

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY GLOVER,

Defendant-Appellant.

UNPUBLISHED

September 25, 2007

No. 271293

Wayne Circuit Court

LC No. 06-001040-01

Before: Schuette, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to life imprisonment for the first-degree murder conviction, 40 to 60 years' imprisonment for the second-degree murder conviction, and two to ten years' imprisonment for the felon-in-possession conviction, those sentences to be served concurrently, but consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I. FACTS

This case arises out of a shooting death of Martese Roberts and Karod "Freaky" Thomas in front of 4445 30th Street in Detroit, Michigan on September 29, 2005. Ciera Truitt and JuJuan "Twin" Payne were eyewitnesses to the events that occurred. Truitt lived two houses down from 4445 30th Street. She testified that she knew both the defendant and the defendant's brother, Lawan "Cokie" Smith. At the time of the shooting, Truitt was on her front porch talking on the phone. She stated that she saw an argument start between Cokie and her cousin, Roberts, at Roberts's house. Shortly after, Cokie walked down the street talking on his cell phone. Fifteen to twenty minutes later, Cokie returned to Roberts's house with defendant and renewed the argument. The argument escalated into a fight between Cokie and Roberts. As Roberts was bent over fighting Cokie, the defendant pulled out a gun and started shooting Roberts in the back. At that point, Truitt explained that her father pulled her into the house, and she heard multiple gunshots, but she did not see any other individuals with weapons.

Payne testified that he knew Cokie and defendant from the neighborhood. Payne was intending on living at Roberts's house; he was Roberts's cousin and was recently released from

prison. Payne stated that he and Roberts were cleaning the house when Cokie came to the door. Payne explained that an argument broke out because Cokie was concerned that Payne was planning on selling drugs out of the house. Cokie left while making a cell phone call and later returned with defendant, who wanted to know what was going on. Again, Cokie started to argue with Roberts and a fight broke out. When Roberts knocked Cokie down, defendant shot him in the back. Defendant also shot Karod Thomas, who was standing in the street nearby. Payne stated that he never saw Cokie, Roberts, or anyone else with a gun before he ran off.

According to medical evidence, Roberts was shot seven times, and Thomas was shot twice.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence of premeditation to support his first-degree murder conviction. We disagree.

A. Standard of Review

When reviewing a challenge to the sufficiency of the evidence, we must “view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

B. Analysis

“In order to convict defendant of first-degree, premeditated murder, the prosecution [must] prove that [the] defendant intentionally killed the victim and that the act of killing was premeditated and deliberate.” *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2002). “To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem. . . . [P]remeditation and deliberation characterize a thought process undisturbed by hot blood.” *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998), quoting *People v Morrin*, 31 Mich App 301, 329-331; 187 NW2d 434 (1971). “Premeditation and deliberation require sufficient time to allow the defendant to take a second look.” *People v Marsack*, 231 Mich App 364, 370-371; 586 NW2d 234 (1998). “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.’” *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999), quoting *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992).

In this case, the evidence showed that defendant’s brother Cokie argued with one of the victims over drugs. Cokie then made a cell phone call and defendant arrived shortly thereafter, armed with a gun. The two men then returned to the victims’ home and Cokie initiated a fight. Defendant observed the fight, then subsequently shot both victims. None of the victims were armed with a weapon. One of the victims, Roberts, was shot seven times. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant had a sufficient opportunity for a second look before shooting the victims. The evidence was sufficient to support defendant’s first-degree murder conviction with respect to Roberts.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant argues that defense counsel was ineffective for failing to raise the defense of defense of others. We disagree.

A. Standard of Review

Defendant did not raise this issue in a motion for a new trial or request for an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); therefore, our review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

B. Analysis

“A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitution, a convicted defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).” *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The defendant must first show that counsel’s performance was deficient, i.e., that counsel made errors so serious that counsel was not performing as the “counsel” guaranteed by the Sixth Amendment. *Id.* at 600. To do so, the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *Id.* “Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.” *Id.*, quoting *Strickland, supra* at 694.

As this Court observed in *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999),

[a] defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses. Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial. A substantial defense is defined as one that might have made a difference in the outcome of the trial. This Court is reluctant to substitute its judgment for that of trial counsel in matters of trial strategy, and ineffective assistance of counsel will not be found merely because a strategy backfires. [Citations omitted.]

If the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm, the killing of another person to defend himself or another person is justifiable homicide. *People v Kurr*, 253 Mich App 317, 320-321; 654 NW2d 651 (2002). However, a defendant cannot use any more force than is necessary to defend himself or the other person. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Also, if the defendant is the aggressor, the defense is not available, unless defendant withdraws from any further encounter with the victim and communicates such withdrawal to the victim. *Id.* at 323.

In this case, the evidence showed that defendant was the aggressor. Defendant and Cokie returned to the victims' home where the shooting took place to continue an earlier argument. Moreover, there was no evidence suggesting that defendant attempted to withdraw from the encounter with the victims. Also, the evidence showed that none of the victims were armed with a weapon, whereas defendant was armed with a gun, which he used to shoot the victims several times. In light of this evidence, a defense of others was not viable. Thus, counsel was not ineffective for failing to pursue such a defense. See *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Further, under the circumstances, it was not unreasonable for counsel to pursue a strategy focused on misidentification. In light of this strategy, it would have been inconsistent to also argue defense of others. In sum, defendant has not overcome the presumption of sound trial strategy relative to defense counsel's decision to pursue a defense of misidentification rather than an unsupported defense of defense of others.

IV. ADMISSIBILITY OF IMPEACHMENT EVIDENCE

Lastly, defendant argues that the trial court erred by not allowing him to impeach a witness with a prior inconsistent statement under MRE 613(b), and further, that defense counsel was ineffective for failing to establish a proper foundation for admission of the evidence under this rule.

A. Standard of Review

We review a trial court's decision whether to admit or exclude evidence for an abuse of discretion. *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005).

B. Analysis

MRE 613(b) provides:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

The record discloses that counsel was offering the statement in question as substantive evidence to establish that someone else was the shooter, not for impeachment. Therefore, because the evidence was not offered for impeachment, counsel was not ineffective for failing to establish a foundation for admissibility under MRE 613(b). Moreover, defendant does not claim that the evidence was not inadmissible hearsay or that a hearsay exception applied. Thus, defendant has failed to show that the trial court abused its discretion in excluding the evidence as inadmissible hearsay. *People v Stanaway*, 446 Mich 643, 692-693; 521 NW2d 557 (1994) (explaining that while prior inconsistent statements may be used for impeachment purposes under MRE 613, they are still inadmissible if they are hearsay).

Further, defendant's reliance on *Holmes v South Carolina*, 547 US 319; 126 S Ct 1727; 164 L Ed 2d 503 (2006), to argue that his due process right to present a defense was violated is misplaced. Unlike the situation in *Holmes*, this case does not involve an arbitrary evidentiary rule. Moreover, defendant was able to present a defense of misidentification, notwithstanding

the exclusion of the challenged evidence. Therefore, defendant was not denied his constitutional right to present a defense.

Affirmed.

/s/ Bill Schuette
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter