# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME HARVEY SMITH,

Defendant-Appellant.

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UNPUBLISHED
February 12, 1999

No. 204095
Muskegon Circuit Court
LC No. 97-1-40179-FC

Before: Griffin, P.J., and Neff and Bandstra, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and carrying a concealed weapon, MCL 750.227; MSA 28.424. The trial court sentenced defendant to life imprisonment without parole for first-degree murder, and two-and-one-half years' to five years' imprisonment for carrying a concealed weapon, to be served consecutively with a two-year sentence for felony-firearm. Defendant appeals his convictions and sentences as of right. We affirm.

Defendant first claims on appeal that the trial court erred in failing to find that defendant killed John Manurs in self-defense. We disagree. We find that the trial court, in compliance with MCR 6.403, found on the record that defendant did not act in self-defense, and this finding is supported by the record and applicable law.

It is well-settled in Michigan that "the killing of another person in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm." *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). A claim of self-defense necessarily requires a finding that the defendant acted intentionally, but that his actions were justified under the circumstances. *Id.* at 503. A defendant may only use the amount of force necessary to defend himself, but no more. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Also, if the defendant is the aggressor, he is not entitled to claim self-defense unless he withdraws from any further encounters with the victim and communicates his withdrawal to the victim. *Id.* at 323. Furthermore, retreat is required to avoid using deadly force where a defendant can do so safely. *People v Stallworth*, 364 Mich 528, 535; 111 NW2d 742 (1961).

The trial court found Darnesia Langston's and Satanuel Hall's version of events more believable than defendant's as expressed in his own testimony and as conveyed through Michael Boyd on the witness stand. Darnesia and Satanuel testified that defendant did not have the box cutter in his hand when he was shot; rather, the box cutter fell out of his jacket pocket when Manurs fell to the floor after being shot. Although officer Lovely Jamison testified that Darnesia told him on the night of the shooting that defendant produced a handgun and told Manurs that he would blow his head off, and that Manurs "produced" a box cutter and stood in front of defendant, Jamison admitted on cross-examination that the word "produced" was his word and that Darnesia could have told him that Manurs "had" a box cutter. Furthermore, both Darnesia and Satanuel testified that Manurs never approached defendant aggressively or threatened him in any way. Although the trial judge discounted Gretchen Langston's testimony somewhat because after the shooting she asked Satanuel what had happened, Gretchen's testimony was the same as that of Darnesia and Satanuel, i.e., that when defendant shot Manurs, he had his coat in his hand and was not trying to attack defendant or threaten him in any way.

Pursuant to MCR 2.613(C), we give regard to the special opportunity of the trial court to judge the credibility of witnesses. Given that the trial court believed the version of events testified to by Darnesia and Satanuel, defendant did not have a valid claim of self-defense. According to Darnesia's and Satanuel's version of events, Manurs did not display the box cutter that was in his jacket pocket before defendant shot him. It follows then that defendant could not have honestly and reasonably believed that his life was in imminent danger or that there was a threat of serious bodily harm. *Heflin, supra* at 502. Furthermore, because Darnesia testified that defendant could have left through the front door when Manurs turned to get his jacket, it is clear that defendant did not retreat as he was legally required to do. *Stallworth, supra*. The trial court did not err in finding that defendant's self-defense claim fails.

Next, we address defendant's imperfect self-defense claim. The imperfect self-defense doctrine is a means of mitigating a murder charge to involuntary manslaughter and has been applied by this Court where the defendant would have been entitled to claim self-defense had he not been the initial aggressor. *Kemp, supra;* see, also, *Heflin, supra* at 507. Whether the accused is entitled to invoke the imperfect self-defense doctrine requires a determination of "'the intent with which the accused brought on the quarrel or difficulty.'" *Kemp, supra* at 324 (emphasis omitted), quoting *State v Partlow*, 90 Mo 608, 617; 4 SW 14 (1887). If the defendant initiated the confrontation between himself and the victim with the intent to kill or do great bodily harm, he is not entitled to mitigate the murder charge to manslaughter. *Kemp, supra*. Additionally, we noted in *Kemp* that in circumstances where the defendant uses excessive force, the defense of imperfect self-defense is likewise unavailable. *Id.* at 325, n 2.

The trial court in this case considered the imperfect self-defense claim, which it recognized could mitigate the murder charges to manslaughter. In determining whether the defense of imperfect self-defense was available to defendant, the trial court focused on the intent with which defendant brought on the quarrel or confrontation. In so doing, the trial court again resolved conflicting testimony about the general escalation of events in favor of Darnesia and Satanuel, finding that defendant was the aggressor. The trial court found defendant killed Manurs because Manurs had "disrespected" him, which is what defendant told Porsche Collins on the night of the murder. Based on defendant's movement of the gun

under his leg after Manurs came to the door, his comments that he was "no whore" and that he wanted to be prepared if Manurs said something or approached him in the wrong way, his conduct in staring at Manurs once Manurs was inside the home and his saying "nigger what" to Manurs as defendant jumped up off the couch with a gun hidden behind his back, it is clear that defendant was the aggressor in this situation. After defendant jumped up off the couch, Manurs appeared to Darnesia and Satanuel to still be joking around and was unaware that defendant was serious and had a gun behind his back. Manurs turned around to reach for his jacket and before he even turned all the way back around, defendant shot him. There is no indication whatsoever, aside from defendant's own testimony, which the trial court found incredible, that Manurs was aggressive toward defendant in any way before defendant shot him and killed him. Based on this evidence, which is supported in the record, the trial court correctly found that the defense of imperfect self-defense was not available to defendant.

Defendant next claims on appeal that there was insufficient evidence to prove first-degree murder. We review a challenge to the sufficiency of the evidence at a bench trial by viewing the evidence presented in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Kemp, supra* at 322. Viewing the evidence in a light most favorable to the prosecution, we find that there was sufficient evidence upon which the trier of fact could find defendant guilty of first-degree murder and specifically, that defendant's killing of Manurs was intentional, premeditated, and deliberate.

To establish the crime of first-degree murder, it must be determined that the defendant intentionally killed the victim and that the act of killing was deliberate and premeditated. *People v Wofford,* 196 Mich App 275, 278; 492 NW2d 747 (1992). "Premeditation and deliberation may be inferred from the circumstances surrounding the killing." *Id.* "To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem." *People v Furman,* 158 Mich App 302, 308; 404 NW2d 246 (1987). Premeditation and deliberation require sufficient time to allow a defendant to take a second look. *People v Anderson,* 209 Mich App 527, 537; 531 NW2d 780 (1995). The length of time required to provide a sufficient time lapse to take a second look may be seconds, minutes, hours, or more, depending on the circumstances surrounding the killing. *People v Conklin,* 118 Mich App 90, 93; 324 NW2d 537 (1982). Evidence of the following factors may establish premeditation: (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide. *Anderson, supra; Furman, supra.*

Defendant contests the trial court's finding that defendant's killing of Manurs was willful, premeditated, and deliberate. First, the evidence clearly establishes that the killing was willful. Defendant brought the gun to Gretchen's residence and shot Manurs at close range after he made a remark that defendant found insulting or disrespectful. Further, a review of the evidence supports the trial court's finding that defendant's actions were deliberate and premeditated. The facts are undisputed that defendant brought a sawed-off shotgun with him to Gretchen's house. Further, Darnesia testified that she observed defendant move the gun and place it under his leg on the couch where it was accessible to him should he need it if Manurs said something to him or approached him in the wrong way. Defendant's conduct clearly indicates that he was preparing to use the gun in certain

circumstances. In *Conklin, supra* at 93, this Court stated that evidence that defendant had time for a "second look," i.e., time to consider his course of action, includes "[a] murder weapon acquired and positioned in preparation for homicide." Additionally, this Court in *People v Waters*, 118 Mich App 176, 186-187; 324 NW2d 564 (1982), stated that premeditation and deliberation can be inferred from the possession of a deadly weapon in advance of a killing, provided there is other evidence showing a motive or plan that would enable a trier of fact to infer that the killing was not a spur-of-the-moment decision. Defendant's motive for the killing in this case is established by his own words to Collins that he killed Manurs because he disrespected him.

Further, the circumstances of the killing itself suggest premeditation. Upon the perceived disrespect, i.e., when Manurs made comments about his boots that defendant took as direct insults or threats, defendant jumped off the couch and said to Manurs "nigger what." Gretchen testified that she heard the two men arguing, saying "nigger what" back and forth. When defendant jumped from the couch and began the confrontation with Manurs, he hid the gun behind his back. If the testimony of Darnesia and Satanuel is believed, defendant shot Manurs as Manurs was turning around after reaching for his jacket. There was no threatening or aggressive behavior displayed by Manurs that would have hurried defendant's decision whether to shoot Manurs with the gun. While it is recognized that some time span must lapse between the initial homicidal intent and the killing in order to find premeditation and deliberation, it is also recognized that only a few seconds can satisfy the lapse of time requirement. *Waters, supra* at 187 (where we found that it could be inferred that formation of a homicidal intent occurred between time defendant drew weapon from waistband and instant he first pulled the trigger). In the present case, when defendant first jumped up from the couch perceiving disrespect or an insult, he formed the homicidal intent, as this was the kind of event that he considered warranted the use of the gun he made sure was accessible to him. After defendant formed the initial homicidal intent, time passed as defendant asked Manurs "nigger what" and as Manurs turned around, asked Satanuel to get off his jacket and then grabbed his jacket and began to turn back around when defendant shot and killed him. This string of events can be considered evidence of premeditation and deliberation.

Defendant's conduct after the homicide is also a factor that may be considered in determining premeditation. *Anderson, supra* at 537. In *People v Gonzalez*, 178 Mich App 526, 534; 444 NW2d 228 (1989), this Court considered the defendant's actions after the homicide of running away and attempting to obtain false identification to conceal his involvement in the homicide as evidence of premeditation. In the present case, the testimony establishes, as the trier of fact pointed out, that defendant ran from police in the snow until he was finally apprehended. Further, once defendant waived his *Miranda*[1] rights, he denied any involvement in the shooting. Additionally, after Manurs fell to the floor after being shot by defendant, defendant kicked him two or three times in the back and held the gun to his head and threatened to blow his brains out. Defendant then calmly walked out the front door, telling Satanuel that he should be a real "G" like him, apparently referring to a gangster. These comments indicate that defendant intended his actions and that his actions were thought out before he acted.

Review of the entire record, taken in a light most favorable to the prosecution, establishes that a rational trier of fact could have found defendant guilty of first-degree murder beyond a reasonable doubt.

We affirm.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Richard A. Bandstra

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).