

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT ALAN DAY,

Defendant-Appellant.

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UNPUBLISHED

April 23, 2009

No. 282686

Oakland Circuit Court

LC No. 2007-213791-FC

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

PER CURIAM.

Defendant appeals by right his jury trial convictions for first-degree premeditated murder, MCL 750.316, and assault with intent to murder, MCL 750.317. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to life in prison for the first-degree murder conviction, and 20 to 30 years in prison for the assault with intent to murder conviction. We affirm.

Defendant argues on appeal that there was insufficient evidence from which a jury could find that defendant killed with premeditation and deliberation and did not act in self-defense. We disagree.

A challenge to the sufficiency of the evidence is reviewed de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). “[A] court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential 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). Nevertheless, “[t]his Court will not interfere with the trier of fact’s role of determining the weight of the evidence or the credibility of the witnesses. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime.” *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007).

Defendant first argues that the prosecution failed to prove that he acted with premeditation and deliberation. Defendant asserts that he did not have a history of assaulting any of the victims involved and only confronted Giovanni Russell because she appeared in his yard. Defendant further contends that he intended only to assault Russell, but did not, even though he had the opportunity, until he was confronted by three attackers. These arguments are without merit.

First-degree murder is that ““which is perpetrated by means of poison, lying in wait, or other wilful, deliberate, and premeditated killing, or which is committed in the perpetration, or attempt to perpetrate”” an enumerated felony. *People v Garcia (After Remand)*, 203 Mich App 420, 424; 513 NW2d 425 (1994), quoting MCL 750.316. The prosecution must prove “that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate.” *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). “Premeditation and deliberation require sufficient time to allow the defendant to take a second look.” *Id.*, quoting *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992).

Premeditation and deliberation may be established by evidence of “(1) the prior relationship of the parties; (2) the defendant’s actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant’s conduct after the homicide.” *Schollaert, supra* at 170. “Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime.’ Proof of motive is not essential.” *Abraham, supra* at 656-657 (internal citations omitted). Regarding the third factor, circumstances of the killing, the trier of fact may consider “the type of weapon used and the location of the wounds inflicted.” *People v Berry (On Remand)*, 198 Mich App 123, 128; 497 NW2d 202 (1993).

Considering the factors used to evaluate premeditation and deliberation, and opportunities defendant had to “take a second look,” we believe there is sufficient evidence from which a rational jury could find beyond a reasonable doubt that defendant acted with premeditation and deliberation. Regarding the first factor, it is true that there was no relationship between defendant and either of the victims. Nevertheless, when considering the second factor – defendant’s actions prior to the killing – we note there was evidence that once he was alerted to the fact that there was an alleged intruder in the yard, defendant chose to engage in a verbal altercation and threatened to assault Russell. He then *told Russell to wait* while he went back to his room, changed his clothes, and armed himself with a knife. From this fact alone, a rational jury could conclude that defendant sought out a lethal confrontation, yet had time to think it over while getting dressed.

Defendant then left the house and pursued Russell (who had not heeded his call to “wait”), despite pleas from his housemate to refrain from further confrontation. Defendant admitted that as he moved forward, Russell moved away from him. He described this as “a forced march.” He further admitted that Russell was not showing any physical aggression toward him during this period. During his pursuit of Russell, defendant certainly had time to take a “second look.” Nevertheless, defendant *had his knife drawn*, further indicating his expectation of a physical encounter.

The third factor contemplates the circumstances of the killing, including the weapon used and the wounds inflicted. In this case, despite the presence of Derrick Burrow and Frederick Leon Jackson, as well as Burrow’s attempt to explain that Russell was a woman (which, again, gave defendant time to reflect), defendant attacked Russell with the knife, stabbing her in the chest, back and arm. After Burrow managed to momentarily deter defendant by striking him with the tree branch, defendant turned on Jackson, who had helped Russell to her feet. Jackson was unarmed and “backpedaling” away from defendant, giving defendant yet more time to reflect. Nonetheless, when Jackson slipped, defendant took advantage of his vulnerability and leaped on top of him. Despite Jackson’s struggles, defendant stabbed him in the heart with

enough force for the entire six-inch blade to penetrate Jackson's body. A rational jury could certainly conclude that this precise and lethal injury aimed at the heart was deliberate.

The fourth factor for the jury to consider was defendant's behavior after the killing. Defendant (1) did not call 911 or otherwise aid the victims, (2) hid the murder weapon, (3) disposed of his clothing and boots, (4) took a shower to wash off the blood, and (5) initially told police he did not remember much about the incident except that he stabbed Jackson with a sharp stick. A rational jury could conclude that defendant was trying to cover up his actions. This constituted evidence was sufficient for a jury to find beyond a reasonable doubt that defendant acted with premeditation and deliberation.

Defendant further argues, however, that he introduced evidence that he acted in self-defense, and that the prosecution failed to disprove it beyond a reasonable doubt. We disagree.

As a general rule, the 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).]

Furthermore, “[o]ne who is involved in a physical altercation in which he is a willing participant . . . is *required* to take advantage of any reasonable and safe avenue of retreat before using deadly force against his adversary, should the altercation escalate into a deadly encounter.” *Id.* at 120 (emphasis in original).<sup>1</sup> Moreover, “an act committed in self-defense but with excessive force or in which defendant was the initial aggressor does not meet the elements of lawful self-defense.” *People v Heflin*, 434 Mich 482, 509; 456 NW2d 10 (1990). “Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt.” *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993).

Defendant's evidence that he acted in self-defense came through his own testimony. He claimed that after he saw Jackson and Burrow he turned to leave, but he was attacked from behind by three people, making it impossible for him to escape. He could not say how many times he had been struck with the branch—only that it was more than once. It was only then he feared for his own safety and lashed out with the knife. Defendant offered few additional details,

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<sup>1</sup> “[U]nder § 2 of the [Self Defense Act, MCL § 780.971 *et seq.*], there is no duty to retreat if the person has not committed or is not committing a crime and has a legal right to be where they are at the time they use deadly force. Section 2 of the SDA thus constitutes a substantive change to the right of self-defense.” *People v Conyer*, 281 Mich App 526, 530 n 2; \_\_\_ NW2d \_\_\_ (2008). Defendant did not argue that the Self Defense Act applied to his case, possibly because he did not have a legal right to be in the yard where the stabbing occurred, or because, at the very least, he was arguably guilty of an assault by pursuing Russell (who was unarmed and retreating) with his knife drawn.

saying merely that he was “swingin” the knife and at one point noticed that he had fallen on top of Jackson. On the other hand, a rational jury could have found the testimony of the prosecution witnesses more credible than that of defendant and concluded that defendant was the aggressor, did not have an honest or reasonable fear of imminent bodily harm, surely had the ability to retreat, and responded with excessive force.

First, there was sufficient evidence that defendant was the aggressor. Defendant himself *admitted* that he pursued Russell, who was moving away from him and not trying to put up a fight. Furthermore, Burrow testified that defendant had his weapon drawn as he approached, and defendant attacked Russell despite Burrow’s attempt to explain that Russell was a woman. Finally, defendant attacked Jackson, who was unarmed, for doing nothing more than helping Russell to her feet. At the time he was stabbed, and Jackson was moving backward, trying to get away from defendant, but had slipped and fallen.

Second, even if defendant were attacked first, the jury could rationally conclude that his fear of imminent bodily harm was neither honest nor reasonable, and his response was excessive. Testimony indicated that neither Russell, Jackson, or Burrow was armed with anything more deadly than a baseball-bat-sized tree branch, but defendant himself was armed with what he conceded was a six-inch blade capable of causing death. The medical evidence indicated that defendant stabbed Russell in the back with enough force to fracture her bone, and he also stabbed her in the chest. He further stabbed her in the arm causing damage to the muscle and tendon. The single wound to Jackson’s chest was inflicted six inches deep, piercing the heart.

Most likely the jury did not believe defendant’s version of being attacked by three people and further concluded that he could have avoided or left the conflict at any time because he sustained only a minor laceration to his finger and an 18-inch red mark on his back that quickly faded after the incident. The single red mark on defendant’s back was consistent with the testimony that Burrow struck him while he was attacking Russell and inconsistent with defendant’s claim that he was struck more than once. Therefore, there was sufficient evidence from which a rational jury could find that defendant did not act in self-defense, but rather, he killed with premeditation and deliberation.

We affirm.

/s/ Jane E. Markey  
/s/ E. Thomas Fitzgerald  
/s/ Elizabeth L. Gleicher