

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERMAINE MELTON,

Defendant-Appellant.

UNPUBLISHED

October 7, 2004

No. 247535

Wayne Circuit Court

LC No. 02-05487-01

Before: Schuette, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 17 to 25 years in prison for the second-degree murder conviction, to run consecutive to two years in prison for the felony-firearm conviction. We affirm.

Defendant first argues that the evidence at trial was insufficient to support his conviction for second-degree murder. We disagree. “This Court reviews 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.” *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). The trial court “must find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment.” MCR 6.403. “Factual findings are sufficient as long as it appears that the trial court was aware of the issues and correctly applied the law.” *Kemp, supra* at 322.

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 malice. *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325, amended on denial of rehearing 453 Mich 1204; 551 NW2d 163 (1996). “Malice is the intent to kill, the intent to do great bodily harm, or the intent to create a high risk of death or great bodily harm with knowledge that death or great bodily harm will be the probable result.” *Kemp, supra* at 322. “Malice may be inferred from the facts and circumstances of the killing.” *Id.*

Defendant argues that insufficient evidence existed to convict him of second-degree murder because the prosecution failed to prove defendant bore any malice toward the victim. We disagree and find that the prosecution presented sufficient evidence from which the trial

court could infer the element of malice. Defendant's brother called defendant and asked defendant to come over to his apartment following an incident with the victim, who was upset because defendant's brother would not allow the victim to use his phone. Defendant testified that he brought a handgun along because he did not think the area where his brother lived was safe. As defendant and his brother encountered the victim in the hallway of the apartment complex, the victim yelled obscenities at defendant and defendant's brother, and defendant confronted the victim. Defendant maintains that the victim then brandished a knife and lunged at him, and that he shot the victim in self-defense. The victim died as the result of five gunshot wounds: one to the abdomen; one to the front left shoulder; one to the front right shoulder; one to the back right shoulder; and one to the back right arm. Based on the evidence adduced at trial, sufficient evidence existed from which the trial court could infer the element of malice as defined by case law.

Defendant next argues that the trial court clearly erred in finding that he did not act in self-defense. We disagree. A trial court's finding of fact is clearly erroneous only if the reviewing court is left with a definite and firm conviction that a mistake has been made. *People v Lombardo*, 216 Mich App 500, 504; 549 NW2d 596 (1996). "[T]he killing of another person in self-defense is justifiable homicide only if the defendant honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself." *People v Riddle*, 467 Mich 116, 127; 649 NW2d 30 (2002). However, "Michigan law imposes an affirmative obligation to retreat upon a nonaggressor . . . in one narrow set of circumstances: A participant in voluntary mutual combat will not be justified in taking the life of another until he is deemed to have retreated as far as safely possible." *Id.* at 120. (Emphasis deleted.) That is to say, "[o]ne who is involved in a physical altercation in which he is a willing participant . . . is required to take advantage of any reasonable and safe avenue of retreat before using deadly force against his adversary, should the altercation escalate into a deadly encounter." *Id.* (Emphasis deleted.)

Here, defendant testified that after the victim lunged at him with a knife, he backed seven feet away from the victim and was one foot from the door of his brother's apartment. Defendant testified that nothing prevented him from going into his brother's apartment when confronted by the victim. Defendant had sufficient distance to safely retreat through the door directly behind him. Accordingly, the trial court's finding that defendant did not act in reasonable self-defense because he failed to pursue an available, safe avenue of escape, was not clearly erroneous.

Defendant next argues that the trial court clearly erred by discrediting the testimony given by himself and his brother, and instead concluding that a prosecution witness' version of events was reliable. But "[i]n a bench trial, it is the role of the trial judge sitting as the trier of fact to observe the witnesses and decide the weight and credibility to be given to their testimony," and we will not disturb that decision on appeal. *People v Garcia*, 398 Mich 250, 262-263; 247 NW2d 547 (1976), overruled in part on other grounds, *People v D'Alessandro*, 165 Mich App 569; 419 NW2d 609 (1988).

In sum, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could conclude that defendant caused the victim's death, without justification, excuse, or mitigation, and that he had the intent to kill, the intent to do great bodily harm, or the intent to create a high risk of death or great bodily harm with knowledge that death or great bodily harm

would be the probable result. There was sufficient evidence to sustain defendant's conviction for second-degree murder, and defendant is not entitled to relief on this basis.

Defendant next argues that his sentence for the second-degree murder conviction was disproportionate. We disagree. If the minimum sentence imposed is within the appropriate guidelines sentence range, this Court must affirm the sentence unless the trial court erred in scoring the sentencing guidelines or relied on inaccurate information in determining the defendant's sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003).

Defendant's guidelines sentencing range was 144 to 240 months, or 12 to 20 years. Defendant was sentenced to 17 to 25 years in prison. The seventeen-year minimum falls within the guidelines range. Therefore, we must affirm defendant's sentence because he raises no challenge to the trial court's guideline scoring and points to no inaccuracies in the information relied on in imposing sentence. MCL 769.34(10).

We affirm.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Patrick M. Meter