

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENJAMIN MCCOY,

Defendant-Appellant.

UNPUBLISHED

August 21, 2003

No. 234042

Wayne Circuit Court

LC No. 00-009853

Before: Griffin, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant Benjamin McCoy was convicted as charged of first-degree premeditated murder, MCL 750.316, two counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment without parole on his first-degree murder conviction, to be served concurrently with two parolable life sentences on his convictions for assault with intent to murder, and a consecutive two-year sentence on the felony-firearm conviction. Defendant now appeals as of right.

For the reasons set forth in this opinion, we reverse defendant's conviction for first-degree murder and remand to the trial court for a new trial on the first-degree murder charge; remand to the trial court for an evidentiary hearing on defendant's claims that his trial counsel was ineffective for failing to advance his self-defense claim by calling defendant as a witness and failing to file a pretrial motion to suppress his custodial statement; and vacate defendant's sentences on his two convictions for assault with intent to commit murder and remand for resentencing on his assault convictions.

I

Defendant's convictions arise from a shooting incident outside a Detroit club, the Dance Factory, during the early morning hours of June 4, 2000, which resulted in the death of fifteen-year-old Martel Wilson and injuries to Hombre Foster. In his opening statement, defense counsel admitted that defendant, twenty-one years of age at the time of the offenses, shot the decedent, but indicated that he did so in self-defense.

At trial, Hombre Foster, the surviving victim, testified that he was upset with defendant, whom he personally did not know, because a few weeks before the shooting he was at the Dance

Factory when defendant, without provocation, punched him. Defendant ran out of the club chased by Foster, Wilson, and Quentin Leapheart. Foster testified that on the night of the murder, he was again at the Dance Factory when he saw defendant. A short confrontation occurred, and defendant and his associates left the club. Thirty minutes later, Foster and Wilson went outside to meet Leapheart, who was driving them home. They got into Leapheart's car and waited for another friend. At this time, Foster saw defendant in a car which left and returned fifteen minutes later. One of defendant's friends approached Leapheart's car; he turned and went back toward defendant. Defendant then left his car, ran toward Foster and his friends and began shooting. Foster and Leapheart ran from the car: Leapheart escaped injury, Foster was struck by gunfire and Wilson was not so fortunate -- he died as the result of five gunshot wounds.

Quentin Leapheart gave a similar account of the events on the night in question. He acknowledged that the decedent had a .25 caliber handgun in his jacket pocket, but left it in the car when he entered the Dance Factory. He testified that no one in his car fired a weapon at defendant.

Kenya Carter, a cousin of one of defendant's friends, testified that when she left the club on the night of the shooting, she saw defendant walk toward her in the direction of the victims' car, carrying a long black gun. After her cousin advised her to go back inside, Carter turned around and headed toward a building. According to Carter, defendant stated "You talking ____" to the individuals in the car before she heard gunshots. Carter did not see anyone else shooting or with a gun.

The subsequent police investigation turned up ten fired cartridges at the crime scene; nine were fired from defendant's rifle and the tenth casing was fired from a different weapon. A police officer testified that when he reported to the crime scene, he saw a toy pistol on the back seat of the victims' car. The officer did not see a .25 caliber handgun in the car.

A Detroit Police Department investigator testified that defendant gave a custodial statement to her on August 3, 2000. In his statement, which was admitted into evidence at trial, defendant stated that a few weeks before the shooting he "got into it with some guys" while at the Dance Factory. On the night of June 3, 2000, defendant went to the club with two friends. There he saw the young man who was involved in the previous altercation. Defendant went out the back door and waited in the parking lot. Defendant then saw the young man with whom he had previously fought standing with his friends next to a car. Defendant stated that he heard someone say, "He got a gun." Defendant then returned to his own car, retrieved a rifle and ran back to "where the guys were." Defendant started shooting at the car. After firing five shots, defendant heard gunfire and started shooting again before he ran back to his car and drove away. Defendant estimated that he fired a total of seven to nine shots. Defendant claimed that he fired at the young men because his friend said "He got a gun." Defendant "got mad" and returned to his car to get his rifle. According to defendant, "I started shooting at them because I didn't want them to start shooting at us."

At trial, no witnesses were called on behalf of the defense and the jury found defendant guilty as charged. Subsequently, following a hearing, the trial court denied defendant's motions for a new trial and an evidentiary hearing regarding his claims of ineffective assistance of counsel. Defendant now appeals.

II

Defendant first argues that he was denied his right to a fair trial when the trial court conducted voir dire in a cursory fashion and “was not sufficiently probing to uncover juror bias.” Defendant further maintains that the trial court totally foreclosed defense counsel’s participation in the jury selection. We disagree.

