

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 186092

Bay Circuit Court

CARLOS ARZOLA LOPEZ,

LC No. 94-001189 FC

Defendant-Appellant.

Before: McDonald, P.J., and O'Connell and Smolenski, JJ.

McDONALD, P.J. (dissenting).

I dissent.

Defendant claims the trial court erred when it denied his motion for a directed verdict with regard to both first and second-degree murder. I agree the trial court erred when it allowed the jury to consider the charge of first-degree murder but find no error in submitting the second-degree murder charge to the jury.

First-degree murder is a specific intent crime. It requires proof of an intent to kill, which is premeditated and deliberate. *People v Garcia*, 398 Mich 250; 247 NW2d 547 (1976); *People v Johnson*, 93 Mich App 667; 287 NW2d 311 (1979).

The circumstances surrounding the killing establish that defendant did not go to Wilkins' apartment in order to seek out and kill Porter and Berry. Upon defendant's entry into the apartment he and Wilkens greeted each other in a friendly manner. At that point, Porter entered the kitchen, said something and then punched defendant in the face. Other people in the kitchen attacked defendant when he fell to the ground. Joyner attacked Nunez at the same time. Defendant then drew his gun and fired, injuring himself while he and his attackers were struggling for the gun. As people reacted to that struggle, Nunez was able to pull his gun out and started shooting. By all accounts Nunez fired his weapon in an attempt to get out of the apartment. The prosecutor conceded during his opening statement the defendant did not go to the apartment to kill anyone at that time. Finally, defendant and Nunez's conduct after the shootings was inconsistent with the premeditation and deliberation. There were no orderly plans in place after the shootings. Defendant and Nunez ran from the apartment to

Angel's home. Viewed in a light most favorable to the prosecution, the evidence was insufficient to enable a rational trier of fact to find the essential elements of first-degree murder were proven beyond a reasonable doubt. *People v Peebles*, 216 Mich App 661; 550 NW2d 589 (1996). However, because defendant's actions clearly created a high risk of death or great bodily harm, the trial court did not err in allowing the jury to consider the second-degree murder charge. *People v Bailey*, 451 Mich 657; 549 NW2d 325 (1996).

Although the jury rejected the first-degree murder charge and convicted defendant of a lesser offense, actual prejudice stemming from the submission of the first-degree murder charge to the jury is presumed because of the danger of a compromise verdict. *People v Vail*, 393 Mich 460; 227 NW2d 535 (1975).¹ Therefore reversal is required.

I would reverse and remand for a new trial.

/s/ Gary R. McDonald

¹ I agree with the majority that this holding should be revisited. *People v Graves*, 224 Mich App 676; 569 NW2d 911 (1997), lv granted in part 456 Mich 903; 572 NW2d 14 (1997).