STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LONNIE CARL THOMAS,

Defendant-Appellant.

UNPUBLISHED
January 24, 1997

Ingham County
No. 179483
LC No. 94-066887

Before: Corrigan, P.J., and Taylor and D.A. Johnston,* JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of voluntary manslaughter, MCL 750.321; MSA 28.553, and his plea-based conviction of habitual offender, second offense, MCL 769.10; MSA 28.1082. The court sentenced defendant to a term of imprisonment of 15 to 22½ years on the habitual offender conviction, after vacating his sentence of ten to fifteen years on the manslaughter conviction. We affirm.

In the early morning hours of December 8, 1993, defendant stabbed and killed victim James Woods at the rooming house where defendant lived. Woods and defendant previously had discussed killing another resident of the house, Kip Brown. Woods, defendant and another man beat Brown several times that day. For unknown reasons, Woods later slapped defendant's girlfriend and slapped and choked defendant. Defendant, his girlfriend, Woods, and others then went to Brown's apartment and assaulted him. As they left Brown's apartment, defendant pulled out a knife and attacked Woods again. The two men fought on the stairway of the rooming house and defendant stabbed Woods, who died from the wounds.

Defendant first argues that he acted in self-defense and that the prosecutor did not disprove his self-defense theory beyond a reasonable doubt. We disagree.

* Circuit judge, sitting on the Court of Appeals by assignment.

Criminal conduct is justifiable as self-defense if the defendant honestly and reasonably believes that his life is in imminent danger or that a threat of serious bodily harm exists and that his conduct is necessary to prevent such harm. *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). Once the defendant produces evidence of self-defense, the prosecutor must disprove it beyond a reasonable doubt. *People v Fortson*, 202 Mich App 13, 19-20; 507 NW2d 763 (1993). Defendant's girlfriend testified that defendant pulled a knife from the back of his pants and "went at" Woods. Defendant produced no evidence to show that he reasonably believed that his life was in danger or that Woods was threatening him with serious bodily harm. The evidence disproves defendant's self-defense theory beyond a reasonable doubt.

Defendant next asserts that the court should have granted his motion for a directed verdict on the first-degree murder charge. When ruling on a directed verdict motion, we consider the evidence presented by the prosecutor, up to the time the motion was made, in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1991).

To convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). The elements of premeditation and deliberation require that the defendant had an opportunity for a second look. The factfinder may infer those elements from the circumstances surrounding the homicide. *Id.* Premeditation may be established by evidence of: (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances surrounding the killing itself; and (4) the defendant's conduct after the killing. *Id.*

The jury convicted defendant of voluntary manslaughter. If the evidence was insufficient on the element of premeditation, then prejudice is presumed and defendant's conviction must be reversed, even though defendant was acquitted of first-degree murder. *People v Vail*, 393 Mich 460, 464; 227 NW2d 535 (1975). That a killing occurred in an unplanned confrontation does not preclude a finding of premeditation and deliberation. *People v Gonzalez*, 178 Mich App 526, 532-534; 444 NW2d 228 (1989). Because sufficient evidence existed to submit the issue to the jury, however, defendant is not entitled to relief.

The prosecutor presented sufficient evidence on the issue of premeditation and deliberation to justify the court's denial of the directed verdict motion. The testimony from defendant's girlfriend established that a period of time elapsed between the first altercation, when Woods slapped and choked defendant, and the time when defendant killed Woods. Because time passed between the two events, the court could have determined that sufficient time elapsed for an opportunity for a "second look." Moreover, defendant initiated the stabbing and Wood was unarmed. Thus, the question of defendant's state of mind was properly for the trier of fact.[1]

Additionally, defendant contends that the court erred by not instructing the jury that he had no duty to retreat while he was in his own dwelling. We cannot agree. Generally, a person must retreat, if retreat is safely possible, before he may exercise deadly force to repel an attack. *People v Mroue*, 111 Mich App 759, 765; 315 NW2d 192 (1981). Where the person honestly and reasonably believes that he must immediately use deadly force to protect himself from an immediate threat of death or serious injury, however, then he need not retreat. Similarly, if a person is attacked in his own home, where he has a right to be, he has no duty to retreat. *Id.*

The trial court declined to give the instruction regarding duty to retreat, stating that defendant killed Woods in the rooming house's hallway, a common area, and thus defendant was not in his personal and private space. While we agree that the court properly refused to instruct the jury on defendant's right not to retreat, we do not agree with the proffered reasoning. We will not reverse, however, where a trial court reaches the right result for the wrong reason. *People v Brake*, 208 Mich App 233, 242 n 2; 527 NW2d 56 (1994).

Under *Mroue*, a person must have been attacked to invoke the no duty to retreat defense. Here, Woods did not attack defendant. According to one witness, Woods merely was holding a bottle of vodka and a cigarette and "ordering people around" when defendant rushed at him, fought with him, and stabbed him. Defendant's girlfriend said that defendant attacked Woods; she did not testify that Woods was the aggressor and assaulted defendant. Defendant produced no evidence that Woods attacked him. Accordingly, the trial court correctly refused to instruct the jury that defendant had no duty to retreat.

Defendant next contends that the trial court erred in failing to instruct the deadlocked jury of its options to acquit defendant and/or to be discharged without reaching a verdict. Absent manifest injustice, instructional error is not properly preserved for appeal absent a timely objection. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Because this issue is not properly preserved for our review and because our refusal to review this issue will not result in manifest injustice, we decline to review the claim. In any event, the court provided the jury with written copies of the jury instructions regarding self-defense. Additionally, defendant presents no authority requiring a court to instruct that it will discharge the jury if the jury cannot reach a verdict. Also, the court did not coerce a verdict when attorneys for both parties agreed that asking the jury to stay later than 5:00 p.m. was reasonable and when the court instructed the jury that it could resume deliberations the following day.

Finally, defendant argues that his sentence of fifteen to 22½years as an habitual offender was disproportionate. The sentencing guidelines do not apply to habitual offenders. *People v Cervantes*, 448 Mich 620, 625; 532 NW2d 831 (1995) (Riley, J.), and *Cervantes*, 448 Mich at 630 (Cavanagh, J). Appellate review of habitual offender sentences utilizing the sentencing guidelines is inappropriate. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). Nonetheless, a sentence must be proportionate to the seriousness of the offense and the background of the offender. *People v Milbourn*, 435 Mich 630, 635-636, 650-651; 461 NW2d 1 (1990). Defendant has prior adult felony convictions for second-degree murder and for possession of a firearm during the commission of a felony. In this case, defendant stabbed Woods eight times, and stabbed Woods'

hands as he attempted to defend himself. Defendant was on bond for a charge of assault and battery when he committed the instant offense. Because of his criminal history and the nature of this offense, defendant has not established that the court abused its discretion in sentencing him. See *Cervantes*, *supra*.

Affirmed.

/s/ Maura D. Corrigan
/s/ Clifford W. Taylor
/s/ Donald A. Johnston

[1] We note that defendant's reliance on *People v Morris*, 202 Mich App 620; 509 NW2d 865 (1993), is misplaced. Our Supreme Court vacated the *Morris* opinion and reinstated the defendant's first-degree murder conviction. *People v Morris*, 445 Mich 860; 514 NW2d 167 (1994).