

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNATHAN M. WEBB,

Defendant-Appellant.

---

UNPUBLISHED  
December 9, 2003

No. 242415  
Wayne Circuit Court  
LC No. 01-003496-01

Before: Cavanagh, P.J., and Jansen and O’Connell, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316(1)(a), possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to concurrent prison terms of life without parole for the first-degree murder conviction, and two to five years for the felon in possession of a firearm conviction, to be served consecutive to a two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

On appeal, defendant raises two issues concerning jury instructions. Defendant first argues that reversal is required because the trial court denied his request to instruct on the lesser offense of reckless discharge of a firearm, MCL 752.861. We disagree.

A claim of instructional error is reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Under our Supreme Court’s decision in *People v Cornell*, 466 Mich 335, 359; 646 NW2d 127 (2002), an instruction on reckless discharge of a firearm would not have been warranted because that offense is not a necessarily included lesser offense of murder. But it is not clear whether *Cornell, supra*, applies to this case, because defendant was convicted before *Cornell* was decided and because this case was not then pending on appeal. See *Cornell, supra* at 367. Even if *Cornell, supra*, does not apply, however, appellate relief would not be warranted because a review of the record discloses that the evidence did not support an instruction on reckless discharge of a firearm. Defendant’s theory was that he shot the victim in anger. The evidence did not support a finding that the victim was shot four times because defendant’s shotgun recklessly discharged. Thus, failure to instruct on reckless discharge of a firearm was not error. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991); *People v Burns*, 250 Mich App 436, 441; 647 NW2d 514 (2002).

Defendant also argues that reversal is required because the trial court instructed the jury that defendant's state of mind could be inferred from the use of a dangerous weapon. Because defendant did not preserve this issue by objecting to the challenged instruction at trial, we review this issue for plain error affecting his substantial rights. *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003).

The trial court instructed the jury in accordance with CJI2d 16.21, advising that defendant's state of mind "may be inferred from the kind of weapon used" and that "[y]ou may infer the defendant intended to kill if he used a dangerous weapon in a way that was likely to cause death." The court's instructions used the permissive term "may" and, therefore, did not improperly suggest that the jury must find that defendant had an intent to kill if it found that he used a dangerous weapon. The instructions here did not leave the jury with no alternative other than to find that defendant intended to kill. The trial court merely informed the jury that it may make certain inferences. Furthermore, the instruction did not shift the burden of proof. Indeed, the trial court instructed the jury several times that the burden of proof was with the prosecutor. Accordingly, defendant has failed to show a plain error affecting his substantial rights.

Defendant also argues that reversal is required because the jury was biased against him. This claim is premised on an apparent note from the jury after the parties had rested, but before closing arguments, in response to which the trial court instructed the jurors that they would have to rely on their independent recollection of the testimony. Because defendant did not object below to any allegedly improper conduct by the jury, or object to the trial court's response to the jury's inquiry, this issue is not preserved. Therefore, defendant must show a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A defendant who chooses a jury trial has an absolute right to a fair and impartial jury. *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994). Here, the record does not reveal the nature of the jury's question that prompted the response by the trial court, nor is there any indication in the record that the jury was biased against defendant. Neither the fact that the jury asked a question, nor the response given by the trial court, suggests any bias. Plain error has not been demonstrated. See *Carines*, *supra* at 763.

Next, defendant argues that the evidence was insufficient to support his conviction of first-degree murder. In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

In this case, defendant and the victim were long-term friends. Shortly before the shooting, defendant was informed that the victim had physically assaulted and injured his sister, causing defendant to become visibly angry. Defendant asserts that this evidence demonstrates that he was incapable of forming the requisite premeditation and deliberation to commit first-degree murder. We disagree.

To establish first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and the act of killing was deliberate and premeditated. *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995). Although there is no

specific time requirement, premeditation and deliberation require sufficient time to allow the defendant to take a second look. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999); *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). To premeditate is to think about beforehand and to deliberate is to measure and evaluate the major facets of a choice or problem. *Plummer, supra* at 300. Premeditation and deliberation characterize a thought process undisturbed by hot blood. *Id.* 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. *Haywood, supra* at 229. Additionally, premeditation may be inferred from the type of weapon used and the location of the wounds inflicted. *People v Berry*, 198 Mich App 123, 128; 497 NW2d 202 (1993).

Defendant asserts that the shooting occurred because he learned that the victim had physically abused his sister, thus, demonstrating that he was "clearly disturbed by hot blood." But there was also evidence that defendant and the victim had known each other for many years and that defendant was aware of the victim's past physical abuse of another sister. The prior relationship between defendant and the victim may support a finding of premeditation. *People v Coy*, 243 Mich App 283, 316; 620 NW2d 888 (2000). Further, the evidence indicated that defendant did not leave the house immediately after learning of the abuse of his sister. The evidence also indicated that defendant was not armed with a weapon when he learned of the abuse to his sister, thus, supporting an inference that he had to obtain the gun from elsewhere. Also, the victim was at a different location, thereby requiring defendant to travel to the victim's residence. Viewed most favorably to the prosecution, there was sufficient evidence to enable the jury to find that defendant had ample time for reflective thought and to take a "second look" at his actions. When defendant arrived at the victim's residence, he shot the victim four times with a shotgun, once each in the neck or shoulder area, armpit, chest, and abdomen. There was sufficient evidence to enable the jury to find that defendant killed the victim with premeditation and deliberation.

Finally, we find no merit to defendant's arguments that his legislatively mandated life sentence without the possibility of parole violates the Michigan Constitution. Const 1963, art 4, § 45. While the Michigan Constitution plainly authorizes indeterminate sentencing, it does not prohibit determinate sentencing as punishment for a crime. *People v Snider*, 239 Mich App 393, 426; 608 NW2d 502 (2000); *People v Cooper*, 236 Mich App 643, 661; 601 NW2d 409 (1999). Further, the appellate courts of this state have long held that the imposition of a mandatory, nonparolable life sentence for first-degree murder does not constitute cruel or unusual punishment. *People v Hall*, 396 Mich 650, 657; 242 NW2d 377 (1976); *People v Smith*, 108 Mich App 338, 345; 310 NW2d 235 (1981).

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Kathleen Jansen  
/s/ Peter D. O'Connell