

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ETTA LISA DUNMIRE,

Defendant-Appellant.

UNPUBLISHED

December 18, 2007

No. 272737

Calhoun Circuit Court

LC No. 2005-004539-FC

Before: Donofrio, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant was convicted of second-degree murder, MCL 750.317, following a jury trial. She was sentenced to 20 to 30 years' imprisonment. She appeals as of right. We affirm.

Defendant argues that there was insufficient evidence of malice to convict her of second-degree murder. She claims that she should have been convicted of the lesser-included offense of voluntary manslaughter. Defendant reasons that, even if she were acting with malice when she stabbed the victim, her malice was negated by the heat of passion caused by adequate provocation. Defendant requests a new trial, a conviction for manslaughter and resentencing, or a reversal of the trial court's denial of her motion for directed verdict. Defendant is not entitled to relief.

In reviewing a challenge to the sufficiency of the evidence, we must determine whether, considering the evidence in a light most favorable to the prosecution, a reasonable jury could have found defendant guilty beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 420-421; 646 NW2d 158 (2002). In reviewing a motion for a directed verdict, we view the evidence up to the time of the motion to determine whether a rational trier of fact could have found that all the essential elements of a crime were proved beyond a reasonable doubt. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

The only element of second-degree murder challenged by defendant is the element of malice. Voluntary manslaughter is a lesser-included offense of second-degree murder. *People v Mendoza*, 468 Mich 527, 544; 664 NW2d 685 (2003). The only difference between the two crimes is that second-degree murder requires malice. *Id.* at 540. Malice is "an intent to kill, an intent to do great bodily harm, or an intent to create a high risk of death or great bodily harm with knowledge that such is the probable result." *People v Neal*, 201 Mich App 650, 654; 506

NW2d 618 (1993). It is sometimes described as “acting in wanton and willful disregard of the possibility that death or great bodily harm would result,” *People v Carines*, 460 Mich 750, 760; 597 NW2d 130 (1999), and it can be inferred that the defendant “intentionally set in motion a force likely to cause death or great bodily harm.” *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998). Malice can be inferred from the use of a deadly weapon. *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995). The facts and circumstances of a killing may give rise to an inference of malice, and “[i]t is for the jury to determine whether the element of malice can be inferred from all the evidence.” *People v Flowers*, 191 Mich App 169, 176-177; 477 NW2d 473 (1991). In manslaughter, the element of malice is negated by heat of passion caused by adequate provocation. *Mendoza, supra* at 540. Whether there is credible evidence to support or negate the element of malice is a question of fact for the jury. *Neal, supra* at 655.

Here, sufficient evidence was offered by the prosecution to support the jury’s finding that defendant acted with malice.

At the end of their evening together, defendant and the victim became embroiled in an argument. Defendant punched the victim in the face two times. The victim did not retaliate. Defendant and the victim later ended up at defendant’s house, to which the victim had a key. The argument continued. Defendant ultimately used an eight-inch kitchen knife to stab defendant, who was smoking a cigarette at the time. She stabbed him in the chest and punctured the front and back of his aorta, causing his death. A natural consequence of using a large, sharp, dangerous weapon to stab a person’s chest is severe injury or death. Defendant’s statement after the stabbing was that the victim was “in her face,” calling her names. A reasonable juror could conclude that by stabbing the victim in the chest, defendant intended to cause a high risk of death or great bodily harm, and knew that such was likely to happen. Considering the evidence in a light most favorable to the prosecution, a reasonable jury could have found that defendant acted with malice.

With regard to whether defendant’s malice was negated by heat of passion caused by adequate provocation, the evidence, when viewed in the light most favorable to the prosecution, supported that defendant was not adequately provoked. Adequate provocation is something that would cause a reasonable person to lose control. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998).

About an hour before the murder, defendant and the victim were observed leaving the grand opening of a nightclub. They appeared to be happy to be together. Then defendant and the victim were thereafter observed arguing at a party store shortly before the murder. Defendant punched the victim in the face twice, and the victim did not retaliate. While taking pictures of her body, officers noted that the only fresh injuries were a small red area on her forehead and some broken blood vessels under her eye. When police arrived at defendant’s trailer, the victim was found lying on the kitchen floor, with a cigarette between the fingers of his right hand, scratches on his face, and a stab wound in his heart. The victim did not have a weapon. Considered in a light most favorable to the prosecution, the victim’s actions would not have caused a reasonable person to lose control.

On appeal, defendant also argues that the jury should have been allowed to consider defendant's intoxication as a factor in determining whether she acted in the heat of passion. But, voluntary intoxication is not a defense to second-degree murder. MCL 768.37.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Mark J. Cavanagh