# S T A T E  O F  M I C H I G A N

# C O U R T  O F  A P P E A L S

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODERICK SPEARS,

Defendant-Appellant.

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UNPUBLISHED
April 24, 2007

No. 267572
Wayne Circuit Court
LC No. 05-007354-01

Before: Donofrio, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

A jury convicted defendant of voluntary manslaughter, MCL 750.321, assault with intent to do great bodily harm, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b. The trial court sentenced him as a third habitual offender, MCL 769.11, to 10 to 15 years imprisonment for the voluntary manslaughter conviction, five to ten years for the assault with intent to do great bodily harm conviction, three to five years for the felon in possession of a firearm conviction, and two years for the felony-firearm conviction. We affirm.

Defendant first argues that there was insufficient evidence to convict him of voluntary manslaughter because he was acting in self-defense and because the killing was justified under the fleeing felon rule. We disagree. We review de novo a claim that the evidence was insufficient to sustain a conviction to determine whether a rational factfinder could have concluded that the prosecution proved all elements of the crime beyond a reasonable doubt. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). We view all of the evidence, direct and circumstantial, in the light most favorable to the prosecution. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

"Common-law murder encompasses all killings done with malice aforethought and without justification or excuse." *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003). What differentiates manslaughter from murder is the absence of malice (the intent to kill, the intent to commit great bodily harm, or the intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result). *Id.* at 540. Voluntary manslaughter is an intentional killing that is committed in the heat of passion, caused by adequate provocation, and before adequate time has passed for the blood to cool. *Id.* at 535. The presence of provocation and heat of passion negates malice. *Id*. at 540.

Defendant was entitled to claim self-defense as a legal justification for the killing if "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).[1] This 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." *Id.* But there is no duty to retreat from a sudden, fierce, and violent attack or from an attack in one's own home. *Id*. at 119-120. The latter exception extends only to a defendant's dwelling and attached appurtenances and not to other areas within the curtilage of the home.[2] *Id.* at 135-136. Even in his dwelling, a person must not use deadly force "if he can otherwise arrest or repel the assailant.'" *Id*. at 137, quoting *Pond v People*, 8 Mich 150, 177 (1860). "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). The prosecution has the burden of disproving self-defense beyond a reasonable doubt once evidence is introduced. *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993).

In this case, there was evidence that Gary Rouse went to defendant's house. While on defendant's porch, Rouse scuffled with defendant, and defendant brandished a gun. Then, gunfire was heard coming from the direction of the porch. Rouse jumped over the side of the porch steps and began running up the street. Defendant fired several shots in Rouse's direction from the porch and then turned and shot toward two men standing in the street, David Todd and Antoine Williams. Rouse died of a single gunshot wound to the back. This evidence is sufficient to support defendant's conviction of voluntary manslaughter. *Mendoza*, *supra* at 535.

There is, however, some evidence that Rouse had attempted to rob defendant. In his statement to the police, defendant indicated that he was leaving the house when Rouse approached him, spun around with a gun in his hand, and asked for defendant's money. Defendant grabbed the gun, and they struggled over it. The gun went off three times while they were wrestling, and they both stumbled backward. Defendant had the gun, but Rouse came toward him. Defendant felt threatened. He saw two members of Rouse's family standing by a van and another man behind the wheel. Defendant fired three times because Rouse was charging him and then fired twice into the air. Rouse ran toward the van, but the other two had already entered the vehicle and left. Defendant ran, yelling that Rouse had tried to rob him.

Even assuming Rouse was attempting to rob defendant, defendant was not justified in killing him. Once defendant had disarmed Rouse, the threat of death or great bodily harm was removed, especially after Rouse began running away. Although defendant had no duty to retreat because he was on the porch of his home during the initial attack, defendant actually shot Rouse outside as Rouse was running up the street. This was some distance from defendant's home and

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[1] Effective October 1, 2006, MCL 780.972 codified the right to use deadly force in self-defense or defense of another individual.

[2] In addressing whether the exception to the duty to retreat extended to the curtilage of the home, our Supreme Court applied the common-law rules existing in 1846 when murder was codified in Michigan. *Riddle*, *supra* at 135, n 26. Effective October 1, 2006, and therefore inapplicable to this case, MCL 768.21c extended this exception to the curtilage of the dwelling.

after he had successfully repelled the danger. Defendant was not acting in lawful self-defense when he shot Rouse in the back as he was running away from defendant's home. *Riddle*, *supra* at 137.

Defendant also argues that the shooting was justified under the fleeing felon exception. The court read the instruction for this exception to the jury. A private citizen may make an arrest for a felony committed in his presence. MCL 764.16(a); *People v Hampton*, 194 Mich App 593, 596; 487 NW2d 843 (1992). The use of deadly force is justified where the person is met with force from the person being arrested or where it is necessary to prevent the flight of the felon. *Id.* To justify the use of deadly force to prevent the escape of a fleeing felon: "(1) the evidence must show that a felony actually occurred, (2) the fleeing suspect against whom force was used must be the person who committed the felony, and (3) the use of deadly force must have been 'necessary' to ensure the apprehension of the felon." *Id.* at 596-597. Necessity is a question of fact for the jury to decide. *Id.* at 597. In addition, the private person must apply reasonable care to prevent the felon's escape without violence. *People v Couch*, 436 Mich 414, 421; 461 NW2d 683 (1990), quoting *People v Gonsler*, 251 Mich 443, 446-447; 232 NW 365 (1930).

Even if Rouse had been trying to rob defendant at gunpoint, the jury could have concluded from the evidence that defendant was not justified in using deadly force against him as a fleeing felon. According to the evidence, defendant knew Rouse from the neighborhood; it was widely known in the neighborhood that Rouse and his brothers lived on Barlow Street, only a block away, and they had tattoos of their rap group, "Barlow Boys." A private citizen is not justified in using deadly force against a suspected felon when the citizen knows where the fleeing felon lives, and the police could arrest the suspect there. *People v Smith*, 148 Mich App 16, 25-26; 384 NW2d 68 (1985).

Defendant next argues that there was insufficient evidence to support his conviction for assault with intent to do great bodily harm. We disagree. Assault with intent to do great bodily harm is a specific intent crime that requires: "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha,* 227 Mich App 236, 239; 575 NW2d 316 (1997). Testimony that defendant shot at Todd and Williams is sufficient to support defendant's conviction.

Viewing the evidence in the light most favorable to the prosecution, defendant shot in Rouse's direction a few times from the porch and then turned and shot toward Todd and Williams. Todd was shot in the arm. No evidence was presented that Todd or Williams had a weapon or that either man approached defendant. Therefore, defendant's self-defense argument fails because even if he felt threatened by the mere presence of the three men standing in the street, defendant used more force than was necessary to defend himself. *Kemp*, *supra* at 322.

Defendant also argues that there was insufficient evidence for the felon in possession conviction because he had a valid defense of duress to the charge. We disagree. A person convicted of a felony "may not possess, use, transport, sell, purchase, carry, ship, receive, or distribute" a firearm in Michigan until three years after he has paid all fines for the violation, served all prison terms for the violation, and completed all conditions of probation or parole for the violation. MCL 750.224f(1). If the defendant was convicted of a "specified felony," the period of time is five years. MCL 750.224f(2). In this case, the parties stipulated that defendant was convicted of a specified felony.

To establish the defense of duress, defendant must prove there was: (1) threatening conduct sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm; (2) the conduct in fact caused fear of death or serious bodily harm in the mind of the defendant; (3) the fear or duress was operating upon the mind of the defendant at the time of the alleged act; and (4) the defendant committed the act to avoid the threatened harm. *People v Lemons*, 454 Mich 234, 247; 562 NW2d 447 (1997). Duress is a defense to offenses that have criminal intent as an element, and therefore, is inapplicable to the offense of felon in possession. *People v Luther*, 394 Mich 619, 622; 232 NW2d 184 (1975); *People v Benevides*, 204 Mich App 188, 192; 514 NW2d 208 (1994). Furthermore, even if defendant acted under duress in wrestling the gun from Rouse, defendant was not justified in continuing the possession once the threat of death or great bodily harm terminated. A defendant must cease the proscribed conduct as soon as the duress has "lost its coercive force," or the defense is forfeited. *Lemons*, *supra* at 247 n 18. Here, defendant was not justified in holding on to the gun after Rouse left the porch, shooting at Rouse, Todd, and Williams, running down the street with the gun, and hiding it in a parking lot.

Next, defendant argues that he was deprived of a fair trial by the prosecutor's handling of the investigation regarding the gun, magazine, and bullets. We disagree. Defendant did not object to the handling of the investigation during the trial or move for a mistrial, so this issue is not properly preserved. *People v Pipes*, 475 Mich 267, 277-278; 715 NW2d 290 (2006).

"Generally, a claim of prosecutorial misconduct is a constitutional issue reviewed de novo." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). However, unpreserved claims of constitutional error are reviewed for plain error. *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture: 1) an error must have occurred, 2) the error must be clear or obvious, 3) and the error must have affected substantial rights, meaning it affected the outcome of the trial. *Id*. at 763. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" *Id*., quoting *United States v Olano,* 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

Defense counsel indicated in his opening statement that once the forensic testing of the gun, magazine, and bullets was completed, it would show that defendant never touched the magazine and bullets inside the gun. But forensic officer Mary Gross, the evidence technician who was asked to retrieve fingerprints from the gun, did not bring a report regarding the gun to court. Defendant argues he was denied a fair trial because the prosecutor and the police failed to properly investigate the case. We disagree.

At sentencing, defense counsel conceded that Gross provided him materials indicating that no fingerprints were found on the gun or bullets. Therefore, even if misconduct occurred, defendant has not established plain error affected his substantial rights. Further, we have already concluded that defendant cannot sustain his theory of self-defense even if Rouse were the initial aggressor. Consequently, defendant was not deprived of a fair trial because the fingerprint test results for the gun were not prepared for trial.

Defendant also claims that he was denied the effective assistance of counsel. We disagree. Defendant failed to preserve this issue for review by filing a post-judgment motion for a new trial or evidentiary hearing with the trial court. *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973). The determination whether defendant received ineffective assistance of

counsel is a question of both fact and constitutional law. The trial court's findings of fact are reviewed for clear error, while questions of law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

The right to effective assistance of counsel is guaranteed by the United States and Michigan Constitutions, in order to protect a criminal defendant's right to a fair trial. US Const, Am VI; Const 1963, art 1, § 20; *Strickland v Washington*, 466 US 668, 684; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and the burden is on defendant to prove counsel's actions were not sound trial strategy. *Id*. at 689. To prove a claim of ineffectiveness of counsel, defendant must show that "his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To establish prejudice, a defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 302-303.

Defendant argues that trial counsel was ineffective for failing to call Moesha Owensby, who was also in defendant's house during the incident, as a witness because she observed Rouse point the gun at defendant. Decisions regarding whether to call witnesses are presumed to be questions of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Here, counsel's decision not to call Owensby fell within the wide range of reasonable professional assistance. Owensby's testimony would have been cumulative, and even if true, would not have affected the outcome of the trial because defendant did not act within the parameters of self-defense. This Court will not substitute its judgment for that of counsel in matters of trial strategy. *Id*.

Defendant also argues that trial counsel was ineffective for failing to raise the defense of duress to the felon in possession charge; however, we have already established that defendant did not have a valid defense of duress. Counsel is not required to advocate a meritless position. *People v Snider,* 239 Mich App 393, 425; 608 NW2d 502 (2000). Trial counsel's performance did not fall below objective reasonableness and did not deprive defendant of a fair trial.

Defendant's final argument is that the evidence presented at the preliminary examination did not establish probable cause to bind defendant over for trial on the first-degree murder charge. We disagree. This issue has been raised for the first time on appeal, so it is not properly preserved. Because this issue is unpreserved, our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763.

Although defendant argues there was insufficient evidence presented at the preliminary examination to support a circuit court trial for first-degree murder "where a defendant has received a fair trial, appellate review is limited to the trial court's denial of the defendant's motion for a directed verdict." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Here, however, it does not appear that defendant moved for a directed verdict. Therefore, our review is further limited to whether the trial court plainly erred by failing to sua sponte direct a

verdict of acquittal as to the charge of first-degree murder. MCR 6.419(A).[3] When ruling on a motion for a directed verdict, a court must consider the evidence up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *Gillis*, *supra* at 113.

To establish first-degree murder, the prosecution must show that the defendant intended to kill the victim, and did so with premeditation and deliberation. MCL 750.316; *People v Coddington,* 188 Mich App 584, 599; 470 NW2d 478 (1991). To establish premeditation and deliberation, there must have been sufficient time for the defendant to take a second look, and this may be inferred from the circumstances. *Id*. at 599-600.

Prosecution witnesses testified at trial that defendant shot at Rouse more than once as he was running away. An assistant medical examiner testified that Rouse died of a single gunshot wound to the back from a bullet that traveled from back to front, right to left, and lodged in Rouse's left jaw. Marshall testified that she heard a scuffle on the porch, looked out the window and saw defendant with a gun, heard shots and lay on the floor, heard more shots, and then defendant told her to get out of the house because someone was trying to rob them. Todd testified that he and Williams were standing by the van; Rouse and defendant were on the porch. He heard shooting. He turned to see Rouse running down the street, and defendant standing on the porch shooting. Todd and Williams found Rouse lying face down on the sidewalk.

The trial court did not plainly err by failing to sua sponte direct a verdict of acquittal on the first-degree murder charge. Premeditation and deliberation may be inferred from all of the circumstances surrounding a killing. *Coddington*, *supra* at 600. The evidence that defendant shot at Rouse while he was running away from the porch and the fact that Rouse died from a gunshot wound to the back was sufficient evidence from which a rational trier of fact could find that the essential elements of first-degree, premeditated murder were proven beyond a reasonable doubt. *Gillis*, *supra* at 113; *Coddington*, *supra* at 599-600.

We affirm.

/s/ Pat M. Donofrio
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

[3] MCR 6.419(A) provides in pertinent part: "After the prosecutor has rested the prosecution's case-in-chief and before the defendant presents proofs, the court on its own initiative may, or on the defendant's motion must, direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction."