STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2009
v	No. 285781 Wayne Circuit Court
JESSE STAR PRICE, Defendant-Appellant.	LC No. 07-008920-FC

Before: Hoekstra, P.J., and Murray and M.J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317,[1] and possession of a firearm during the commission of a felony. Defendant was sentenced to 20 to 40 years' imprisonment for the second-degree murder conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the prosecution presented insufficient evidence for a rational trier of fact to conclude, beyond a reasonable doubt, that defendant committed the crime of second-degree murder, and further argues that the prosecution failed to disprove defendant's claim of self-defense. This Court reviews the record de novo when presented with a claim of insufficient evidence. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). Reviewing the evidence in a light most favorable to the prosecution, this Court determines whether a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003). This Court will not interfere with the fact-finder's role in weighing the evidence and judging the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). It is for the trier of fact to decide what inferences can be fairly drawn from the evidence and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Conflicts in the evidence are resolved in the prosecution's favor. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004).

[1] Defendant was acquitted of a first-degree premeditated murder charge, MCL 750.316(1)(a).

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." *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999). "Malice may also be inferred from the use of a deadly weapon." *Id*.

Viewing the evidence in a light most favorable to the prosecution, and according to defendant's trial testimony, defendant used a firearm to shoot the victim, Christopher Rodriguez, in the back. Dr. Leigh Hlavaty, the assistant medical examiner who performed the autopsy on Rodriguez, testified that Rodriguez's death was the result of a single gunshot wound to his back. A reasonable trier of fact could have reasonably inferred that defendant acted with malice from defendant's use of a firearm to shoot Rodriguez. *Id*. Thus, the prosecution presented sufficient evidence for a rational trier of fact to conclude, beyond a reasonable doubt, that defendant caused Rodriguez's death with malice. *Id*.; *Mendoza, supra* at 534.

However, defendant also argues that killing Rodriguez was justified under the circumstances, thus negating the fourth element of second-degree murder, which requires that the killing must have been "without justification." *Mendoza, supra* at 534. Defendant argues that the prosecution failed to present sufficient evidence for a rational trier of fact to conclude, beyond a reasonable doubt, that he did not act in self-defense.

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 self-defense, 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 is not entitled to use any more force than is necessary to defend himself." *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Where a defendant asserts that homicide is a justifiable self-defense,

> "[t]he question to be determined is, did the accused, under all the circumstances of the assault, as it appeared to him, honestly believe that he was in danger of [losing] his life, or great bodily harm, and that it was necessary to do what he did in order to save himself from such apparent threatened danger?" [*Riddle, supra* at 127, quoting *People v Lennon*, 71 Mich 298, 300-301; 38 NW 871 (1888).]

"Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). A prosecutor meets this burden by presenting sufficient evidence for a reasonable trier of fact to conclude, beyond a reasonable doubt, that the defendant's belief that the use of deadly force was necessary under the circumstances was either not honest or unreasonable. *Id*.

Viewing the evidence in a light most favorable to the prosecution, defendant shot Rodriguez in the back as Rodriguez and his cousin, Anthony Toledo, walked toward their vehicle

intending to leave the scene and withdraw from the verbal altercation between Rodriguez and defendant's girlfriend, Cecilia Loiz. Neither Toledo, Miranda Daniels, nor Rodriguez threatened defendant or Loiz with their words (i.e. threatening to harm defendant) or a weapon. From this evidence, a rational trier of fact could conclude, beyond a reasonable doubt, that defendant did not "honestly and reasonably believe that he [was] in imminent danger of death or great bodily harm and that it [was] necessary for him to exercise deadly force." *Riddle, supra* at 119. Defendant testified that he shot Rodriguez in the back as Rodriguez approached the driver's side door of the mini-van in order to prevent Rodriguez from obtaining a firearm that defendant thought Rodriguez could have used against defendant. However, the jury in this case could have decided that Toledo's testimony that he told Rodriguez during the verbal altercation, "Come on, let's go," and that Toledo walked toward the driver's side of the mini-van, was more credible than defendant's testimony that he shot Rodriguez, "for breaking for the floorboard of that driver's side door."

Further, we observe that defendant admitted that if he felt that he was in danger, he "could have gone in the gas station." Accordingly, the jury could have concluded on the basis of this evidence that defendant's use of deadly force against Rodriguez under these circumstances was unnecessary. See *Riddle, supra* at 129, restating the rule that: "If it is possible to safely avoid an attack then it is not *necessary*, and therefore not permissible, to exercise deadly force against the attacker." (Emphasis in original.) Further, even if defendant's testimony is taken as true, defendant's act of shooting Rodriguez in order to prevent Rodriguez from obtaining a weapon that defendant claims Rodriguez could have had, would constitute a "preemptive strike." This Court has held that even where a decedent has previously threatened and assaulted a defendant, killing the decedent in a "preemptive strike" is not recognized as self-defense in Michigan. *People v Truong (After Remand)*, 218 Mich App 325, 338; 553 NW2d 692 (1996).

Consequently, we hold that the prosecution presented sufficient evidence for a rational trier of fact to conclude, beyond a reasonable doubt, that (1) defendant caused Rodriguez's death with malice, (2) that defendant's asserted belief that the use of deadly force was necessary was dishonest or unreasonable under the circumstances, *Fortson, supra* at 20, and (3) the prosecution presented sufficient evidence for a rational trier of fact to conclude that defendant committed second-degree murder. *Mendoza, supra* at 534.

We also reject defendant's argument that the trial court improperly denied his motion for a directed verdict on the first-degree murder charge. This Court reviews the record de novo when reviewing a trial court's decision on a motion for a directed verdict, in order to ascertain whether the evidence presented by the prosecutor, when viewed in a light most favorable to the prosecution, could persuade a rational trier of fact that the elements of the crimes charged were proved beyond a reasonable doubt. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

Due process requires that the trial court direct a verdict of acquittal if there is insufficient evidence to support a conviction. MCR 6.419(A); *People v Lemmon*, 456 Mich 625, 633-634; 576 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); *Wolfe, supra* at 514-515. Questions regarding the credibility of witnesses are within the purview of the trier of fact. *People v Peña*, 224 Mich App 650, 659; 569 NW2d 871 (1997), mod in part on other grds 457 Mich 885 (1998).

To convict defendant on the first-degree premeditated murder charge, the prosecution had the burden to prove beyond a reasonable doubt that "the defendant intentionally killed the victim and the act of killing was deliberate and premeditated." *Wofford, supra* at 278. This Court has explained that there is no specific time requirement with respect to premeditation or deliberation; however, to obtain a conviction for first-degree premeditated murder, the prosecution must present evidence to show that enough time had elapsed to allow the defendant to "take a 'second look.'" *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). "The intent to kill may be proven by inference from any facts in evidence." *People v Abraham*, 234 Mich App 640, 658; 599 NW2d 736 (1999), quoting *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). "Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence of intent to kill is sufficient." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

The trial court properly denied defendant's motion, as the evidence supported the prosecution's theory that defendant committed first-degree premeditated murder. Defendant, during a custodial interview, stated that during the altercation between Loiz and Rodriguez, he concealed a pistol underneath his shirt. Toledo testified that during Loiz's verbal altercation with Rodriguez, Toledo suggested to Rodriguez that they should leave, and as Rodriguez was walking toward the mini-van to do so, Toledo heard the gunshot that killed Rodriguez. Defendant, in his interview with Officer Byrge, stated that he shot Rodriguez as Rodriguez headed toward the mini-van. Dr. Hlavaty concluded that the "cause of death was a single gunshot wound to the back," and further opined that Rodriguez's death was a homicide. This evidence shows that defendant intentionally killed Rodriguez. *Wofford, supra* at 278.

Because "premeditation and deliberation may be inferred from the circumstances," and "minimal circumstantial evidence is sufficient to prove an actor's state of mind," *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001), a rational trier of fact could infer from the evidence that defendant necessarily had adequate time to premeditate and deliberate the act of killing Rodriguez. The evidence, particularly defendant's statement to Officer Byrge that defendant shot Rodriguez while Rodriguez approached the mini-van, persuades us that the prosecution presented sufficient evidence to show that enough time had elapsed to allow defendant to "take a 'second look,'" before shooting Rodriguez to death. *Plummer, supra* at 300. Thus, we conclude that the prosecution presented sufficient evidence that defendant premeditated and deliberated his intentional act of killing Rodriguez, and the trial court properly denied defendant's motion for a directed verdict on the first-degree premeditated murder charge. *Wofford, supra* at 278.

Defendant next argues that the trial court improperly denied his request for a jury instruction relating to voluntary manslaughter. We disagree. "Claims of instructional error are generally reviewed de novo by this Court, but the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007).

Jury instructions "must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). As a general matter, a trial court's jury instructions are adequate if "they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001). Where, as here,

the jury instruction relates to voluntary manslaughter, a necessarily included offense of murder, the "instruction is warranted when a rational view of the evidence would support it." *Mendoza, supra* at 544, 548.

Where the trial court denies a defendant's request for an instruction on a lesser included offense, defendant must rebut the presumption that the verdict is valid, and demonstrate that the trial court's failure to give the jury instruction resulted in outcome-determinative error. *Gillis, supra* at 140 n 18. Defendant must show that the reliability of the verdict was undermined by the trial court's failure to give the instruction by demonstrating that the jury instruction regarding the necessarily included offense was supported by substantial evidence. *People v Cornell*, 466 Mich 335, 363-364; 646 NW2d 127 (2002). If the jury instruction was not clearly supported by substantial evidence, then a trial court's failure to instruct the jury with respect to a necessarily included offense constitutes harmless error. *Id*. at 365.

"The elements of voluntary manslaughter are (1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions." *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). Although provocation is not an element of voluntary manslaughter, provocation is a circumstance that negates the existence of malice. *Mendoza, supra* at 536.

Defendant argues that he acted in the heat of passion caused by adequate provocation, based upon defendant's testimony that Rodriguez ordered defendant to "calm your bitch down." However, even if Rodriguez did use insulting and abusive language in referring to Loiz, no reasonable jury could conclude, under these circumstances, that this constituted adequate provocation for defendant to kill Rodriguez in response. See *People v Pouncey*, 437 Mich 382, 391; 471 NW2d 346 (1991). Defendant also contends that Toledo's challenge, which consisted of Toledo waving his arms while shouting, "What you wanna do? We can do whatever," constituted evidence of adequate provocation. However, even if Toledo's challenge were adequate provocation, defendant does not explain why in response to Toledo's provocation, defendant instead killed Rodriguez. Defendant further urges that Rodriguez's breaking of a beer bottle during the altercation constituted adequate provocation for him to shoot Rodriguez, but defendant testified that he did not actually see Rodriguez break the bottle; instead, defendant heard the bottle break near where Rodriguez was standing.

Finally, defendant argues that when Rodriguez "bolt[ed]" to the driver's side door of the mini-van, this constituted adequate provocation for defendant to shoot Rodriguez. Even if this would "cause a reasonable person to lose control," there is no evidence that defendant actually lost control at any point during the altercation, or, in other words, acted in the "heat of passion." *Pouncey, supra* at 389. Defendant specifically testified that after he heard the glass breaking, he was "telling everybody to calm down . . . [j]ust go our separate ways." According to defendant, it was when Rodriguez "broke for his door," that Loiz walked over to him, handed him the gun, and defendant shot Rodriguez in the back. The evidence demonstrates that defendant's acts were not influenced by passion or a highly inflamed state of mind; instead, defendant coolly reasoned that if he turned his back to walk away, he would have been shot, and, as a preventative measure, deliberately shot Rodriguez in the back. We conclude that defendant has failed to demonstrate that the trial court's failure to instruct the jury regarding voluntary manslaughter undermined the reliability of the verdict because the voluntary manslaughter instruction was not clearly

supported by substantial evidence that defendant killed Rodriguez in the heat of passion caused by adequate provocation under these circumstances. *Cornell, supra* at 363-364; *Sullivan, supra* at 518. Accordingly, any error in failing to give a voluntary manslaughter instruction was harmless. *Cornell, supra* at 363-364.[2]

Defendant next argues that the trial court's admonitions of his defense counsel, and defendant himself, pierced the veil of judicial impartiality and denied defendant a fair trial. A trial court may exercise broad discretion with regard to matters of trial conduct. MCL 768.29; *People v Taylor*, 252 Mich App 519, 522; 652 NW2d 526 (2002). However, in exercising its discretion, a trial court may not pierce the veil of judicial impartiality. *People v Conley*, 270 Mich App 301, 308; 715 NW2d 377 (2006). The veil of judicial impartiality is pierced where the trial court's conduct unduly influenced the fact-finder and deprived defendant of a fair trial. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

Although defendant provides a number of examples of the trial court's manner in regulating the conduct of the trial that include the trial court's rebuke during his direct examination by counsel, and the trial court's insistence upon defendant directly answering the prosecutor's questions during cross-examination and subsequent warning to defendant with respect to the consequences of defendant's failure to follow its direction, we conclude that the trial court did not exceed the parameters of its discretion in regulating trial conduct. MCL 768.29; *Taylor, supra* at 522. Defendant's selective references to isolated exchanges between the trial court and defendant and his counsel do not demonstrate that the trial court pierced the veil of judicial impartiality. Viewing the record as a whole, although the trial court's exercise of its discretion with regard to matters of trial conduct was terse and somewhat adversarial to both the prosecution and defense, the trial court's enforcement of procedure was not biased. The record supports the prosecution's argument that the trial court's admonitions of defense counsel do not demonstrate bias because there were several instances where the trial court interrupted the prosecutor, ordered the prosecutor to lay a foundation for the admission of evidence, "criticized" the prosecutor for permitting a witness to give a non-verbal response to a question, and sustained a defense objection without allowing the prosecutor to respond, along with a myriad of other examples.

Moreover, even if the trial court's admonitions of defendant and defense counsel outnumbered the trial court's admonitions of the prosecution, and thus indicated some degree of bias, defendant cannot demonstrate plain error affecting his substantial rights. *Carines, supra* at 774. The trial court, following closing arguments, properly instructed the jury as follows:

> My comments, my rulings, my questions, and my instructions are also not evidence. It is my duty to see that this trial is conducted according to law, and to tell you the law that applies to this case.

[2] *People v Darden*, 230 Mich App 597; 585 NW2d 27 (1998), is distinguishable. In that case, the defendant shot an individual who was not only in an argument with defendant, but who was also caught committing a felony on defendant's property. *Id*. at 604.

> However, when I make a comment or give an instruction, I am not trying to influence your vote or express a personal opinion about how you should decide this case. If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion. You are the only judges of the facts, and you must decide this case from the evidence presented.

Generally, jurors are presumed to have followed their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Because defendant cannot show that the trial court's conduct affected the outcome of the case, defendant has forfeited this assignment of error. *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly