STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLEMMER MONTGOMERY,

Defendant-Appellant.

UNPUBLISHED
June 28, 1996

No. 164228
LC No. 92-00839

Before: Corrigan, P.J., and MacKenzie and P.J. Clulo*, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and sentenced to life imprisonment. He appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence of premeditation to support his conviction. When reviewing a challenge to the sufficiency of the evidence, this Court views the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Premeditation is an element of first-degree murder. See *People v Coddington*, 188 Mich App 584, 599; 470 NW2d 478 (1991). Premeditation requires sufficient time to allow the defendant to take a second look and may be inferred from the facts and circumstances surrounding the killing. *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992); *Coddington, supra*, p 600. Factors that may be considered to establish premeditation include: (1) the previous relationship between the defendant and the victim, (2) the defendant's actions before and after the crime, and (3) the circumstances of the killing, including the weapon used and the location of the wounds. *Id.*

In this case, trial testimony established that defendant and the victim began fighting on defendant's porch, apparently after the victim demanded the return of money he paid to defendant for "crack" that was actually soap. Defendant applied a chokehold, and several people shouted to

* Circuit judge, sitting on the Court of Appeals by assignment.

defendant to stop fighting because the victim appeared to be hurt. Defendant left the victim on the porch, face down and gasping for air. The victim stumbled down the stairs, fell on the grass, and did not move. Six witnesses saw defendant go to the back yard and return with a cement block. Defendant repeatedly hit the victim on the head several times with the cement block, killing him. Viewed in the light most favorable to the prosecution, this evidence was sufficient for a reasonable trier of fact to find beyond a reasonable doubt that defendant had an opportunity to take a "second look", and that when he went to retrieve the cement block as a weapon, he acted with premeditation and deliberation.

Defendant next argues that defense counsel was ineffective in telling defendant that he did not have to testify, in failing to object to the prosecution's impeachment of defendant's girlfriend, and in failing to properly impeach witnesses regarding where defendant had obtained the cement block. We disagree.

During trial, defense counsel stated that he had discussed the issue with defendant and that defendant did not wish to testify. Defendant cannot now claim error where he acquiesced to counsel's representation to the trial court. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Counsel's impeachment of witnesses and his decision to make objections are matters of trial strategy and did not deprive defendant of a substantial defense. Further, given the overwhelming evidence in support of the prosecution, defense counsel performed at least as well as a lawyer with ordinary training and skill in the area of criminal law. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Defendant next argues that he was denied a fair and impartial trial due to prosecutorial misconduct in admonishing a witness to testify truthfully and in asking her whether she would be surprised to hear that her testimony had been contradicted by others. Defendant failed to object to the prosecutor's remarks, and we find that, because a proper instruction would have cured any prejudice, no manifest injustice will result from our failure to review this claim. *People v Warren*, 200 Mich App 586, 589; 504 NW2d 907 (1993).

Defendant also contends that the prosecutor misled the jury by stating that defendant had a duty to retreat because he was not attacked inside his home. Additionally, defendant argues this comment deprived defendant of the defense of self-defense. We conclude that the prosecutor's argument was proper.

As a general rule, self-defense is available as a defense only where a defendant's act of killing was the single avenue available to escape a reasonably perceived threat of death or great bodily harm. *People v Godsey*, 54 Mich App 316, 318; 220 NW2d 801 (1974). The exception to this "duty to retreat rule" is when the defendant is assaulted in his own dwelling. *People v Kulick*, 209 Mich App 258, 264-265; 530 NW2d 163 (1995). The exception does not extend to outdoor portions of a curtilage. *Id.* Here, any assault on defendant took place outside, so that the duty to retreat rule applied. *Id.* Having failed to retreat from the yard or porch, defendant was not in a

position to assert self-defense. Accordingly, the prosecutor's statement was neither misleading nor unfair.

Affirmed.

/s/ Maura D. Corrigan
/s/ Barbara B. MacKenzie
/s/ Paul J. Clulo