

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY SAGARGO LATHAM,

Defendant-Appellant.

UNPUBLISHED

August 17, 1999

No. 204350

Washtenaw Circuit Court

LC No. 96-006888 FC

Before: Hood, P.J., and Fitzgerald and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, conspiracy to commit murder, MCL 750.157a; MSA 28.354(1), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to the mandatory term of two years' imprisonment for the felony-firearm conviction, the mandatory term of life imprisonment without parole for the first-degree murder conviction, and life imprisonment for the conspiracy conviction. Defendant appeals as of right. We affirm.

Defendant's conviction arose from the shooting death of Troy Patterson. Troy Patterson had been involved in a romantic relationship with Melanise Patterson. The couple coincidentally shared the Patterson name; they were not married or otherwise legally related. Testimony at trial established that Troy and Melanise quarreled and physically assaulted each other, and that subsequently, Melanise arranged with Troy to retrieve some of her belongings from his residence. On December 16, 1995, Melanise traveled to Troy's residence accompanied by Tedario Reece, Leah Richardson, Lee Washington, a woman named Dawnya, and defendant, in two vehicles. Upon their arrival, the three women went up to Troy's townhouse and spent about five minutes there. Melanise then returned to the parking lot and brought defendant and Reece with her up to the door. Defendant testified that Melanise knocked, and when the door opened, he entered and, shortly thereafter, shot Troy. The prosecution's theory at trial was that defendant had conspired with Melanise and the others to kill Troy. Defendant's defense was that he was aware of no plan to kill Troy, that he accompanied Melanise only to help her retrieve her belongings, and that he acted in self-defense when Troy drew a weapon on him first.

Defendant first argues on appeal that there was insufficient evidence to find him guilty beyond a reasonable doubt of first-degree murder; specifically, he argues that there was insufficient evidence of premeditation. We disagree. In reviewing the sufficiency of the evidence, this Court considers the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could conclude that the essential elements of the crime were proven beyond a reasonable doubt. *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998). Circumstantial evidence and reasonable inferences that arise therefrom may be sufficient to prove the elements of an offense. *Id.*

In order 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). Premeditation requires sufficient time for the defendant to take “a second look.” *Plummer, supra* at 300. Premeditation and deliberation may be inferred from all the facts and circumstances, but the inferences must have support in the record and cannot be drawn based on mere speculation. *Id.* at 301. A non-exhaustive list of factors which may be considered to establish premeditation includes: (1) the previous relationship between the defendant and the victim; (2) the defendant’s actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted. *Id.* at 300.

A finding of premeditation in this case was supported by the circumstances surrounding the shooting. The evidence established that defendant traveled with others from Detroit to Troy Patterson’s residence. Defendant acknowledged during one of his police interviews that he knew that Reece was upset with Troy. Melanise told the drivers of the cars to park a distance from Troy’s apartment, went up to the apartment, established that Troy was there, and then returned to get defendant. Several witnesses testified that as Melanise knocked on the door, defendant stood to her side with his back to the house. Defendant himself told Detective Heren that he had his gun in his hand behind his back, cocked with his finger on the trigger, and that he entered the apartment immediately behind Melanise. Although defendant argues that he had his gun cocked simply because he was readying himself for a violent response from Troy, Heren testified that defendant told him at an early interview that Melanise never told him that Troy had a gun.

In *Plummer, supra*, this Court noted that “use of a deadly weapon only establishes premeditation where circumstances show a motive or plan that would enable the trier of fact to infer that the killing was not a spur-of-the-moment decision.” and that “holding a weapon at one’s side does not definitively establish an intent to shoot another,” as “a person may bring out a weapon for self-defense if needed or as a warning to others.” *Id.* at 304 n 1. However even by his own account, as told to the police when questioned regarding this incident, defendant did more than “bring out a weapon.” Defendant’s act of cocking the gun and holding his finger on the trigger, coupled with his actions in following Melanise to the front door and standing with his back to the wall next to the door as she knocked, suggests that his shooting of Patterson was not a spur-of-the-moment decision. And while defendant later testified that he did not cock the gun prior to entering Troy’s apartment, when considering sufficiency of the evidence, all conflicts in testimony must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Furthermore, although defendant asserts that Troy drew his gun on defendant first, the evidence was such that a jury could find that the prosecution had proven beyond a reasonable doubt that defendant was not acting in lawful self-defense. See *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996), quoting *People v Fortson*, 202 Mich App 13, 19-20; 507 NW2d 763 (1993). The killing of another 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. *Id.* However, a defendant is not privileged to use any more force than is necessary to defend himself. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Moreover, the defense is not available when a defendant is the aggressor unless he withdraws from any further encounter with the victim and communicates such withdrawal to the victim. *Id.* at 323.

The evidence in this case supports a conclusion that defendant was the aggressor. The basket of clothing, vacuum cleaner, and keys that Melanise purportedly sought to retrieve were sitting at the bottom of the stairway, just inside the door. Troy also told his former girlfriend and mother of his daughter, with whom he was speaking on the phone just prior to the shooting, that Melanise had arrived to retrieve her belongings, and that he would call her back later. From this evidence, a rational trier of fact could infer that Troy was handing over her property willingly. There also was no evidence presented that prior to defendant entering the apartment, Troy had threatened anyone in any way or displayed a weapon.¹ At the same time, there was no evidence that defendant attempted to withdraw. He told police that as he approached Troy's residence and entered his front door, he had his gun cocked behind his back. Furthermore, witnesses testified that the shots rang out immediately upon defendant's entry into the apartment. From these facts and circumstances, a rational trier of fact could conclude beyond a reasonable doubt that defendant's shooting of Troy was premeditated and deliberate, and that he was not acting in self-defense.

Defendant argues next that there was insufficient evidence to find him guilty beyond a reasonable doubt of conspiracy to commit murder. We disagree. A conspiracy is an agreement, expressed or implied, between two or more persons to commit an unlawful or criminal act. *People v Barajas*, 198 Mich App 551, 553; 499 NW2d 396 (1993). Circumstantial evidence may provide proof of an agreement. *Id.* at 554.

Although minimal, the circumstantial evidence in this case is sufficient to support an inference that defendant participated in conspiracy to murder Troy Patterson. Following Melanise's fight with Troy and Reece's discovery of her resulting injuries, Melanise, Reece, and Richardson met behind closed doors at Reece's residence. There was testimony at trial that, although Melanise was very upset prior to the kitchen meeting, afterward she was happy, stating, "That's my boy, that's my girl, them my dawgs, them my niggers." When Tedario saw defendant at defendant's grandmother's funeral, he asked defendant if he could get him a gun. Defendant testified that he did so. On the night of the murder, Melanise repeatedly paged Troy. Again, when the group arrived at Troy's apartment complex, Melanise instructed them to park a distance away from Troy's apartment. After confirming that Troy was home, Melanise returned to get defendant from the car. Defendant waited with his back to the wall, gun drawn and behind his back, next to the front door, while Melanise knocked, drawing defendant to answer the door and gaining entry to the apartment.

The fact that defendant was not present for the meeting at Tedario's residence does not mean that he cannot be found to be part of the conspiracy. Even if some conspirators are not members from the beginning of the conspiracy, all are nonetheless bound by the acts done in furtherance of the conspiracy. *People v Meredith (On Remand)*, 209 Mich App 403, 412; 531 NW2d 749 (1995). Defendant's acts on the night of the shooting were sufficient to infer that he was a party to a plan to murder Troy Patterson. Although the evidence presented could also support an inference that defendant did not know that there existed a plan to harm Troy, but, rather, participated as an unwitting accomplice to the murder, primed by the others to believe that Troy was ready to do him harm, the jury clearly did not accept that theory put forth by the defendant. When considering a challenge to the sufficiency of the evidence, this Court does not determine the weight of the evidence or the credibility of the witnesses. *Terry, supra*.

Defendant next argues on appeal that he was deprived of his right to a fair trial because the trial court's instructions dictated to the jury that the jury must infer an intent to kill from the fact that defendant had used a gun in his assault on Patterson. We disagree. Defendant's approval of the jury instructions as given at trial precludes appellate review unless failure to review the instructions would result in manifest injustice. *People v Welch*, 226 Mich App 461, 463; 574 NW2d 682 (1997). The instruction given by the trial court was verbatim from the Michigan Criminal Jury Instructions, CJI2d 16.21, and was clearly phrased in permissive terms. Thus, we find that no manifest injustice will result from our failure to review this unpreserved claim of instructional error.

Defendant's last argument on appeal is that he must be resentenced because it is unclear from the transcript if his sentence for conspiracy is for life with parole rather than life without parole. We disagree. Parole determinations are controlled by statute. See MCL 791.234; MSA 28.2034. Defendant cites no law, and we know of none, requiring the sentencing court to state for the record whether and/or when a defendant will be eligible for parole. A party who fails to cite authority in support of his position on appeal waives the argument. *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994). Furthermore, given defendant's life sentence for first-degree murder, a nonparolable offense, see MCL 791.234(6); MSA 28.2304(6), whether defendant is eligible for parole on the conspiracy sentence is immaterial. Because defendant was convicted of first-degree murder, his life sentence without parole is mandated and clearly is not invalid. Because defendant's sentence is not invalid, it is not subject to being set aside on appeal. *People v Raby*, 456 Mich 487, 497; 572 NW2d 644 (1998).

Affirmed.

/s/ Harold Hood
/s/ E. Thomas Fitzgerald
/s/ Jeffrey G. Collins

¹ Although defendant testified that Troy drew a weapon on him when he entered the door, no weapon was retrieved by police from the scene. Defendant explained that he took the weapon from the scene and that it was later confiscated by Detroit police. Testimony showed that although the Detroit Police Department had some knowledge of a weapon taken from defendant, attempts to locate that weapon were unsuccessful.