STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 12, 2010
v	No. 292722 Wayne Circuit Court
BRODERICK JEROME HODGE, Defendant-Appellant.	LC No. 09-001988-FC

Before: BORRELLO, P.J., and CAVANAGH and OWENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; felon-in-possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 15 to 25 years' imprisonment for his second-degree murder conviction and one to five years' imprisonment for his felon-in-possession conviction. He was also sentenced to two years' imprisonment with 153 days' credit for his felony-firearm conviction, which is consecutive to his other sentences. Defendant appeals as of right. For the reasons set forth in this opinion, we affirm.

On November 22, 2008, Magaly Moore hosted a birthday party for her one-year-old son at her apartment in Detroit, Michigan. Jeremy Jackson, the victim in this case, was the child's father. Defendant, who was the cousin of the father of another child born to Moore, resided in a room in the back of Moore's apartment. Trial testimony differs somewhat as to the details of the evening, but all eyewitnesses ultimately testified that in the late evening, defendant shot Jackson and ran from Moore's apartment. Defendant was eventually apprehended in Athens, Georgia and then extradited to Michigan.

On appeal, defendant first argues that the trial court wrongly denied his motion for a directed verdict on the initial charge of first-degree murder because the prosecutor failed to present sufficient evidence of premeditation. We review de novo a denial of directed verdict in a criminal jury trial. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). "The elements of premeditated murder are (1) an intentional killing of a human being (2) with premeditation and deliberation." *People v Gayheart*, 285 Mich App 202, 210; 776 NW2d 330 (2009), lv pending 485 Mich 1117 (2010). "To premeditate is to think about beforehand[.]" *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998), quoting *People v Morrin*, 31 Mich App 301, 329-331; 187 NW2d 434 (1971). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *People v Schollaert*, 194 Mich

App 158, 170; 486 NW2d 312 (1992). Premeditation "may be inferred from all the facts and circumstances surrounding the incident . . . including the parties' prior relationship, the actions of the accused both before and after the crime, and the circumstances of the killing itself[.]" *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995) (citations omitted). The circumstances of the killing that may be considered can include "the type of weapon used and the location of the wounds inflicted." *People v Berry*, 198 Mich App 123, 128; 497 NW2d 202 (1993). When reviewing the record, we must view the evidence in a light most favorable to the prosecution, *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003).

On the basis of our review of the record, we conclude that sufficient evidence was presented concerning the elements of premeditation and deliberation. Testimony presented at trial established that during one conversation between Jackson and defendant, Jackson said "If I had a gun, I would shoot you." Defendant responded, "I got my gun." Defendant then went to his bedroom where he remained for about five minutes. He then came back out and shot Jackson in the chest. Then, as Jackson lay on the floor, defendant shot him a second time in the leg and said, "I'm tired of this n[…..] talkin' [sic] shit." All witnesses testified that defendant immediately fled the scene after the shooting. We find that the five minutes defendant spent in his bedroom was more than enough time to contemplate the murder beforehand. Moreover, the bullet that killed Jackson perforated his heart, which could lead a rational trier of fact to conclude that at the time of the shooting, defendant engaged in a deliberate act to kill the victim. Although some of the eyewitness testimony differs as to the events immediately preceding the shooting, we find that viewing all the evidence up to the point the motion was made in the light most favorable to the prosecutor, a rational trier of fact could have concluded that the prosecutor proved premeditation beyond a reasonable doubt. *Riley*, 468 Mich at 140. Accordingly, we find no error in the submission of the first-degree murder charge to the jury.

Next, defendant contends that there was sufficient evidence of adequate provocation by Jackson to warrant a voluntary manslaughter jury instruction, and that the trial court erred in denying his request for such an instruction. We review this issue de novo. *People v McMullan*, 284 Mich App 149, 152; 771 NW2d 810 (2009). "To prove voluntary manslaughter, the prosecution must prove that: (1) the defendant killed in the heat of passion; (2) the passion was caused by adequate provocation; and (3) there was no lapse of time during which a reasonable person could have controlled his passions." *People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005).

> The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason. Case law has consistently held that the provocation must be adequate, namely, that which would cause a *reasonable person* to lose control. [*People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998) (citation omitted).]

Here, the only evidence that would support a finding of adequate provocation came from Tiffany Dixon, a friend of defendant's who showed up late to the party. She testified that Jackson threatened to shoot Moore in the face if she did not end a telephone conversation with her aunt. Defendant intervened and told everyone to calm down and said that no one would be shot. Then Jackson turned toward defendant, said he would shoot defendant, and walked toward defendant. It was at that point, according to Dixon, that defendant shot Jackson. However, it was undisputed that Jackson had previously issued several empty threats to defendant, Moore,

and other persons at the home throughout the day. And, Moore testified that Jackson previously told defendant that he did not have a gun that night. Thus, we conclude that the last, empty threat was not sufficient to cause a "reasonable person to lose control." See *People v Roper*, 286 Mich App 77, 88; 777 NW2d 483 (2009) ("[V]erbal exchanges . . . are not usually sufficient to constitute adequate provocation"); Cf. *Pouncey*, 437 Mich 382, 391; 471 NW2d 346 (1991) ("However, words of an informative nature, rather than mere insults, have been considered adequate provocation.") A rational view of the evidence supports only that defendant overreacted after one of several brief and mild confrontations with Jackson. "The law cannot countenance the loss of self-control; rather, it must encourage people to control their passions." *Pouncey*, 437 Mich at 389 (citation omitted). Thus, under these circumstances, no reasonable jury could find that there was no lapse of time during which a reasonable person could have controlled his passions. *Tierney*, 266 Mich App at 716. Accordingly, we concur with the finding of the trial court that the voluntary manslaughter instruction was not supported by the record because the evidence does not support that defendant was adequately provoked to kill in the heat of passion. *People v Mendoza*, 468 Mich 527, 535-536, 548; 664 NW2d 685 (2003).

Next, defendant argues there was insufficient evidence to prove the requisite malice to support the second-degree murder conviction. "[T]the elements of second-degree murder are: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful [sic] disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). "Malice may be inferred from the facts and circumstances of the killing." *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Additionally, "[a] defendant's malice, sometimes described as 'acting in wanton and wilful disregard of the possibility that death or great bodily harm would result,' can be inferred from evidence 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) (internal citation and footnote omitted).

For the reasons previously stated regarding the volume of evidence in the record to support a finding of premeditation for first-degree murder, see *supra*, we likewise find that after viewing all the evidence in a light most favorable to the prosecution, and after resolving all conflicts in the evidence in favor of the prosecution, a rational trier of fact could have found the prosecution proved malice beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). In addition to the previously stated factors that would prove malice beyond a reasonable doubt, we also find that defendant's use of a deadly weapon constitutes further evidence of his malicious intent. *Bulls*, 262 Mich App at 627.

Lastly, we address the argument presented by defendant in his standard 4 brief. He contends that his counsel was ineffective for failing to assert the defenses of self-defense and imperfect self-defense. Because defendant did not obtain an evidentiary hearing, our review is limited to the mistakes apparent in the trial record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000) (citation omitted). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657,

663; 683 NW2d 761 (2004). A "defendant must show that his attorney's conduct fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was deprived of a fair trial." *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003). To prove the latter, defendant must show that the result of the proceeding would have been different but for defense counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

A defendant may not use deadly force in self-defense unless he "honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual." MCL 780.972(1)(a). See also *Roper*, 286 Mich App at 86. Our review of the record leads us to conclude that defendant's trial counsel had little, if any, evidentiary support to argue that defendant held an honest and reasonable belief that the use of deadly force was necessary to prevent imminent death or great bodily harm under MCL 780.972(1)(a). To the contrary, although Dixon testified that Jackson stated he would shoot defendant and walked toward him, the evidence revealed that defendant remained civil toward Jackson in the face of other numerous empty threats earlier in the evening. Moore and Dothard testified that defendant and Jackson argued in the moments leading up to the shooting, but they never raised their voices and always spoke in a conversational tone. Earlier that evening, Jackson told defendant that he did not have a gun with him. Moreover, defendant's statement after he shot Jackson, specifically, "I'm tired of this n[…..] talkin' [sic] shit," directly refutes his theory of self-defense. Rather, the record clearly supports the finding that in defendant's own words the reason he shot Jackson was a result of his annoyance or impatience with Jackson's previous statements, not in self-defense. In sum, the evidence did not support a theory of self-defense. As a result, a theory of imperfect self-defense also cannot lie. *People v Butler*, 193 Mich App 63, 68; 483 NW2d 430 (1992). Thus, defense counsel was not ineffective for failing to request the inapplicable instructions. *People v Truong*, 218 Mich App 325, 341; 553 NW2d 692 (1996).

Affirmed.

/s/ Stephen L. Borrello
/s/ Mark J. Cavanagh
/s/ Donald S. Owens