STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 3, 2009
v	No. 286211 Wayne Circuit Court
DURRELL RICKEY MOORE, Defendant-Appellant.	LC No. 07-011575-FC

Before: K. F. Kelly, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals by right his bench-trial conviction of second-degree murder, MCL 750.317. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 50 to 100 years in prison. We affirm.

Defendant argues that there was insufficient evidence to support his conviction of second-degree murder. He contends that the evidence showed that he either acted in self-defense or that there was sufficient provocation to mitigate the crime to voluntary manslaughter. We disagree.

A challenge to the sufficiency of evidence is reviewed de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*; see also *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

When reviewing a sufficiency-of-the-evidence claim, all conflicts in the evidence must be resolved in favor of the prosecution. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

To convict a defendant of second-degree murder, the prosecution must prove beyond a reasonable doubt that there was a death, caused by an act of the defendant, who acted with malice and without justification, excuse, or mitigation. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998); *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325, amended 453 Mich 1204 (1996). "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 willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Goecke*, *supra* at 464.

"As a general rule, the killing of another person in self-defense by one who is free from fault is justifiable homicide if, under all the circumstances, he honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force." *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). 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 James*, 267 Mich App 675, 677; 705 NW2d 724 (2005). Once a defendant introduces evidence of self-defense, the prosecutor bears the burden of disproving it beyond a reasonable doubt. *Id*.

Defendant's evidence that he acted in self-defense came through his own testimony and the testimony of his codefendant, Ivory Crawford. Defendant claimed that after he exited the house, he started yelling at Kela Keys and Ebony Long when they approached with belts. At this point, defendant and Crawford testified that the victim grabbed defendant from behind and choked him, causing defendant to pass out. When he woke up, defendant saw Crawford struggling in a fight with the victim. Defendant testified that he only punched the victim a few times and also kicked him in his side before withdrawing.

Nevertheless, the trial court found credible the testimony of other witnesses who testified that the victim only intervened after defendant initially attacked another. According to these witnesses, when the victim intervened, he was able to get on top of defendant. However, Crawford, Sofhia Steen, and Dorothea Robinson then attacked the victim and were then able to gain the advantage over him using beer bottles, their fists, and their feet. Defendant then rejoined the fight after the victim was subdued and already on the ground. The weight of the testimony established that even after the victim had become unable to defend himself, defendant continued to kick, punch, and stomp him despite the his incapacitated state. The testimony simply failed to support defendant's assertion that he acted in defense of himself when he punched and kicked the incapacitated victim. And even if defendant was somehow arguably defending himself at the time, "an act committed in self-defense but with excessive force or in which defendant was the initial aggressor does not meet the elements of lawful self-defense." *People v Heflin*, 434 Mich 482, 509; 456 NW2d 10 (1990). The evidence found credible by the trial court all tended to establish that defendant was the initial aggressor when he attacked another, and that the victim only intervened after this attack took place.

In addition, "[t]he necessity element of self-defense normally requires that the actor try to avoid the use of deadly force if he can safely and reasonably do so, for example by applying nondeadly force or by utilizing an obvious and safe avenue of retreat." *Riddle*, *supra* at 119. Indeed, "[o]ne who is involved in a physical altercation in which he is a willing participant . . . is *required* to take advantage of any reasonable and safe avenue of retreat before using deadly force against his adversary, should the altercation escalate into a deadly encounter." *Id*. at 120 (emphasis in original).

When Steen, Robinson, and Crawford joined in the fight against the victim, they were able to take control. Once they had control and the victim was on the ground unable to defend himself, defendant could have safely retreated by getting in his car and leaving. However, defendant chose instead to rejoin the fight against the helpless victim by repeatedly punching,

kicking, and stomping him, resulting in the victim's death. Although there were certain differences in the testimony, the trial court resolved the credibility issues against defendant. Because the evidence showed that defendant was an aggressor and did not retreat when he had the opportunity to do so, there was more than sufficient evidence presented to negate defendant's theory of self-defense in this case.

To show voluntary manslaughter, a defendant is required to show that he killed in the heat of passion, that the passion was caused by adequate provocation, and that there was not a lapse of time during which a reasonable person in defendant's position could have controlled his passions. *People v Mendoza*, 468 Mich 527, 535; 664 NW2d 685 (2003). The degree of provocation that a defendant is required to demonstrate to mitigate his offense from murder to manslaughter is the degree of provocation that would cause the defendant to act out of passion rather than reason, and that which would cause a reasonable person to lose control. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998).

Defendant has failed to show that he was adequately provoked. As noted above, the trial court found that defendant was an initial aggressor when he attacked another. And any provocation that resulted from the earlier incident inside the club would not be adequate to mitigate the homicide to manslaughter because the victim was not involved in that earlier incident and about 15 minutes had elapsed between the time that incident ended and the time the conflict resumed outside. Additionally, defendant presented no evidence that he killed the victim in the heat of passion. Rather, the evidence showed that after Crawford, Robinson and Steen had subdued the victim, defendant joined the fight and continued to beat and kick the victim, who was lying helplessly on the ground. Viewing the evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence from which the trial court could have concluded that defendant did not act in self-defense or in a manner that would mitigate the crime from murder to manslaughter.

Defendant also argues that the trial court abused its discretion by scoring ten points under offense variable (OV) 10, MCL 777.40. Defendant contends that there was no showing of victim vulnerability or exploitation in this case. We disagree.

We review a trial court's scoring decision to determine whether the trial court properly exercised its discretion and whether the evidence of record adequately supported a particular score. *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005). A sentencing factor need only be proven by a preponderance of the evidence. *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006); *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). We review de novo questions concerning the interpretation of the statutory sentencing guidelines. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

Defendant received ten points under OV 10, which relates to the exploitation of a vulnerable victim. Ten points may be scored for OV 10 if the offender "exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). The trial court found that defendant had exploited the victim's physical disability after the victim was on the ground incapacitated and unable to defend himself. We perceive no error in this finding.

OV 10 "applies when exploitive conduct, including predatory conduct, is at issue." *People v Cannon*, 481 Mich 152, 157; 749 NW2d 257 (2008). The word "exploit" means to "manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b); see also *People v Wilkens*, 267 Mich App 728, 742; 705 NW2d 728 (2005). "Vulnerability" is defined as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c); see also *Wilkens*, *supra* at 742.

The record showed that even as the victim was lying helplessly on the ground unable to defend himself, defendant took advantage of his susceptibility to injury and continued to punch, kick, and stomp him. Defendant exploited the victim's physical disability at this point in the altercation by continuing to inflict further injury on the victim while the victim was incapacitated and wholly unable to defend himself. We conclude that ten points were properly scored for OV 10 in this case.

Defendant also argues that the trial court abused its discretion by scoring 50 points under OV 7, MCL 777.37. Again, we disagree. The trial court may score 50 points for OV 7 if the "victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(c); see also *Cline*, *supra* at 652.

The trial court scored 50 points under OV 7 because it found from the medical testimony that defendant's beating of the victim was excessively brutal. This finding was not erroneous. The medical testimony revealed that there were multiple areas of trauma on the victim's head and legs, abrasions on his right forehead, his nose, and his right eye. The victim's right lower face and chin were both swollen and bruised, and there were lacerations on the inside of his mouth caused by his mouth being pushed against his teeth. According to the assistant medical examiner, these injuries were caused by severe blunt force trauma. Upon internal examination, the medical examiner found three more impact sites and bleeding underneath the scalp. The medical examiner also found bleeding on the brain, as well as swelling of the brain. The medical evidence concerning the nature of defendant's injuries adequately supported the trial court's conclusion that defendant suffered an excessively brutal beating. Furthermore, four other witnesses testified that defendant continued to viciously kick, beat, and stomp the victim even as he was no longer fighting back and lying helplessly on the ground. The record evidence adequately supports the trial court's decision to score 50 points for OV 7.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald