

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HOMER NATHANIEL HEATH,

Defendant-Appellant.

UNPUBLISHED

October 2, 2001

No. 228238

Wayne Circuit Court

LC No. 99-009383

Before: Cavanagh, P.J., and Markey and Cooper, JJ.

MEMORANDUM.

Defendant appeals as of right his bench trial convictions for second-degree murder, MCL 750.317, felony-firearm, MCL 750.227b, and unlawfully driving away an automobile, MCL 750.413. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant asserts that the trial court erred in finding him guilty of second-degree murder rather than manslaughter. We disagree.

The elements of second-degree murder are “(1) a death, (2) caused by an act of the defendant, (3) absent circumstances of justification, excuse, or mitigation, (4) done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm.” *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996), quoting *People v Dykhouse*, 418 Mich 488, 508-509; 345 NW2d 150 (1984).

The element of provocation which characterizes manslaughter separates it from murder. To establish voluntary manslaughter, the defendant must kill in the heat of passion, the passion must be caused by an adequate provocation, and there must not be a lapse of time during which a reasonable person could control his passions. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991).

Defendant’s statement shows that there was a lapse of time before the shooting in which a reasonable person could control his passions. Defendant was no longer in danger after he wrestled the weapon away from the victim. Defendant then stopped and reminded the victim that

he had just threatened to kill defendant. The trial court did not clearly err in finding defendant guilty of second-degree murder.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey

/s/ Jessica R. Cooper