STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 20, 2011
v	No. 298675 Wayne Circuit Court
SHAWN TATE, Defendant-Appellant.	LC No. 09-028827-FC

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to concurrent prison terms of 28 to 45 years for the murder and assault-with-intent-to-commit-murder convictions, and 2 to 5 years for the felon-in-possession conviction. He was also sentenced to a consecutive prison term of two years for the felony-firearm conviction. We affirm.

I

Defendant's convictions arise from the shooting death of Dwayne Franklin Newton (the victim) outside a known drug house near the intersection of Warren Avenue and Townsend Street on Detroit's east side.

Defendant was initially charged with first-degree premeditated murder, felon-in-possession, and felony-firearm. At the preliminary examination, the prosecution notified the court and defense counsel of its intent to amend the complaint to add the charge of assault with intent to commit murder, MCL 750.83. Following the preliminary examination, defendant was bound over to the circuit court for trial on all charges contained in the amended complaint.

On March 10, 2010, defendant pleaded guilty to the lesser offense of second-degree murder, MCL 750.317, and to the charge of felony-firearm, MCL 750.224b, with the agreement that the prosecution would seek sentences of 12 to 30 years for the murder conviction and two years for the felony-firearm conviction. The prosecution agreed to dismiss the remaining charges. The court accepted defendant's pleas and scheduled sentencing for March 24, 2010.

Defendant appeared for sentencing on March 24, 2010, and moved to withdraw his guilty pleas. Defendant stated, "I don't feel like I should be taking this [plea agreement] for something I didn't do," and informed the court of his belief that defense counsel had "tricked [him] into taking these deals." The circuit court found that setting aside defendant's guilty pleas would not prejudice the prosecution and therefore granted defendant's motion. Thereafter, defense counsel requested that the court allow him to withdraw as defendant's attorney, citing defendant's accusation that counsel had "tricked" him into pleading guilty. The court denied defense counsel's motion to withdraw and scheduled the matter for trial.

Trial began on May 10, 2010. Defense counsel again requested to withdraw and defendant requested a substitution of counsel, citing a breakdown in the attorney-client relationship. Nonetheless, the circuit court denied the requests, noting that it was "the very day of trial and so we're going to proceed."

The evidence presented at trial established that the victim had been present with several of his acquaintances in the living room of a drug house at 4840 Townsend Street on the afternoon of October 15, 2009. Defendant and another man approached the house and knocked on the front door. Defendant had been driving his uncle's green Ford Taurus, which was parked outside the home. One of the victim's acquaintances left the living room and answered the door. Defendant asked the man whether he could purchase marihuana and gave the man $20. The man took the $20 into the living room and gave it to the victim. The victim then took two bags of marihuana to the front door and handed them to defendant. Immediately thereafter, witnesses overheard defendant threatening the victim in a loud voice. Several witnesses in the house then heard two or three gunshots and a general commotion at the front door. At that point, the victim came back into the living room,[1] retrieved an assault rifle, and ran out of house. Witnesses subsequently heard several more gunshots outside.

Llachone Welch, who observed the shooting from her second-floor apartment window, saw the victim firing his assault rifle at the green Ford Taurus as defendant drove the car in reverse from Townsend Street onto Warren Avenue. She testified that several bullets hit the windshield as defendant attempted to "get away" in the car. Welch testified that defendant simultaneously fired back at the victim with a handgun as he drove the car. According to Welch, the Ford Taurus eventually came to a stop and defendant got out of the car and ran away. Another witness, Brittany Pruitt, heard the gunshots, looked out her window, and saw the green Ford Taurus come to a stop when it hit a telephone pole. According to Pruitt, a man matching defendant's description then got out of the Ford Taurus and ran around the corner toward Baldwin Street.

Once the shooting had ended, several witnesses went outside and found the victim lying on the ground in a pool of blood, just down the street from the drug house. One of the witnesses testified that he removed the assault rifle that was next to the victim's body and hid it under a roll

[1] It appears that the victim had not yet been shot at this time.

of carpet in the backyard.[2] Other witnesses noticed that there were several bullet holes in the Ford Taurus, which was parked across Warren Avenue. The driver's side front door of the Ford Taurus had been left open and defendant was no longer in the car.

