

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
September 29, 2011

v

LLOYD MICHAEL BLAIR,  
  
Defendant-Appellant.

No. 298377  
Oakland Circuit Court  
LC No. 2008-223286-FC

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Before: SERVITTO, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of 44 to 80 years for the murder conviction and 5 to 10 years for the felon-in-possession and CCW convictions, and consecutive two-year terms of imprisonment for the felony-firearm convictions. He appeals as of right. We affirm.

Defendant's convictions arise from the August 2008 shooting death of Jason Jones at a birthday party attended by defendant, Jones, and defendant's girlfriend, Amanda Marion. The evidence showed that the victim and Amanda left the party together to go to a store. When they returned, defendant physically assaulted Amanda because she was with the victim. The victim intervened and defendant and the victim began fighting. Defendant pulled out a gun, fired two shots at the victim, and then began chasing the victim down the street during which he fired additional shots at the victim. The victim died from a gunshot wound to his face. The bullet entered his chin and traveled down into his chest cavity. The jury acquitted defendant of first-degree premeditated murder, but found him guilty of second-degree murder.

On appeal, defendant does not dispute that he shot the victim, but he argues that his second-degree murder conviction should be reduced to voluntary manslaughter because he acted in the heat of passion when he shot the victim. Defendant's argument implicates the sufficiency of the evidence to support a conviction for second-degree murder.

We review issues involving the sufficiency of the evidence to sustain a conviction de novo. *People v Harrison*, 283 Mich App 374, 377; 768 NW2d 98 (2009). "The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a

light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt.” *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). The prosecution need only prove its own theory beyond a reasonable doubt, in the face of whatever contradictory evidence the defendant may provide. *People v Chapo*, 283 Mich App 360, 363-364; 770 NW2d 68 (2009). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of an offense. *Harrison*, 283 Mich App at 378. “The credibility of witnesses and the weight accorded to evidence are questions for the jury, and any conflict in the evidence must be resolved in the prosecutor’s favor.” *Id.* at 378.

Second-degree murder requires proof that the defendant’s act, with malice and without justification or excuse, caused the death of another. *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009). In this case, 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.” *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998).

The evidence that defendant produced a gun and fired at least two gunshots toward the victim, one of which penetrated his chin and caused his death, viewed in a light most favorable to the prosecution, was sufficient to allow the jury to find the requisite malice for second-degree murder beyond a reasonable doubt. Defendant’s use of a deadly weapon supports the inference of malice. *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). Although defendant argues that some of the witnesses were not credible, “[t]he credibility of witnesses and the weight accorded to evidence are questions for the jury, and any conflict in the evidence must be resolved in the prosecutor’s favor.” *Harrison*, 283 Mich App at 378. The record does not reveal any extraordinary circumstances that would warrant a court in taking the issue of witness credibility away from the jury. *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998).

Further, although defendant correctly observes that adequate provocation is a circumstance that 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), the existence of adequate provocation sufficient to establish manslaughter is usually a question of fact for the jury. *Roper*, 286 Mich App at 88.

Voluntary manslaughter requires a showing that (1) defendant killed in the heat of passion, (2) this passion was caused by an adequate provocation, and (3) there was no lapse of time during which a reasonable person could have controlled his passions. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). “The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason”; that is, adequate provocation “that which would cause the reasonable person to lose control.” *Id.* at 389 (citations omitted). [*Roper*, 286 Mich App at 87.]

In this case, the jury was instructed on the lesser offense of voluntary manslaughter, but instead found defendant guilty of second-degree murder. The evidence showed that defendant

approached a vehicle occupied by his girlfriend and the victim at a birthday party. After defendant hit his girlfriend, the victim came to her aid by confronting defendant. Any verbal exchange may or may not have escalated to a physical fight before defendant pulled out a gun and fired at least two gunshots at the victim. Whether the victim was struck with a bullet at that point, or by additional gunshots fired before the victim ended up on a porch at a nearby house with a gunshot wound to his chin, was a question of fact for the jury to decide. Regardless of whether defendant fired the fatal gunshot during his initial confrontation with the victim, or during the victim's flight, the jury could have reasonably concluded that the circumstances did not involve a situation that would have caused a reasonable person to lose control. Because the jury'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.

Defendant next argues that the trial court erred in denying his request to instruct the jury on self-defense. We review the trial court's determination that the facts did not support a self-defense instruction for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217-218; 749 NW2d 272 (2008).

At common law, the killing of another person in self-defense was considered justifiable homicide if the offender "honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm." *People v Dupree*, 486 Mich 693, 707; 788 NW2d 399 (2010) (citation omitted). More recently, the circumstances under which a person may use deadly force in self-defense or in defense of another were codified in the Self-Defense Act (SDA), MCL 780.971 *et seq.*, which became effective October 1, 2006. *Dupree*, 486 Mich at 708. The SDA modified the common-law duty to retreat that was imposed on a person who was not attacked inside his or her own home. *People v Conyer*, 281 Mich App 526, 530 n 2; 762 NW2d 198 (2008). But the SDA continues to require an honest and reasonable belief of danger of death or great bodily harm to justify the use of deadly force. MCL 780.972(1)(a); *Dupree*, 486 Mich App at 707. The SDA provides, in pertinent part:

An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:

(a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual. [MCL 780.972(1).]

The SDA applies in this case because defendant's confrontation with the victim occurred in August 2008. At trial, defendant principally relied on a statement that he made during a recorded telephone conversation from jail after his arrest to support his request for a self-defense instruction. During a conversation about the offense with his grandmother, defendant remarked, "It's self defense." The trial court ruled that defendant's statement was not admissible to establish self-defense. Defendant does not challenge that ruling on appeal, nor does he rely on

his recorded statement to argue on appeal that the trial court erred in denying his request for a self-defense instruction.<sup>1</sup> Instead, defendant now argues that there was other evidence to support a self-defense instruction. We disagree.

Even if defendant's assault on his girlfriend did not preclude him from claiming self-defense after he was confronted by the victim, the reasonableness of a person's belief that the use of deadly force is necessary "depends on what an ordinarily prudent and intelligent person would do based on the perceptions of the actor." *People v Orlewicz*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 285672, issued June 14, 2011), slip op at 3. Here, there was no evidence that defendant feared for his life or feared great bodily harm when he shot the victim. Defendant contends that a self-defense instruction should have been given because there was testimony that a fistfight preceded the shooting and the evidence showed that the victim was a large man. However, the evidence showed that both men were large. The medical examiner testified that the victim was six feet, seven inches tall and weighed 247 pounds. Pontiac Police Detective Stephen Wittebort described defendant as being six feet tall and weighing approximately 230 to 240 pounds. The evidence regarding the size difference between the victim and defendant is not enough to support an inference of self-defense. Without more, the trial court did not abuse its discretion in finding that the evidence did not support an instruction on self-defense.

We also reject defendant's argument that the absence of a self-defense instruction violated his constitutional right to present a defense. Because defendant did not raise this constitutional claim in the trial court, this issue is not preserved. See *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004) (an objection on one ground is insufficient to preserve an appellate attack based on a different ground). Therefore, defendant has the burden of establishing a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The due process right to present a defense is not absolute. *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984). "The accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Id.* at 279, quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973); see also *Unger*, 278 Mich App at 250. Here, there was no evidence to support a self-defense instruction under established rules of procedure and evidence. Accordingly, there was no due process violation.

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<sup>1</sup> We note that the proponent of evidence has the burden of establishing both the relevancy and admissibility of the evidence. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004). The relevancy of evidence depends on the purpose for which it is offered. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). Considering that the proponent of defendant's statement was the prosecutor, who did not offer the statement to prove the truth of the matter asserted (i.e., that defendant acted in self-defense), but rather as being probative of defendant's identity as the killer, the trial court did not abuse its discretion in concluding that defendant's mere statement, which is no more than a legal conclusion unsupported by any facts, did not support a self-defense instruction.

Defendant next challenges the trial court's decision to admit evidence of several recorded telephone conversations between him and his girlfriend or family members while he was jail. Defendant first argues that his right to due process was violated because he did not receive sufficient notice in advance of trial of the particular conversations that the prosecutor intended to introduce. We review constitutional claims de novo. *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007).

While discovery rules enhance the fairness of the adversary system, *People v Burwick*, 450 Mich 281, 296-297; 537 NW2d 813 (1995), a defendant does not have a general constitutional right to discovery. *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000). General allegations of surprise and prejudice arising from evidence, even where the prosecutor fails to disclose the evidence in accordance with a discovery order or agreement, are insufficient to establish a due process violation. See *People v Clark*, 164 Mich App 224, 229-231; 416 NW2d 390 (1987), and *People v Taylor*, 159 Mich App 468, 486; 406 NW2d 859 (1987). Where a defendant does not claim that the prosecutor violated a specific constitutional right, but makes only a general claim of a right to due process, a court must determine whether the prosecutor committed error that so infected the trial with unfairness to make the resulting conviction a denial of due process. *People v Blackmon*, 280 Mich App 253, 262; 761 NW2d 172 (2008).

The record in this case indicates that defense counsel had access to all of the recorded conversations before trial and, in fact, had been granted a prior adjournment of trial to allow him to review the recordings. Thus, defendant cannot claim that he was surprised by the evidence. If defense counsel needed more time to prepare after learning of the particular conversations that the prosecutor intended to offer at trial, he could have moved for another adjournment. No such request was made. The record does not support defendant's claim that his due process right to a fair trial was violated.

Defendant also challenges the trial court's decision to admit two of the recorded conversations, which defendant argues on appeal were irrelevant and unduly prejudicial. We review the trial court's decision to admit the evidence for an abuse of discretion. *People v Jones*, 270 Mich App 208, 211; 714 NW2d 362 (2006).

We are not persuaded that the trial court abused its discretion in admitting defendant's statement that he was a "jealous f\*\*ker." The statement was relevant to the issues of motive and intent. Motive is the inducement for a person to do some act. *People v Sabin (After Remand)*, 463 Mich 43, 68; 614 NW2d 888 (2000). "Evidence of the defendant's motive to commit the charged crime lends itself to three theories of logical relevance: (1) identity; (2) actus reus, and (3) mens rea." *Id.* at 68. Motive is not an essential element of a crime of murder, but evidence of motive is always relevant. *Unger*, 278 Mich App at 223.

Further, defendant's use of offensive language to describe his jealousy did not subject the evidence to exclusion under MRE 404(a). The context of the statement was relevant to an understanding of the jealous mind expressed by defendant. *People v McReavy*, 436 Mich 197, 214-215; 462 NW2d 1 (1990). The material question is whether the statement should have been excluded under MRE 403, despite its relevancy. Evidence, even if relevant, may be excluded under MRE 403 if its probative value is substantially outweighed by the danger of unfair

prejudice or to avoid a needless presentation of cumulative evidence. A MRE 403 determination is best left to the trial court's contemporaneous assessment of the presentation, credibility, and effect of testimony. *Sabin*, 463 Mich at 71.

Evidence is unfairly prejudicial if there is a danger that the jury will give marginally probative evidence undue or preemptive weight or it would be inequitable to allow a party to use the evidence. *People v Mardlin*, 487 Mich 609, 627; 790 NW2d 607 (2010); *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008). Here, any character implications arising from the nature of the language used by defendant to describe his jealousy were minimal. In addition, the evidence was not needlessly cumulative because it allowed the jury to hear defendant's own assessment of his character as relevant to the issue of motive. The fact that defendant's girlfriend had previously testified that defendant was a jealous person did not render defendant's self-characterization needlessly cumulative, especially considering that defendant's girlfriend attempted to minimize defendant's jealousy. Accordingly, the trial court did not abuse its discretion by failing to exclude the statement under MRE 403.

Defendant also argues that the trial court erred in admitting statements in which he referred to himself as being a "street ni\*\*a." As a whole, the portion of the conversation in which defendant made this statement could have had a tendency to show defendant's consciousness of guilt. But the vagueness of defendant's statement regarding why he was in his "current situation" diminishes any probative value of the evidence to establish consciousness of guilt. The evidence had little, if any, tendency to make the existence of a fact of consequence to the action more or less probable without the evidence. MRE 401; *Sabin*, 463 Mich at 57. At the same time, the vagueness of the statement also diminished the risk of unfair prejudice. While defendant used racial language to describe himself and his knowledge of or association with the "streets," we do not agree with defendant's argument that the jury would have concluded from the statement that he was a "thug" or someone who was engaged in unrelated criminal activity.

Nonetheless, considering the vagueness of the statement and defense counsel's specific objection to the particular statement, the trial court's reliance on its earlier broad ruling allowing the several proffered recorded conversations for the purpose of establishing defendant's identity to overrule defendant's objection to the "street ni\*\*a" statement was not within the range of reasonable and principled outcomes. Therefore, the trial court abused its discretion in allowing this evidence. *Unger*, 278 Mich App at 216-217. But because the evidentiary error is nonconstitutional in nature, defendant has the burden of showing that it undermined the reliability of the jury's verdict. *Elston*, 462 Mich at 766; see also *Blackmon*, 280 Mich App at 259. We must consider the error in the context of the weight and strength of the untainted evidence to determine "whether it is more probable than not that a different outcome would have resulted without the error." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Here, the jury acquitted defendant of the most serious charge of first-degree premeditated murder. In addition, the jury had already been informed that defendant was a convicted felon in connection with the felon-in-possession charge. Also, considering the untainted evidence that defendant shot the victim after the victim came to the aid of defendant's girlfriend by confronting defendant, we cannot conclude that defendant's vague statement undermined the reliability of the jury's verdict that defendant committed second-degree murder and the

associated weapons offenses. Because it is not more probable than not that a different outcome would have resulted without the vague statement, the error was harmless.

Affirmed.

/s/ Deborah A. Servitto

/s/ Jane E. Markey

/s/ Kirsten Frank Kelly