As a preliminary matter, we note that defendant did not object to the voir dire as conducted and expressed satisfaction with the empanelled jury after both parties had exercised peremptory challenges. Thus, defendant has not preserved this issue for appellate review, and he may obtain relief only if the unpreserved error was plain and affected substantial rights, i.e., the outcome of the proceedings, and it either resulted in the conviction of an innocent person or seriously affected the fairness, integrity, or public reputation of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). This Court reviews the trial court’s conduct of voir dire for an abuse of discretion. *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994). A trial court “abuses its discretion if it does not adequately question jurors regarding the potential bias so that challenges for cause, or even peremptory challenges, can be intelligently exercised.” *Id.*

Here, defendant has failed to show plain error regarding the trial court’s conduct of voir dire. As the prosecution points out, the trial court adequately elicited sufficient information from the jurors to allow the parties to exercise challenges for cause under MCR 6.412(D) or peremptory challenges under MCR 6.412(E). The record reflects that the trial court thoroughly and appropriately questioned the individual jurors about potential sources of bias. Moreover, there is nothing in the record to suggest that the trial court foreclosed defense counsel from participating in voir dire. Apart from the trial court’s gratuitous remarks about the anticipated short duration of the trial, defendant does not identify any specific deficiencies in the trial court’s conduct of voir dire demonstrating that it did not sufficiently probe for possible juror bias. Defense counsel exercised eleven of his twelve peremptory challenges, and the record does not otherwise reflect that any of the jurors could have been challenged for cause. We therefore conclude that the trial court did not abuse its discretion by the manner in which it conducted voir dire, and there was no resultant plain error affecting defendant’s substantial rights. *Carines, supra.*

III

Next, defendant claims that the trial court improperly limited his cross-examination of prosecution witnesses and thus violated his right to confrontation and a fair trial. Defendant specifically complains that the trial court interrupted defense counsel’s cross-examination of certain prosecution witnesses, including Investigator Simon who took defendant’s custodial statement, the complainant Hombre Foster, and Quentin Leapheart.

This Court reviews a trial court’s limitation of cross-examination for an abuse of discretion. *People v Hackett*, 421 Mich 338, 347; 365 NW2d 120 (1984). The trial court has broad discretion “to impose reasonable limits on . . . cross-examination based on concerns about . . . prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993),

quoting *Delaware v Van Arsdall*, 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1986). However, this Court has recognized that limitations on cross-examination may infringe on the constitutional right to confrontation when a defendant is prevented from placing before the jury “facts from which bias, prejudice or lack of credibility of a prosecution witness might be inferred. . . .” *People v Kelly*, 231 Mich App 627, 644; 588 NW2d 480 (1998). Violations of the right to adequate cross-examination are subject to a harmless-error analysis. *Id.*

Here, with regard to defendant’s cross-examination of Investigator Simon, our review of the record indicates that the trial court instructed defense counsel not to question Simon about what defendant’s custodial statement did not say. Although the record reflects that the trial court may not have been even-handed in its ruling – limiting the defense’s cross-examination of Investigator Simon but allowing the prosecutor to pursue this line of questioning – any error in this regard was harmless and did not unduly prejudice defendant in light of the fact that defendant’s custodial statement was introduced into evidence. *Kelly, supra; People v Holliday*, 144 Mich App 560, 566-567; 376 NW2d 154 (1985).

Defendant also claims that his right to confrontation was improperly limited with regard to the cross-examination of Hombre Foster and Quentin Leapheart. We find no basis in the record to support these allegations. Defense counsel was allowed to impeach Leapheart, and the trial court properly exercised its discretion to control cross-examination by finding that defense counsel’s questioning was argumentative and by not allowing defense counsel to return continuously to the same areas covered during cross-examination. The trial court also properly limited the cross-examination of Foster for similar reasons.

IV

Defendant next argues that the trial court clearly erred in finding that the prosecution used due diligence in its efforts to produce endorsed *res gestae* witnesses, Robert and Roberto Carter, at trial. We disagree.

This Court reviews a trial court’s determination of due diligence for an abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). The trial court’s factual findings underlying its due diligence decision will not be set aside unless clearly erroneous. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

If a prosecutor endorses a witness, he is obliged to exercise due diligence to produce that witness at trial regardless whether the endorsement was required. *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991); *People v Jackson*, 178 Mich App 62, 65; 443 NW2d 423 (1989). If a prosecutor fails to produce an endorsed witness, he may be relieved of the duty by showing that the witness could not be produced despite the exercise of due diligence. *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000); *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). Due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of a witness. *Bean, supra* at 684; *Cummings, supra* at 585. An investigating officer’s lack of diligence or reasonable effort in identifying witnesses is imputed to the prosecution. *People v DeMeyers*, 183 Mich App 286, 293; 454 NW2d 202 (1990).

Robert Carter and Roberto Carter were nineteen-year-old twin brothers who lived with their family across the street from defendant. At the due diligence hearing conducted by the trial court on the second day of trial, the police officer in charge of this case testified that he went to the Carters' home ten times from January of 2001 until the trial began on February 28, 2001. The Carter twins were never at home, and their mother, Ora Parker, refused to tell the police officer where they were located, adamantly insisting that she did not want them to testify. As a result of the Carter twins' reluctance to testify, the prosecutor obtained a material witness detainer against each of them, entered each detainer into the LEIN system, and advised Mrs. Parker that her children were subject to arrest. Nevertheless, neither Carter twin was detained before trial.

The police obtained information that the Carter twins were working for a Horace Johnson, but were unsuccessful in locating Johnson or the twins. In addition, according to the record, neither Carter twin was incarcerated or hospitalized in the area, and neither one had obtained telephone, gas or electrical service, or benefits from the Social Security Administration or MESC before the trial.

The trial court specifically found that the Carter twins were hiding and avoiding service, that their immediate family was unwilling to cooperate in producing them, and that there were no other leads available to locate them. Thus, the trial court, concluding that the prosecution exercised due diligence, struck the two witnesses.

Under the circumstances, we find neither clear error in the trial court's factual findings nor an abuse of discretion regarding the court's ultimate conclusion that the prosecution made a good faith diligent effort to produce the missing witnesses. While defendant has attached to his appellate brief affidavits of the Carter twins in support of his contention that these witnesses "could have been produced with minimal effort," the circumstances of this case indicate to the contrary that the police and prosecutor went to great lengths to obtain the presence of these witnesses at trial. Defendant's argument is therefore without merit.

V

Next, defendant argues there was insufficient evidence to convict him of first-degree murder because the prosecution failed to establish the requisite element of premeditation. We disagree.

In reviewing a sufficiency of the evidence challenge, this Court reviews the evidence de novo in the light most favorable to the prosecution 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 Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Id.* at 400. Circumstantial evidence and reasonable inferences drawn from the evidence can constitute satisfactory proof of the elements of a crime. *Id.*; *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000). The prosecution need not negate every reasonable theory consistent with innocence; instead, the prosecution is bound to prove the elements of the crime beyond a reasonable doubt. *Nowack, supra* at 400.

To convict a defendant of first-degree murder, the prosecution must prove that the killing was intentional and that the act of killing was accompanied by premeditation and deliberation on the part of the defendant. MCL 750.316(1)(a); *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation and deliberation imply that an interval existed wherein a reasonable person could have taken a “second look,” and these elements may be inferred from the circumstances surrounding the killing, including (1) the prior relationship between the parties; (2) defendant’s actions before the killing; (3) the circumstances of the killing itself; and (4) defendant’s conduct after the killing. *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998); *Anderson, supra*; *People v Daniels*, 192 Mich App 658, 665-666; 482 NW2d 176 (1992).

Here, the evidence viewed in the light most favorable to the prosecution established that defendant had an antagonistic relationship with the decedent and his companions. Defendant left the area and returned armed. He conveyed his intent to shoot at the victims so that his companions could warn their friends, and then ran at the decedent’s vehicle and fired numerous shots, seven of which struck the decedent and the other victim. This evidence if accepted by the jury was sufficient to establish the requisite elements of first-degree murder. Specifically, there was sufficient evidence that defendant had adequate time for a second look and that he deliberated before he shot and killed Wilson.

VI

Defendant next alleges three categories of instructional error in this case. He contends that he was denied his right to a fair trial when the trial court (1) failed to give the order of deliberations instruction, (2) denied his request to instruct the jury on the offense of voluntary manslaughter, and (3) improperly instructed the jury on the essential elements of the offense of first-degree murder. Each of these allegations of error has been properly preserved for appellate review.

Claims of instructional error are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). 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. *Id.* In addition, no error results from the omission of an instruction if the instructions as a whole covered the substance of the omitted instruction. *People v Messenger*, 221 Mich App 171, 177-178; 561 NW2d 463 (1997).

Jury instructions in a criminal case must address each element of the offense charged. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002); *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975). If the trial court fails to give an applicable instruction, then the defendant has the burden of establishing that the trial court’s failure to give the requested instruction resulted in a miscarriage of justice. MCL 769.26; *Riddle, supra* at 124. A conviction will not be reversed unless it affirmatively appears more probable than not that the error was determinative of the outcome of the case. *Riddle, supra* at 125.

A.

Defendant initially contends that the trial court erred by failing to give the order of deliberations instruction. CJI2d 3.11 states in pertinent part:

(5) In this case, there are several different crimes that you may consider. When you discuss the case, you must consider the crime of [*name principal charge*] first. [If you all agree that the defendant is guilty of that crime, you may stop your discussions and return your verdict.] If you believe that the defendant is not guilty of [*name principal charge*] or if you cannot agree about that crime, you should consider the less serious crime of [*name less serious charge*]. [You decide how long to spend on (*name principal charge*) before discussing (*name less serious charge*). You can go back to (*name principal charge*) after discussing (*name less serious charge*) if you want to.]

In *People v Handley*, 415 Mich 356; 329 NW2d 710 (1982), our Supreme Court required that an order of deliberations instruction be given when there are both principal and lesser included offenses. In *Handley*, the trial court instructed the jury regarding possible verdicts of first-degree murder, second-degree murder, and manslaughter. *Id.* at 357-358. However, the trial court also instructed the jury that it must acquit the defendant of the first-degree murder charge before considering the other charges. On appeal, the Supreme Court held that a jury should be instructed to consider the principal charge first. If the jury fails to convict or acquit or is unable to agree whether to convict or acquit on the principal charge, then it may turn to lesser offenses. *Id.* The Court further stated that an instruction would not be deemed erroneous unless it conveyed the impression that there must be an acquittal on one charge before a lesser charge could be considered. *Id.*

Although Michigan courts are generally not required to adhere to the instructions of CJI2d, *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985), the Supreme Court in *People v Pollick*, 448 Mich 376, 386; 531 NW2d 159 (1995), specifically noted that CJI2d 3.11 “is a sound instruction, and we continue to direct that it be given.”

In the present case, we conclude that although the trial court erred when it declined to give the requested order of deliberations instruction, reversal of defendant’s conviction is not required. As noted in *Handley, supra* at 358-360, the purpose of its holding was to avoid a situation where the jury believed that it was required to unanimously find the defendant not guilty of the principal charge before it could consider the lesser charge. See also *Pollick, supra*. Here, the jurors were not expressly or impliedly instructed that they had to acquit defendant of first-degree murder before they could consider the charge of second-degree murder. The trial court’s error in not giving the order of deliberations instruction therefore did not result in manifest injustice. *Riddle, supra* at 124.

B.

Defendant also alleges instructional error stemming from the trial court’s denial of defendant’s request to instruct the jury regarding the offense of voluntary manslaughter. We disagree.

MCL 768.32(1) states:

Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense *inferior* to that charged in the indictment, or of an attempt to commit that offense. [Emphasis added.]

In *People v Cornell*, 466 Mich 335, 353-354; 646 NW2d 127 (2002), our Supreme Court held that only instructions on necessarily included lesser offenses, not cognate lesser offenses, are to be given under MCL 768.32(1). In other words, an inferior-offense instruction is appropriate only if all of the elements of the lesser offense are included in the greater offense, and a rational view of the evidence would support such an instruction. *Id.* at 357.

Recently, in *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003), the Supreme Court further determined that manslaughter is an “inferior” offense of murder within the meaning of the above statute governing inferior-offense instructions because manslaughter is a necessarily included lesser offense of murder. In order to prove common-law voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions. *Id.*, 664 NW2d at 690, citing *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). The *Mendoza* Court noted that provocation is not an element of voluntary manslaughter, but rather the circumstance that negates the presence of malice, *id.* at 690; thus, “[m]anslaughter is murder without malice.” *Id.* at 689. “Consequently, when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence.” *Id.* at 693.

Here, a rational view of the evidence does not support a voluntary manslaughter instruction. The requisite provocation must be adequate to cause a reasonable person to lose control, causing him or her to act out of passion rather than reason. *Pouncey, supra* at 389-390. The present circumstances do not show that defendant was so provoked. According to defendant, he went back to his car to retrieve his gun when he heard his friend say that one of the victims had a gun. Defendant then ran toward the victims’ car and began shooting. The mere fact that defendant’s friend said, “He’s got a gun” was not sufficient provocation to cause a reasonable person to lose control and act out of passion, not reason. In his statement to the police, defendant explained that “I started shooting at them because I didn’t want them to start shooting at us.” Although the decedent apparently had a gun in his jacket in the car, there was no testimony that defendant knew that the decedent was armed. Moreover, there is no evidence that anyone shot at defendant. Thus, the trial court did not err in finding that the evidence did not support the voluntary manslaughter instruction.

Further, contrary to defendant’s claim, the trial court did not err in refusing to give the voluntary manslaughter instruction on the grounds that the jury should have been permitted to mitigate the murder charge to voluntary manslaughter under the theory of an imperfect self-defense. The circumstances surrounding the shooting incident show that defendant initiated the confrontation between himself and the victim with the intent to kill or do great bodily harm. See *People v Kemp*, 202 Mich App 318, 323-324; 508 NW2d 184 (1993).

C.

Defendant also claims that the trial court committed error requiring reversal when failed to properly instruct the jury regarding the offense of first-degree murder, i.e., the court failed to adequately define and distinguish the essential elements of premeditation and deliberation. Initially, the trial court instructed the jury on first-degree premeditated murder as follows:

The elements of the offense of Murder in the First Degree, is that the killing must be intentional, the person intends to kill. That's what we call a specific intent crime.

How do you determine what a person's intent is? One way you can determine the intent is if the person says, "I'm going to do so and so", and he does it.

But if there are no words spoken, you may imply, infer what the person meant to do by looking at the circumstantial evidence in the case.

You may infer an intent to kill by the use of a dangerous weapon. Guns and knives, by their nature, are dangerous weapons. You may infer an intent to kill by the use of a dangerous weapon.

You may also consider an intent to kill by looking at the wounds, if any, and the number of shots fired, if any, and the nature of the wounds, if any. Were they in an area which was likely to cause death?

Those are the ways that can help you decide the intent.

The other element of the offense is premeditation. Premeditation means that a person has an opportunity not to do what they're going to do.

You don't have to premeditate over a period of days or weeks, or even minutes, as long as the perpetrator has an opportunity to weigh what he is going to do, and he does it anyway.

He thinks about it, has an opportunity for a second look, and he will go and then do the act anyway.

So the elements are, an intent to kill, and it was done with deliberation and premeditation. That is what is known as Murder in the First Degree.

It's an unlawful killing, it's an intentional killing, and it's done with premeditation and deliberation.

Again, premeditation doesn't take a week or a month, or even 10 minutes. As long as the person intends to do something, he thinks about it, and has an opportunity to walk away and not do it. That is known as premeditated murder.

During deliberation, the jury sent out a note asking the court to “Explain premeditation.” In response, the trial court gave the following explanation:

Premeditation means a person thought about something before doing it and had an opportunity to say, “I’m not going to do it.”

It doesn’t matter how long it was, as long as the person thought about it and had an opportunity to say, or for a second look to walk away, and committed the offense anyway.

So, all premeditation means, is what the word implies, to think about something beforehand, and to do it anyway. That’s all it is.

When defense counsel requested that the court give the standard jury instruction, CJI2d 16.1, the trial court refused to do so. CJI2d 16.1 states in pertinent part:

(4) Third, that this intent to kill was premeditated, that is, thought out beforehand.

(5) Fourth, that the killing was deliberate, which means that the defendant considered the pros and cons of the killing and thought about and chose [his/her] actions before [he/she] did it. There must have been real and substantial reflection for long enough to give a reasonable person a chance to think twice about the intent to kill. The law does not say how much time is needed. It is for you to decide if enough time passed under the circumstances of this case. The killing cannot be the result of a sudden impulse without thought or reflection.

As previously noted, to convict a defendant of first-degree murder, the prosecutor must prove that the killing was intentional and that the act of killing was premeditated and deliberate. MCL 750.316(1)(a); *Anderson, supra* at 537. In *Plummer, supra* at 300, this Court, quoting from *People v Morrin*, 31 Mich App 301, 329-331; 187 NW2d 434 (1971), reiterated the significance of the factors of premeditation and deliberation:

[I]t underscores the difference between the statutory degrees of murder to emphasize that premeditation and deliberation must be given independent meaning in a prosecution for first-degree murder. The ordinary meaning of the terms will suffice. To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of choice or problem. As a number of courts have pointed out, premeditation and deliberation characterize a thought process undisturbed by hot blood. While the minimum time necessary to exercise this process is incapable of exact determination, the interval between initial thought and ultimate action should be long enough to afford a reasonable man time to subject the nature of his response to a “second look.”

In other words, first-degree murder is distinguished from second-degree murder by the separate and distinct elements of premeditation and deliberation.¹ As this Court noted in *People v Milton*, 81 Mich App 515, 518; 265 NW2d 397 (1978), judgment amended 403 Mich 821 (1978),

Another fatal flaw in the instructions was their failure to define the elements of premeditation and deliberation. These elements distinguish first-degree murder from second-degree murder. *People v Vail*, 393 Mich 460, 468; 227 NW2d 535 (1975). Failure to define these elements independently of malice has the effect of abolishing the difference between first-degree murder and second-degree murder. *People v Morrin*, *supra* at 326; *People v Hoffmeister*, 394 Mich 155, 158; 229 NW2d 305 (1975). “To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem.” *People v Morrin*, *supra* at 329; see also, *People v Vail*, *supra* at 468. In the instant case, nothing in the instruction afforded the jury any understanding of these crucial elements of the crime of which they convicted the defendant.

Similarly, in the instant case, the trial court in its instructions to the jury failed to adequately define and distinguish premeditation and deliberation and indeed, failed to provide the jury with any definition of deliberation. Although the trial court instructed that the elements of first-degree murder are “an intent to kill, and it was done with deliberation and premeditation,” and that premeditation involved “the opportunity for a second look,” the trial court never explained that deliberation was separate and distinct from premeditation, and that deliberation effectively involves “real and substantial reflection for long enough to give a reasonable person a chance to think twice about the intent to kill.” CJI2d 16.1(5). Obviously, the jury’s note requesting additional instructions on premeditation shows that this was a concern in this case. We conclude that the trial court’s instruction omitting any definition of the element of deliberation constituted error requiring reversal of defendant’s first-degree murder conviction

¹ In *People v Mayhew*, 236 Mich App 112,125; 600 NW2d 370 (1999), this Court explained:

The offense of second-degree murder consists of the following elements: “(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.” *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). . . . The element of malice is defined as “the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *Id.* at 464. Malice for second-degree murder can be inferred from evidence that the defendant “intentionally set in motion a force likely to cause death or great bodily harm.” *People v Djordjevic*; 230 Mich App 459, 462; 584 NW2d 610 (1998). The offense of second-degree murder does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of life-endangering consequences. *Goecke*, *supra* at 466.

because it affirmatively appears more probable than not that the error was outcome determinative.

Specifically, there was a serious question of fact whether defendant gave substantial reflection for a sufficiently long enough period of time before he began shooting. As explained in *Morrin, supra* at 329, “to deliberate is to measure and evaluate the major facets of a choice or problem.” According to defendant’s custodial statement, he ran back to his car to get his gun when he heard someone say, “He got a gun.” After retrieving his gun, defendant ran toward the victims and started shooting. Based on defendant’s account, the jury might have found that he acted impetuously, without premeditation or deliberation, shooting at the victims because he believed that one of them had a gun.

Thus, while there was sufficient evidence for the jury to find defendant guilty of first-degree murder in this case, see text, issue V, *supra*, the jury might well have found him guilty only of second-degree murder if it had been properly instructed on the elements of first-degree murder. Under these circumstances, reversal of defendant’s conviction is required because it affirmatively appears more probable than not that the instructional error was outcome determinative. We therefore reverse defendant’s first-degree murder conviction and remand for a new trial on that charge.

VII

Defendant next contends that the trial court abused its discretion by denying his request for a *Ginther*² hearing to develop a record to test the validity of his ineffective assistance of counsel claims. Defendant asserts that he was denied effective assistance of counsel because his counsel (1) failed to investigate effectively and advance the self-defense claim, (2) acquiesced in the trial court’s inadequate voir dire, (3) failed to challenge the inadequate efforts of the police in producing two res gestae witnesses at trial, (4) failed to impeach a complainant effectively with his prior inconsistent statement, and (5) failed to file a pretrial motion to suppress his custodial statement. We conclude that remand to the trial court for a *Ginther* hearing is warranted regarding two of these allegations.

A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). “First, the defendant must show that counsel’s performance was deficient. This requires a showing that counsel made errors so serious that counsel was not performing as the ‘counsel’ guaranteed by the Sixth Amendment.” *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *Id.* at 690. “Second, the defendant must show that the deficient

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

performance prejudiced the defense.” *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). [*People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).]

Defendant first claims that he was denied effective assistance of counsel because his counsel failed to investigate effectively and advance the self-defense claim. As the prosecution points out, defendant declined to testify at trial. By exercising his constitutional right to remain silent, it would appear that defendant opted not to present his self-defense claim as a matter of trial strategy.

However, it is troubling that defense counsel, after advancing the self-defense theory in his opening statement and having the trial court instruct the jury on self-defense, failed to put defendant – the critical witness to such a defense – on the stand. According to defendant, he did not voluntarily waive his right to testify because both he and his mother understood counsel’s advice as indicating that defendant would be convicted of manslaughter if he did not testify. Defendant and his mother testified to this effect at the motion hearing on February 1, 2002.

Although decisions about whether to call a particular witness are decisions of trial strategy, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), the failure to call a certain witness can constitute ineffective assistance when it deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A substantial defense is one which might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Under the present circumstances, we conclude that remand for an evidentiary hearing is warranted to determine whether defendant was denied the effective assistance of counsel because his trial counsel failed to investigate and advance the self-defense claim, thereby depriving defendant of a substantial defense.

We conclude that another aspect of defendant’s ineffective assistance of counsel claim likewise calls for further review at a *Ginther* hearing. Defendant claims that trial counsel was ineffective because he failed to file a pretrial motion to suppress defendant’s custodial statement. At the hearing on his motion for a new trial, defendant testified that after he turned himself into the police, he twice asked to see a lawyer but his request was rudely rebuffed by a police officer. Defendant testified that the next day, before giving his statement to Investigator Simon, he again asked to see a lawyer. According to defendant, when he told his trial counsel about his requests for a lawyer, trial counsel said that “it was a waste of time” and in fact never filed a motion pursuant to *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965) to determine whether his custodial statement was voluntarily proffered.

Under these circumstances, we conclude that the trial court abused its discretion by denying defendant’s request for a *Ginther* hearing to develop a record to test the validity of this ineffective assistance of counsel claim. Accordingly, we remand for an evidentiary hearing to

determine whether defendant was denied ineffective assistance of counsel because trial counsel failed to file a pretrial motion to suppress his custodial statement.

On the other hand, there is no merit to defendant's claim that his trial counsel was ineffective because he acquiesced in the trial court's inadequate voir dire. As already determined, the trial court did not abuse its discretion in conducting voir dire. Further, defense counsel properly exercised eleven of twelve peremptory challenges and none of the jurors was excusable for cause.

Similarly, there is no merit to defendant's claim that trial counsel was ineffective because he failed to challenge the inadequate efforts of the police in producing two res gestae witnesses. The failure of the two res gestae witnesses to appear in court was a consequence of their own actions in avoiding service, not those of defense counsel. As appellate counsel admitted at the hearing on the motion for a new trial, the witnesses were not called because the police could not find them.

Finally, defendant's claim that trial counsel was ineffective because he failed to impeach Quentin Leapheart with his prior inconsistent statement lacks merit. As the prosecution notes, defendant's attached exhibit is not a statement of Quentin Leapheart, but rather a police report reflecting that he was a witness. Thus, there was no basis in the record for defendant's claim that his counsel erred by failing to impeach Leapheart with a prior statement.

VIII

Defendant also contends that the cumulative effect of the errors in this case denied defendant a fair trial and require reversal of his convictions. We disagree.

The cumulative effect of error may be so prejudicial as to require reversal on the basis of a denial of a fair trial. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). This Court reviews this issue to determine if the combination of alleged errors denied defendant a fair trial. *Id.* at 387. "[T]he effect of the errors must have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *Id.* at 388.

As we have already concluded, defendant is entitled to a new trial on the basis of the trial court's instructional error regarding the first-degree murder charge. In addition, we have concluded that remand to the trial court for an evidentiary hearing on defendant's ineffective assistance of counsel claims is warranted. The effect of the other alleged errors was not sufficiently prejudicial to show that defendant was denied a fair trial.

IX

Defendant's final argument on appeal is that he is entitled to resentencing because the trial court departed from the statutory sentencing guidelines without complying with the statutory requirements and imposed disproportionate maximum sentences on his assault convictions. We agree and therefore vacate defendant's sentences on his two convictions for assault with intent to commit murder and remand for resentencing on these offenses.

In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed as a matter of law, and the determination that the factors constitute substantial and compelling reasons for departure is reviewed for an abuse of discretion. *People v Babcock*, ___ Mich ___, sl op p 18; ___ NW2d ___ (2003) (No. 121310, issued 7/31/03). As the *Babcock* Court explained, *supra* at sl op at 20, MCL 769.34(11) does not require this Court, in accordance with the commonly cited abuse of discretion standard set forth in *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959), to affirm a sentencing decision “unless the result [is] so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.” Rather,

The *Spalding* abuse of discretion standard is one that entitles the trial court the utmost level of deference. In our judgment, while the Legislature intended to accord deference to the trial court’s departure from the sentencing-guidelines range, it did not intend this determination to be entitled to *Spalding’s* extremely high level of deference.

* * *

. . . the appropriate standard of review must be one that is more deferential than de novo, but less deferential than the *Spalding* abuse of discretion standard. At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. . . . When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court’s judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes. See *Conoco, Inc v JM Huber Corp*, 289 F3d 819, 826 (CA Fed, 2002) (“Under an abuse of discretion review, a range of reasonable determinations would survive review.”); *United States v Penny*, 60 F3d 1257, 1265 (CA 7, 1995) (“a court does not abuse its discretion when its decision ‘is within the range of options from which one would expect a reasonable trial judge to select’”)(citation omitted). We believe that this test more accurately describes the appropriate range of the trial court’s discretion with regard to determining whether a substantial and compelling reason exists to justify its departure from the appropriate sentence range. [*Babcock, supra* at 19, 23-24.]

Pursuant to the legislative sentencing guidelines, a trial court is required to choose a sentence within the guidelines range unless there is a “substantial and compelling” reason for departing from this range. MCL 769.34(3); *Babcock, supra* at sl op p 7; *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A “substantial and compelling reason” must be “objective and verifiable;” must “‘keenly’ or ‘irresistibly’ grab our attention;” and must be “of ‘considerable worth’ in deciding the length of a sentence.” *Babcock, supra* at sl op at 9, quoting *People v Fields*, 448 Mich 58, 62, 67; 528 NW2d 176 (1995). The trial court must articulate on the record a substantial and compelling reason to justify the particular departure imposed. *Id.* at 12. A court may not depart from a sentencing guidelines range based on an offense

characteristic or offender characteristic already considered in determining the guidelines range unless the court finds, based on the facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b); *Babcock, supra* at sl op at 10 n 12, 21. If the sentence constituted a departure from the guidelines range and this Court finds that the trial court did not have a substantial and compelling reason for the departure, this Court must remand for resentencing. MCL 769.34(11); *Babcock, supra* at sl op at 20.

“In determining whether a sufficient basis exists to justify a departure, the principle of proportionality – that is, whether the sentence is proportionate to the seriousness of the defendant’s conduct and to the defendant in light of his criminal record – defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed.” *Babcock, supra* at sl op at 14-15. See also *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). “[I]n departing from the guidelines range, the trial court must consider whether its sentence is proportionate to the seriousness of the defendant’s conduct and his criminal history because, if it is not, the trial court’s departure is necessarily not justified by a substantial and compelling reason.” *Babcock, supra* at sl op at 17.

