STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ANTHONY HARVEY,

Defendant-Appellant.

UNPUBLISHED
December 11, 2012

No. 305274
Saginaw Circuit Court
LC No. 09-033266-FC

Before: TALBOT, P.J., and WILDER and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of first-degree premeditated murder, MCL 750.316(1)(a); possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1); and carrying a dangerous weapon with unlawful intent, MCL 750.226. We affirm.

I. BASIC FACTS

Defendant was charged with open murder, MCL 750.318, in the shooting death of his brother. Prior to trial, defendant filed a motion in limine, requesting the trial court to allow evidence regarding the character and conduct of the victim to be introduced. The evidence included the following: (1) a police report showing the victim's involvement in a domestic violence case; (2) the victim's history of violence while previously incarcerated; (3) the victim's mental health records from his prior hospitalization for schizophrenia in a mental ward; and (4) the victim's prior attacks and death threats while using a knife against his mother, brother, sister, and defendant. The trial court allowed defendant to introduce general character evidence of the victim's trait for aggressiveness, as well as specific conduct that was known to defendant prior to the assault, but precluded any evidence regarding specific instances of the victim's conduct that were unknown to defendant at the time of the altercation, including the victim's psychological evaluations and police reports.

At trial, several of defendant's family members, as well as his longtime girlfriend, testified against him at trial. These witnesses indicated that the victim began arguing with defendant when defendant's girlfriend accidentally walked through trash that the victim had recently swept into a pile on the living room floor. The family witnesses claimed that defendant entered his sister's room and lay down on her bed. Meanwhile, the victim was standing a couple of feet outside of the sister's room. The sister testified that defendant and the victim argued for

approximately five minutes until the victim told defendant to "squash it," which the sister interpreted to mean "forget about it." The sister said that defendant then stood up, drew his revolver from beneath his shirt, pointed it at the victim, asked the victim "you think I'm a punk ass bitch?" and fired the gun at the victim. The sister testified that the victim then charged at defendant, and while they wrestled for the gun on the bed, defendant continued firing at the victim until all six shots were emptied from the revolver. The family witnesses testified that they heard several gunshots and that immediately after the shooting, defendant emerged from the bedroom and stated that he "got" the victim. The victim suffered several gunshot wounds, including a fatal wound to the head and a wound to the hand, which the medical examiner said could be characterized as a defensive wound.

Police officers located defendant at a local church shortly after the shooting. Defendant first denied shooting the victim but later recanted, asserting that he shot the victim because he feared for his life because of the victim's past criminal record, mental instability, and threatening behavior towards himself and members of his family. Additionally, defendant stated that he was afraid of the victim because the victim had repeatedly threatened him and always carried a knife. However, at trial, evidence was introduced that the victim did not have any knife on him at the time of the shooting.

Defendant maintained that he did not mean to fire all six shots at the victim, but the gun malfunctioned. However, a ballistics expert testified that the gun was in proper working order, and that it would be highly unlikely for a revolver to accidentally discharge six rounds.

Defendant did not testify, but called several character witnesses to testify regarding the victim's character. They testified that the victim was a violent and aggressive person who had been incarcerated for ten years, regularly fought with everyone in the home, always carried a knife, often threatened people with the knife, and received psychiatric treatment for his hyper-aggressive behaviors.

Defendant sought a jury instruction on imperfect self-defense, but the trial court refused to give the instruction on the ground that the doctrine's precedential viability was questionable. After deliberating, the jury found defendant guilty on all counts.

II. ANALYSIS

First, defendant argues that the evidence was insufficient to sustain his conviction of first-degree murder with premeditation. We disagree.

A challenge to the sufficiency of the evidence is reviewed de novo and in a light most favorable to the prosecution to determine "whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). "All conflicts with regard to the evidence must be resolved in favor of the prosecution. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005) (internal citations omitted). "As a result, a reviewing court is required to draw all reasonable inferences and make credibility

choices in support of the jury verdict." *People v Kissner*, 292 Mich App 526, 534; 808 NW2d 522 (2011) (quotations omitted).]

Murder is defined as the unjustified killing of another with malice, which is the intent to kill, do great bodily harm, or acting in willful or wanton disregard of the fact that the likely result of one's conduct would cause death or great bodily harm to another. *People v Johnson (On Rehearing)*, 208 Mich App 137, 140-141; 526 NW2d 617 (1994). The elements of first-degree murder with premeditation are (1) the intentional killing of another person (2) with premeditation and deliberation. MCL 750.316(1)(a); *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010).

> Premeditation and deliberation require sufficient time to allow the defendant to take a second look. The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. Premeditation may be established through evidence of the following factors: (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide. [*People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (2005).]

We hold that the evidence was sufficient to support defendant's conviction of first-degree murder with premeditation. The evidence submitted satisfies the element of an intentional killing of another person. Here, the evidence established that defendant drew his revolver and shot the victim during a verbal altercation, discharging all the bullets in the weapon. Although defendant initially claimed that the revolver fired accidentally, the ballistics expert testified that the gun was not malfunctioning and that a revolver would not discharge six bullets if someone only pulled the trigger one time. Defendant also admitted to the police that he fired at the victim because he was in fear of his life, providing further evidence that the firing of the revolver was an intentional act by defendant. The totality of the evidence was sufficient to establish that the killing was intentional rather than accidental.

The evidence also was sufficient to enable a jury to find that defendant acted with premeditation and deliberation. "Some time span between the initial homicidal intent and the ultimate killing is necessary to establish premeditation and deliberation." *People v Unger*, 278 Mich App 210, 229; 749 NW2d 272 (2008). The evidence shows that when the victim ended the verbal argument by telling defendant to "squash it," defendant reacted by standing up, drawing his revolver, pointing the gun at the victim, and asking, "You think I'm a punk ass bitch?" Defendant then fired the gun. The jury could infer that defendant developed a homicidal intent as a response to the victim telling him to "squash it," while defendant was still on the bed. Likewise, the jury could have inferred that the time it took defendant to stand up, draw his weapon, and ask his question to the victim was sufficient for him to have taken "a second look."

Furthermore, the testimony established that after defendant fired this initial shot, there was sufficient time while defendant and the victim wrestled with the revolver and before defendant fired the remaining bullets from the gun to provide defendant an opportunity to take a "second look." See *id.* at 231. Additionally, the medical examiner testified that the gunshot wound to the victim's hand could be characterized as a defensive wound. It is established that "defensive wounds suffered by the victim can be evidence of premeditation." *People v Johnson*,

460 Mich 720, 733; 597 NW2d 73 (1999). Lastly, defendant's exclamation after the shooting that he "got him" is also evidence of premeditation and deliberation. See *People v Paquette*, 214 Mich App 336, 342-343; 543 NW2d 342 (1995) (defendant's lack of remorse after the killing was relevant to premeditation/deliberation determination). Therefore, the evidence, when considered in the light most favorable to the prosecution, was sufficient for a rational jury to find beyond a reasonable doubt that defendant intentionally killed the victim with premeditation and deliberation.

Next, defendant argues that the trial court improperly excluded testimonial and extrinsic documentary evidence of specific acts of the victim that were unknown to defendant at the time of the attack. We disagree.

We review a trial court's decision regarding the admissibility of evidence for an abuse of discretion. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). An abuse of discretion exists if the result is outside the range of principled outcomes. *Id.* We review de novo the trial court's interpretation of evidentiary rules, statutes, or constitutions. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010).

The admissibility of evidence pertaining to a victim's character and conduct is governed by the rules of evidence. Generally, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith." MRE 404(a). However,

> when self-defense is an issue in a charge of homicide, evidence of a trait of character for aggression of the alleged victim of the crime offered by an accused, or evidence offered by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a charge of homicide to rebut evidence that the alleged victim was the first aggressor. [MRE 404(a)(2).]

Evidence concerning the aggressive character of a homicide victim, even if the defendant was unaware of it at the time, is admissible in furtherance of a self-defense claim to prove that the victim was the probable aggressor. *People v Harris*, 458 Mich 310, 315-316; 583 NW2d 680 (1998). A defendant does not have to have personal knowledge of the victim's character in order to introduce this evidence because a defendant's knowledge is not relevant as to which party was the actual aggressor in the altercation. *Id.* at 316. In this context, the victim's character may only be proved by reputation or opinion evidence because the victim's *conduct*, not his character is at issue. *Id.* at 319; *People v Orlewicz*, 293 Mich App 96, 104; 809 NW2d 194 (2011).

Specific instances of conduct are only admissible when character or a trait of character is made an essential element of a claim, charge, or defense. MRE 405(b); *Harris*, 458 Mich at 319. At the trial court, defendant incorrectly argued that the victim's specific acts were admissible because they were an essential element of defendant's defense. "The victim's character is not an essential element of defendant's self-defense claim." *Orlewicz*, 293 Mich App at 104. In other words, the victim need not have had any particular character trait in order for defendant to raise a claim of self-defense.

Therefore, the trial court properly limited defendant's introduction of character evidence of the victim only as it pertained to general reputation and opinion testimony, pursuant to MRE 405. As a result, the extrinsic documentary evidence, i.e., police reports and psychological evaluations, of events that were unknown to defendant were clearly inadmissible at trial, as they did not form the basis for defendant's decision to attack the victim and contained inadmissible details regarding specific instances of conduct committed by the victim.

Defendant next argues that the trial court deprived him of his right to present a complete defense to the charge of murder by declining to instruct the jury on the doctrine of imperfect self-defense. We disagree.

We review questions of law de novo. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). Whether a defendant was deprived of his constitutional right to present a defense is also reviewed de novo. *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009). The *Riddle* Court stated:

> A criminal defendant is entitled to have a properly instructed jury consider the evidence against him. When a defendant requests a jury instruction on a [valid] theory or defense that is supported by the evidence, the trial court must give the instruction. However, if an applicable instruction was not given, the defendant bears the burden of establishing that the trial court's failure to give the requested instruction resulted in a miscarriage of justice. The defendant's conviction will not be reversed unless, after examining the nature of the error in light of the weight and strength of the untainted evidence, it affirmatively appears that it is more probable than not that the error was outcome determinative. [*Riddle*, 467 Mich at 124-125 (citations omitted).]

A trial court may exclude evidence regarding a position that has not been accepted as a valid defense to the charged crime. *People v Demers*, 195 Mich App 205, 207-208; 489 NW2d 173 (1992). Defendant contends the trial court erred by refusing to instruct the jury on the theory of imperfect self-defense. However, our Supreme Court recently announced that imperfect self-defense is not a valid defense in Michigan. *People v Reese*, 491 Mich 127, 150; 815 NW2d 85 (2012). The *Reese* Court noted that the facts giving rise to the hypothetical imperfect self-defense should actually be used as evidence that a defendant lacked malice, an essential element of murder, and that the evidence only supported the charge of manslaughter. *Id.* at 151. Defendant had the opportunity to present these facts to the jury, and these facts could have been used to disprove defendant's malice during the assault. Because defendant was afforded the opportunity to present a complete defense and the trial court properly refused to issue an instruction regarding a nonexistent criminal defense, the trial court did not err.

Finally, defendant argues that the trial court deprived him of his right to allocute prior to sentencing. We disagree.

Whether a defendant has been afforded a reasonable opportunity to allocute is a question of law that we review de novo on appeal. *People v Petty*, 469 Mich 108, 113; 665 NW2d 443 (2003).

During sentencing, the trial court is required to provide the defendant with "an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence." MCR 6.425(E)(1)(c). In *People v Petit*, 466 Mich 624; 648 NW2d 193 (2002), our Supreme Court established the following analytical framework to determine whether a defendant was provided with the reasonable opportunity to allocute:

> [T]he trial court must make it possible for a defendant who wishes to allocute to be able to do so before the sentence is imposed. However, in order to provide the defendant an opportunity to allocute, the trial court need not "specifically" ask the defendant if he has anything to say on his own behalf before sentencing. The defendant must merely be given an opportunity to address the court if he chooses. [*Id*. at 628.]

The trial court can satisfy this requirement by generally asking if there is "anything further[?]" from the defendant. *Id.* at 628-629.

Here, we conclude that defendant was provided with an opportunity to allocute prior to his sentencing. First, the trial court directed several specific questions to defendant, and defendant answered the questions. Then later, it appears from the sentencing transcript that the trial court asked defendant directly, "Sir, anything you wish to add?" Although the trial court did not use defendant's name specifically when asking this question, the trial court addressed defendant as "Sir" at the outset of the hearing and did not refer to defense counsel or the prosecutor in this manner. In addition, immediately before the trial court asked this question, both defense counsel and the prosecutor had each stated that they had nothing further to say. Therefore, we conclude that defendant had an opportunity to allocute, and his claim necessarily fails.

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Riordan