

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WAYNE TURNER,

Defendant-Appellant.

UNPUBLISHED

May 4, 1999

No. 207866

Detroit Recorder's Court

LC No. 96-006953

Before: Fitzgerald, P.J., and Doctoroff, and White, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions for second-degree murder, MCL 750.317; MSA 28.549, assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). We affirm.

Defendant first argues that there was insufficient evidence to convict him of second-degree murder and that the verdict was against the great weight of the evidence. We disagree. Viewed in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). Further, the verdict was reasonably supported by the evidence and has not resulted in a miscarriage of justice because the evidence did not clearly weigh in defendant's favor. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998); *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993).

The elements of second-degree murder are: (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). Defendant contends that the fourth element was not established beyond a reasonable doubt because he killed the victim after he was provoked. Consequently, defendant argues, the evidence only supported a voluntary manslaughter conviction. We disagree.

The elements of voluntary manslaughter are: (1) the defendant kills in the heat of passion; (2) the passion must be caused by an adequate provocation; and, (3) there cannot be a lapse of time during which a reasonable person could control his passions. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). The determination of what is reasonable provocation is a question of fact for the factfinder. *Id.* Provocation is measured under the reasonable person standard. *Id.* at 519.

In the present case, the alleged provocation was that of name calling and, possibly, physical pushing. The trial court apparently found that this behavior would not provoke a reasonable person to go home, retrieve an assault rifle/machine gun, and, in effect, hunt down the alleged offender, and shoot at least thirteen bullets in his general vicinity, eventually striking and killing him. We agree. Further, defendant shot and killed the victim at least thirty minutes after their altercation, a sufficient time for a reasonable person to have gained control over his passion. Therefore, a rational trier of fact could have found beyond a reasonable doubt that defendant was guilty of second-degree murder, and such verdict was not contrary to the great weight of the evidence.

Defendant next argues that he was denied due process because the trial court considered a charge of first-degree murder which was not supported by the evidence. We disagree. Since defendant did not preserve the issue by moving for a directed verdict on the charge of first-degree murder in the trial court, this Court reviews the issue for manifest injustice. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994).

First-degree murder is the intentional, deliberate, and premeditated killing of another person. MCL 750.316; MSA 28.548; *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995). Premeditation and deliberation characterize a thought process undisturbed by hot blood. *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). Although the length of time needed to weigh the choice before it is made is incapable of precise determination, there must be a sufficient time to allow the defendant to take a “second look.” *Id.*

Here there was sufficient evidence to support the charge of first-degree premeditated murder. Defendant was involved in an altercation with the victim, walked away and walked some distance to his house, where he retrieved an assault rifle/machine gun. Defendant then got into his car, drove toward the house where the victim lived, and parked his vehicle. He secreted himself by the side of the house, came running out upon seeing or hearing the victim approach, and shot thirteen bullets in the direction of the retreating victim, striking the victim in the back and killing him. Testimony indicated that defendant had at least thirty minutes to cool off between the time of the relatively minor altercation and the shooting. Under all the circumstances surrounding this killing, a reasonable trier of fact could have inferred that defendant intentionally, deliberately, and after premeditation, killed the victim.

Further, even if the evidence did not support consideration of the charge of first-degree premeditated murder, defendant was not prejudiced by such consideration because he was tried to the bench and properly convicted of second-degree murder. *People v Graves*, 458 Mich 476,

486-487; 581 NW2d 229 (1998); *People v Cazal*, 412 Mich 680, 689; 316 NW2d 705 (1982); *People v Edwards*, 171 Mich App 613, 619, 620; 431 NW2d 83 (1988).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Martin M. Doctoroff

/s/ Helene N. White