STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 19, 2012
v	No. 298157 Wayne Circuit Court
ASHTON ARNIZE SMITH, Defendant-Appellant.	LC No. 08-016177-FC

Before: SAAD, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals his bench trial convictions of second-degree murder, MCL 750.317, assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to 230 months to 30 years in prison for the second-degree murder conviction, 2 to 10 years in prison for the assault with intent to do great bodily harm less than murder conviction, and two years in prison for the felony-firearm conviction. For the reasons set forth below, we affirm.

I. SELF DEFENSE AND GREAT WEIGHT OF THE EVIDENCE

In a bench trial, this Court reviews the trial court's findings of fact under the clearly erroneous standard, giving consideration to the special opportunity of the trial court to judge the credibility of the witnesses. MCR 2.613(C); *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). "A finding is clearly erroneous if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). This Court may grant a new trial if the verdict was manifestly against the clear weight of the evidence, i.e., the evidence so clearly weighed in the defendant's favor that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

Defendant claims that the trial court erred in ruling that he did not act in self-defense. He maintains that the evidence showed he feared for his life and that he was justified in using force. A self-defense claim "requires that a defendant has acted in response to an assault." *Detroit v Smith*, 235 Mich App 235, 238; 597 NW2d 247 (1999). A defendant acts in self-defense when he "honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm." *People v Roper*, 286 Mich App 77, 86; 777 NW2d 483 (2009), citing

People v Heflin, 434 Mich 482, 502; 456 NW2d 10 (1990). The use of deadly force in self-defense is justified if: (1) the defendant honestly and reasonably believed that he was in danger, (2) the danger which the defendant feared was serious bodily harm or death, and (3) the action taken by the defendant appeared at the time to be immediately necessary, i.e., the defendant is only entitled to use the amount of force necessary to defend himself. MCL 780.972(1)(a); *Heflin*, 434 Mich at 502.

Here, defendant testified that Wilson threatened to shoot him, but that defendant quickly disarmed Wilson. The trial court accepted defendant's testimony, but did not believe that either Wilson or Almond then reached for a shotgun. The prosecution's witnesses testified that no one in the house made any threats to defendant and that no one rushed toward the shotgun. Almond further testified that he never threatened defendant and that he did not have a gun. The trial court ruled that, after he disarmed Wilson, defendant was no longer in imminent danger and that he did not act in self-defense. It is well established that the trier of fact is in the best position to evaluate the credibility of witnesses before it. *People v Geno*, 261 Mich App 624, 629; 683 NW2d 687 (2004); MCR 2.613(C). Further, it is for the trier of fact to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). In light of the great deference given to the trial court's credibility assessments, and in light of other supporting testimony, the trial court did not clearly err in rejecting defendant's testimony that Wilson and Almond reached for a shotgun and that defendant shot them in self-defense.

For similar reasons, the verdict was not against the great weight of the evidence. "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). In order to discount testimony that supports a verdict and grant a new trial, the testimony must either contradict indisputable physical facts, or be so patently incredible or inherently implausible that a reasonable trier of fact could not believe it. *Id.* at 643-644. The prosecution's witnesses provided ample evidence that supported the verdict, and defendant failed to show that their testimony contradicted indisputable physical facts or was patently incredible or inherently implausible. We hold that the evidence supported the verdict and defendant is not entitled to relief on his great weight of the evidence claim.

II. VOLUNTARY MANSLAUGHTER

Defendant argues that his second-degree murder conviction should be reduced to voluntary manslaughter because he acted in the heat of passion when he shot Wilson.

This Court reviews de novo a challenge to the sufficiency of the evidence in a bench trial. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). The evidence is viewed in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id*. To find defendant guilty of second-degree murder, the prosecution must prove that the defendant's act, with malice and without justification or excuse, caused the death of another. *Roper*, 286 Mich App at 84. Here, defendant challenges the element of malice. "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." *Id*., citing *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Malice may be "inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm." *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999). "The offense of second-degree murder does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of life-endangering consequences." *Id.* at 125.

