STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LEE JOHNSON,

Defendant-Appellant.

UNPUBLISHED
March 20, 1998

No. 185409
Calhoun Circuit Court
LC No. 94-003537-FC

Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two years' imprisonment for the felony-firearm conviction, and forty to sixty years' imprisonment for the second-degree murder conviction, to be served consecutively. We affirm.

I

First, defendant claims that there was insufficient evidence to justify the charge of first-degree murder going to the jury, and insufficient evidence to support his second-degree murder conviction. We disagree.

Specifically, defendant argues that there was insufficient evidence of premeditation and deliberation to justify sending the first-degree murder charge to the jury. First-degree murder is the intentional killing of another done with premeditation and deliberation. *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993). Premeditation and deliberation may be inferred from the circumstances, including defendant's behavior before and after the crime. *Id*. The length of time necessary to establish premeditation and deliberation is incapable of precise determination; all that is necessary is enough time to take a "second look" at the action contemplated. *Id*. Premeditation and deliberation may be established through evidence of the following factors: (1) the prior relationship of

the parties; (2) defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) defendant's conduct after the homicide. *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992).

Here, testimony indicated that defendant and the victim had several prior disagreements or arguments. Following their last disagreement, while the victim was outside the house yelling at defendant, defendant, who was inside the house, walked into a back bedroom, grabbed an assault rifle, and inserted the magazine. Defendant then walked outside the house onto the porch, with the rifle in shooting position, and told James Dickerson, who was on the porch talking with the victim, to move out of the way. Ignoring Dickerson's pleas not to proceed, defendant began firing the weapon at the victim as the victim retreated in his vehicle. Defendant fired at least twenty-six shots at the victim, and evidence indicated that the rifle was semi-automatic, meaning that defendant had to pull the trigger at least twenty-six times. When this evidence is viewed in a light most favorable to the prosecution, a rational trier of fact could find, beyond a reasonable doubt, that defendant intended to kill the victim and had plenty of time to take a second look at his contemplated action. Therefore, the trial court did not err in allowing the first-degree murder charge to go to the jury.

Defendant argues that his second-degree murder conviction should be reversed because he acted in self-defense. We disagree. All murder which is not first-degree murder is second-degree murder. MCL 750.317; MSA 28.549. A death caused by a defendant with malice and without justification or excuse is second-degree murder. *People v Neal*, 201 Mich App 650, 654; 506 NW2d 618 (1993). Malice requires an intent to kill, and 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. *Id*. Further, malice must be established from facts or circumstances that do not mitigate the degree of the offense to manslaughter or constitute an excuse or justification. *Id*. The killing of another in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger, or that there is a threat of serious bodily harm. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

The evidence indicated that defendant began shooting as the victim was retreating. There was no evidence that the victim was actually armed, and evidence whether the victim appeared to be drawing a weapon is conflicting. Viewing the evidence in a light most favorable to the prosecution, a reasonable trier of fact could conclude that defendant had the requisite intent for second-degree murder and did not act in self-defense.

II

Next, defendant claims that he was denied the opportunity to have a jury that was representative of a fair cross-section of the community because only one of sixty-five potential jurors was African-American. We disagree.

Testimony indicated that the procedure used to obtain potential jurors did not take race into consideration. There is no evidence that any underrepresentation of African-Americans was the result of anything but benign, random selection. In addition, defendant offered no evidence of other venires being disproportionate. Defendant's bald assertion that systematic exclusion must have occurred is not sufficient to support his challenge. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1993).

III

Next, defendant claims that he was denied a fair trial by the prosecutor's failure to produce Robert Cilwa, a firearms expert. Defendant claims that the prosecutor did not show due diligence in attempting to secure Cilwa's presence.

A trial court's determination of due diligence is a factual matter, and the court's findings will not be reversed unless clearly erroneous. *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991). Here, Cilwa was a late endorsed witness who had recently retired and was on vacation. We cannot conclude that the trial court clearly erred in finding that the prosecutor did everything reasonable to obtain Cilwa's presence. See *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988).

IV

Next, defendant claims that the trial court erred in admitting into evidence the victim's bloodied clothing. We disagree.

The bloodied garments, which contained bullet holes, were relevant to show the location of the wounds, which in turn were relevant to show premeditation or deliberation and to negate defendant's claim of self-defense. See *People v Daniels*, 192 Mich App 658, 673-674; 482 NW2d 176 (1992). While apparently some of the clothing did not contain bullet holes, thereby diminishing the relevance of that evidence, this same fact also diminishes any prejudicial effect. We do not consider the fact that the trial court admitted all of the clothing, as opposed to only some, an abuse of discretion.

V

Next, defendant claims that the prosecutor misstated the law, thereby denying him a fair trial. Specifically, defendant takes issue with the prosecutor's statements that he had a duty to retreat before using deadly force. Defendant asserts that he resided at the scene of the shooting and, therefore, had no duty to retreat.

Generally, before using deadly force in self-defense, a person has a duty to retreat if safely possible. *People v Mroue*, 111 Mich App 759, 765; 315 NW2d 192 (1981). However, when the person is in his own home, there is no duty to retreat. *Id*. Here, conflicting evidence was presented as to whether defendant resided at the scene of the shooting. The prosecutor's argument was premised on

the assertion, supported by evidence, that defendant did not reside at the location of the shooting. Therefore, the prosecutor did not misstate the law. The jury was correctly instructed as to when a person has a duty to retreat. Thus, defendant was not denied a fair trial.

VI

Next, defendant claims that the trial court erred in failing to read a requested instruction on imperfect self-defense. We disagree.

Defendant's requested instruction stated that if the jury were to find that defendant acted in self-defense, but used excessive force, he would be guilty of involuntary manslaughter. Defendant's instruction is an incorrect statement of the law. Imperfect self-defense applies only when the defendant would have been entitled to self-defense had he not been the initial aggressor. *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). It does not apply when the defendant uses excessive force. See *People v Kemp*, 202 Mich App 318, 324; 508 NW2d 184 (1993). In addition, imperfect self-defense mitigates second-degree murder to voluntary manslaughter, not involuntary manslaughter. The trial court did not err in failing to give defendant's incorrect instruction.

We also find no error warranting reversal in the trial court's failure to sua sponte give a correct instruction on imperfect self-defense. Defendant at no time pursued a theory that he was the initial aggressor, and did not request such an instruction consistent with such a theory. As a result, the trial court was not required to give such an instruction. See *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995). In addition, because the instructions as read did not limit the application of self-defense to a situation where defendant was not the initial aggressor, the jury could have concluded that defendant was the initial aggressor and still found that he acted in self-defense. Therefore, any error was harmless.

VII

Next, defendant claims that the trial court erred by admitting evidence that he had used cocaine on the day of the shooting. We disagree.

Defendant's argument that this constitutes prior bad acts evidence under MRE 404(b) is incorrect. The evidence was not offered as character evidence to show action in conformity therewith. Therefore, MRE 404(b) is not applicable. Defendant's state of mind was a central issue in this case and we cannot say that the trial court abused its discretion in concluding that the evidence was relevant to assist the jury in inferring defendant's state of mind.

VIII

Next, defendant claims that he was denied a fair and adequate closing argument because the trial court added a jury instruction after defense counsel completed his closing argument. Before closing arguments, the trial court informed the parties what the final instructions would be. Afterwards, the trial court notified the parties that it had inadvertently omitted an instruction on inferring intent. Defendant

objected to the reading of this instruction, explaining that he had made his closing argument on the basis of his belief that the instruction would not be given. The trial court gave defendant the opportunity to reargue, but defendant declined.

We agree with the trial court that the inferring intent instruction was of great importance in the case. In light of the import of the instruction and the fact that defendant was given the opportunity to reargue, and defendant's failure to demonstrate how he was prejudiced or how his argument would have been different had he known the instruction was going to be given, it does not affirmatively appear that the trial court's actions resulted in a miscarriage of justice. MCL 769.26; MSA 28.1096. Therefore, relief is not warranted.

IX

Next, defendant claims that his forty to sixty year sentence is disproportionate. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). However, defendant's sentence is within the applicable guidelines range, and he offers no unusual circumstances to overcome the presumption that the sentence is proportionate. Accordingly, we find no abuse of discretion. See *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992).

X

Last, defendant claims that he is entitled to a new trial on the basis of newly discovered evidence and ineffective assistance of counsel. We disagree.

Defendant argues that newly discovered evidence, in the form of an affidavit of Steven Armstrong which states that the weapon used in the shooting was an automatic, entitles him to a new trial. Even assuming, without deciding, that this evidence is newly discovered, the evidence is merely cumulative, see *People v English*, 302 Mich 463, 467; 4 NW2d 727 (1942), and would be used mainly to impeach. As a result, a new trial is not warranted. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). In addition, in light of the evidence that the rifle was a semi-automatic, Armstrong's testimony would merely have contributed to a contested issue of fact and was not likely to affect the outcome. See *Davis, supra*. Thus, defendant is not entitled to a new trial on the grounds of newly discovered evidence.

Defendant also argues that his trial counsel was ineffective for failing to call Armstrong as a witness. However, on the basis of the record before us, defendant has not shown that, if Armstrong had been called, there is a reasonable probability that the result of the proceedings would have been different. Therefore, defendant is not entitled to a new trial on the grounds of ineffective assistance of counsel. See *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1991).

Defendant also argues that defense counsel was ineffective by failing to object to the prosecutor's misstatement of the law regarding defendant's duty to retreat. As previously discussed,

the prosecutor did not misstate the law. Therefore, any objection would have been futile and would not have resulted in a different outcome.

Defendant further argues that defense counsel was ineffective by failing to adequately cross-examine witnesses Cork and Dickerson about prior inconsistent statements, and by failing to use a prior conviction for impeachment. However, the record indicates that defense counsel did cross-examine these witnesses about their prior statements and we fail to see how any additional inquiry would have resulted in a different outcome. In addition, decisions regarding cross-examination and impeachment are tactical decisions, and we will not second guess them. See *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ David H. Sawyer