendant.

Several of the victim's neighbors testified that at approximately 7:45 on the evening the victim was shot, defendant was seen parked outside the victim's home. Soon after defendant entered the home through the garage, shots were heard, followed by defendant leaving the home

and driving away in his car. Thereafter, defendant's two children and two neighbor children who had been in the home ran out screaming that the victim had been shot. Neighbors immediately rushed to the home, but the victim was already dead. He had been shot four times at close range. The bullets fired came from the gun found in defendant's possession at the time of his arrest minutes after the shooting.

Defendant first argues that the trial court abused its discretion when it denied his motion for a directed verdict with respect to the first-degree murder charges. We disagree.

No special steps need be taken to preserve a claim of insufficient evidence. *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999). We review a trial court's decision on a motion for directed verdict de novo, in a light most favorable to the prosecutor, to determine whether the evidence could persuade a rational trier of fact that the essential elements of the crime were proved beyond a reasonable doubt. *Id.* at 117; *People v Aldrich*, 246 Mich App 101, 122-123; 631 NW2d 67 (2001). Defendant claims that insufficient evidence of premeditation and deliberation was presented to support his premeditated murder conviction, *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995), and that insufficient evidence was presented on first-degree home invasion to support his felony murder conviction, *People v Kelly*, 231 Mich App 627, 642-643; 588 NW2d 480 (1998).

To prove premeditation and deliberation, the prosecution must show that the defendant thought about taking the victim's life beforehand and pondered and evaluated for some appreciable, though not specific, amount of time the major aspects of this choice before the act occurred. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). The elements of premeditation and deliberation require "substantially more reflection on and comprehension of the nature of the act than the mere amount of thought necessary to form the intent to kill." *Id.* at 301. The defendant must have had time to take a "second look" at his actions or to "pause between the thought and the action itself." *Plummer, supra* at 300-301.

The jury can infer premeditation and deliberation, as well as intent, from the circumstances of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *Plummer, supra* at 301. Moreover, because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004). When viewed in the required light, substantial evidence of premeditation and deliberation was set before the jury. Evidence of defendant's continuing threats of violence; the circumstances surrounding defendant's arrival at, entry, and departure from the victim's home; defendant's possession of the murder weapon; and the orientation and location of the gunshot wounds established these essential elements of premeditated murder.

To sustain a conviction for felony murder, the prosecution must prove: "(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in" MCL 750.316(1)(b). *Kelly, supra* at 642-643. First-degree home invasion is an enumerated felony under MCL 750.316(1)(b).

First-degree home invasion requires proof (1) that the defendant broke and entered into a dwelling or entered a dwelling without permission; (2) that defendant either intended to commit a felony, larceny, or assault when he entered, or did commit a felony, larceny, or assault while entering, being present in, or exiting the dwelling, and (3) that the defendant was armed with a dangerous weapon or another person was lawfully in the dwelling. MCL 750.110a(2). The evidence showed that the victim had contacted the police about defendant's threats, had sought a PPO, installed a security system, and informed his neighbors of the situation. This indicated that when defendant entered the victim's home, he did so without permission. Together with the previously mentioned evidence of the circumstances of the murder itself, this evidence established the elements of the enumerated felony. MCL 750.110a(2).

Defendant next argues that the trial court erred when it admitted one autopsy photograph and four photographs of the victim taken at the scene of the crime. We disagree.

The decision whether to admit evidence is within the trial court's discretion and will not be disturbed on appeal absent an abuse of discretion. *People v Ho*, 231 Mich App 178, 187-188; 585 NW2d 357 (1998). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made." *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). The photographs were relevant to facts of consequence in defendant's trial. They showed the location of the wounds inflicted and the stipling that indicated he had been shot at close range. This tended to make the existence of the requisite intent elements of both murder charges more probable than they would be without it. MRE 401. Furthermore, the photographs corroborated the testimony of numerous prosecution witnesses regarding the nature and location of the victim's wounds. Accordingly, the photographs were relevant. Moreover, the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. As our Supreme Court observed in *People v Eddington*, 387 Mich 551, 562-563; 198 NW2d 297 (1972):

"[I]f photographs are . . . admissible for a proper purpose, they are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors. Generally, also, the fact that a photograph is more effective than an oral description, and to the extent calculated to excite passion and prejudice, does not render it inadmissible in evidence." [Quoting 29 Am Jur 2d, Evidence, § 787, pp 860-861.]

While the photographs were somewhat prejudicial to defendant's case, they were so precisely because of their substantial relevance. Such prejudice is not what MRE 403 means by unfair prejudice. Although they "vividly" depicted the circumstances of the crime, this did not render them inadmissible. *Id.* Accordingly, we conclude that the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. See *People v Mills*, 450 Mich 61, 77-78; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995).

Defendant next argues that his dual convictions of premeditated and felony murder violated double jeopardy. We agree.

"Where dual convictions of first-degree premeditated murder and first-degree felony murder arise out of the death of a single victim, the dual convictions violate double jeopardy."

People v Adams, 245 Mich App 226, 241-242; 627 NW2d 623 (2001), citing *People v Bigelow*, 229 Mich App 218, 220-222; 581 NW2d 744 (1998). Accordingly, defendant's judgment of sentence should be modified to indicate a single first-degree murder conviction supported by two theories, i.e., premeditation and felony murder. *Adams, supra* at 242, citing *Bigelow, supra* at 220-221.

Defendant next argues that his three convictions of felony-firearm violate his right to be free from double jeopardy. The prosecution concedes these errors and has agreed to the entry of an amended judgment of sentence.

We affirm the trial court with respect to defendant's claims of evidentiary error. We remand for modification of the judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ David H. Sawyer

/s/ Helen N. White