The evidence that defendant disarmed Wilson and subsequently fired the gun at Wilson causing his death was sufficient to allow the trier of fact to find the requisite malice for second-degree murder beyond a reasonable doubt. Defendant pointed a gun at Wilson and pulled the trigger—an act in obvious disregard of life-endangering consequences. Further, defendant's use of a deadly weapon supports an inference of malice. See *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995), overruled in part on other grounds *People v Mass*, 464 Mich 615; 628 NW2d 540 (2001).

Defendant maintains that adequate provocation can negate the presence of malice, and thereby reduce a defendant's culpability in causing the death of another person to that of manslaughter. *People v Mendoza*, 468 Mich 527, 535–536; 664 NW2d 685 (2003). However, the existence of adequate provocation sufficient to establish manslaughter is a question of fact for the trier of fact. *Roper*, 286 Mich App at 88. The elements of voluntary manslaughter are: (1) the defendant killed in the heat of passion; (2) the passion was caused by adequate provocation; and (3) there was no lapse of time during which a reasonable person could have controlled his passions. *People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005). "The degree of provocation required to mitigate a killing from murder to manslaughter 'is that which causes the defendant to act out of passion rather than reason.'" *Id*. at 714-715, quoting *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). Further, in order for the provocation to be adequate, it must be "that which would cause a reasonable person to lose control." *Sullivan*, 231 Mich App at 518.

During closing arguments, defendant urged the trial court to consider the lesser offense of voluntary manslaughter. However, the trial court found that the circumstances surrounding the shooting were not sufficient to support a manslaughter conviction, and it found defendant guilty of second-degree murder. As discussed, the evidence showed that defendant wrestled a gun away from Wilson and then shot him. The trial court found no credible evidence to show that defendant acted in the heat of passion and no evidence suggests that the circumstances would have caused a reasonable person to lose control. Because the trial court's decision to convict defendant of second-degree murder rather than manslaughter is supported by the evidence, defendant is not entitled to a reduction of his conviction to voluntary manslaughter.

III. EFFECTIVE ASSISTANCE OF COUNSEL

In defendant's Standard 4 Brief, he claims that he received ineffective assistance of counsel. Defendant did not move for a new trial on this ground and failed to request an evidentiary hearing before the trial court; therefore, his ineffective assistance of counsel claim is not preserved. *People v Davis*, 248 Mich App 655, 666; 649 NW2d 94 (2002). This Court's review of an unpreserved ineffective assistance of trial counsel claim is limited to mistakes apparent on the record. *Id*.

Defendant argues that defense counsel's failure to object to hearsay testimony deprived him of the right to the effective assistance of counsel. Hearsay is a "statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v Bartlett*, 231 Mich App 139, 159; 585 NW2d 341 (1998). Further, under MRE 801(a), "[a] 'statement' is . . . an oral . . . assertion[.]"

We hold that the testimony highlighted by defendant is not hearsay. Defendant takes issue with Almond's description of the conduct and actions of others as well as Darryll Duckett's testimony describing the location of the shotgun. Defendant's challenge to this testimony fails because testimony describing a person's actions, movements, and conduct is not hearsay and is admissible. See MRE 801(c); also see *People v Gursky*, 486 Mich 596, 625 n 55; 786 NW2d 579 (2010).

Defendant also contends that Almond's testimony about what Wilson said after being shot constituted hearsay. At trial, Almond testified that Wilson said, "Don't let me die." This testimony was not hearsay because Wilson's comment is not a statement as defined by MRE 801(a). Wilson's comment contained no assertion, i.e., it was a command or imperative. Since a command is not assertive, it cannot express a "truth" for which it could be offered. This Court has held that a command is not an assertion, and thus, does not qualify as a statement under the rule of evidence. *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 204–205; 579 NW2d 82 (1998), mod in part and rev'd in part on other grounds and remanded 458 Mich 862 (1998). Defense counsel is not obligated to make futile objections, and for that reason, defense counsel was not ineffective for failing to object to the statements. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Defendant argues that certain testimony was inadmissible because it was based on opinions, assumptions, and guesses. MRE 602 permits a lay witness to testify on matters for which he or she has personal knowledge. In addition, MRE 701 provides that lay opinion testimony is admissible if it is rationally based on the perception of the witness and is helpful to the determination of a fact in issue. The record reveals that the witnesses' testimony was based on their personal knowledge and observations. Almond, Keith Cooper and Duckett were eyewitnesses. They were present during the shooting and testified based on their observations. Accordingly, defense counsel was not ineffective for failing to object to their testimony because they testified on matters for which they had personal knowledge.

Defendant also claims that defense counsel was ineffective because he failed to investigate and present an insanity defense. *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988). MCL 768.21a(1) provides:

> It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. An individual is legally insane if, as a result of mental illness . . . or as a result of being mentally retarded . . . that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law . . . .

Here, no evidence shows that defendant had a history of mental illness or mental retardation affecting his mental capacity. Further, no facts indicate that defendant was legally insane when he committed the charged offenses, and nothing in the record supports his claim that he had a meritorious insanity defense. Defendant has not provided any affidavits or documentation indicating that he had any medical or psychological condition at the time of the offenses to support his assertion that an investigation of an insanity defense might have been objectively reasonable. Having failed to establish the necessary factual predicate of his claim, defendant has not proven his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant contends that counsel should have presented the defense of duress. To prevail, defendant must show that he was deprived of a substantial defense; however, "this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *Davis*, 248 Mich App at 666. Defendant's claim fails because defendant was not prejudiced by defense counsel's failure to raise a duress defense. The trial court's explanation regarding why it rejected defendant's self-defense claim demonstrates that the trial court would have also rejected a claim that he shot Wilson and Almond while under duress. The elements of duress and self-defense are similar. Both duress and self-defense require that the actor honestly and reasonably believe that he is in imminent danger of death or great bodily harm. See *People v Lemons*, 454 Mich 234, 247; 562 NW2d 447 (1997) (noting that, under a duress defense, the threatening conduct must be imminent); *People v Riddle*, 467 Mich 116, 127; 649 NW2d 30 (2002) (noting that self-defense is available only if the defendant reasonably believes that the threat of death or serious bodily injury is imminent).

As discussed, the trial court found that, after defendant disarmed Wilson, he was not in imminent danger. The trial court found that defendant shot Wilson and Almond because he was angry, not because he was defending himself. Defendant was not prejudiced by defense counsel's failure to raise the defense of duress because it is clear from the trial court's findings of fact and conclusions of law that it would have rejected the defense had it been raised. It is also clear that such a rejection would have been proper because the evidence did not support a finding that defendant could reasonably believe that he was in imminent danger of harm when he shot Wilson and Almond. Based on defendant's failure to demonstrate that a duress defense was viable, his claim that defense counsel was ineffective for failing to assert a duress defense fails.

Defendant asserts that counsel also should have asserted necessity as a defense. Defendant's argument attempts to merge the defenses of duress and necessity; however, the defense of necessity "applies to situations involving natural physical forces, whereas duress applies to the threatened conduct of another human being." *People v Jones*, 193 Mich App 551, 554; 484 NW2d 688 (1992), rev'd on other grounds 443 Mich 88 (1993). The record is void of any evidence that defendant's conduct was the result of or influenced by a natural physical force. Defendant has failed to demonstrate that a necessity defense was viable, and therefore, defense counsel was not ineffective for failing to pursue a meritless defense.

Finally, defendant asserts that defense counsel was ineffective for failing to object to the trial court's score of 25 points for offense variable (OV) 13. Under MCL 777.43(1)(c), OV 13 is scored at 25 points when "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." Further, "[f]or determining the appropriate points

under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). Defendant was charged with first-degree murder, two counts of assault with intent to murder, and felony-firearm, and thus, the trial court's assignment of 25 points was correct. In the absence of an error by the trial court in scoring OV 13, defense counsel was not ineffective because he was not required to make a futile objection. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Affirmed.

/s/ Henry William Saad
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause