STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH VENOY RICHARDSON,

Defendant-Appellant.

UNPUBLISHED
June 12, 2008

No. 278241
Wayne Circuit Court
LC No. 06-011496-01

Before: Whitbeck, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for manslaughter, MCL 750.321, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 75 months to 15 years' imprisonment for the manslaughter conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred in denying his motion for a directed verdict on the second-degree murder charge. We disagree. We review de novo a trial court's decision on a motion for a directed verdict in order to determine, based on the evidence as viewed in a light most favorable to the prosecution, whether a rational trier of fact could find that the elements of the crimes charged were proved beyond a reasonable doubt. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). A trial court must consider the evidence presented by the prosecutor up to the time the motion for a directed verdict was made. *People v Lemmon*, 456 Mich 625, 634; 476 NW2d 129 (1998). The court must not weigh the evidence or determine the credibility of the witnesses, even if the testimony was inconsistent or vague, *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997), as the credibility of witnesses is determined by the trier of fact. *People v Peña*, 224 Mich App 650, 659; 569 NW2d 871 (1997), mod in part on other grounds 457 Mich 885 (1998).

The elements of second-degree murder are: "(1) death, (2) caused by defendant's act, (3) with malice, and (4) without justification." *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003). To support the element of malice, the prosecution must demonstrate 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 the knowledge that death or great bodily harm is the probable result. *People v Wofford*, 196 Mich App 275, 278; 492 NW2d 747 (1992). "The facts and circumstances of the killing may give rise to an inference of malice," including the use of a deadly weapon. *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999).

A defendant may claim that he acted in self-defense where, at the time of the offense, "he honestly and reasonably believe[d] that he [was] in imminent danger of death or great bodily harm and that it [was] necessary for him to exercise deadly force." *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). Although a person may use deadly force in defense of another, the defense "requires that the actor try to avoid the use of deadly force if he can safely and reasonably do so, for example by applying the use of nondeadly force or by utilizing an obvious and safe avenue of retreat." *Id*. A defendant must use only the force necessary to defend the other person, and no more. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993).

Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find that the elements of second-degree murder were proven beyond a reasonable doubt. Assistant Medical Examiner and forensic pathologist Dr. Francisco Diaz testified that the victim, Michael Richardson, died as a result of multiple gunshot wounds. Raymond Rogers, who had been repeatedly stabbed by Richardson prior to defendant's appearance on the scene of the altercation, testified that he was at least seven feet away from Richardson when defendant shot Richardson and that Richardson was not stabbing him when defendant opened fire. Rogers testified further that Richardson had let him go by the time defendant fired five or six shots at Richardson, that Richardson had nothing in his hands when defendant shot Richardson, and that Richardson was trying to run away when defendant shot Richardson. The other eyewitness to the altercation, Durell Foster, similarly testified that defendant shot Richardson after Richardson had released his hold on Rogers.

From these circumstances, including but not limited to defendant's use of a handgun, a rational trier of fact could infer that defendant acted with malice when he caused Richardson's death by shooting him multiple times. *Carines*, *supra* at 759. Also from these facts, a rational trier of fact could find that defendant was not using reasonable force in defense of another because Richardson had let Rogers go and was unarmed and trying to run away when defendant shot him. Therefore, the trial court did not err in denying defendant's motion for a directed verdict on the second-degree murder charge. *Gillis, supra.*

Because we find sufficient evidence to sustain a second-degree murder charge, defendant's claim that there was insufficient evidence to sustain his conviction for manslaughter because there was no proof to support the element of provocation must fail. The record evidences that defendant requested the voluntary manslaughter instruction. Where there is sufficient evidence to sustain a conviction for second-degree murder, and defendant requests a jury instruction on voluntary manslaughter, we will not reverse the voluntary manslaughter conviction even where the record is devoid of any evidence of provocation. *People v Cutchall*, 200 Mich App 396, 409; 504 NW2d 666 (1993).

Defendant next argues that the prosecutor committed misconduct when he referred to the death penalty during his opening statement. We disagree. We review allegations of prosecutorial misconduct on a case-by-case basis, analyzing the prosecutor's comments in view of defense arguments and the evidence admitted at trial, to determine whether a defendant has been denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

As a general rule, "prosecutors are accorded great latitude regarding their arguments and conduct." *Id.* at 282 (citations omitted). Moreover, prosecutors are permitted to argue the

evidence and all reasonable inferences that can be drawn therefrom as they pertain to their theory of the case. *Id*. Although a prosecutor is not required to present arguments using only the blandest terms possible, *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004), "the consequences of a conviction may not be discussed in the jury's presence," *In re Spears*, 250 Mich App 349, 352; 645 NW2d 718 (2002).

Defendant objects to the following portion of the prosecution's opening statement:

> *Prosecutor*: You know in America we don't have the death penalty for any crime. I don't care what you do -- I shouldn't say America, in Michigan we don't. Murderers don't get the death penalty.
>
> *Defense Counsel*: Your Honor, I'll object to any assertion of punishment–
>
> *The Court*: Can I see the attorneys, please?
>
> (At 11:06 a.m., bench conference held)
>
> (At 11:07 a.m., court reconvened)
>
> *Prosecutor*: As I was saying ladies and gentlemen, we don't have the death penalty in Michigan for any crime, murder, nothing. And we can't allow vigilantism to control what's happening in our community.

When viewed in context, the prosecutor referred to the death penalty in relation to Richardson and the reason that defendant killed him, and not that defendant should or would be subject to the death penalty. In other words, the prosecutor argued that defendant essentially imposed the death penalty upon Richardson in retribution for Richardson's stabbing of Rogers. Because the prosecutor's argument that defendant sought vigilante justice when he killed Richardson was supported by the evidence, the reference to the death penalty was not improper. Further, prior to the prosecution's opening statement, the trial court instructed the jury that: "Possible penalty should not influence your decision. It is the duty of the Judge to fix the penalty within the limits provided by law." The trial court repeated this instruction following closing arguments. Jurors are presumed to have followed their instructions. *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000). Accordingly, we do not find that the prosecutor's comments deprived defendant of a fair and impartial trial. *Bahoda, supra*.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly