

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TREVEON DESHODD CAMEL,

Defendant-Appellant.

UNPUBLISHED

January 21, 2010

No. 290270

Saginaw Circuit Court

LC No. 07-029540-FC

Before: Cavanagh, P.J., and Fitzgerald and Shapiro, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial of second-degree murder, MCL 750.317, as a lesser offense of first-degree premeditated murder, MCL 750.316(1)(a), possession of a firearm during the commission of a felony (felony-firearm), 750.227b, and carrying a concealed weapon (CCW), 750.227. Defendant was sentenced to concurrent prison terms of 25 to 40 years for second-degree murder and 2 to 5 years for CCW. He was also sentenced to a consecutive 2 years' imprisonment for felony-firearm. This case involves the shooting death of Cquaton Holmes. We affirm.

First, defendant argues that the trial court erred when it denied his motion for a directed verdict and submitted the first-degree premeditated murder charge to the jury. We disagree. In reviewing a circuit court's denial of a motion for directed verdict, we view the evidence in a light most favorable to the prosecution to determine if sufficient evidence was adduced for a rational trier of fact to have found the defendant guilty. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

To convict a defendant of first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and that the killing was premeditated and deliberate. MCL 750.316(1); *People v Unger*, 278 Mich App 210, 223, 229; 749 NW2d 272 (2008). Although there is no specific time requirement, premeditation and deliberation require that a defendant had an opportunity to take a "second look" between the initial homicidal intent and the ultimate killing. *Unger*, 278 Mich App at 229. Premeditation and deliberation "may be inferred from the circumstances surrounding the killing." *Id.*

"To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem. As a number of courts have pointed out, premeditation and deliberation characterize a thought process

undisturbed by hot blood. While the minimum time necessary to exercise this process is incapable of exact determination, the interval between initial thought and ultimate action should be long enough to afford a reasonable man time to subject the nature of his response to a ‘second look.’” [*People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998), quoting *People v Morrin*, 31 Mich App 301, 329-330; 187 NW2d 434 (1971).]

The prosecution presented sufficient evidence from which a jury could infer that defendant had sufficient time for reflection before shooting Holmes. Defendant’s then-girlfriend, Ashley Romero, testified that she watched the killing from the front porch of her house. According to Romero, when she went out on her front porch, defendant and Holmes were on the sidewalk. Romero went onto her porch after hearing Holmes cursing and yelling outside. Romero said that she saw Holmes walking with his bike. Romero testified that as Holmes was walking away, he called defendant a “bitch.” According to Romero, defendant then shot Holmes.

Darquavious Miree, a friend of defendant, said that he watched defendant and Holmes argue from across the street. According to Miree, Holmes pulled out a gun and pointed it at defendant’s head. Miree saw defendant reach for his gun, but not pull it out. Miree testified that next he saw Holmes pick up his bike and start to walk off with it. Miree thought the altercation was over, so he turned his head began walking. Miree then heard gunshots, looked back toward the house, and saw defendant holding a gun.

Romero’s and Miree’s versions do not directly contradict each other, so it is possible that both scenarios are accurate. In other words, Miree witnessed the initial confrontation outside Romero’s home and then Romero saw the actual shooting as Miree’s back was to the scene. In both Romero’s and Miree’s versions, however, Holmes was walking away from defendant before he was shot. Additionally, the shots that struck Holmes were fired from behind him and a .38 special revolver was recovered from Holmes’s right, front pocket. A rational jury could infer that defendant had an opportunity, undisturbed by the threat of imminent harm (as the Holmes’s gun was in his pocket), to take a “second look” between forming a initial homicidal intent and ultimately pulling his gun and shooting Holmes in the back as he walked away from the confrontation. *Unger*, 278 Mich App at 229; *Plummer*, 229 Mich App at 300.

Defendant next argues that the prosecution presented insufficient evidence that defendant was guilty of second-degree murder. We disagree. To convict a defendant of second-degree murder, the prosecution must prove: “(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.” *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999). Defendant argues that there was insufficient evidence presented on the element of malice. Specifically, he argues that the evidence was insufficient to show that he did not act either in the heat of passion or in self-defense. To establish malice, the evidence must show that a defendant acted with “the intent to kill, the intent to inflict great bodily harm, or the intent to do an act in wanton and willful disregard for whether death will result.” *People v Goecke*, 457 Mich. 442, 464, 465 n 26; 579 NW2d 868 (1998). Malice may be inferred from the use of a deadly weapon. *People v Bulls*, 262 Mich App 618, 627; 687 NW2d 159 (2004).

Romero testified that defendant shot Holmes as Holmes was walking away. Similarly, Miree testified that he thought the altercation between defendant and Holmes was over when he, Miree, turned his head and began to walk away. While Holmes did have a .38 special revolver, it was found in his right, front pocket. Under these circumstances, a rational trier of fact could conclude that defendant had not acted in self-defense when shooting Holmes. Defendant may have been enraged by the encounter, including being called a “bitch” by Holmes. But given that Holmes had broken-off the confrontation, had his gun in his pocket, and was walking away from the scene with his bike, a rational jury could conclude that defendant did not act out of impulse during a state of emotional excitement that was so intense that he acted before he could have calmed down.

Finally, defendant argues that the prosecutor committed misconduct and violated defendant’s right against self-incrimination when the prosecutor commented during closing argument that defendant ran away after the shooting, did not bring the gun to the police, and did not turn himself in until the next day. We disagree. Because defendant failed to raise a timely and specific objection to the alleged prosecutorial misconduct, we review for plain error that affected the defendant’s substantial rights. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003).

Both the United States and the Michigan Constitutions protect accused individuals against involuntary self-incrimination. US Const, Am V; Const 1963, art 1, § 17. The constitutional privilege against self-incrimination and the right to due process restrict the use of a defendant’s silence in a criminal trial. *People v Dennis*, 464 Mich 567, 573; 628 NW2d 502 (2001). Defendant’s argument rests on the following from the prosecutor’s rebuttal closing argument:

If it was self-defense, why didn’t he bring the gun to the police? Why did he run away? Sure, he might have panicked. Why did he wait until the afternoon of the next day to turn himself in if he’s such an up righteous citizen and in fact not guilty of anything but defending himself? You’re going to hear an instruction on credibility and listen to that very carefully, because the simple fact that witnesses testify differently on some matters doesn’t necessarily mean they’re lying.

Defendant asserts in his brief before us that the prosecutor “in effect told the jury that they should convict [him] because he did not testify and answer his questions.”

The premise of defendant’s argument is invalid. A defendant’s right against self-incrimination is not compromised by simply posing a series of rhetorical questions on the validity of a proffered theory of defense in light of the evidence presented. Moreover, the prosecutor’s comments were proper argument, particularly in response to defendant’s closing. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). The prosecutor’s comment that defendant fled the scene of the crime was proper commentary to support an inference of “consciousness of guilt.” *Goodin*, 257 Mich App at 432; see also *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005) (observing that a prosecutor may comment on inferences that may be drawn from defendant’s flight). The prosecutor’s comment that defendant waited a day before reporting the crime or turning himself in was proper commentary on defendant’s

failure to report a crime under circumstances under which it would have been natural to do so. *McGhee*, 268 Mich App at 634-635. The comment questioning why defendant failed to turn over the gun was proper because it referred to the weaknesses of the self-defense theory and referred to prearrest conduct. *Id.* Moreover, because the prosecutor's comments attacked the credibility of the defense theory, the prosecutor did not impermissibly shift the burden of proof. *Id.* Therefore, we conclude that there was no plain error.

Further, the trial court instructed the jury that they were the sole judges of the evidence and that the attorneys' statements and arguments were not to be considered as evidence. The court also instructed that the prosecutor had the burden to "prove each element of the crime beyond a reasonable doubt," that defendant had "the absolute right not to testify," and that the jury must not let the fact that defendant did not testify "[a]ffect your verdict in anyway." There is nothing in the record to even suggest that we should not presume that the jury followed these clear instructions. *Unger*, 278 Mich App at 235-236.

In defendant's Standard 4 brief, he argues that his trial counsel was ineffective for failing to object to the prosecutor's allegedly impermissible closing argument comments. Defendant's argument fails because counsel cannot be deemed ineffective for failing to object to comments that were proper in the context of this case. Counsel is not required to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro