

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PENNINGTON TROY MCDANIELS,

Defendant-Appellant.

UNPUBLISHED

June 10, 2004

No. 247035

Wayne Circuit Court

LC No. 02-008005-01

Before: Saad, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

After a jury trial, defendant was convicted as charged of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b, arising from the shooting death of the victim, Robert Blackwell III. The trial court sentenced defendant to a term of life imprisonment without parole for the murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erred by admitting into evidence his custodial statement to the police, which defendant maintains was the product of police promises of leniency and physical violence. This Court generally reviews a trial court's determination concerning the voluntariness of an inculpatory statement by examining the entire record de novo and arriving at an independent determination. *People v Shipley*, 256 Mich App 367, 372; 662 NW2d 856 (2003). But this Court reviews for clear error the trial court's specific factual findings in support of its determination of voluntariness. *Id.* at 372-373. Clear error exists only when this Court possesses the definite and firm conviction that the trial court made a mistake. *Id.* at 373. This Court defers to the trial court's assessments regarding the weight of the evidence and the credibility of witnesses. *Id.*

In determining whether a defendant's statement qualifies as voluntary, this Court examines the following factors:

[T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him

before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

“The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made.” *Id.*

After reviewing the record of the *Walker*¹ hearing testimony in this case, we conclude that the totality of the circumstances reflects that defendant voluntarily provided his statement to Detroit Police Officer Barbara Simon. At the time of the statement, defendant was twenty-two years old, had progressed in school to the tenth grade, and had no difficulty reading the advice of rights form Simon presented him. Defendant was arrested within minutes of the crime, his interview took place within one to two hours after the crime, and neither defendant’s nor Simon’s testimony suggested that they had a prolonged interview. The testimony of both Simon and defendant showed that defendant read and understood each of his constitutional rights and initialed and signed the advice of rights form. Although defendant and his girlfriend testified that defendant had several drinks and smoked half a small marijuana joint earlier that afternoon, the officers who arrested defendant denied that he smelled of alcohol or appeared intoxicated at the time of his arrest several hours later, and Simon testified that defendant appeared clear and sober at the time of their interview, approximately 6:00 p.m. Simon also observed that defendant did not appear injured and denied that he ever complained regarding his condition at the time of the interview. Defendant did not suggest that Simon deprived him of food or sleep.

The prosecutor’s witnesses and defendant presented contradictory testimony regarding a number of factors. First, defendant stated that to induce his confession, Officer Simon made repeated threats regarding life imprisonment, refused to permit defendant to contact an attorney, and promised to help him if he signed a confession. Second, defendant stated that one of the arresting officers physically abused and injured defendant by grabbing him around his neck. Third, defendant stated that Officer Simon denied defendant’s request for medical treatment. The trial court, which had the opportunity to observe all the witnesses as they offered their testimony, recognized the credibility dispute and explicitly found the officers more credible than defendant, who the trial court found offered an inherently contradictory account of the interview. This Court will not second guess the trial court’s credibility determination. *Shipley, supra* at 373. In light of the trial court’s credibility determination in favor of the officers on the disputed testimonial facts regarding coercion, and all the other circumstances surrounding defendant’s confession, we cannot conclude that the trial court clearly erred in finding that defendant offered his confession freely and voluntarily. *Cipriano, supra* at 334; *Shipley, supra* at 372-373.

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

Defendant next argues that the trial court improperly denied his request that it instruct the jury with respect to the lesser included offenses of voluntary and involuntary manslaughter. This Court generally reviews de novo claims of instructional error. *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003).

Within MCL 768.32(1), which governs the propriety of lesser included offense instructions, the Legislature contemplated that “upon an indictment for an offense, consisting of different degrees . . . the jury . . . may find the accused not guilty of the offense in the degree charged . . . and may find the accused person guilty of a degree of that offense inferior to that charged . . .” In this case, defendant, who was charged with first-degree murder, requested that the trial court instruct the jury regarding voluntary and involuntary manslaughter. Both voluntary and involuntary manslaughter are inferior or necessarily included offenses of murder under MCL 768.32(1) because “the elements of voluntary and involuntary manslaughter are included in the elements of murder.” *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). “Consequently, when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence.” *Id.* at 541, citing *People v Cornell*, 466 Mich 335, 356; 646 NW2d 127 (2002).

Here, a rational view of the evidence does not support the notion that defendant shot the victim after being provoked and while under the influence of the heat of passion.

Regarding voluntary manslaughter, both murder and voluntary manslaughter require a death, caused by defendant, with either an intent to kill, an intent to commit great bodily harm, or an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. However, the element distinguishing murder from manslaughter—malice—is negated by the presence of provocation and heat of passion. [*Mendoza, supra* at 540.]

“Thus, to show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions.” *Id.* at 535.

In this case, the only possible evidence of provocation within the trial record is defendant’s statement to Officer Simon during his interview that several months before he shot the victim, the victim and some accomplices “broke into [his] grandmother’s house,” injured his aunt by striking her head, and sold his grandmother’s property. Even assuming that the armed robbery of defendant’s grandmother and injury of his aunt were adequate provocation for him to search for the alleged perpetrators, defendant’s own statement establishes that this provocative event occurred months before the shooting of the victim. The several-month lapse of time between the alleged robbery and the shooting of the victim afforded defendant more than ample time “during which a reasonable person could control his passions.” *Id.*²

² To the extent that defendant also suggests that provocation occurred when the victim began to
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Furthermore, a rational view of the evidence does not permit a finding that defendant's shooting of the victim was involuntary manslaughter. "Involuntary manslaughter is the unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty." *Mendoza, supra* at 536. Defendant sought an instruction that the victim's death occurred after defendant, without malice, merely aimed a gun at the victim, and the gun discharged. See MCL 750.329. But several witnesses testified at trial that they heard as many as five or six gunshots. The sole eyewitness to the shooting testified that after she heard an initial gunshot, she looked down the street to see a man who wore a white t-shirt on his head walk from the passenger side of the victim's car around to the driver's side, point his gun at the victim, and fire two or three more shots. Other witnesses testified that they viewed a man with what appeared to be a towel or rag over his face just prior to hearing gunshots. Further, the medical examiner's testimony established that the victim sustained one gunshot wound that traveled from his right side to his left, and four gunshot wounds that traveled from his left side toward his right. Under these unrebutted circumstances, no rational view of the evidence would permit the conclusion that defendant accidentally shot the victim. Accordingly, the trial court correctly denied defendant's requested manslaughter instructions.

Defendant further asserts that the prosecutor failed to introduce sufficient evidence that he premeditated and deliberated the victim's murder. In reviewing a criminal defendant's challenge to the sufficiency of the evidence, or the trial court's denial of a motion for a directed verdict of acquittal, this Court considers all the evidence presented in the light most favorable to the prosecution to determine whether a reasonable juror could find the defendant's guilt proven beyond a reasonable doubt. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003); *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). This Court must draw all reasonable inferences and make credibility choices in support of the jury's verdict; this Court should not interfere with the factfinder's role in determining witness credibility or the weight of the evidence. *Nowack, supra* at 400; *People v Elkhoja*, 251 Mich App 417, 442; 651 NW2d 408 (2002), vacated in part on other grounds 467 Mich 916 (2003).

To convict a defendant of first-degree premeditated murder, MCL 750.316(1)(a), the prosecutor must establish that the defendant intentionally killed the victim and that the defendant premeditated and deliberated the act of murder. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). Premeditation and deliberation require sufficient time to permit the defendant to take a second look. *Id.* Inferences of premeditation and deliberation may arise from evidence of (1) the prior relationship between the defendant and the victim, (2) the

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reach for something inside his car, we fail to comprehend how the victim's mere act of movement alone could be adequate provocation of a heat of passion in defendant's mind. The more apt significance of defendant's perception of the victim's movement presumably would be its potential basis for his honest and reasonable belief that he was in imminent danger of death or great bodily harm and that it had become necessary for him to employ deadly force in self-defense. *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). The trial court properly instructed the jury regarding self-defense pursuant to CJI2d 7.15 and CJI2d 7.20, and the jury rejected this defense.

defendant's actions before the murder, (3) the circumstances of the killing itself, including the type of weapon used and the location of the wounds inflicted, and (4) the defendant's conduct after the murder. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999); *People v Berry (On Remand)*, 198 Mich App 123, 128; 497 NW2d 202 (1993). Circumstantial evidence and the reasonable inferences arising therefrom may suffice to prove the elements of a crime, and "[m]inimal circumstantial evidence is sufficient to prove an actor's state of mind." *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001); *Abraham, supra* at 656.

In this case, no indication exists that defendant and the victim had a personal relationship, but defendant apparently believed that the victim had robbed his grandmother and inflicted head injuries on his aunt. Before the shooting, defendant armed himself with a .357-caliber revolver, two witnesses observed a man wearing a white t-shirt or towel on his head walking through yards and along streets toward the scene of the shooting, and defendant acknowledged in his statement that "[b]efore I shot into the car I pulled my t-shirt over my head so that no one would know who I was." Defendant committed the crime by shooting the victim five times, firing one shot into the victim's right neck and four more shots into the victim's left side. The eyewitness testified that she heard an initial gunshot, looked down the street, and saw a man wearing a white t-shirt on his head walk from the passenger side of the victim's car around to the driver's side, point his gun at the victim, and fire two or three more shots at him. After defendant fired the fatal shots, several witnesses saw defendant run away from the scene holding the t-shirt on his head. Along the route that defendant used to flee, the police later found the .357 revolver, which defendant admitted he discarded before they caught him.

The facts that months before the shooting defendant had a preexisting motivation to harm the victim, that on the day of the shooting defendant armed himself and donned a mask before searching out the victim, and that defendant shot the victim once in the neck before rounding the car and shooting the victim four more times, indicate that defendant had abundant time to rethink his planned retribution, or at least refrain from firing more than one shot at the victim. *Kelly, supra* at 642. We conclude that these circumstances, coupled with the facts showing defendant's flight from the scene and attempt to conceal his involvement in the shooting, support the jury's rational determination beyond a reasonable doubt that defendant premeditated and deliberated the shooting of the victim. *Abraham, supra* at 656; *Berry, supra* at 128.

Affirmed.

/s/ Henry William Saad
/s/ Michael J. Talbot
/s/ Stephen L. Borrello