

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD L. FINLEY, JR.,

Defendant-Appellant.

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UNPUBLISHED

December 18, 2003

No. 242368

Wayne Circuit Court

LC No. 01-008452

Before: Wilder, P.J., and Griffin and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment on the murder conviction and a consecutive two-year term of imprisonment on the felony-firearm conviction. We affirm.

Defendant first argues on appeal that there was insufficient evidence to sustain his conviction of first-degree premeditated murder. Specifically, defendant contends that the prosecution failed to present sufficient evidence to prove beyond a reasonable doubt that defendant was not acting in self-defense when he shot the fourteen-year-old victim, Bernard Brown, nine times. Defendant also argues that proof regarding the requisite elements of premeditation and deliberation were deficient. We disagree.

In reviewing a challenge to the sufficiency of the evidence, this Court considers the evidence in the light most favorable to the prosecution to determine whether a rational finder of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003); *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002). This Court must draw all reasonable inferences and make credibility choices in support of the jury's verdict, and will not interfere with the factfinder's role in determining witness credibility or the weight of the evidence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000); *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. *Nowack, supra* at 400. The prosecution need not negate every reasonable theory consistent with innocence; instead, the prosecution is bound to prove the elements of the crime beyond a reasonable doubt. *Id.*

A claim of self-defense requires proof that the defendant acted in response to an assault. *Detroit v Smith*, 235 Mich App 235, 238; 597 NW2d 247 (1999). As our Supreme Court recently explained in *People v Riddle*, 467 Mich 116, 142; 649 NW2d 30 (2002):

We hold that the cardinal rule, applicable to *all* claims of self-defense, is that the killing of another person is justifiable homicide if, under all the circumstances, the defendant 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. As part and parcel of the “necessity” requirement that inheres in every claim of lawful self-defense, evidence that a defendant could have safely avoided using deadly force is normally relevant in determining whether it was *reasonable necessary* for him to kill his assailant. However, (1) one who is without fault is *never* obligated to retreat from a sudden, violent attack or to retreat when to do so would be unsafe, and in such circumstances, the presence of an avenue of retreat cannot be a factor in determining necessity; (2) our law imposes an affirmative “duty to retreat” only upon one who is at fault in voluntarily participating in mutual nondeadly combat; and (3) the “castle doctrine” permits one who is within his dwelling to exercise deadly force even if an avenue of safe retreat is available, as long as it is otherwise reasonably necessary to exercise deadly force. [Emphasis in original.]

Significantly, the *Riddle* Court rejected the position that the “castle doctrine” included the outlying areas within the curtilage of the home and, instead, limited its application to the home and its attached appurtenances. *Id.* at 121.

Once a defendant introduces evidence of self-defense, the prosecution has the burden of disproving it beyond a reasonable doubt. *People v Fortson*, 202 Mich App 13, 19-20; 507 NW2d 763 (1993).

The circumstances of the instant case do not support a claim of self-defense. The evidence indicates that although the fourteen-year-old victim, Bernard Brown, rode his bike past defendant’s house three times and called out epithets to him, when he left his bike a block away and walked back to defendant’s house, he did not appear to be armed. Yet defendant, instead of retreating inside his house, took a rifle from the porch where he had left it in anticipation of trouble and carried it openly at his side down to the public sidewalk for his confrontation with Brown. More words were exchanged, but it was defendant who had his gun in hand. Brown lifted his shirt and displayed a weapon in his belt. In his statement to the police, defendant stated that Brown then reached for his gun. Although two witnesses supported defendant’s claim, all who witnessed the incident, including defendant, agreed that defendant began firing before Brown ever got his gun out; instead, Brown turned and ran. Defendant went into the house to reload his rifle and then walked out to the median of the street where Brown had fallen, wounded, in his attempt to get away. There, defendant fired another volley of shots into Brown, who was fatally wounded by nine gunshot wounds.

Viewing the evidence in the light most favorable to the prosecution, we conclude that the evidence was sufficient to negate defendant’s claim of self-defense beyond a reasonable doubt. *Fortson, supra*. Defendant armed himself with a rifle when he saw Brown walking toward his house even though there was no reason to believe that Brown was armed. Defendant was not

under attack at that time and he could have retreated into his home or at least the porch, an avenue he was duty-bound to take. *Riddle, supra*. Instead, defendant chose to walk out to the sidewalk, gun in hand, making him the first to escalate the argument from fighting words to armed combat, in essence the aggressor. Under these circumstances, we conclude that when defendant armed himself, he did not have an honest and reasonable belief in the imminent danger posed by Brown, and he did not attempt to retreat. Therefore, defendant's self-defense claim must fail. *Riddle, supra*.

Defendant next contends on appeal that even if the shooting was not justified, the premeditated murder conviction still cannot stand because he acted out of passion rather than with due deliberation and reflection. Again, we disagree.

To convict a defendant of first-degree murder, a specific intent crime, the prosecution must prove that the killing was intentional and that the act of killing was premeditated and deliberate. MCL 750.316(1)(a); *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). To premeditate means that a person thinks about an action beforehand, *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998), whereas to deliberate means to measure and evaluate the major facets of a problem or choice. *Id.* "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). See also *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998); *Plummer, supra* at 300. Premeditation and deliberation can be inferred from the surrounding circumstances, but the inferences cannot be merely speculative and must have support in the record. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001); *Plummer, supra* at 301. A prosecutor may sufficiently prove premeditation and deliberation through the evidence of the homicide's particular circumstances and the defendant's conduct before, during, and after the homicide. *Abraham, supra* at 656. Such particular circumstances include the weapon used and the location of the wounds inflicted. *People v Coddington*, 188 Mich App 584, 600; 470 NW2d 478 (1991).

In the instant case, in response to verbal threats, defendant retrieved a rifle and walked out to the sidewalk to confront the victim. When the victim pulled up his shirt and revealed a weapon, defendant began shooting in rapid succession. After he fired the first round into Brown, Brown ran away and made it as far as the median of the road before he collapsed. In his statement to the police, defendant stated that he went to his house and reloaded his rifle, and then returned to Brown, who "was still moving." Defendant then shot the victim four or five more times in the arms, leg, and shoulder as he was laying on his side "to make sure he was dead." In the time it took to reload and walk to the median, defendant could have taken a second look and he did – he saw that Brown was still alive, so he shot him again.

Under these circumstances, we conclude that the elements of premeditation and deliberation were clearly established beyond a reasonable doubt by the prosecution. The evidence was sufficient to establish first-degree murder and underscored that defendant had ample time to engage in cool-headed reflection and to take a second look before he killed the victim. *Plummer, supra* at 301-302. Defendant's sufficiency of the evidence claim is therefore without merit.

Defendant next argues that he was denied his due process right to a fair trial because the prosecutor improperly appealed to the “civic duty” of the jurors during his closing argument. We disagree.

This Court reviews de novo claims of prosecutorial misconduct to determine whether defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Defendant did not object to the prosecutor’s alleged misconduct during trial. “Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; this Court will only review the defendant’s claim for plain error.” *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). “Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003), citing *Carines, supra* at 763. See also *Ackerman, supra* at 448-449.

In the instant case, defendant objects to the prosecutor’s statements to the jury that “we have to do justice,” and “[w]e have to do the right thing.” While a prosecutor may not advocate that jurors convict a defendant as part of their civic duty, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), the prosecutor’s comments must be read as a whole, and evaluated in context and in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Ackerman, supra* at 45. A prosecutor may argue the evidence and all reasonable inferences arising from the evidence. *Id.* at 453.

Here, when viewed in context, the prosecutor’s remarks were not a demand for the jury to suspend its own judgment and do its civic duty. See *People v Farrar*, 36 Mich App 294, 298-299; 193 NW2d 363 (1971). Rather, the prosecutor’s whole argument constituted a proper evaluation of the evidence and an admonition to the jury to consider, think about, and weigh that evidence. Defendant has failed to establish outcome-determinative plain error. *Schutte, supra*.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ Richard Allen Griffin  
/s/ Jessica R. Cooper