Six days later, on October 21, 2009, defendant was seen running from the police in the area of Hoyt Street and Liberal Street on the city's northeast side. Detroit Police Officer Michael Benton witnessed defendant run down an alley, pull a handgun from his waistband, and throw the gun into the yard of a vacant house. Benton and his two partners arrested defendant, whose photograph was later identified by one of the witnesses who had been present at the time of the shooting on October 15, 2009. Officer Benton recovered the discarded handgun and identified it as a 0.40-caliber semiautomatic pistol. The pistol contained five rounds of live ammunition at the time it was recovered.

Detroit Police Officer David Andrews, an evidence technician, responded to the area of Warren Avenue and Townsend Street on the evening of October 15, 2009. Andrews took photographs and made a sketch of the scene. When Andrews arrived, the victim's body had already been removed. However, Andrews testified that there was a large area of blood on the sidewalk where the body had been located. Andrews recovered several 0.45-caliber semiautomatic shell casings from the area near the blood and discovered two 0.40-caliber shell casings in the area as well. He also recovered one 0.40-caliber shell casing from just inside the front door of the drug house, as well as a 0.45-caliber assault rifle, which was hidden under a roll of carpet in the backyard. Andrews then processed the green Ford Taurus, which had sustained extensive damage from gunfire. He located an additional 0.40-caliber shell casing and two bullet fragments inside the car. The vehicle was photographed and impounded.

An assistant Wayne County medical examiner testified that he had performed an autopsy on the victim's body and that the victim had died from a single gunshot wound to the head. The assistant medical examiner found no evidence of close-range firing.

Detective Lieutenant Brett Sojda of the Michigan State Police, a firearms expert, testified that he had received and examined the shell casings that were collected from the scene on October 15, 2009. Sojda testified that he had also examined the 0.45-caliber assault rifle that was recovered from the backyard of the drug house and the 0.40-caliber semiautomatic pistol that defendant was seen discarding on October 21, 2009. Sojda identified eight of the recovered 0.45-caliber semiautomatic shell casings as having been fired from the assault rifle in question. Sojda also identified all four of the recovered 0.40-caliber shell casings as having been fired from defendant's semiautomatic pistol.

The parties stipulated that defendant had been previously convicted of a felony, that his right to carry a firearm had not been restored under Michigan law, and that he was ineligible to

[2] This witness cooperated with the authorities, subsequently making a statement in which he admitted that he had moved the assault rifle prior to the arrival of the police. The witness testified at trial that he had removed the rifle because he had been scared.

carry a firearm at the time of the shooting on October 15, 2009. Defendant did not testify and the defense presented no witnesses of its own.

The circuit court instructed the jury on the elements of the charged offenses of first-degree premeditated murder, assault with intent to commit murder, felon-in-possession, and felony-firearm. With respect to the murder charge, the court also instructed the jury on the elements of the lesser offense of second-degree murder. Defense counsel objected to the court's refusal to provide a self-defense instruction to the jury. The circuit court explained that it had found that "self-defense [is] not a defense in this particular case" and that it would therefore not instruct the jury in this regard. The court based its determination that defendant had not acted in self-defense on the evidence that defendant had been the initial aggressor when he fired at least two shots at or near the front door of 4840 Townsend Street.

As noted previously, the jury convicted defendant of the charged offenses of assault with intent to commit murder, MCL 750.83, felon-in-possession, MCL 750.224f, and felony-firearm, MCL 750.227b. The jury also convicted defendant of the lesser offense of second-degree murder, MCL 750.317.[3]

II

Defendant first argues that the circuit court abused its discretion by denying his request for the appointment of substitute counsel and by denying defense counsel's motions to withdraw from the case. We disagree.

We review for an abuse of discretion a circuit court's denial of an attorney's motion to withdraw as counsel. *People v Bauder*, 269 Mich App 174, 193-194; 712 NW2d 506 (2005). We similarly review for an abuse of discretion a circuit court's decision regarding the substitution of counsel. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). A court has abused its discretion only if its decision falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

"An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced." *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). "Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process." *Id*.

We perceive no abuse of discretion in the circuit court's denial of defense counsel's motions to withdraw. When counsel made his first motion to withdraw, the only evidence of a

[3] We note that defendant's convictions of second-degree murder and assault with intent to commit murder do not violate the constitutional protection against double jeopardy in this case because defendant's initial assault on the victim at the front door of the drug house was completed before defendant subsequently shot and killed the victim outside. See *People v Colon*, 250 Mich App 59, 63-64; 644 NW2d 790 (2002).

disagreement between defendant and his attorney was defendant's unsubstantiated accusation that counsel had "tricked" him into pleading guilty. Defendant did not explain how he had been tricked; nor did he raise any other legitimate objections to counsel's performance. Defendant merely informed the court that he did not wish to plead guilty to crimes that he "didn't do." We conclude that, at the time of counsel's first motion, there existed insufficient reasons to permit counsel's withdrawal from the case. Counsel then moved to withdraw once more, this time on the first day of trial. Defense counsel again cited defendant's accusation that counsel had "tricked" him into entering his initial guilty pleas. Observing that it was the "very day of trial," that the jury was present, and that the prosecution was ready to proceed, the court denied counsel's second motion to withdraw. We conclude that permitting defense counsel to withdraw on the very day set for trial, for less than compelling reasons, would have unnecessarily delayed the proceedings and disrupted the judicial process. See *People v Johnson*, 144 Mich App 125, 135; 373 NW2d 263 (1985).

Nor do we find any abuse of discretion in the circuit court's refusal to appoint substitute counsel on defendant's motion. While we acknowledge that defendant accused defense counsel of "trick[ing]" him into entering his initial guilty pleas, we perceive no evidence on the record to suggest that there existed a legitimate difference of opinion between defendant and his appointed counsel with regard to a fundamental issue in the case. *Mack*, 190 Mich App at 14. Once defendant had withdrawn his guilty pleas and the matter proceeded to trial, defense counsel demonstrated dedication and commitment to defendant's case. *Id*. Further, our review of the record reveals that counsel was prepared and competent to represent defendant. *Id*. Among other things, counsel secured the pretrial appointment of a private investigator to assist the defense, aptly cross-examined the prosecution's witnesses at trial, and delivered a thorough closing argument to the jury. It is true that the defense did not call any witness of its own. However, decisions about defense strategy, including what evidence to present and which witnesses to call, "are matters of trial strategy and disagreements with regard to trial strategy or professional judgment do not warrant appointment of substitute counsel." *People v Strickland*, ___ Mich App ___; ___ NW2d ___ (2011). In the end, while it is clear that defendant was unhappy with his appointed attorney, he has provided no concrete reasons to establish that he was entitled to the appointment of substitute counsel. A mere allegation that a defendant lacks confidence in his attorney, unsupported by a substantial reason, does not amount to adequate cause for the appointment of substitute counsel. *Id*.; see also *People v Otler*, 51 Mich App 256, 258-259; 214 NW2d 727 (1974). "Likewise, a defendant's general unhappiness with counsel's representation is insufficient." *Strickland*, ___ Mich App at ___. We find no abuse of discretion in the circuit court's refusal to appoint substitute counsel in this case.

III

Defendant next argues that there was insufficient evidence to charge him with first-degree premeditated murder in the first instance, and that this unsupported charge necessarily led the jury to "improper[ly] compromise" and convict him of the lesser offense of second-degree murder. We disagree.

Criminal charges must be supported by probable cause. *People v Plunkett*, 485 Mich 50, 58-59; 780 NW2d 280 (2010). "Probable cause that the defendant has committed a crime is established by evidence sufficient to cause a person of ordinary prudence and caution to

conscientiously entertain a reasonable belief of the defendant's guilt." *People v Henderson*, 282 Mich App 307, 312; 765 NW2d 619 (2009). "To establish that a crime has been committed, a prosecutor need not prove each element beyond a reasonable doubt, but must present some evidence of each element." *Id*. "If the evidence conflicts or raises a reasonable doubt, the defendant should be bound over for trial, where the questions can be resolved by the trier of fact." *Id*.

On appeal, defendant does not actually dispute that he shot and killed the victim. Instead, defendant argues that there was no evidence to suggest that the killing was deliberate and premeditated, and that he therefore should not have been charged with first-degree murder. The issue of a defendant's premeditation is a question for the jury. *People v Ray*, 56 Mich App 610, 613; 224 NW2d 735 (1974). If there is no evidence from which a jury could draw a reasonable inference of premeditation, there should be no charge of first-degree murder. See *id*.