Here, defendant was convicted of first-degree murder, two counts of assault with intent to commit murder, and felony-firearm. The recommended minimum range under the legislative guidelines was 126 to 210 months’ imprisonment on the assault with intent to murder convictions; defendant was sentenced to the statutory maximum of parolable life sentences on these charges. In sentencing defendant, the trial court stated in pertinent part:

Well, I saw the weapon. It had been altered. The barrel had been, I mean not the barrel, the stock had been altered to permit the weapon to be fired from a running position, and not from a shoulder position, as a pistol would have been.

There was also a concealed baronet [sic]. This is an assault rifle, used by many armies around the world. And it’s only good for one reason.

Now, this is the weapon that the defendant had when he sprayed that car, with bullets. And could have ended up killing three people.

The Court totally rejects the statement that he made about misrepresentation, and having people take advantage of his inexperience, and not representing him properly. Pure nonsense. Absolute poppycock.

The Court will sentence him to serve a sentence of life, for First Degree Murder.

The Court will sentence him to serve a sentence of life, for Assault with Intent to Commit Murder.

The Court will sentence him to serve a sentence of life, for Assault with Intent to Commit Murder, the second count.

And I’m aware of the guidelines, and I reject the guidelines as being totally inadequate, in view of the circumstances that this man tried to kill three

people, and actually killed one. That he used a dangerous assault weapon that had been altered. A weapon with a baronet [sic] that shows clearly his intent was to come away from there killing as many people as he could. So, I'm going to ignore it.

I think that a statement has to be made. And that others must be discouraged from taking similar action.

The Court will also sentence him to serve a two year sentence for Felony Firearm, to be served consecutive to Count 1, Count 2, and Count 3.

As the trial court noted at sentencing, defendant used an "assault rifle" to commit the assaults.³ Although our review of Michigan precedent reveals no cases in which departure from the sentencing guidelines (whether judicial or legislative) has been based expressly on the nature of the weapon used to commit the offense, we conclude that departure from the guidelines may be predicated on the nature of the weapon because it is an objective and verifiable factor. *Babcock, supra*. Further, there is no indication that the use of a semi-automatic weapon is an offense characteristic or offender characteristic that is already considered in determining the guidelines range.

Nonetheless, we conclude that the trial court abused its discretion in determining that the objective and verifiable factor present in this case – defendant's use of an semi-automatic rifle – constituted a substantial and compelling reason justifying the particular guidelines departure at issue, because the sentences imposed for the assault convictions (the statutory maximum of parolable life imprisonment) are not proportionate to the seriousness of defendant's conduct and his criminal history.⁴

In this case, we conclude that defendant's sentences on his assault convictions were not proportionate to the seriousness of the crime *and* his prior record. Here, there is no question about the seriousness of defendant's criminal conduct. As the trial court noted, defendant, by using an assault rifle in the shooting, could have killed three people. However, the sentence is not proportionate in light of defendant's prior record. Defendant, who was twenty-one years old at the time of the crime, had no prior record, had graduated from high school but was unemployed and not married. In the presentence report, defendant denied that he used illegal controlled substances or that he abused alcohol. He also denied that he participated in gangs. He was raised by both parents and apparently presented no special problems growing up. We conclude that there is no justification for imposing the statutory maximum on this particular

³ According to the trial testimony of Detroit Police Officer David Pauch, defendant's rifle was a "semi-automatic weapon."

⁴ As the *Babcock* Court noted, *supra* at sl op at 25 n 22:

While a reason cannot be a substantial and compelling reason unless it is objective and verifiable, the opposite is not always true. A reason can be objective and verifiable without being substantial and compelling.

offender with regard to his assault convictions, notwithstanding the seriousness of the shooting incident. Consequently, the trial court abused its discretion in sentencing defendant to the statutory maximum on his assault convictions because the departures from the guidelines violate the principle of proportionality. We therefore vacate defendant's sentences on his assault convictions and remand for resentencing. *Babcock, supra*.

X

In sum, we reverse defendant's conviction for first-degree murder and remand to the trial court for a new trial on the first-degree murder charge; remand to the trial court for a *Ginther* hearing on defendant's claims that his trial counsel was ineffective for failing to advance his self-defense claim by calling defendant as a witness and failing to file a pretrial motion to suppress his custodial statement; and vacate defendant's sentences on his convictions for assault with intent to commit murder and remand for resentencing on these two convictions. In light of the fact that the *Ginther* hearing disposition could impact the viability of defendant's convictions on two counts of assault with intent to murder and felony-firearm, the trial court should conduct the *Ginther* hearing and rule on defendant's motion for a new trial on this basis before conducting further trial proceedings. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ William B. Murphy
/s/ Kathleen Jansen