

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SYLVESTER PAYTON,

Defendant-Appellant.

UNPUBLISHED

March 7, 2006

No. 257402

Wayne Circuit Court

LC No. 04-004610-01

Before: Cooper, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to twelve to twenty years' imprisonment for the second-degree murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole issue on appeal is whether, given the trial court's findings of fact, defendant should have been convicted of voluntary manslaughter instead of second-degree murder. This Court reviews a trial court's findings of fact for clear error and its conclusions of law de novo. *People v McRae*, 469 Mich 704, 710; 678 NW2d 425 (2004).

The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). 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. *Goecke, supra* at 464.

Voluntary manslaughter is a lesser included offense of murder. *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003). The element distinguishing murder from manslaughter is malice; manslaughter is murder without malice. In voluntary manslaughter cases, malice is negated by the presence of provocation and heat of passion. *Mendoza, supra* at 540. Voluntary manslaughter requires that the defendant 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 could control his passions. *Mendoza, supra* at 534. Provocation is not an element of voluntary manslaughter; rather, provocation is a circumstance that negates the presence of

malice. *Mendoza, supra* at 534. The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes a defendant to act out of passion rather than reason. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). The provocation must be that which would cause a reasonable person to lose control. *Sullivan, supra* at 518.

Pursuant to MCR 6.403, the trial court stated its findings of fact and conclusions of law on the record. Factual findings are sufficient as long as it appears that the trial court was aware of the issues in the case and correctly applied the law. *People v Legg*, 197 Mich App 131, 134; 494 NW2d 797 (1992). The trial court need not make specific findings of fact regarding each element of the crime. *Legg, supra* at 134.

The trial court found that there was a confrontation on the victim's property between the victim and defendant after defendant came over to confront the victim as he was entering his home. The shooting was not accidental and it was completely unprovoked. There was no provocation present because defendant is the one who went over to the victim's property and started the confrontation. Defendant was also the only one to pull out a gun. The victim was shot in the leg first. Defendant had the intent to do great bodily harm when he fired 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. Defendant did not have an original intent to kill when he shot Thomas in the leg. The second shot was fired in the heat of the moment. There was no premeditation or deliberation on the part of defendant because the first shot was at the victim's leg while the second was fired in the heat of the moment.

Based on those findings, the trial court was correct to convict defendant of second-degree murder. All of the elements of second-degree murder are present. The victim died as a result of defendant's actions. Defendant shot the victim with malice because he intended to cause great bodily harm or he intended 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. Defendant had no justification or excuse. While the trial court did find that the second shot was fired in the heat of the moment, all of the factors necessary to negate malice are not present because the trial court also found that defendant's passion was not based on any provocation that would cause a reasonable person to lose control. We find that the trial court's factual findings are not clearly erroneous. Because the trial court did not find adequate provocation for the shooting, we conclude that the trial court was correct to convict defendant of second-degree murder.

Affirmed.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Jane E. Markey