

S T A T E O F M I C H I G A N
C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN HAROLD DAVIS,

Defendant-Appellant.

UNPUBLISHED

October 11, 1996

No. 186807

LC No. 94-006759

Before: Young, P.J., and Taylor and R. C. Livo,* JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to parolable life imprisonment for the murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first argues that the trial judge had an obligation to disqualify himself from the case because of his bias or prejudice against defendant. Generally, a party must pursue a claim of disqualification before the trial court in order to preserve the issue for appellate review. *In re Schmeltzer*, 175 Mich App 666, 673; 438 NW2d 866 (1989). In this case, defendant failed to file a motion to disqualify the trial judge. As such, we find that this issue was not properly preserved for appellate review. See MCR 2.003; *People v Bettistea*, 173 Mich App 106, 122-124; 434 NW2d 138 (1988); *People v Gibson (On Remand)*, 90 Mich App 792, 796; 282 NW2d 483 (1979). Even if defendant had preserved this issue, the trial judge was not required to disqualify himself from presiding over defendant's case. Defendant points to a heated verbal exchange between himself and the trial judge that occurred at a court hearing four months before his trial as evidence of the trial judge's bias or prejudice against him. On the day of the verbal exchange the trial judge stated on the record that he was not angry with defendant, in spite of defendant's name-calling, and that he was more "amused" than anything else. Defendant has failed to show the requisite bias or prejudice needed to have warranted the trial judge's disqualification.

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

Defendant next argues that he was denied a fair trial when the trial judge “pierced the veil of impartiality.” Specifically, defendant asserts that the trial judge prevented the cross-examination of defense witnesses by the prosecution and precluded the prosecution from making a closing argument. Defendant did not object at trial to the trial judge’s conduct. In the absence of an objection, this Court may review the matter only if manifest injustice would result from our failure to review. *People v Paquette*, 214 Mich App 336, 340; ___ NW2d ___ (1995). Upon reviewing the lower court record, we find that the trial judge’s conduct did not deny defendant a fair and impartial trial. The prosecutor’s apparent waiver of her right to cross-examine witnesses or to make a closing argument is not a proper basis for finding error in defendant’s appeal. Additionally, the lower court record does not show that the trial judge made up his mind as to defendant’s guilt before rendering his decision. This argument is pure speculation.

Next, defendant argues that the trial court erred in denying his motion for directed verdict as to first-degree premeditated murder. Defendant also argues that there was insufficient evidence to convict him of second-degree murder. We disagree with both arguments.

When ruling on a motion for a directed verdict, the trial court must consider the evidence presented by the prosecutor up to the time the motion was made in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). When reviewing a trial court’s ruling on a motion for directed verdict, this Court tests the validity of the motion by applying the same standard used by the trial court. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992). Similarly, in reviewing a challenge to the sufficiency of the evidence, this Court views all of the evidence in a light most favorable to the prosecutor in order to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 516 n 6; 489 NW2d 748 (1992), amended 441 Mich 1201-1202 (1992).

We find that the prosecution presented sufficient evidence to justify the submission of the first-degree murder charge to the fact finder. In this case, defendant’s intent to kill could be inferred, as he entered the victim’s home and repeatedly shot the victim in the chest and head area. Accord *People v Ritsema*, 105 Mich App 602, 609; 307 NW2d 380 (1981). Although a precise time frame cannot be set, premeditation and deliberation require a sufficient time to allow the defendant to take a “second look.” *People v Passeno*, 195 Mich App 91, 100; 489 NW2d 152 (1992). In this case, defendant had a sufficient time to contemplate the killing of the victim. Several witnesses saw defendant arrive at the victim’s home carrying a weapon. Moreover, one witness indicated that defendant inquired as to where his aunt was located. In addition, another witness testified that defendant said hello to her. Because defendant had time to talk with witnesses, defendant must have had time to contemplate his future actions and could have left the premises before shooting the victim. We also note that defendant had a volatile relationship with the victim in the past. Indeed, on the very day of the shooting, defendant and the victim engaged in a heated argument over a stolen gun. Therefore, on the basis of the previous relationship of the parties and defendant’s actions before the shooting, we conclude there was sufficient evidence to show that defendant’s shooting of the victim was premeditated and deliberate. Accord

People v Daniels, 163 Mich App 703, 706-707; 415 NW2d 282 (1987). Therefore, the submission of the first-degree murder charge to the fact finder was warranted.

The evidence introduced at trial was sufficient to support defendant's second-degree murder conviction. As stated above, defendant's repeated shooting of the victim evidences an intent to kill. Although defendant argues that there were guns in the victim's home at the time of the shooting, there was no evidence that the victim possessed a weapon at the time of the shooting. According to one witness, the victim was watching television before the shooting. The evidence in this case supports a finding that defendant intended to kill the victim.

Defendant next argues that the trial court erred by failing to make sufficient findings of fact regarding defendant's claim of self-defense or imperfect self-defense. Contrary to defendant's argument, the trial court clearly stated in its findings of fact that self-defense was not applicable. We agree with the trial court's holding. The evidence produced at trial indicates that defendant was not in imminent danger of great bodily harm or death. *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985). Moreover, we find that defendant could not avail himself of an imperfect self-defense theory in this case. Imperfect self-defense is only available to a defendant when he would have been entitled to invoke the theory of self-defense had he not been the initial aggressor. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993). Even if defendant had not been the initial aggressor, he could not have invoked a theory of self-defense, because, on the facts of this case, his claim that he was in danger was unreasonable. *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990).

Defendant next argues that the trial court erred by disregarding the sentencing guidelines. We disagree. At sentencing, the trial judge stated: "The Court doesn't recognize guidelines. The Court only recognizes it's [sic] own judgment." The Michigan Supreme Court requires that judges of this state use the sentencing guidelines in imposing sentences. See *People v Potts*, 436 Mich 295, 298-299; 461 NW2d 647 (1990). The trial judge was aware of the sentencing guidelines because he signed the sentencing information report, which set forth the recommended guidelines range in this case. Moreover, the trial judge in this case did actually adhere to the sentencing guidelines in sentencing defendant.¹ Thus, when the trial judge stated that he did not "recognize guidelines," he may have meant, in a general sense, that he does not usually adhere to them. The Michigan Supreme Court has stated that sentencing judges are not required to adhere to the sentencing guidelines. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). Further, the trial judge's comment, although maladroit, is not a ground for resentencing where the actual sentence imposed was within the sentencing guidelines range.

Finally, defendant argues that his parable life sentence is disproportionate to the offense and the offender. We disagree. A sentence within the guidelines range is presumed to be proportionate. *People v Albert*, 207 Mich App 73, 75; 523 NW2d 825 (1994). However, a sentence within the guidelines may still violate the principle of proportionality "in unusual circumstances." *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). In this case, the sentence imposed falls within the sentencing guidelines range, and we find no unusual circumstances rendering it disproportionate. We find that the sentence imposed reflected the seriousness of the matter. *Houston, supra* at 320.

Affirmed.

/s/ Robert P. Young
/s/ Clifford W. Taylor
/s/ Robert C. Livo

¹The guidelines were fifteen to thirty years or life. Thus, defendant's life sentence was at the highest end of the guidelines range in this case.