

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYREE DYSHAWN BROOKS,

Defendant-Appellant.

UNPUBLISHED

July 31, 2008

No. 271412

Washtenaw Circuit Court

LC No. 05-001539

Before: Wilder, P.J., and Saad, C.J., and Smolenski, J.

PER CURIAM.

Defendant Tyree Dyshawn Brooks was convicted by a jury of his peers of second-degree murder, MCL 750.317, and sentenced, as an habitual offender, second offense, MCL 769.10, to 40 to 60 years' imprisonment. He appeals as of right. We affirm.

Defendant's conviction arises out of facts occurring in Ypsilanti in 2005. In the early morning hours of September 5, defendant stood outside MJ's bar, with a crowd of 15 to 20 people. At some point, the victim left the bar to make a call on his cellular telephone. After he completed the call, the victim found himself surrounded by defendant and several of defendant's friends. One of the men hit the victim, and the victim fought back. At another point, the victim and defendant "squared up," facing each other, raising their fists, and prepared to fight. The bar's bouncer pulled the victim back inside, and told defendant and his friends to go home. As the bar closed, the crowd finally dispersed, and the bar owner escorted the victim to his car.

Less than an hour later, defendant, the victim and the victim's friend, Lewis Fairley, met in the 600 block of Armstrong Street. The victim and Fairley removed their shirts. The victim and defendant argued, and then defendant shot a firearm at the victim. The first shot missed its intended target (the victim), and pierced the windshield of a parked car. Defendant resumed firing, and the next three shots hit the victim, first in the leg, which fractured two of his bones, then in the hip, and finally in the back, puncturing his heart. Defendant fled the crime scene, and the victim died. Later that morning, Fairley invaded the homes of several of defendant's relatives, looking for defendant, who had fled the state.

Defendant first argues that there was insufficient evidence to convict him of second-degree murder, and instead, he should only have been convicted of voluntary manslaughter. In the alternative, defendant argues that we should reverse the trial court's denial of his motion for a directed verdict of acquittal. We disagree with both arguments.

We review a trial court's denial of a directed verdict for acquittal by considering the evidence presented before the motion in a light most favorable to the prosecution, to "determine whether a rational trier of fact could have found that the essential elements were proved beyond a reasonable doubt." *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). We review an appeal challenging the sufficiency of the evidence for whether, considering the evidence in a light most favorable to the prosecution, "a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Hardiman*, 466 Mich 417, 420-421; 646 NW2d 158 (2002).

Considering the evidence in this light, we find that there was sufficient evidence for a rational trier of fact to find that all the essential elements were proven by the prosecution, and that defendant was guilty beyond a reasonable doubt. To prove second-degree murder, the prosecutor must prove that there was (1) a death, (2) caused by defendant, (3) with malice, and (4) without justification or excuse. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). The only element at issue here is malice.

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). Malice is sometimes described as "acting in wanton and willful disregard of the possibility that death or great bodily harm would result," and it can be inferred that the defendant "intentionally set in motion a force likely to cause death or great bodily harm." *People v Bulls*, 262 Mich App 618, 626; 687 NW2d 159 (2004) (quotations omitted). Malice can be inferred from the use of a deadly weapon. *Id.*, citing *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995).

Malice is negated where 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." *People v Mendoza*, 468 Mich 527, 535; 664 NW2d 685 (2003). Adequate provocation is that which would cause a reasonable person to lose control. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). Ultimately, "[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).

Here, considering the evidence in a light most favorable to the prosecution, we find that there was sufficient evidence of malice. Defendant shot a loaded gun (a dangerous weapon) four times directly at the victim. After defendant's first accurate shot, which fractured two of the victim's leg bones, defendant either knew or should have known that if he fired the gun at the victim again, he was likely to cause a risk of great bodily harm or death to the victim. Thus, we find there was sufficient evidence of malice.

We also find that there was sufficient evidence that defendant's malice was not mitigated by adequate provocation, leading to a heat-of-passion killing. By the account of every witness, defendant was the aggressor. He first sought to fight the victim at the bar. When defendant and the victim argued immediately before the murder, defendant was the aggressor, and the victim tried to "brush him off." Finally, it was defendant who gravely escalated the situation, by brandishing and intentionally discharging a firearm directly at the victim. Considering the evidence in a light most favorable to the prosecution, the evidence did not establish adequate provocation to mitigate defendant's malice.

Defendant next argues that the trial court erred when it excluded evidence that defendant had recently been assaulted, and that Fairley invaded the homes of defendant's relatives. Defendant further claimed that the exclusion of this evidence prevented him from presenting his defense of self-defense. We disagree.

Generally, we review a trial court's decision to exclude evidence for an abuse of discretion. *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007). "An abuse of discretion will not be found if the trial court's decision is within the principled range of outcomes." *People v Osantowski*, 274 Mich App 593, 607; 736 NW2d 289 (2007). However, we review a preliminary issue of admissibility based on the construction of a constitutional provision de novo. *People v Jambor*, 273 Mich App 477, 481; 729 NW2d 569 (2007).

Defendant's right to present a defense is protected by the Michigan and United States constitutions. *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984). However, this right is not an absolute right. *Id.* at 279. "The accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Id.*, quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

Generally, all relevant evidence is admissible. MRE 402. Evidence is relevant where it has "any tendency" to make a material fact or issue at trial more or less probable than it would be without the evidence. MRE 401; *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). However, even relevant evidence may be excluded, within the discretion of the trial court, where the evidence may confuse the issues, mislead the jury, waste time, or be cumulative. MRE 403. In addition, relevant evidence of a person's other crimes, wrongs, or acts, is not admissible to prove the person's character, or actions in conformity with the other crimes, wrongs, or acts. MRE 404(b).

Here, defendant had two alternative theories of defense: that he was adequately provoked, and killed in the heat of passion; or that he acted in self-defense. See *Mendoza, supra*. Defendant may claim self-defense if, "under all the circumstances, he honestly and reasonably believe[d] that he [was] in imminent danger of death or great bodily harm and that it [was] necessary for him to exercise deadly force." *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). Defendant was assaulted three months before the victim was murdered, and again only a few days before the murder, but he did not assert that the victim was the person who assaulted him. Accordingly, evidence of the assaults was not relevant or admissible to prove adequate provocation or that defendant honestly and reasonably believed he was "in imminent danger of death or great bodily harm and that it [was] necessary for him to exercise deadly force." *Id.*

Similarly, Fairley's home invasions were not relevant to defendant's claim that he had adequate provocation to kill the victim, or that his actions constituted self defense because Fairley's actions occurred after the murder. Fairley was not the victim, so Fairley's actions could not have adequately provoked defendant to kill the victim. Similarly, Fairley's home invasions after the murder occurred could not have led the defendant to honestly and reasonably believe that he was "in imminent danger of death or great bodily harm and that it [was] necessary for him to exercise deadly force." *Id.*

Because the trial court's decision to exclude evidence that defendant was assaulted and that Fairly illegally entered defendant's relatives' homes was within the principled range of outcomes permitted by the rules of evidence, we conclude that defendant's right to present a defense was not infringed.

Defendant next argues that the testimony regarding the contents of video data, to which defendant never had access, was inadmissible hearsay, violated his constitutional right of confrontation, and resulted in a deprivation of his liberty without due process of law. We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion. *Osantowski, supra* at 607. An unpreserved constitutional objection to the admission of evidence is reviewed for whether there was a plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affected the fairness, integrity or public reputation of judicial proceedings' [sic] independent of the defendant's innocence.'" *Id.*, quoting *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

We find that the trial court's admission of the video data over defendant's hearsay objection was not an abuse of discretion, because the video data was not hearsay. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Such a statement can be oral or written, and it is inadmissible unless it falls within an enumerated exception. *Jambor, supra* at 481. Here, the video data did not have sound. The officer who testified about the contents of the video data, only testified to what he observed as he viewed it. The prosecution did not seek admission of any statements or assertions from the video data. Therefore, the officer's testimony does not fit the definition of hearsay, and its admission was not an abuse of discretion.

We also reject defendant's arguments regarding due process and the right of confrontation. Defendant correctly asserts that he has a constitutional right not to be deprived of his liberty without to due process of law. US Const, Am XIV. But the "[f]ailure to preserve evidentiary material that may have exonerated the defendant will not constitute a denial of due process unless bad faith on the part of the police is shown." *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993), citing *Arizona v Youngblood*, 488 US 51, 57; 109 S Ct 333; 102 L Ed 2d 281 (1988). Defendant bears the burden to show that the evidence was exculpatory, and that the police acted in bad faith. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992).

Here, defendant has not met his burden. The record shows that police officers made every effort to preserve the video data. They requested the video data immediately after viewing it. After they learned that the bar owner did not know how to use his equipment, and that the information had been inadvertently replaced by new video data, officers secured a search warrant, and submitted the computer to the federal Department of Homeland Security for further analysis. There was no evidence that they acted in bad faith, destroyed the evidence, or neglected to secure it. Furthermore, there was no evidence on the record that the video data contained exculpatory evidence. Therefore, the admission of the officer's testimony about the

contents of the video data did not result in a deprivation of defendant's liberty without due process of law.

Defendant also correctly asserts that he has a constitutional right to confront the witnesses against him. US Const, Am VI. This right ensures the reliability of evidence, by allowing defendant to cross-examine such witnesses. *Jambor, supra* at 487. Here, defendant cross-examined the officer who testified about the contents of the video data. This is sufficient. The video data was not a witness against him, because, even if the video data had been presented at trial, defendant would not have been able to cross-examine it. Therefore, we find that the admission of the officer's testimony about the video data did not violate defendant's right of confrontation.

We note that defendant also argued that the prosecution suppressed this evidence, and therefore caused a deprivation of his liberty without due process of law. But defendant failed to provide facts from the record to show that the video data would have been favorable to him, that the prosecution suppressed the favorable evidence, and that had the evidence been disclosed, defendant would have likely been acquitted. See *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). Because defendant did not properly brief this argument, it was abandoned and we will not consider it. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

Defendant next argues that he has a right for his sentence to be imposed on the basis of accurate facts, that the trial court improperly scored offense variables (OV) six and nine, and that the trial court improperly sentenced him as an habitual offender. But although defendant cites a wealth of authority with respect to sentencing above the guidelines range, he was sentenced *within* the guidelines range, so his cited authorities do not apply. Defendant also provided no facts from the record to support his arguments. Therefore, defendant has abandoned this issue. *Kevorkian, supra*. If we were to consider this issue, however, there is sufficient evidence in the record to establish that defendant had malice, validating a score of 25 points for OV six under MCL 777.36. Similarly, there was evidence on the record that defendant placed at least two people at risk of harm, by firing his weapon through a car windshield, and at the victim, as the victim tried to run away, supporting a score of 10 points for OV nine under MCL 777.39. Therefore, because there is evidence to support both OV scores, we would uphold the sentence in any event. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Michael R. Smolenski