

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL I. TRICE,

Defendant-Appellant.

UNPUBLISHED

December 29, 1998

No. 203686

Recorder's Court

LC No. 96-003064

Before: Kelly, P.J., and Hood and Markey, JJ.

PER CURIAM.

Defendant appeals by 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 ten to fifteen years in prison for the second-degree murder conviction and two years in prison for the felony-firearm conviction. We affirm.

Defendant's sole issue on appeal is that the prosecution failed to present sufficient evidence to support his conviction. We disagree.

In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). This Court should not, however, interfere with the jury's role of determining the weight of evidence or credibility of witnesses. *Wolfe, supra* at 514-515; *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Death caused with malice and without justification or excuse is second-degree murder. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). "Malice is the intent to kill, the intent to do great bodily harm, or the intent to create a high risk of death or great bodily harm with knowledge that death or great bodily harm will be the probable result. Malice may be inferred from the facts and circumstances of the killing." *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993), citing *People v Harris*, 190 Mich App 652, 659; 476 NW2d 767 (1991). The killing of another in self-defense is justifiable homicide, however, if the defendant honestly and reasonably believes that his

life is in imminent danger or that there is a threat of serious bodily harm. *Kemp, supra* at 322. A defendant is not entitled to use any more force than is necessary to defend himself. *Kemp, supra*. The defense is not available when a defendant is the aggressor unless he withdraws from any further encounter with the victim. *Id.* at 322-323. “Generally, a person must retreat if retreat is safely possible before he may exercise deadly force to repel an attack.” *People v Mroue*, 111 Mich App 759, 765; 315 NW2d 192 (1981).

Here, the facts and circumstances of the killing indicate that defendant acted with malice. When the victim entered the front door of his own home, no one witnessed him carrying or possessing a gun. Although defendant testified that the victim said, “Y’all bitches here,” and then reached back with his right hand, the victim’s mother testified she did not hear the victim say anything like that nor did she see him reach for a gun. Defendant intentionally shot the victim two times at close range inside the victim’s house. Although defendant testified that his intention was only to wound the victim, it is reasonable to conclude that, when shooting someone twice from a short distance, the intent is to cause great bodily harm or death. Furthermore, a rational trier of fact could conclude that defendant’s claim of self-defense was not based on an honest or reasonable belief that he was in imminent danger or his life was threatened.

Moreover, the evidence suggests that defendant acted out of anger and retaliation. Defendant was told earlier that the victim had beaten his mother, had beaten, raped, and abducted his aunt, and had broken the windows in his cousin’s house. Defendant testified that he brought a gun with him that morning when his cousin asked him to accompany her for a car ride, although he denied intending to use it for anything but protection and denied any knowledge that they were going to find the victim. Finally, there was no evidence to support defendant’s claim that he vomited due to the trauma of shooting someone or that he dropped the weapon outside the victim’s house.

Based on the trial testimony, a rational trier of fact could have determined that defendant did not possess an honest or reasonable belief that his life was in danger. Likewise, the facts and circumstances of the killing support the conclusion that defendant acted with malice. This evidence, when viewed in the light most favorable to the prosecution, was sufficient to convict defendant of second-degree murder.

We affirm.

/s/ Michael J. Kelly

/s/ Harold Hood

/s/ Jane E. Markey