

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES POWELL,

Defendant-Appellant.

UNPUBLISHED

February 27, 2001

No. 220268

Wayne Circuit Court

LC No. 98-011189

Before: Smolenski, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted 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). He was sentenced to twenty-five to fifty years' imprisonment for the murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant challenges the sufficiency of the evidence supporting his second-degree murder conviction. Due process requires the prosecution to present sufficient evidence to justify a rational trier of fact's conclusion that defendant was guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). We resolve a sufficiency of the evidence challenge by viewing de novo the evidence presented in the light most favorable to the prosecution to determine whether the prosecution presented sufficient evidence to justify a rational trier of fact's conclusion that defendant was guilty beyond a reasonable doubt of each of the essential elements of the crime. *Johnson, supra*; *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). To prove that defendant was guilty of second-degree murder, the prosecutor had to prove the following elements beyond a reasonable doubt: (1) there was a death, (2) caused by defendant, (3) with an intent to kill, an intent to do great bodily harm, or with willful and wanton disregard of the likelihood that such actions would naturally tend to cause death or great bodily harm, (4) without justification, excuse, or mitigation. MCL 750.317; MSA 28.549; *People v Dykhouse*, 418 Mich 488, 508-509; 345 NW2d 150 (1984).

Defendant first contends that the prosecution failed to present sufficient evidence to disprove that he killed the victim in self-defense or in defense of defendant's fiancée. Once a defendant introduces evidence that he acted in self-defense or in defense of another, the prosecutor bears the burden of proving beyond a reasonable doubt that the defendant did not act

in self-defense or in defense of another. *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). To constitute lawful self-defense that would excuse a defendant from homicide, the evidence must show: (1) the defendant honestly and reasonably believed that he was in danger of death or serious bodily harm; (2) the action taken appeared to be immediately necessary at the time; and (3) the defendant was not the initial aggressor. *People v Heflin*, 434 Mich 482, 502-503; 456 NW2d 10 (1990); *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985).

In this case, defendant testified that he repeatedly beat the victim with a brick and shot the victim twice because he believed that the victim was forcing his fiancée to perform oral sex. However, defendant's former fiancée testified that she was leaving the victim's house at the time defendant beat the victim. Defendant's former fiancée also testified that she saw defendant point the gun at the victim, who was lying motionless on the floor, and then heard a number of shots. The trial court found defendant's testimony not credible and found the fiancée's testimony credible. This Court defers to the trial court's determination of factual issues, especially when it involves the credibility of witnesses. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997). Viewed in the light most favorable to the prosecution, sufficient evidence was presented to enable a rational trier of fact to conclude that defendant did not kill the victim in self-defense or in defense of another.

Defendant next contends that the shooting was accidental and that the prosecution presented insufficient evidence that the shooting of the victim was intentional. A criminal homicide that includes intent as an element of the crime is excusable if the killing is accidental. *People v St Cyr*, 392 Mich 605, 607-608; 221 NW2d 389 (1974); *People v Hess*, 214 Mich App 33, 37-38; 543 NW2d 332 (1995). Although defendant testified that the first shot occurred as a result of a struggle between him and the victim, defendant also admitted to shooting the victim a second time because he was frightened. Moreover, defendant's former fiancée testified that she observed defendant point a gun at the victim, who was lying motionless on the floor. Viewed in the light most favorable to the prosecution, sufficient evidence was presented to justify a rational trier of fact's conclusion that defendant intentionally shot the victim.

Finally, defendant contends that the evidence presented at trial established, at most, that he was guilty of voluntary manslaughter because the discovery of his former fiancée performing oral sex on the victim constituted sufficient provocation to mitigate his second-degree murder conviction to voluntary manslaughter. Second-degree murder may be reduced to voluntary manslaughter when circumstances surrounding the killing demonstrate that malice was negated by adequate and reasonable provocation and the killing was committed in the heat of passion. *People v Harris*, 190 Mich App 652, 661; 476 NW2d 767 (1991). Although most jurisdictions recognize provocation as a mitigating circumstance where a person discovers a spouse committing adultery, this rule of mitigation does not extend beyond the marital relationship to include engaged couples, divorced couples, or unmarried lovers. *People v Eagen*, 136 Mich App 524, 527; 357 NW2d 710 (1984), citing LaFave & Scott, Criminal Law, § 76, pp 575-576.

In this case, defendant was not married to his former fiancée when he claims to have discovered her performing oral sex on another man. Moreover, defendant's former fiancée testified that she was walking down the stairs to leave the victim's house when defendant entered the house, and she denied any sexual involvement with the victim. Viewed in the light most

favorable to the prosecution, sufficient evidence was presented to justify the trial court's conclusion that defendant's killing of the victim was not mitigated to voluntary manslaughter.

Affirmed.

/s/ Michael R. Smolenski

/s/ Kathleen Jansen

/s/ E. Thomas Fitzgerald