STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY RAY,

Defendant-Appellant.

UNPUBLISHED
May 30, 2000

No. 210708
Wayne Circuit Court
LC No. 97-001723

Before: Holbrook, Jr., P.J., and Kelly and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 50.316(1)(a); MSA 28.548(1)(a). He was sentenced to mandatory life in prison. Defendant appeals as of right. We affirm.

Defendant first argues that his conviction was not supported by sufficient evidence of premeditation. We disagree. This Court reviews an insufficiency of the evidence claim to determine whether the evidence, viewed in a light most favorable to the prosecution, was sufficient to justify a rational trier of fact in finding that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

In order to convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *Id.* The jury may infer from the circumstances surrounding the killing that a defendant acted with premeditation and deliberation. *Id.*

Here, the evidence showed that defendant and Jearard Rosser beat the victim over an extended period of time.[1] One witness testified that the beating was in progress when he first looked out of his window. The beating continued as he left his house and got into his car. He drove around the block and when he returned, defendant and Rosser were still beating the victim. Defendant and Rosser then dragged the victim into an alley, where they continued to beat him with beer bottles and liquor bottles. Another witness observed that defendant and Rosser "stomped on" and kicked the victim. One of

them held the victim up while the other one punched him, and then they slammed him onto the concrete and continued kicking and stomping on him. Both witnesses testified that the victim did not fight back. The evidence of the duration of the incident, the various methods of attack, and the movement of the victim to an alley where defendant and Rosser resumed their attack, suggests that there was sufficient opportunity for defendant to take a second look. See *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Accordingly, we conclude that there was sufficient evidence of premeditation and deliberation to support a jury finding that defendant was guilty of first-degree murder.

Defendant next contends that the trial court improperly admitted his first two statements to police because he was in custody at the time they were given and defendant was not given *Miranda*[2] warnings. The issue whether a person is in custody for purposes of *Miranda* is a mixed question of law and fact that this Court answers independently after review de novo of the record. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). To determine whether a defendant was in custody at the time of the interrogation, we look at the totality of the circumstances. *Id.* The key question is whether the accused reasonably could have believed that he was not free to leave. *Id.* The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned. *Id.*

We agree with the trial court's finding that defendant was not in custody the first two times the police questioned him. The first two interviews consisted of routine questions intended to gather information about defendant's discovery of the victim's body. Defendant initiated the first interview by reporting the discovery of the body to the police, and the questions were limited to how he came to discover the body. The second interview was motivated by questions that occurred to one of the police officers after he viewed the crime scene and read defendant's first statement. Defendant voluntarily went to the police station and was returned home shortly afterward. Although defendant points to testimony at trial by one of the interviewing officers that he believed that defendant was a suspect at the time of the first two interviews, the fact that an individual may be the focus of an investigation does not mean that he is in custody for purposes of *Miranda*. *People v Hill*, 429 Mich 382, 397; 415 NW2d 193 (1987). Rather, the issue is whether the person being questioned reasonably could have believed that he was not free to leave. *Zahn, supra*. Because defendant could not have reasonably believed that he was not free to leave when the police questioned him the first two times, the trial court properly admitted defendant's statements. Furthermore, although defendant said nothing inculpatory in his first two statements, he admitted beating the victim in his third statement, the admission of which he does not contest on appeal. Given his third statement and the other evidence produced against defendant, we are convinced that any error in admitting defendant's first two statements was harmless beyond a reasonable doubt. *Kelly, supra* at 637.

Defendant argues next that the trial court erred in precluding him from questioning the victim's father about the effect of the victim's drug and alcohol use on the victim's behavior. Defendant contends that because there was evidence of alcohol and cocaine in the victim's blood at the time of his death, and because a witness testified to hearing an argument prior to observing the beating, evidence of the victim's usual conduct when under the influence of drugs or alcohol was relevant to show that the victim may have provoked defendant's attack. However, because defendant made no offer of proof

regarding the substance of the excluded testimony, MRE 103(a)(2), we are unable to conclude that the exclusion of the victim's father's testimony affected defendant's substantial rights. MRE 103(a); *People v Hampton*, 237 Mich App 143, 154; 603 NW2d 270 (1999).

Moreover, even assuming that the victim's father would have testified that he had observed the victim act in an antagonistic manner when under the influence of drugs or alcohol, such evidence was not admissible, because

> [a]s a general rule, the character of the victim may not be shown by specific instances of conduct unless those instances are independently admissible to show some matter apart from character as a circumstantial evidence of the conduct of the victim on a particular occasion. [*People v Harris*, 458 Mich 310, 319; 583 NW2d 680 (1998).]

Therefore, to the extent that the victim's father would have testified to specific instances of the victim's conduct while under the influence of drugs or alcohol, the trial court did not abuse its discretion in excluding the testimony.

Finally, defendant argues that the trial court erred by refusing to give the requested jury instruction of voluntary manslaughter. We disagree. The trial court was required to instruct the jury on voluntary manslaughter, a lesser included offense of murder, only if the evidence supported a conviction of that offense. *People v Veling*, 443 Mich 23, 36; 504 NW2d 456 (1993); *People v Sullivan*, 231 Mich App 510, 517-518; 586 NW2d 578 (1998). Voluntary manslaughter is a killing in the heat of passion caused by adequate provocation, without a lapse of time sufficient for a reasonable person to control his passions. *Id.* at 518. It is the element of provocation that distinguishes the offense of manslaughter from murder. *Id.* Where the evidence does not support a finding that the defendant was provoked or was incapable of cool reflection, he is not entitled to an instruction on voluntary manslaughter. *People v Harris*, 190 Mich App 652, 661; 476 NW2d 767 (1991).

In this case, defendant's request for a voluntary manslaughter instruction was properly denied because it was not supported by the evidence. The only evidence that defendant cites in support of his provocation argument is testimony that a witness heard "arguing or something" prior to looking out his window and observing the assault on the victim. The witness did not testify as to who was arguing or the content of the argument. We conclude that such evidence is not sufficient to warrant an instruction on voluntary manslaughter. We also note that the jury rejected a verdict of second-degree murder in favor of first-degree murder. Where a defendant is convicted of first-degree murder, and the jury rejects other lesser included offenses, the failure to instruct on voluntary manslaughter is harmless. *Sullivan*, *supra* at 520.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Jeffrey G. Collins

[1] One witness testified that he observed the beating for five to ten minutes.

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).