We fully acknowledge that, once the victim had retrieved the assault rifle and exited the house, he began shooting at defendant in the street. But this does not in any way negate the record evidence that defendant had verbally threatened the victim and fired his handgun at the front door of the drug house minutes before the killing. In other words, the evidence was at least sufficient to create a question of fact concerning whether defendant had time "to take a second look" before deciding to shoot the victim. See *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995) (noting that "[p]remeditation and deliberation require sufficient time to allow the defendant to take a second look"). Indeed, even a few seconds may be sufficient time to allow a defendant to deliberate and premeditate a killing. *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979). Moreover, the evidence that defendant made threatening statements to the victim at the front door just before the killing and that defendant brought a loaded handgun to the house at 4840 Townsend Street strongly supported an inference of premeditation in this case. *People v Taylor*, 133 Mich App 762, 764-765; 350 NW2d 318 (1984). After a thorough review of the record, we conclude that there was more than sufficient evidence to support the prosecution's decision to charge defendant with, and the district court's decision to bind defendant over on, the charge of first-degree premeditated murder. There was certainly "evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief" that defendant acted with deliberation and premeditation when he shot the victim. *Henderson*, 282 Mich App at 312. The charge of first-degree murder was therefore properly submitted to the jury. See *Ray*, 56 Mich App at 613.

IV

Defendant lastly argues that the circuit court erred by failing to instruct the jury on the theories of perfect and imperfect self-defense. Again, we disagree.

With regard to the issue of perfect self-defense, the circuit court correctly determined that a jury instruction was unwarranted because defendant was the initial aggressor. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993); see also *People v Heflin*, 434 Mich 482, 509; 456 NW2d 10 (1990).

But the question remains whether defendant was entitled to a jury instruction on imperfect self-defense. "Imperfect self-defense is a qualified defense that can mitigate second-

degree murder to voluntary manslaughter." *Kemp*, 202 Mich App at 323. The doctrine of imperfect self-defense applies "where a defendant would have been entitled to invoke the theory of self-defense had he not been the initial aggressor." *Id*.

One of the problems with defendant's argument in this regard, of course, is that neither he nor his attorney ever requested an instruction on *imperfect* self-defense in the court below. It is well-settled that "a trial court is not required to present an instruction of the defendant's theory to the jury unless the defendant makes such a request." *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995); see also *People v Wilson*, 122 Mich App 1, 3; 329 NW2d 513 (1982). A circuit court is not required to sua sponte instruct the jury on imperfect self-defense. *People v Amos*, 163 Mich App 50, 56; 414 NW2d 147 (1987).

Even more importantly, however, we conclude that a rational view of the evidence would not have supported a jury instruction on imperfect self-defense. "[T]he inquiry regarding the applicability of the doctrine of imperfect self-defense requires more than just a determination whether defendant was the initial aggressor. In determining whether an initial aggressor is entitled to a claim of imperfect self-defense, the focus is on '*the intent with which the accused brought on the quarrel or difficulty*.'" *Kemp*, 202 Mich App at 324 (emphasis in original; citation omitted). As this Court has previously observed:

> "[I]f one takes life, though in defense of his own life, in a quarrel which he himself has commenced with the intent to take life or inflict grievous bodily harm, the jeopardy in which he has been placed by the act of his antagonist constitutes no defense whatever, but he is guilty of murder. But if he commenced the quarrel with no intent to take life or inflict grievous bodily harm, then he is not acquitted of all responsibility for the affray which arose from his own act, but his offense is reduced from murder to manslaughter." [*Id*. (citation omitted).]

In other words, a defendant "is not entitled to invoke the doctrine of imperfect self-defense to mitigate his crime to manslaughter if the circumstances surrounding the incident indicate that he initiated the confrontation between himself and the victim with the intent to kill or do great bodily harm." *Id*.

Here, the evidence would have allowed a rational trier of fact to find that defendant initiated the confrontation with the victim at the front door of 4840 Townsend Street with the intent to kill or inflict great bodily harm. The testimony established that immediately after defendant and another man knocked on the front door, defendant spoke loudly to the victim in a threatening manner and fired at least two shots from his semiautomatic handgun. Considering the fact that defendant threatened an unarmed victim and immediately thereafter chose to confront that same victim with a loaded handgun, it is reasonable to conclude that the he either intended to kill or to inflict great bodily harm. For this reason, defendant was not entitled to an instruction on imperfect self-defense in this case. *Id*.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen