

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN ROGER RYTLEWSKI,

Defendant-Appellant.

UNPUBLISHED

July 19, 1996

No. 162221

LC No. 92-006252

Before: Markman, P.J., and Murphy and Hoekstra, JJ.

PER CURIAM.

A jury convicted defendant of voluntary manslaughter, MCL 750.321; MSA 28.553. The trial court sentenced him to imprisonment for five to fifteen years. Defendant appeals as of right, and we affirm.

Defendant argues that the trial court erred in denying his motion for directed verdict on the charge of first-degree premeditated murder. We disagree. When reviewing the grant or denial of a motion for a directed verdict, this Court must view the evidence in a light most favorable to the prosecution to determine whether the evidence was sufficient to permit a rational trier of fact to find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Herbert*, 444 Mich 466, 473; 511 NW2d 654 (1993). To establish first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and that the killing was deliberate and premeditated. *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995).

Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could conclude that defendant killed the victim. Circumstantial evidence and the reasonable inferences therefrom may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Here, there was sufficient circumstantial evidence that defendant killed the victim. The location of the blood stains on defendant's sweatshirt were consistent with defendant having been involved in a struggle with the victim and inconsistent with defendant's account of events. Furthermore, defendant had minor injuries to his body, such as scratches and gouges, which appeared to be fresh and

which were consistent with defendant having been involved in a struggle with the victim. Finally, there is circumstantial evidence that permits the inference that defendant was at the victim's home at the time the victim was killed.

A rational trier of fact could also conclude that defendant killed the victim with premeditation and deliberation. The elements of premeditation and deliberation may be inferred from all the facts and circumstances surrounding the incident. *Haywood, supra*, 229. Testimony revealed that two kitchen knives were used to stab the victim. The use of two weapons gave defendant time to take a second look and reconsider his decision to kill. *Id.*, 230. Thus, it can be inferred from the number of weapons used that the killing was deliberate and premeditated.

Defendant also argues that the prosecution did not present sufficient evidence of the provocation element of voluntary manslaughter to warrant the trial court's voluntary manslaughter instruction. We disagree. The trial court must give a requested instruction on a cognate lesser included offense if there is evidence on the record that would support a conviction of the offense. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). Under the standard established by the Supreme Court, there must be more than a modicum of evidence; there must be sufficient evidence that the defendant could be convicted of the lesser offense. *Id.*

Although the prosecution presented no direct evidence of provocation, after reviewing the record, we conclude that the evidence is sufficient to permit the inference that the provocation element of voluntary manslaughter was satisfied. As noted above, circumstantial evidence and the reasonable inferences therefrom may be sufficient to prove the elements of a crime. *Jolly, supra*, 466. Furthermore, both this court and the Supreme Court have recognized that it is permissible to infer the provocation element of voluntary manslaughter from other circumstances even in the absence of any direct evidence of provocation. *People v Milhem*, 350 Mich 497; 87 NW2d 151 (1957); *People v Williams*, 26 Mich App 218; 182 NW2d 347 (1970).

Testimony established that defendant and the victim were or had been involved in an intimate relationship, that this relationship was troubled and was deteriorating, that defendant had lived with the victim in the victim's home, that the victim had taken back defendant's key to the victim's residence but continued to allow defendant into his home when the victim was present, and that the victim would become angry and refuse to pick up defendant when defendant stayed out late. Defendant arrived at the victim's house about 3:45 or 4:00 a.m. on the morning of the murder. From the evidence presented, it can be inferred that the victim was angry at defendant for staying out late and that defendant and the victim argued. Viewing the evidence in a light most favorable to the prosecution, it can be inferred from the evidence presented that the provocation element of voluntary manslaughter was satisfied. Accordingly, the trial court did not err in instructing the jury on the offense of voluntary manslaughter. For the same reasons, the trial court did not abuse its discretion in denying defendant's motion for new trial on the basis that the evidence was insufficient to sustain his voluntary manslaughter conviction. *People v Legrone*, 205 Mich App 77, 79; 517 NW2d 270 (1994).

Defendant finally argues that his sentence is disproportionate and that it violates the prohibitions against cruel and/or unusual punishment contained in the United States and Michigan Constitutions. US Const, Am VIII; Const 1963, art I, § 16. Defendant's five- to fifteen-year minimum sentence is within the minimum guidelines range of four to ten years and is therefore presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). We have reviewed the record and conclude that the trial court did not abuse its discretion in sentencing defendant because the sentence is proportionate in light of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Furthermore, because defendant's sentence is proportionate, it is not cruel or unusual *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993).

Affirmed.

/s/ Stephen J. Markman

/s/ William B. Murphy