STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VERNON L. KATO,

Defendant-Appellant.

UNPUBLISHED
June 16, 1998

No. 198352
Wayne Circuit Court
LC No. 96-500926 FY

Before: Sawyer, P.J., and Bandstra and J.B. Sullivan*, JJ.

PER CURIAM.

Defendant appeals as of right from 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 consecutive terms of eighteen to thirty year's imprisonment for the second-degree murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant claims that the trial court erred in denying his motion for a directed verdict on the original charge of first-degree murder. We disagree. When reviewing a trial court's ruling on a motion for a directed verdict, this Court tests the validity of the motion by the same standard as the trial court. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992). When considering a motion for a directed verdict, the trial court must consider the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *Daniels, supra*. To convict a defendant of first-degree murder, the prosecution must prove beyond a reasonable doubt that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation and deliberation require sufficient time to allow the defendant to take a second look and may be inferred from the circumstances surrounding the killing. *Id*. "Premeditation may be established through evidence of the following factors: (1) the prior relationship of the parties; (2) the defendant's

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *Id.*

Here, defendant went to the victim's house with a loaded gun to collect money for a drug transaction that had occurred ten days prior. When he was told that the person that owed him money was not there and that he would not be allowed to take any items from the premises, he drew his gun and aimed it at the person giving him this information. The victim interceded, and defendant fired twice, killing him. This evidence, and all reasonable inferences therefrom, was sufficient to permit a rational trier of fact to find that the elements of first-degree murder were proven beyond a reasonable doubt. Therefore, the trial court did not err when it denied defendant's motion for a directed verdict and allowed this charge to go to the jury.

Defendant next claims that there was insufficient evidence to support his second-degree murder conviction. We again disagree. Viewing the evidence in the light most favorable to the prosecution, we conclude that there was sufficient evidence to find that defendant caused the death of the victim, with malice, and without justification or excuse. *People v Harris*, 190 Mich App 652, 659; 476 NW2d 767 (1991).

Defendant also argues that there was sufficient evidence to find that he acted in self-defense. We disagree. 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 Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). The defense is not available when a defendant is the aggressor unless he withdraws from any further encounter with the victim and communicates such withdrawal to the victim. *Id.* at 323. Here, the evidence was sufficient to support a determination by the factfinder that defendant initiated and pursued the confrontation and that at no time did he withdraw or attempt to withdraw from the confrontation. Therefore, there was sufficient evidence on the record to support the jury's finding that defendant was not acting in self-defense.

Defendant also claims that the trial court should have instructed the jury on the crime of manslaughter, despite defendant's own objections, because sufficient evidence existed to support a finding of imperfect self-defense. We disagree. At trial, defendant himself stated on the record that he did not want a manslaughter instruction given to the jury. Defendant cannot now predicate error where he requested the action of the trial court. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995); *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). "To hold otherwise would allow defendant to harbor error as an appellate parachute." *Barclay, supra.*

Defendant next claims that his eighteen to thirty-year sentence for second-degree murder is disproportionate. We disagree. We review the trial court's sentencing decision for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). A sentencing court abuses its discretion when it violates the principle of proportionality. *Id.* Because defendant's eighteen-year minimum sentence was within the sentencing guidelines' range of 180 to 360 months, it is presumed proportionate. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Defendant has presented no unusual circumstances that would overcome the presumption of proportionality. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

Lastly, defendant claims that the trial court improperly scored the sentencing guidelines. The Michigan Supreme Court recognized that "[t]here is no juridical basis for claims of error based on alleged misinterpretation of the guidelines, instructions regarding how the guidelines should be applied, or misapplication of guideline variables." *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997). "[A]pplication of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate." *Id.* at 177. Having concluded that defendant's sentence is proportionate, we find that this claim is precluded.

We affirm.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Joseph B. Sullivan