STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 24, 2009
v	No. 286966 Macomb Circuit Court
JOHN BOMAR, Defendant-Appellant.	LC No. 2007-005808-FC

Before: Talbot, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of one count of second-degree murder, MCL 750.317, and sentenced to 25 to 40 years' imprisonment. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first claims that the evidence presented at trial was insufficient to convict him of second-degree murder. Specifically, defendant argues that he killed his girlfriend under circumstances that should have reduced the crime to voluntary manslaughter and, therefore, there was insufficient evidence to find him guilty beyond a reasonable doubt of second-degree murder. We disagree.

When reviewing a sufficiency challenge, "evidence is reviewed de novo, in a light most favorable to the prosecution, to determine whether the evidence would justify a rational jury's finding that the defendant was guilty beyond a reasonable doubt." *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). The issue of credibility is for the jury to decide. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

To convict defendant of second-degree murder, the prosecution must prove (1) there was a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *People v Fletcher*, 260 Mich App 531, 559; 679 NW2d 127 (2004). The element at issue in this case is 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).[1] "Malice can [also] be inferred from the use of a deadly weapon." *People v Bulls*, 262 Mich App 618, 627; 687 NW2d 159 (2004).

The element of malice is negated, and the charge of voluntary manslaughter is appropriate, where the defendant killed in the heat of passion, the passion was caused by an adequate provocation, and there was not 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), affirmed 461 Mich 992 (2000). "Adequate provocation" is that which would cause a reasonable person to lose control. *Id.*

Defendant asserts there was adequate provocation because a physical altercation between himself and the victim occurred before the killing. We note that the only evidence suggesting that an altercation occurred is defendant's testimony. Defendant testified that he and the victim were in their apartment arguing when the victim came at him with a knife. The two struggled, but defendant was able to take the knife away from the victim. Defendant testified that when the victim ran into the hallway, he pursued her while still holding the knife. Defendant alleged that the victim "turned around and started swinging" at him in the hallway so "I kept hitting her and she was hitting me back." Defendant claimed that when he hit the victim he "didn't realize" that the knife was still in his hand. A neighbor in a nearby apartment testified that when she opened her door she saw the victim and defendant in the hallway. After making eye contact with defendant, the neighbor saw him "bolt" away. The victim's autopsy revealed multiple stab wounds, including defensive sharp-force injuries. The cause of death was from a stab wound to the chest with perforation of the heart and left lung.

We hold that the evidence, when viewed in the light most favorable to the prosecution, was sufficient to allow a rational jury to conclude that defendant acted with malice when he stabbed the victim. Defendant's testimony, including his claims that he pursued the victim into the hallway while holding the knife and struck her with it multiple times, along with other testimony that the victim pleaded for help and that defendant immediately fled the scene when a

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[1] In *People v Dykhouse*, 418 Mich 488, 495; 345 NW2d 150 (1984), our Supreme Court defined the "third form" of malice as "the intent to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm is the probable result." This Court has recognized that our Supreme Court's explanations regarding the circumstances under which the element of "malice" has been established are not necessarily consistent. In *People v Bulls*, 262 Mich App 618, 626 n 5; 687 NW2d 159 (2004), lv den 472 Mich 867 (2005), this Court stated,

> [A]n individual who "wantonly and willfully disregard[s] the likelihood that the natural tendency of his behavior was to cause death or great bodily harm" does not necessarily possess "the knowledge that death or great bodily harm is the probable result" of his actions. However, because our Supreme Court has used these definitions interchangeably and the facts herein do not require us to resolve whether the differences between the two definitions have any jurisprudential significance, we leave this question for our Supreme Court to grapple with at an appropriate time.

Our Supreme Court has not yet directly addressed the discrepancy between these lines of cases since the *Bulls* Court made the aforementioned statement.

neighbor responded to the struggle, provides a sufficient basis for a jury to find that when defendant stabbed the victim with a knife approximately ten times, he intended to do great bodily harm or acted in wanton and wilful disregard of the likelihood that the natural tendency of his behavior would be to cause death or great bodily harm. *Goecke*, *supra* at 464. The jury was free to disbelieve defendant's testimony that he did not realize the knife was in his hand when he struck the victim. *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). The issue of defendant's credibility is for the jury to decide. *Milstead*, *supra* at 391. Further, a reasonable jury could infer malice from defendant's use of a knife, a deadly weapon. *Bulls*, *supra* at 627.

Even assuming that defendant's testimony presented adequate evidence from which the jury could have concluded that defendant was provoked and acted in the heat of passion, the determination whether the provocation was so great that a reasonable person would lose control is a question of fact for the jury. *Sullivan*, *supra* at 518. The jury was free to believe or disbelieve, in whole or in part, the testimony presented at trial. *Perry*, *supra* at 63. We will not second-guess the jury's determination of witness credibility or reweigh the evidence. *Wolfe*, *supra* at 514.

Defendant also asserts in a pro se supplemental brief that the trial court improperly considered factors at sentencing that were not proven beyond a reasonable doubt at trial and, therefore, he is entitled to resentencing pursuant to the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree.

Defendant failed to raise this issue at sentencing or in a motion for resentencing, so this issue is not preserved for our review. *People v Sexton*, 250 Mich App 211, 227; 646 NW2d 875 (2002). We will only review an unpreserved constitutional issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Our Supreme Court has held that *Blakely* is inapplicable to Michigan's indeterminate sentencing system. *People v McCuller*, 479 Mich 672, 683; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 162-164; 715 NW2d 778 (2006). Defendant acknowledges the current state of the law in this area, yet asks us to change that law. Defendant argues that Michigan's sentencing scheme is "determinate" under the wording of *Blakely*, and that *McCuller*, which ruled that Michigan's sentencing scheme is indeterminate, was decided incorrectly. Nevertheless, because we are bound by the Supreme Court's decision, defendant's argument lacks merit. *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005).

Defendant also argues in his pro se supplemental brief that his trial counsel was ineffective for failing to raise the *Blakely* issue at sentencing. Because counsel is not ineffective for failing to advocate a meritless position, *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005), defendant's claim of error lacks merit.

Affirmed.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Alton T. Davis