# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL EDUARD CONRAD,

Defendant-Appellant.

UNPUBLISHED
August 5, 1997

No. 183412
Ottawa Circuit Court
LC No. 94-017950-FC

Before: Neff, P.J., and Smolenski and D. A. Roberson*, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to consecutive terms of two years' imprisonment for the felony-firearm conviction and life in prison without parole for the murder conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise out of an incident in which defendant shot the victim, Kevin Ernst, two times. The disputed issues at trial revolved around defendant's state of mind at the time of the shooting. Defendant's theory of defense was voluntary intoxication.

Defendant first argues that the trial court erred in denying his motion for a directed verdict on the charge of first-degree murder. Specifically, defendant contends that a rational jury could not have found beyond a reasonable doubt that he premeditated and deliberated Ernst's killing in light of his intoxication, amiable relationship with Ernst, and other circumstances surrounding the killing.

When reviewing a trial court's ruling on a motion for a directed verdict, this Court considers the evidence presented in a light most favorable to the prosecution to determine whether a rational factfinder could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997); *People v Davis*, 216 Mich App 47, 52-

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

53; 549 NW2d 1 (1996). To establish first-degree murder, the prosecution must prove that the defendant intentionally killed Ernst and that the act of killing was deliberate and premeditated. *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995).

To premeditate is to think about beforehand. *People v Vail*, 393 Mich 460, 468; 227 NW2d 535 (1975). To deliberate is to measure and evaluate the major facts of a choice or problem. *Id*. Premeditation and deliberation characterize a thought process undisturbed by hot blood. *Id*. at 468-469. The length of time necessary to exercise the process of premeditation and deliberation is not capable of precise determination. *Id*. at 469. However; all that is necessary is that there is enough time between the initial homicidal impulse and the ultimate action for the defendant to take a second look at the actions contemplated. *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993); *People v Alexander*, 76 Mich App 71, 82; 255 NW2d 774 (1977); see also *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). The elements of premeditation and deliberation may be inferred from all the facts and circumstances surrounding the incident, including the parties' prior relationship, the actions of the accused both before and after the crime, and the circumstances of the killing itself such as the type of weapon used and the location of the wounds inflicted. *Haywood*, *supra*; *People v Berry (On Remand)*, 198 Mich App 123, 128; 497 NW2d 202 (1993).

Voluntary intoxication is a defense only to specific intent crimes, including the crime of first-degree premeditated murder. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). The defense of intoxication will negate the specific intent element of the crime charged if the degree of intoxication is so great that the accused is incapable of entertaining the requisite intent. *King*, *supra*.

In this case, the evidence indicated that defendant, Ernst and some other people, all students at Grand Valley State University, gathered at defendant's residence at approximately 6:15 p.m. to work on a college project. After some preliminary work, the group began to socialize. Defendant and Ernst were drinking beer. At approximately 10:30 p.m., all of the students except Ernst left defendant's residence. At this time, defendant although not yet drunk, was showing signs of becoming "buzzed." No friction between defendant and Ernst had been observed by the departing students.

At approximately 10:45 pm., a woman who was defendant's friend arrived at defendant's residence with a bottle of liquor. Defendant and Ernst began drinking shots of liquor. Defendant also began acting in an aggressively sexual manner toward the woman. However, the woman kept rebuffing defendant's repeated physical and verbal advances. Although there was no outright fight between defendant and Ernst over the woman, there was evidence from which the jury could infer a growing animosity by defendant toward Ernst. Specifically, after defendant had forced himself on top of the woman, Ernst entered the living room and questioned defendant concerning this conduct. Defendant then retreated from his aggressive posture on top of the woman. When defendant slurred his speech, Ernst made a comment at defendant's expense about defendant being drunk. Although Ernst and the woman laughed, defendant was "unamused."

After the woman left the living room, defendant also left the living room and went to the bathroom and then his bedroom. Although defendant's shirt had previously been tucked into his waistband, when defendant returned to the living room his shirt was completely untucked. From the kitchen, the woman observed defendant sit on the couch next to Ernst, turn to Ernst, lift up his (defendant's) shirt, and show Ernst something tucked into his (defendant's) waistband that was dark, seven or eight inches long, and approximately two inches thick. The object could have been a handgun. Ernst looked at the woman with a serious and intense look. The woman did not observe defendant thereafter go to his bedroom or another room, set the object down, or tuck in his shirt.

After Ernst again left the living room and went onto the residence's deck, defendant again asked the woman to stay the night. When she refused, defendant began to ramble illogically. Defendant followed the woman to the kitchen, wrapped his arms around her from behind, and again asked her to stay the night. She refused. She could not determine if the object was still in defendant's waistband because only defendant's arms and shoulders, not his waist, was touching her. Ernst leaned into the kitchen from the deck and suggested that he and the woman put defendant to bed because defendant was drunk. This comment was not well received by defendant, who "glared" at Ernst with a "very intense, unblinking, kind of mean stare." The woman then left defendant's residence. The time was approximately 12:05 a.m. Shortly thereafter, one of defendant's roommates heard two loud voices and loud noises of chairs moving and feet shuffling. Approximately one or two minutes later, a shot was fired followed by a second shot approximately three seconds later. The police subsequently found Ernst's body with two bullet wounds on the deck of defendant's residence. Following the shooting, defendant engaged in an elaborate, although not sophisticated, plan to try to cover his responsibility for the murder by firing additional rounds inside the house, fleeing on foot, stealing a vehicle, and concocting various false stories.

The murder weapon, although never recovered, was a Colt .357 Trooper revolver owned by defendant. This particular weapon was built with a safety block and would not discharge if dropped or bumped. Rather, this weapon could be discharged only if either the hammer was pulled back and three to six pounds of pressure applied to the trigger or the trigger was pulled continuously back with significantly greater finger pressure (ten to fourteen pounds).

Expert testimony indicated that defendant's blood alcohol content at the time of the shooting could have been .17 or lower or as high as .23. Expert testimony also indicated that the average person with a blood alcohol content of .17, although impaired, knows right from wrong, knows that the use of a firearm may cause death, and possesses the ability to act intentionally. Expert testimony further indicated that a person with a blood alcohol content of .23 also knows the difference between right and wrong.

At trial, one of defendant's cellmates testified that defendant told him that he (defendant) got a gun, got angry about a girl, "blew the guy away," and got rid of the gun because without the gun "they couldn't get him on a first degree murder rap." Although the cellmate's testimony was rendered extremely suspect on cross-examination, it is not permissible for a trial court to determine the credibility

of witnesses in deciding a motion for a directed verdict no matter how inconsistent or vague that testimony might be. *Mehall, supra*.

Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational jury could have found that defendant's voluntary intoxication did not negate specific intent. In light of the inference raised by the evidence that defendant obtained the gun sometime before the shooting, we conclude that a rational jury could also have found that the killing was not done on a sudden impulse, but rather that defendant had sufficient time to "subject the nature of his initial response to a 'second look.'" *Alexander, supra*. Accordingly, we conclude that the trial court did not err in denying defendant's motion for a directed verdict on the charge of first-degree murder.

Next, defendant argues that the trial court erred in denying his request for an instruction on the defense of accident. However, although defendant placed on the record that fact that he objected to the court's refusal to give his requested instruction on accident, defendant did not place on the record the court's reasons for its refusal. In addition, on appeal, defendant does not specify which of several possible instructions on accident that the court should have given. See, e.g., CJI2d 7.1, 7.2 & 7.3. Thus, defendant has placed this Court at a severe disadvantage in evaluating his claim. Moreover, we fail to logically understand how the defendant could have accidentally shot Ernst twice with the particular weapon involved in this case. See, e.g., *People v Mills*, 450 Mich 61, 82; 537 NW2d 909, modified 450 Mich 1212 (1995). Finally, we conclude that defendant was not prejudiced by the court's failure to instruct on accident where the jury was instructed on several lesser offenses, including negligent use of a firearm, and that it must find defendant not guilty if it found that he had only been slightly negligent, but the jury nevertheless convicted defendant of the most serious charge. Accordingly, we conclude that reversal is not required on this ground.

Next, defendant argues that the trial court erred in permitting the prosecution to amend its witness list during trial for the purpose of calling an expert witness. We find no abuse of discretion. *People v Lino (After Remand)*, 213 Mich App 89, 92; 539 NW2d 545 (1995), overruled in part on another ground *People v Carson*, 220 Mich App 662, 674; 560 NW2d 657 (1996). The prosecution established good cause for the late amendment. MCL 767.40a; MSA 28.980(1)(4); *People v Maleski*, 220 Mich App 518, 525; 560 NW2d 71 (1996); *Lino, supra*. Defendant has failed to establish prejudice where the witness was an expert in the area of intoxication, a defense defendant had contemplated for some time, the witness had previously been disclosed as a rebuttal witness, and the trial court fashioned an appropriate remedy in defendant's favor. *Maleski, supra; Lino, supra* at 92-93.

Next, defendant argues that the trial court erred in denying his motion for change of venue in this highly publicized case. Specifically, defendant argues that the atmosphere surrounding his trial was such as would create a probability of prejudice where Ernst's mother was employed by the district court located two floors below the circuit court in which this case was tried and she testified at defendant's trial.

A trial court may order a change of venue upon a showing of good cause. MCL 762.7; MSA 28.850. However, it is not sufficient to establish the existence of pretrial publicity. *People v Hack*, 219 Mich App 299, 311; 556 NW2d 1 (1996). Rather, a defendant has the burden of proving that the atmosphere surrounding the trial was such as would create a probability of prejudice. *Id*. This Court reviews a trial court's ruling on a motion to change venue for an abuse of discretion. *Id*.

In this case, defendant argued below that the jury could learn that Ernst's mother worked at the district court. The trial court rejected defendant's argument on the ground there was little possibility that the jury would learn this information given the different schedules of the jury and district court staff and the fact that the district court staff had little, if any, contact with the circuit court. The court further stated that it would instruct Ernst's mother to not volunteer information concerning her place of employment during her testimony and our review of her testimony reveals that she did not. Accordingly, we find no abuse of discretion. *Id*.

Next, defendant claims that the trial court erred in denying his motion for a mistrial. Specifically, defendant claims that his silence was improperly used against him at trial where the prosecutor elicited the arresting officer's testimony that defendant did not react or say anything after the officer informed defendant that Ernst had been shot and was dead, and that defendant was under arrest for open murder. We note that, contrary to the prosecution's assertion on appeal, it is clear from our review of the pretrial suppression hearing held in this case that the evidence of defendant's silence in this respect occurred after he had received *Miranda*[1] warnings and invoked his right to counsel. Nevertheless, assuming without deciding for the purpose of this analysis that constitutional error occurred, we conclude that the error, as evaluated in the context of the entire record, did not contribute to the jury's verdict and was therefore harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 406-407; 521 NW2d 538 (1994); *People v Gilbert*, 183 Mich App 741, 746-748; 455 NW2d 731 (1990). Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a mistrial where defendant was not prejudiced by the error. *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996).

Finally, we reject defendant's unpreserved argument with respect to CJI2d 3.2(3) (reasonable doubt). *People v Hubbard (After Remand)*, 217 Mich App 459, 486-488; 552 NW2d 593 (1996); *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991).

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Dalton A. Roberson

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).