

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERNARD SPENCER,

Defendant-Appellant.

UNPUBLISHED

January 14, 1997

No. 182875

Recorder's Court

LC No. 94-006209

Before: Jansen, P.J., and Reilly and E. Sosnick,* JJ.

PER CURIAM.

Following a jury trial in the Detroit Recorder's Court, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, six counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life imprisonment without parole for the first-degree murder conviction, life imprisonment for each assault with intent to commit murder conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right and we affirm.

I.

Defendant first argues that there was insufficient evidence of premeditation and deliberation to support his conviction of first-degree murder and insufficient evidence of an intent to kill to support his convictions of assault with intent to commit murder. In reviewing a challenge to the sufficiency of the evidence, this Court must view the evidence 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

A.

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

In order to support a conviction for first-degree murder, the prosecution must show that the defendant intentionally killed the victim with premeditation and deliberation. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation and deliberation may be inferred from the circumstances surrounding the killing. *Id.* Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *Id.*

Taken in a light most favorable to the prosecution, we find that there was sufficient evidence presented for the jury to conclude that defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. On the afternoon of May 25, 1994, defendant and his girlfriend were driving on Vinewood in the City of Detroit. Jimmie Purvey and Victor Tooks were sitting on the porch of Mary Jo Smith's house. Purvey and Tooks saw a car driven by defendant's girlfriend, and got into a car to chase defendant out of the neighborhood. Apparently, defendant and Purvey were members of rival gangs. Smith later received a telephone call from a man who told her to get the people sitting on her porch off of it because he had just gotten into it with Little Jimmie. Purvey, having returned to Smith's house after chasing defendant in the car, then went across the street to Kecia Chaney's house and sat on her front porch with several other people. Approximately ten minutes later, defendant drove past Chaney's house and fired shots at the people on Chaney's porch. Chaney died from a single gunshot wound to the back. This evidence indicates an intent to kill with premeditation and deliberation.

B.

In order to support a conviction for assault with intent to commit murder, the prosecutor must present evidence of: 1) an assault; 2) with the actual intent to kill; 3) which, if successful, would make the killing murder. *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995). Again, where defendant drove by the decedent's house, after warning Smith that he would do so, and fired at the people congregated on the porch, there was sufficient evidence to support his six convictions of assault with intent to commit murder. Had he been successful when he fired at the porch, all six victims could have died just as the decedent did, and such deaths would have been murder. Thus, taken in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.

II.

Next, defendant argues that the trial court erred in instructing the jury.

Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). The reviewing court must balance the general tenor of the instructions in their entirety against the potentially misleading effect of a single isolated sentence. *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991).

A.

Defendant first argues that the trial court's instructions on first- and second-degree murder were imprecise and did not adequately define all the elements of each charge. Specifically, defendant takes exception to the court's definition of second-degree murder as first-degree murder without the premeditation element. However, defendant failed to object to the first- and second-degree murder instructions. Failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Upon review of the trial court's instructions, we find no manifest injustice in this case.

B.

Defendant next argues that the trial court's alibi instruction improperly shifted the burden of proof. Again, defendant failed to object to the alibi instruction. There is no manifest injustice because the trial court's instruction did not shift the burden of proof.

C.

Defendant also argues that the aiding and abetting instruction was improperly given because the evidence did not support such an instruction. Defendant objected to this instruction below. Jury instructions must include all material issues, defenses, and theories for which there is evidence in support. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). The evidence here showed that both defendant and his cohort, Marcus Mitchell, fired gunshots at the people in front of decedent's house, whether they were on the porch or on the curb. The evidence indicated that it was their intent to fire at the rival gang members in retaliation for having been ordered out of the rival gang's neighborhood. To that end, each of these men aided and abetted the other in committing the crimes charged. *People v Davenport*, 122 Mich App 159, 163-164; 332 NW2d 443 (1982). Because there was evidence to support the giving of an aiding and abetting instruction, the trial court properly gave it. *Daniel, supra* at 53.

D.

Defendant next contends that the trial court's denial of his request to instruct on the lesser offenses of voluntary manslaughter, MCL 750.321; MSA 28.553, involuntary manslaughter, MCL 750.321; MSA 28.553, intentional discharge of a firearm from a motor vehicle, MCL 750.234a(1); MSA 28.431(1)(1), intentional discharge of a weapon at a dwelling or occupied structure, MCL 750.234b(1); MSA 28.431(2)(1), and intentional discharge of a firearm without malice, MCL 750.234; MSA 28.431, was erroneous. Before a court instructs on a cognate lesser offense, it must examine the specific evidence to determine whether it would support a conviction of the lesser offense. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991).

There was insufficient evidence to warrant giving instructions on voluntary and involuntary manslaughter and intentional discharge of a firearm without malice, because there was evidence that defendant acted with malice. *People v Datema*, 448 Mich 585, 594-596, 606; 533 NW2d 272 (1995); *People v Booker (After Remand)*, 208 Mich App 163, 170-171; 527 NW2d 42 (1994). Although the evidence supported the giving of instructions on intentional discharge of a firearm from a

motor vehicle, MSA 750.234a(1); MSA 28.431(1)(1), and intentional discharge of a firearm at a dwelling or structure, *People v Guiles*, 199 Mich App 54, 55; 500 NW2d 757 (1993), reversal is not warranted because the jury had a choice to convict defendant on the intermediate charges of assault with intent to do great bodily harm, as well as felonious assault, and declined to do so. *People v Mosko*, 441 Mich 496, 502; 495 NW2d 534 (1992). Thus, the trial court's failure to give these instructions did not deny defendant's right to a fair trial and were harmless beyond a reasonable doubt.

E.

Lastly, defendant argues that the court's inclusion of "moral certainty" language in its instruction on reasonable doubt was improper. However, defendant failed to object to this instruction. There is no manifest injustice because the reasonable doubt instruction was not improper. *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991).

III.

Defendant also contends that the trial court erred when it denied his motion to suppress identification testimony. Defendant contends that the identification testimony should have been suppressed where two witnesses were shown a photograph of defendant while defendant was in custody and available for a lineup. He claims that his right to counsel was violated and that the identification procedure was unduly suggestive.

A.

A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *People v Kurylczuk*, 443 Mich 289, 303, 318; 505 NW2d 528 (1993). In order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. *Id.* at 302.

The procedure used here was not so impermissibly suggestive as to have led to a substantial likelihood of misidentification because the witnesses had identified defendant as the shooter before they were shown the photographs. The witnesses stated to the police that defendant had been a passenger in the car and had fired at the people standing at the porch. Following this identification of defendant, a picture of defendant and Mitchell was shown to the witnesses and they were asked if the men in the pictures were the people they meant. The witnesses responded yes, that the man in the picture was defendant, and that he had been the one to shoot at the porch. Thus, there was no substantial likelihood of misidentification and the photographic showing cannot be deemed to be unduly suggestive. *Id.* at 306-309.

B.

Defendant also argues that his right to counsel was violated because the photographs were shown to the witnesses when defendant was in custody. In *Kurylczyk, supra*, at 302, our Supreme Court held that in the case of photographic identifications, the right of counsel attaches with custody. In this case, defendant was picked up by Detroit police officers shortly after the shooting on an unrelated charge. Defendant was still in custody on May 26, 1994 when the officers conducted the photographic identification procedure. Counsel for defendant was not present when the photographic procedure was used.

Although counsel was not present, the in-court identification of defendant was still proper because the witnesses had an independent basis for the prior identification procedure. Both witnesses knew of defendant, and identified him as being in the car and being a shooter before they were shown the photographs. Both witnesses described defendant, and, when shown the photographs, were only asked if the men in the photographs were the people that they were talking about. The witnesses were in no way tainted by the photographs because they had known defendant since before the shooting. Accordingly, the witnesses had an independent basis for the identification procedure. Thus, there is no reversible error. *People v Anderson*, 389 Mich 155, 169; 205 NW2d 461 (1973).

IV.

Defendant next maintains that the trial court erred when it admitted into evidence testimony regarding his alleged gang involvement.

The decision whether to admit evidence is within the trial court's discretion. An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

Defendant's ostensible involvement in a rival gang was relevant to the issue of motive, planning, premeditation, and deliberation. Proof of motive in a prosecution for first-degree murder is relevant, *People v Wells*, 102 Mich App 122, 128; 302 NW2d 196 (1980), and evidence of motive is material in proving premeditation and deliberation, *id.* at 129. Although all the witnesses pleaded ignorance regarding the actual membership in the two gangs, there was evidence that the members of the Vinewood Boys were men who lived on or around Vinewood and that the members of the Duces Eight were men who lived on the other side of West Grand Boulevard on and around 28th Street. There was also testimony of bad blood between several of the victims, most of whom lived on Vinewood, and defendant who lived on 28th Street. The evidence of defendant's gang involvement explained the reason for the shootings, and was clearly relevant to the elements of premeditation and deliberation. The evidence of defendant's gang affiliation was relevant and probative and thus was properly admitted. *People v VanderVliet*, 444 Mich 52, 60-61; 508 NW2d 114 (1993).

V.

Defendant also argues that he is entitled to resentencing on his assault with intent to commit murder convictions if his conviction for first-degree murder is reversed, because the sentencing court

based its sentences for the assault with intent to commit murder convictions in part on defendant's conviction of first-degree murder. Because we are affirming defendant's conviction for first-degree murder, we need not address defendant's request. Moreover, given our affirmance of defendant's conviction of first-degree murder, and the mandatory sentence term of life imprisonment without the possibility of parole, defendant could gain no relief from challenging his sentence of life imprisonment with the possibility of parole for assault with intent to commit murder. *People v Passeno*, 195 Mich App 91, 101-102; 489 NW2d 152 (1992).

Affirmed.

/s/ Kathleen Jansen

/s/ Maureen Pulte Reilly

/s/ Edward Sosnick