

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MANSA CARVIN,

Defendant-Appellant.

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UNPUBLISHED

January 17, 2006

No. 258796

Wayne Circuit Court

LC No. 04-001318-01

Before: Murray, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 264 to 480 months' imprisonment for the second-degree murder conviction, one to five years' imprisonment for the felon in possession of firearm conviction, and to a consecutive sentence of two years' imprisonment for the felony-firearm conviction. We affirm.

Despite he and his attorney acknowledging on the record that they were not seeking a manslaughter instruction, defendant now argues that he was denied the effective assistance of counsel because his trial counsel failed to request a jury instruction of the lesser-included offense of manslaughter. Defendant maintains that he was denied his constitutional right to effective assistance of counsel because a competent attorney would have requested manslaughter instruction in light of the evidence presented. Defendant argues that, had the jury been given a manslaughter instruction, the outcome of the proceedings may have been different. We disagree.

"Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel." *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). Findings of fact are reviewed for clear error and questions of constitutional law are reviewed de novo. *Id.* at 484-485. Because the trial court did not hold an evidentiary hearing, review is limited to the facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Defendant has failed to demonstrate that he was denied the effective assistance of counsel. To establish a claim of ineffective assistance of counsel a defendant must show (1) that

his trial counsel's performance fell below an objective standard of reasonableness and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Walker*, 265 Mich App 530, 545; 697 NW2d 159 (2005). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Thus, the defendant must overcome a strong presumption that defense counsel's action constituted sound trial strategy. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994); *Walker, supra* at 545.

The evidence shows trial counsel's failure to request a manslaughter instruction was trial strategy, and defendant has not presented any evidence to prove otherwise. Defendant testified that he was not at the scene of the crime, and therefore, he did not commit the murder. Defendant requested that the jury be given the theory of lack of presence, and the court granted defendant's request. While it is possible to present inconsistent defenses, such as lack of presence and manslaughter, the decision whether to do so is trial strategy and this Court will not "substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." MCR 2.111(A)(2)(b); *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Additionally, trial counsel clearly stated below that he did not intend to argue manslaughter and the decision not to do so was approved by defendant. The court confirmed trial counsel's statements when it asked defendant if he agreed to trial counsel's decision and defendant responded in the affirmative. Defendant has not shown that trial counsel's failure to request a manslaughter instruction was anything but trial strategy, and therefore, defendant has failed to show that he was denied the effective assistance of counsel.

Defendant further argues that his conviction for second-degree murder should be reversed because there was insufficient evidence at trial to support a guilty verdict. Defendant maintains that since the jury was only given three options regarding defendant's guilt, first or second-degree murder, or not guilty, the jury had no other option but to find defendant guilty of second-degree murder, despite the insufficiency of the evidence. Defendant argues that there was no evidence presented that showed his actions were done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death. We disagree.

This Court reviews de novo claims of insufficiency of the evidence. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). The Court reviews the evidence "in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003), citing *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In doing so, "circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *McKinney, supra* at 165 (citation omitted).

To prove second-degree murder the prosecution must show that there was: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *People v Fletcher*, 260 Mich App 531, 559; 679 NW2d 127 (2004). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great

bodily harm.” *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Malice may be inferred from the facts and circumstances of the killing. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). For second-degree murder, malice can be inferred from evidence that the defendant “intentionally set in motion a force likely to cause death or great bodily harm.” *People v Bulmer*, 256 Mich App 33, 36-37; 662 NW2d 117 (2003) (citations omitted).

Sufficient evidence was presented at trial to support defendant’s conviction. It was undisputed that Augdon was killed, thus satisfying the first element of the offense. The second element was also sufficiently established. The prosecution presented sufficient evidence for a reasonable jury to infer that defendant’s conduct caused Augdon’s death. Angela testified that defendant was at her home repairing windows that he had broken earlier that day, and during an ensuing confrontation Augdon hit defendant in the face, and in retaliation defendant pulled out a gun and shot Augdon seven times. Renee and John, Angela and Augdon’s neighbors’, testified that they saw defendant arguing with Augdon minutes before the shooting. John heard gunshots fired from across the street of his home, and when he looked outside, he noticed defendant standing over Augdon kicking him. Although Renee and John both testified that they did not witness the shooting, they each witnessed defendant walk away from Augdon’s house with a gun in his hand. Although defendant testified that he was not at the scene, the prosecution presented the testimony of three witnesses that placed defendant at the scene of the crime and at least one of the witnesses directly connected defendant to the shooting. Therefore, the prosecution produced sufficient evidence for a reasonable jury to infer that defendant’s conduct caused Augdon’s death.

The prosecution also produced sufficient evidence for a reasonable jury to find that defendant acted with malice. When viewing the evidence in the light most favorable to the prosecution, it is reasonable for the jury to infer that defendant acted with malice when he shot Augdon. Although Augdon threw the first punch at defendant, defendant’s reaction to Augdon’s attack was to use deadly force. Augdon uttered the words, “you pull it, you better use it.” As the evidence shows, defendant did just that. It is reasonable for a jury to infer that defendant’s use of a firearm during the confrontation with Augdon was an act that “intentionally set in motion a force likely to cause death or great bodily harm.” *Bulmer, supra* at 36-37 (citations omitted). Defendant shot Augdon seven times, and no evidence was presented to show that Augdon had a gun or that defendant was fearful that Augdon had a gun. Therefore, the prosecution produced sufficient evidence from which a reasonable jury could infer that defendant acted with malice when he shot Augdon.

The final element necessary to prove second-degree murder requires a showing that defendant was not justified or excused from the killing. Defendant does not argue on appeal, nor did he argue at trial, that he was justified in the killing because he maintains that he did not commit the crime. However, the evidence shows that defendant did not act in self-defense when he pulled his gun on Augdon. After Augdon hit defendant in the face, defendant stumbled down the porch steps onto the walkway. During this time, Augdon was still on the top of the porch steps, thus establishing that the two men were a few feet away from each other, and no evidence was presented indicating that defendant feared Augdon was about to attack him. Thus, it is reasonable for a jury to infer that defendant was not justified in killing Augdon. Therefore, the prosecution sufficiently established all the elements necessary to prove second-degree murder,

i.e., that there was a death caused by an act of defendant with malice and without justification or excuse.

Defendant also argues that the trial court erred in denying his motion for a directed verdict on the charge of first-degree murder. “When reviewing a trial court’s decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt.” *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). To prove first-degree murder the prosecution must show that “the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate.” *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000); MCL 750.316. “Premeditation and deliberation require sufficient time to allow the defendant to take a second look.” *People v Marsack*, 231 Mich App 364, 370-371; 586 NW2d 234 (1998). Premeditation may be inferred by the circumstances surrounding the killing. *Id.* at 371.

While defendant argues that the evidence was insufficient to identify him as Augdon’s shooter, as we previously concluded, the prosecution presented sufficient evidence for a reasonable jury to identify defendant as the person who shot Augdon.

The prosecution also presented sufficient evidence from which a reasonable jury could conclude that defendant killed with premeditation and deliberation. The evidence presented was sufficient for a reasonable jury to infer that defendant had time to take a “second look.” *People v Coddington*, 188 Mich App 584, 599-600; 470 NW2d 478 (1991). After Augdon hit defendant in the face, defendant stumbled down the porch steps onto the walkway. During this time Augdon was still on the top of the porch steps, thus establishing that the two men were a few feet away from each other. When Augdon noticed that defendant was reaching for a weapon, he stated to defendant, “you pull it, you better use it.” At that moment, defendant pulled the gun from his pocket and fired several shots directly at Augdon. Therefore, the prosecution presented evidence that was sufficient for a reasonable jury to conclude that defendant had sufficient time to think about his actions before he pulled out his weapon and shot Augdon.

Affirmed.

/s/ Christopher M. Murray

/s/ Kathleen Jansen

/s/ Kirsten Frank Kelly