

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN EDWARD GRACE,

Defendant-Appellant.

UNPUBLISHED

May 16, 1997

No. 185450

Macomb Circuit

LC No. 94-000093-FC

Before: Sawyer, P.J., and Saad and Gage, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and felony firearm, MCL 750.227b; MSA 28.424(2). He appeals as of right. We affirm.

I

Defendant first argues that the trial court erred in denying his motion for a directed verdict of acquittal on the charge of first-degree murder, MCL 750.316; MSA 28.548. We disagree.

First-degree premeditated murder requires that the prosecution prove that the defendant intentionally killed the victim and that the act of killing was both premeditated and deliberate. The length of time necessary to evaluate a decision is not susceptible to precise determination; all that is required for premeditation and deliberation is sufficient time to allow the defendant to take a second look. *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993). The elements of premeditation and deliberation may be inferred from the facts surrounding the incident. *Id.* Premeditation may be shown through evidence of any of the following: (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. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). The circumstances of the killing may include the type of weapon used and the location of the wounds inflicted. *People v Thomas Berry (On Remand)*, 198 Mich App 123, 128; 497 NW2d 202 (1993).

Here, the prosecutor's theory of guilt was that defendant aided and abetted in the murder of the victim. An aider and abettor must possess the same requisite intent as that required of the principal. *People v Barrera*, 451 Mich 261, 294; 547 NW2d 280 (1996), cert denied, *Michigan v Barrera*, ___US___; 117 S Ct 333; 136 L Ed2d 246 (1996). Accordingly, it must be shown that the aider and abettor had the intent to kill, the intent to cause great bodily harm or wantonly and wilfully disregarded the likelihood of the natural tendency of his behavior to cause death or great bodily harm. *Id.* When, as here, the aider and abettor participates in a crime with knowledge of his principal's intent to kill or to cause great bodily harm, he is acting with "wanton and wilful disregard" sufficient to support a finding of malice. *Id.*

The trial court did not err in denying defendant's motion for a directed verdict. While the victim's death resulted from a fight between two groups of men who did not know one another, there was evidence that the victim was shot after he started to walk away from the fight and after the victim had told his friend to leave defendant alone. The victim was forced onto his knees by the codefendant who held a gun on the victim. The codefendant shot the victim in the head at close range after defendant instructed him to "cap" (shoot) the victim. The time between the initial fight and the shooting was sufficient to establish the elements of premeditation and deliberation. Once the victim walked away from the fight, defendant had sufficient time to take a second look before he encouraged his codefendant to shoot the victim.

II

Defendant next argues that the prosecutor failed to prove beyond a reasonable doubt that defendant was guilty of felony-firearm in connection with the murder of the victim. We disagree.

Conviction of felony-firearm requires that the defendant possess a firearm during the commission or attempt to commit a felony. *People v John Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). One may properly be convicted of felony-firearm even if one did not possess a firearm; a conviction may be based upon aiding and abetting in either the acquisition or the retention of a gun. *People v Eloby (After Remand)*, 215 Mich App 472, 478; 547 NW2d 48 (1996). Alternatively, a defendant may have constructive possession of a firearm for use in committing a felony if the firearm is in a location known to the defendant and it is reasonably accessible to him. *People v Ben Williams*, 212 Mich App 607, 609; 538 NW2d 89 (1995). Because the statute punishes the possession of a weapon to commit crimes, it also was intended to address the use of weapons used to escape from the scene of felonies. *Id.*

Here, the evidence was clear that defendant had possession of the gun during the escape from the scene of the shooting. We find this possession sufficient to qualify as assistance in the retention of a gun. See *People v Walter Johnson*, 411 Mich 50, 54; 303 NW2d 442 (1981). Therefore, there was sufficient evidence to support the charge of felony-firearm.

III

Defendant also argues that the trial court erred in denying his motion to suppress evidence of the gun found in his parents' home. The gun was discovered during a search of the home when the police were looking for defendant shortly after the shooting. We find no error.

Defendant first contends that he has standing to raise a constitutional challenge to the officers' search under the Fourth Amendment, US Const, Am IV. While the trial court did not decide this issue, we agree that defendant had standing to raise this issue.¹

However, here, the trial court's denial of defendant's motion to suppress evidence was not clearly erroneous. The officers obtained defendant's mother's consent to search the house to look for defendant. There were no limits or restrictions placed upon her consent. After the house was searched and defendant was not found inside, one of the officers asked defendant's mother for a recent photograph of defendant. When she advised him that she did not have one, the officer picked up a framed photograph from a mantle to see if defendant was included in the picture. When he lifted the photograph, the officer saw a .25 semiautomatic gun with the barrel pointing at him. As he moved the barrel gun away from him, he observed that the gun was cold although the inside of the house was warm. The officers immediately seized the gun because they were previously aware that a .25 caliber handgun had been used in this offense. The officers' actions were not outside the scope of the search. Because the gun was in plain view once the officers had a legitimate reason for picking up the photograph, the gun was admissible as evidence. See *People v Cooke*, 194 Mich App 534, 536; 487 NW2d 497 (1992).

IV

Finally, defendant alleges error with the trial court's instructions on his defense theory regarding the assault charge. Defendant claimed that he shot in self-defense at the truck of the victim's friend when the friend chased defendant and his codefendants after the shooting. The prosecution argued that the man who chased defendant was entitled to use force by hitting defendant's car with his truck because he had the right to make a citizen's arrest. The trial court gave the jury instructions on the law for both self-defense and citizen's arrest. However, defendant now argues that the trial court should have given another instruction to explain to the jury that defendant had the right to resist a citizen's arrest. We disagree.

Defendant did not request that the trial court instruct the jury on the right to resist a citizen's arrest and there was no objection made by defendant concerning the absence of such an instruction. Accordingly, this Court's review is limited to deciding whether relief is necessary to avoid manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). The trial court was not required to instruct the jury on defendant's theory in the absence of a request by defendant. *People v Maleski*, 220 Mich App 518, 521; ___NW2d___ (1996).

Here, the trial court's instructions adequately covered the defense theory of the shooting. Defendant claimed in his statement that he was not aware why the man was chasing him and, therefore, he shot at the man in self-defense. There was no evidence that defendant was resisting arrest. The trial

court's instructions on self-defense adequately protected defendant's rights in this area. The jury was properly instructed to decide if defendant acted reasonably because he believed he was in danger. An instruction on the right to resist arrest would have confused the jury because defendant claimed he did not know he was being chased so that the victim's friend could make a citizen's arrest. The failure to instruct the jury on defendant's right to resist arrest did not deny him the right to a fair trial.

The record also does not support defendant's claim that his counsel was ineffective. The choice of what defense to pursue involved a matter of trial strategy which this Court will not second guess. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Moreover, defendant has not shown error by his counsel when the instruction at issue was not supported by the facts of this case. *People v Norman*, 176 Mich App 271, 276; 438 NW2d 895 (1989).

Affirmed.

/s/ David H. Sawyer

/s/ Henry William Saad

/s/ Hilda R. Gage

¹ A defendant's standing to challenge a search is not automatic; the defendant must have a special interest in an area searched or an article seized in order to have standing. *People v Jordan*, 187 Mich App 582, 589; 468 NW2d 294 (1991). The burden is on the defendant to prove standing by demonstrating that, under the totality of the circumstances, there existed a legitimate personal expectation of privacy in the area or object searched. *People v Lombardo*, 216 Mich App 500, 504-505; 549 NW2d 596 (1996). The defendant must also show that his or her expectation is one that society accepts as reasonable. *Id.* Here, defendant had a legitimate expectation of privacy in his parents' home. Although defendant was living with his girlfriend, he continued to reside with his parents part of the time. In light of defendant's relatively young age at the time of the search, defendant's expectation of privacy in his parents' home was reasonable since he was not fully emancipated from his parents. Moreover, his expectation of privacy was not confined to his room in his parents' house, but extended to the entire house. Accordingly, defendant had standing to challenge the search of his parents' home.