

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERYL L. HARLAQUE,

Defendant-Appellant.

UNPUBLISHED

May 8, 2007

No. 267949

Wayne Circuit Court

LC No. 05-010470-01

Before: Talbot, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant was charged with first-degree murder, MCL 750.316. Following a jury trial, defendant was convicted of the lesser offense of voluntary manslaughter, MCL 750.321. Defendant was sentenced, as a third habitual offender, MCL 769.11, to 12 ½ to 30 years in prison. We affirm defendant’s conviction but remand for resentencing.

Defendant first argues that he is entitled to a new trial because he was erroneously bound over on the first-degree murder charge. Specifically defendant contends the trial court abused its discretion in denying his motion to quash the bindover where insufficient evidence of premeditation and deliberation were presented. Defendant contends his conviction of the lesser offense of voluntary manslaughter demonstrates that he was prejudiced as a result of the bindover on the charge of first-degree murder.

A district court’s decision to bind over a defendant and a circuit court’s ruling regarding a motion to quash an information are reviewed for an abuse of discretion. *People v Hill*, 269 Mich App 505, 513-514; 715 NW2d 301 (2006) (citations omitted). This Court defers to the trial court’s judgment when the trial court chooses an outcome that falls within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Notably, sufficient evidence of premeditation and deliberation were present at the bindover. There was testimony that defendant stabbed the unarmed victim multiple times, including several stab wounds to the victim’s back while he was on the ground. In addition, a witness indicated that defendant continued the assault by following the victim when he attempted to retreat by crossing the street. As recognized at the preliminary examination and on the motion to quash, “pursuit of a fleeing victim can indicate premeditation and deliberation.” *People v Johnson*, 427 Mich 98, 115; 398 NW2d 219 (1986) (citation omitted). Because, “[i]t is clear on

this record that there was evidence from which the magistrate could have inferred premeditation and deliberation . . . it is therefore manifest that we, as a reviewing Court, cannot disturb the determination of the magistrate.” *Id.*

Contrary to defendant’s assertion, even if an evidentiary error occurred at the preliminary examination stage, it “does not require automatic reversal of the subsequent conviction absent a showing that defendant was prejudiced at trial.” *People v Hall*, 435 Mich 599, 602-603; 460 NW2d 520 (1990). See also *People v Yost*, 468 Mich 122, 124 n 2; 659 NW2d 604 (2003). In this instance, defendant contends that his conviction for voluntary manslaughter was the result of a compromise verdict and that, had he been properly charged of the lesser offense at trial, that he would have been convicted of an even lesser crime than voluntary manslaughter. This assertion by defendant is mere speculation. Although defendant contends the prosecution failed to come forth with sufficient evidence to dispute his theory of self-defense, the jury, by convicting defendant of voluntary manslaughter, rejected defendant’s claim of self-defense. Because there was sufficient evidence at trial to take the issue of premeditation and deliberation to the jury, any alleged error at the preliminary examination stage must be considered harmless in view of the lack of any actual prejudice.

Next, defendant argues that the prosecution failed to establish beyond a reasonable doubt that he did not act in self-defense. A sufficiency of the evidence claim is reviewed de novo to determine whether a rational factfinder could have concluded that the prosecution proved all elements of the crime beyond a reasonable doubt. *People v Cox*, 268 Mich App 440, 443; 709 NW2d 152 (2005). Direct and circumstantial evidence is viewed in the light most favorable to the prosecution. *People v Hardiman*, 466 Mich 417, 429; 646 NW2d 158 (2002).

Defendant was entitled to claim self-defense as a legal justification for the killing if “he honestly and reasonably believe[d] that he [was] in imminent danger of death or great bodily harm and that it [was] necessary for him to exercise deadly force.” *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002).¹ However, this defense “requires that the actor try to avoid the use of deadly force if he can safely and reasonably do so, for example by applying nondeadly force or by utilizing an obvious and safe avenue of retreat.” *Id.* “A defendant is not entitled to use any more force than is necessary to defend himself.” *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). The prosecution has the burden of disproving self-defense beyond a reasonable doubt once evidence is introduced. *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993).

Defendant was sitting on a wall at a bus stop reading a newspaper when the victim ran toward defendant, striking him in the shoulder. Both men fell to the ground and a scuffle ensued. The victim reached toward his waist, but defendant pulled out a knife and began striking at his assailant. The victim fell to the ground and before he was able to stand up, defendant stabbed him multiple times in the back. The victim stood up and tried to cross the street, but collapsed.

¹ Effective October 1, 2006, MCL 780.972 codified the right to use deadly force in self-defense or defense of another individual.

Defendant initially pursued the victim, but then fled in the opposite direction. A witness testified that he never saw a knife or weapon in the victim's hand.

Even assuming the victim instigated the fight; defendant was not justified in using deadly force, as the victim was unarmed. *Kemp, supra* at 322. Defendant's own statement to the police indicated that he pulled out his knife even before he thought the victim was reaching for something on his belt. In addition, defendant had a duty to retreat if he could safely do so. *Riddle, supra* at 119. Defendant not only escalated the amount of force used in the fight, but used the knife to stab the victim multiple times, even when the victim was on the ground. Defendant demonstrated no intention of retreating and actually pursued his victim into the street. Defendant could not be deemed to be acting in self-defense when he stabbed the victim multiple times in the back while the victim was unarmed and on the ground.

Finally, defendant argues that the trial court erred in assessing 50 points for offense variable three (OV 3) and that trial counsel was ineffective for failing to object. Offense variable 3 is used when there is physical injury to a victim. *People v Cathey*, 261 Mich App 506, 512; 681 NW2d 661 (2004); MCL 777.33. Defendant should receive 50 points under OV 3 "if death results from the commission of a crime and the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive" and the defendant is under the influence of alcohol or a controlled substance. MCL 777.33(2)(c). The prosecution concurs that defendant was improperly assessed 50 points for OV 3 based on the absence of defendant's use or the "operation of a vehicle."² Defendant failed to object to the scoring deficiency at sentencing and did not seek resentencing or remand. As such, our review of this unpreserved scoring issue is for plain error. *People v Kimble*, 252 Mich App 269, 275-276; 651 NW2d 798 (2002).

We find plain error requiring resentencing. The guidelines range for defendant was improperly calculated based on the undisputed scoring error on OV 3. Because the upper range for defendant, as a third habitual offender, would be 129 months, MCL 777.21(3)(b), defendant's current minimum sentence of 150 months falls outside the guidelines range. Thus, defendant was sentenced on the basis of an improper guidelines range. This is plain error requiring remand for resentencing or articulation by the trial court of a substantial and compelling reason for the departure.

Although defendant contends that counsel was ineffective for failing to challenge the scoring error for OV 3, this Court need not address this issue in light of our remand for resentencing.

² Notably, both parties concur that defendant should have been assessed 25 points on OV 3.

We affirm defendant's conviction and remand to the trial court for resentencing. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto