

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WATSON JEROME WARD,

Defendant-Appellant.

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UNPUBLISHED

June 19, 2007

No. 267726

Wayne Circuit Court

LC No. 05-001160-01

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 25 to 40 years' imprisonment for the second-degree murder conviction, 11 to 25 years' imprisonment for the assault with intent to commit murder conviction, one to five years' imprisonment for the felon in possession of firearm conviction, and to 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 first argues that the prosecution presented insufficient evidence to sustain his second-degree murder conviction. We disagree. We review a claim of insufficiency of the evidence de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). We review the evidence "in the light most favorable to the prosecutor and [determine] whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003), citing *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

To prove second-degree murder, the prosecution must show that there was: (1) 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). "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). Malice may be inferred from the facts and circumstances of the killing. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). For second-degree murder, malice can be inferred from evidence

that the defendant “intentionally set in motion a force likely to cause death or great bodily harm.” *People v Bulmer*, 256 Mich App 33, 36-37; 662 NW2d 117 (2003).

Sufficient evidence was presented at trial to support defendant’s second-degree murder conviction. It is evident and undisputed, that Michael Lloyd was killed, thus satisfying the first element of this offense. The prosecution also presented sufficient evidence for a reasonable jury to infer that Lloyd’s death was caused by defendant. The evidence showed that, on January 4, 2005, Gregory Boggerty and Lloyd picked up defendant so that they could drive to Park Grove to steal some speakers and an “amp.” Lloyd was the driver, Boggerty the front seat passenger, and defendant the backseat passenger. While on the way to Park Grove, defendant started firing shots from the backseat of the car. Despite being shot at, Boggerty managed to escape from the car.

Although Boggerty could not recall how many shots were fired or if Lloyd was alive when Boggerty escaped from the car, Boggerty was certain that defendant fired shots while he and Lloyd were inside of the car. Boggerty escaped from the car, but Lloyd did not and his body was found “slumped over” in the driver’s seat. Keaira Wagner and Sharon Harris corroborated Boggerty’s account of the events that followed the shooting. Wagner and Harris confirmed that, during the time in question, a gunman was chasing a man and that the man being chased ran into Harris’s house for help. The evidence showed that a cigarette butt with a mixture of defendant’s and Lloyd’s DNA was recovered from Lloyd’s car and that Lloyd had a contact wound, which indicated that the gun that killed him was against his skin when it was fired. Lloyd was also shot twice. The evidence presented was sufficient for a reasonable jury to infer that Lloyd’s death was caused by defendant. For reasons stated, the second element of this offense was sufficiently proven.

When viewing the evidence in the light most favorable to the prosecution, the prosecution also presented sufficient evidence for a reasonable jury to conclude that defendant acted with malice when he shot Lloyd. “The offense of second-degree murder does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of life-endangering consequences.” *Bulmer, supra* at 37. It is reasonable for a jury to infer that defendant’s use of a firearm while seated in the backseat of a car “intentionally set in motion a force likely to cause death or great bodily harm.” *Id.* at 36-37.

When defendant started firing shots, he was seated in the backseat of the car while both Lloyd and Boggerty were seated in the front. Lloyd’s dead body was found inside of his car positioned in the driver seat when the police arrived. The car was also still in gear. Lloyd’s contact wound showed that the gun that killed him was against his skin when it was fired. It is reasonable to infer, from the evidence presented, that defendant shot Lloyd knowing that his actions would result in death or great bodily harm. Therefore, the prosecution produced sufficient evidence from which a reasonable jury could infer that defendant acted with malice when he shot Lloyd.

The final element necessary to prove second-degree murder requires a showing that defendant was not justified or excused from the killing. Defendant does not argue that he was justified or excused from the killing because he argues that he did not commit the crime. However, even if defendant asserted that he acted justifiably or in self-defense, the evidence presented would not support his claim. As a general rule:

[T]he killing of another person in self-defense by one who is free from fault is justifiable homicide if, under all the circumstances, he honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force. The necessity element of self-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. [*People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002).]

The evidence showed that defendant did not act in self-defense when he pulled his gun on Boggerty and Lloyd. No evidence was presented that showed Boggerty or Lloyd had weapons, nor was there any evidence presented that showed defendant feared that Lloyd or Boggerty had weapons on their person. Defendant's actions of chasing Boggerty while firing shots at him, despite Boggerty's appearance of being unarmed, was sufficient to infer that defendant was not acting in self-defense that night. Therefore, it is reasonable for a jury to infer that defendant was not justified in killing Lloyd. The prosecution sufficiently established all the elements necessary to prove second-degree murder, i.e., that there was a death caused by an act of defendant with malice and without justification or excuse. *Fletcher, supra*.

Defendant next argues that he was denied the effective assistance of counsel. We disagree. Because the trial court did not hold an evidentiary hearing, review is limited to the facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). However, if a claim of ineffective assistance of counsel involves a question of law, this Court's review is de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish a claim of ineffective assistance of counsel a defendant must show: (1) that his trial counsel's performance fell below an objective standard of reasonableness; and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Thus, defendant must overcome a strong presumption that defense counsel's action constituted sound trial strategy. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994).

Defendant argues that counsel was ineffective because counsel failed to set forth a defense, his opening statement had nothing to do with the case, and he only called one witness. We disagree. Based on the record presented, it appears that the defense theory of the case was that defendant did not commit the charged acts because he was working during the time of the shooting. During opening statement, defense counsel informed the jury that evidence would be presented showing that defendant did not commit the charged crimes because, during the time in question, defendant was working with Donald Jones on the other side of town. It appears that, during trial, the defense presented Jones as a witness for the purpose of establishing defendant's alibi. Defense counsel, during cross-examination and closing argument, challenged factual inconsistencies of Boggerty's account of the crime, to dispute Boggerty's claim that defendant was the shooter. The defense trial strategy and theory of the case was alibi. Even if that strategy backfired, "this Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy." *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001).

Defendant also argues that counsel was ineffective because he only called one witness. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and therefore, this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). “The decision whether to call witnesses is a matter of trial strategy which can constitute ineffective assistance of counsel only when the failure to do so deprives the defendant of a substantial defense.” *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). “A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Kelly*, 186 Mich App 524, 526-527; 465 NW2d 569 (1990).

Defense counsel called an alibi witness who claimed that defendant was working with him during the time of the fatal shooting. Although defendant argues that defense counsel only called one witness, defendant fails to provide any proof, by affidavit or other means, showing that counsel was aware that other witnesses, who would have contributed to the defense, were available but counsel failed to call them. The theory of the case was alibi, and defense counsel presented an alibi witness. Because defendant offers no support for his claim, we have no basis of determining if defendant was denied a substantial defense.

Affirmed.

/s/ Patrick M. Meter  
/s/ Kirsten Frank Kelly  
/s/ Karen M. Fort Hood