

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 21, 2014

v

MARVIN LAVELL FRITZ,

Defendant-Appellant.

No. 315951
Wayne Circuit Court
LC No. 12-010897-FC

Before: RIORDAN, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of second-degree murder, MCL 750.317, felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. Defendant was sentenced to 22½ to 37½ years' imprisonment for the second-degree murder conviction, time served for the felon-in-possession conviction, and five years' consecutive imprisonment for the felony-firearm, second offense, conviction. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises out of an incident that occurred on September 25, 2012 on Monterey Street in Detroit, Michigan. A fight involving several persons broke out outside the home of Greg Wheeler, apparently following a request to borrow a cigarette. Two of the combatants were the decedent, Deon Dudley, and defendant. At one point, Dudley put defendant in a "choke hold." Eventually, others broke up the fight between defendant and Dudley. Tensia Wolfe testified that she had to pull Dudley towards the car because he was still trying to fight defendant. As Dudley walked towards the car, defendant yelled at him, "what are you running for, nigger? You scared?" Dudley responded, "No. I ain't scared." Then, Dudley took off his shirt, threw it on the grass, and started moving back towards defendant. Wolfe again grabbed Dudley and dragged him to the vehicle.

During the altercation, Wheeler went into his house and retrieved a handgun, which he handed to defendant as Dudley, his brother Bryant Dudley (Bryant), and Danyale Smith were getting into Smith's vehicle. Defendant walked to the side of Smith's vehicle and shot Dudley. Defendant and Wheeler grabbed Wolfe and began beating her with the gun. Defendant also hit Smith in her face with the gun. Wolfe believed that defendant was about to shoot Smith as well,

until Smith's daughter started screaming, so defendant "shot the rest of the bullets out in the car," but did not hit anyone.

Wolfe then observed Dudley in the back seat of the car, leaning on Bryant because he had been shot in the head. Smith drove off with Wolfe, Dudley, and Bryant, and took Dudley to Henry Ford Hospital. As they started to drive off, Wolfe observed defendant get into his truck and "zoom off." Wolfe testified that she and Dudley had consumed a couple of beers at Toya Connely's house, but Smith, Connely, and Bryant were drinking gin from a bottle that was in Smith's vehicle. Contrarily, Smith testified that she was not drinking, but Wolfe, Dudley, and Bryant were drinking either beer or gin.

Dr. Leigh Hlavaty, Deputy Chief Medical Examiner at the Wayne County Medical Examiner's Office, performed an autopsy on Dudley on September 27, 2012. She observed three gunshot wounds to Dudley's body – "an entrance gunshot wound present lateral to the left eye, sort of right at the end of, of the brow. There was an entrance, an exit gunshot wound on the back of the left calf. And then there was a graze gunshot wound on the back of the right calf." She recovered a bullet from the gunshot wound to the head, and also observed "stippling" from "gunpowder grains that strike the skin. [The stippling] indicates that the muzzle of the weapon was in close proximity to the decedent's head." Dr. Hlavaty also determined that Dudley had a blood alcohol level of 0.075.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the prosecution failed to present sufficient evidence of malice to support his conviction for second-degree murder. We disagree.

We review a claim of insufficient evidence in a criminal trial de novo on appeal. *People v Kissner*, 292 Mich App 526, 534; 808 NW2d 522 (2011). In determining whether sufficient evidence was presented at trial to sustain defendant's conviction, this Court must consider the "evidence in the light most favorable to the prosecutor" and determine whether a rational trier of fact could have found defendant guilty beyond a reasonable doubt. *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010).

The elements of second-degree murder are "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Portellos*, 298 Mich App 431, 443; 827 NW2d 725 (2012). "Malice includes the intent to kill, the intent to cause great bodily harm, or the intent to take an action whose natural tendency is to cause death or great bodily harm, wantonly and willfully disregarding that risk." *Id.* This Court has held that "[c]ircumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of a crime." *Id.* "Minimal circumstantial evidence is sufficient to prove the defendant's state of mind." *Id.*

Defendant, while ostensibly challenging the sufficiency of the evidence regarding the malice element of his second-degree murder conviction, in fact appears to argue that the evidence supported a conviction for voluntary manslaughter, not murder. Voluntary manslaughter, like murder, has as an essential element the intent to kill or commit serious bodily harm. *People v Hess*, 214 Mich App 33, 38; 543 NW2d 332 (1995). Thus, it is unclear how

defendant's argument concerning voluntary manslaughter relates to his claim of insufficient evidence of malice. A conviction for voluntary manslaughter requires a finding that a defendant, although possessed with the intent to kill, killed in the heat of passion caused by adequate provocation. *People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005). Here, the evidence, taken in the light most favorable to the prosecution, shows that defendant was initially involved in a fight with decedent in which no weapons were used, but that the decedent and defendant had ceased fighting (and in fact the decedent was seated in a vehicle) before defendant shot him. Such evidence does not support a finding that defendant was adequately provoked by virtue of being involved in mutual combat. See *People v Brown*, 37 Mich App 565, 569; 195 NW2d 60 (1972); *Brown v Swartz Creek VFW*, 214 Mich App 15, 23; 542 NW2d 588 (1995).

Further, the prosecution did present sufficient evidence to prove, beyond a reasonable doubt, that defendant acted with malice. This Court has held that 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 Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009). In *Roper*, this Court determined that sufficient evidence had been established that the defendant acted with malice because he "intentionally set in motion a force likely to cause death or great bodily harm," by picking up a knife, "brandishing it, and then stepping up and swinging at" the victim. *Id.* at 85. Similarly, defendant had a gun in his hand, intentionally walked to Smith's vehicle with the purpose of setting in motion a force that was likely to cause death or great bodily harm. Defendant intentionally pointed the gun at Dudley, and shot him three times. Moreover, the stippling around Dudley's head wound indicated that the shot was fired from close range, supporting an inference that it was done with the intent to cause serious bodily harm. At the time of the shooting, Dudley had retreated back to Smith's vehicle and was sitting in the back seat as Smith was preparing to drive away. Based on the evidence presented – that Dudley had retreated to and was in the car, and defendant intentionally walked up to the car with the purpose of shooting at Dudley – an inference could be properly drawn that defendant acted with malice. Thus, defendant was properly convicted of second-degree murder.

III. INCONSISTENT VERDICT

Next, defendant argues that the trial court clearly erred because its findings of fact were inconsistent with the second-degree murder verdict. We disagree.

"A trial court's findings of fact may not be set aside unless they are clearly erroneous." *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). "A ruling is clearly erroneous if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *Id.* (internal citations omitted). A trial judge sitting as the finder of fact in a bench trial may not render a verdict that is inconsistent with his or her findings of fact. *People v Ellis*, 468 Mich 25, 26-28; 658 NW2d 142 (2003).

In stating its findings of fact for second-degree murder, the trial court stated, in relevant part:

And from all the testimony, the environment was just crazy out there. [Defendant] drove up crazy. That's what we heard. Was not at the scene at first. And that did we hear about, as weird as this might sound, about Gregory

Wheeler? Gregory Wheeler was described as the senior person there. That when a person is older than everybody, we would like to think that they possess a little wisdom with that age.

* * *

I find that there is nobody else, but Mr. Fritz, who possessed that gun, whether you believe the witnesses, whether you believe the tape recordings that were made from the jail, it doesn't matter what theory you base it on, even the theory that was argued at the time of the closing by the defense. It was all an admission that, okay. Mr. Fritz had the gun. Okay. He shot Mr. Dudley.

* * *

Now, I imagine that it couldn't have been more chaotic than it was out there. Nobody had a cool head. Anybody have a cool head out there? No. Everybody was reacting to something that somebody else was reacting. And when people react, what is the tendency? To overact.

* * *

How could it be so out of control that everybody got up here and said he was acting crazy? It was just nobody was thinking clearly. And for first[-]degree murder to apply, it has to be deliberate. It has to be premeditated. You have to have time to reflect. And it has to be real and substantial.

How many people are given a gun and can say: Oh. Okay. Let me think about what I'm supposed to do with this gun? Think about what was happening at the time that Mr. Fritz got that gun. Nobody wanted to back down. At least Mr. Dudley wasn't backing down.

And look how he acted after he used the gun. He was so enraged that he and Mr. Wheeler going [sic] to beat an unarmed young lady on the hood of a car and then threaten somebody else, still not able to contain himself, until, as everybody heard, it was a child's voice that restored everybody's common sense.

The innocent voice of a child, I would say sent there specifically on that day by our Creator. The innocent voice of a child that brought reason back, that restored everybody's focus. And then everybody was left to deal with the damage. *There was no excuse or justification for any of this.*

I think that the People have shown beyond a reasonable doubt that at the time that Mr. Fritz shot [Dudley] that he intended to do great bodily harm less than the crime of murder. And I'll find him guilty of murder in the second degree and felony[-]firearm at the time that he committed the murder of Mr. Dudley. [Emphases added.]

A trial court that sits without a jury "must make separate findings of fact and conclusions of law." MCR 2.517(A)(1); see also *People v Johnson*, 208 Mich App 137, 141; 526 NW2d 617 (1994). Here, the trial court made clear findings of fact. Defendant incorrectly asserts, however, that these findings were inconsistent with defendant's conviction of second-degree murder.

Although the trial court acknowledged that the scene was “chaotic,” it consistently held that there “was no excuse or justification” for defendant’s actions. The trial court determined that defendant shot Dudley, intending to do great bodily harm less than murder, as required for second-degree murder, *Portellos*, 298 Mich App at 443, and did so without excuse or justification. Simply put, there is no indication that the trial court’s findings were inconsistent with the second-degree murder verdict and the trial court did not clearly err in making its findings of fact.

Affirmed.

/s/ Michael J. Riordan

/s/ Pat M. Donofrio

/s/ Mark T. Boonstra