STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 16, 2007
v	No. 269095 Calhoun Circuit Court
JONATHON H. HILL, Defendant-Appellant.	LC No. 2005-002925-FC

Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

PER CURIAM.

Defendant Jonathon Hill appeals as of right his jury trial convictions of two counts of first-degree murder,[1] and two counts of possession of a firearm during the commission of a felony (felony firearm).[2] The trial court sentenced Hill to life in prison for each of the two first-degree murder convictions and to two years' imprisonment for each of the two felony-firearm convictions. We affirm.

I. Basic Facts And Procedural History

This case arises out of the April 24, 2001 shooting deaths of Philip Terrell and Stephen Haley. On the night of the shootings, Haley's body was found in a church parking lot in Battle Creek, Michigan. Later that night, Terrell's body was found in the front passenger seat of a green Cadillac parked in a nearby hospital parking lot. Medical evidence revealed that Haley died as result of three gunshot wounds to the back and that Terrell died from a single gunshot wound to the head.

Several days later, Hill admitted to meeting Terrell and Haley in the church parking on the night of the shootings, but he denied being the shooter. At trial, George Williams testified that, between late 2002 and early 2003, he and Hill were cellmates in a federal prison.

[1] MCL 750.316. Hill was convicted of felony-murder in the death of Philip Terrell and was convicted of first-degree murder under theories of both premeditation and felony-murder in the death of Stephen Haley.

[2] MCL 750.227b.

According to Williams, Hill admitted shooting both Haley and Terrell. Hill told Williams that he met the men to exchange drugs. Hill said that he and the two men sat in a green Cadillac while conducting the drug deal. At some point, Terrell, who was sitting in the front passenger seat, "jumped," and Hill shot him. Hill fired a second shot after, the driver, Haley jumped out of the car. As Haley staggered away, Hill got out of the car and shot him again. After the shootings, Hill stole money and drugs from the trunk of the Cadillac, as well as jewelry and cash from the victims' bodies. Hill told Williams that he then drove away in the Cadillac, with Terrell still inside.

II. Sufficiency Of The Evidence

A. Standard Of Review

Hill argues that there was insufficient evidence presented at trial to find him guilty of the premeditated murder of Haley. According to Hill, even assuming Williams' testimony was true, it supported a finding that Hill only fired his gun as an impulsive reaction to the victims' sudden behavior. We review sufficiency of the evidence claims de novo, determining whether the evidence, viewed in the light most favorable to the prosecution, warrants a rational trier of fact in finding that all the elements of the charged crime have been proved beyond a reasonable doubt.[3]

B. Analysis

To establish first-degree murder under MCL 750.316(1)(a), the prosecutor must show that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate.[4] Premeditation and deliberation require sufficient time to allow a reasonable person to take a second look.[5] Evidence of the victim's manner of death may be used to establish premeditation.[6] In addition to the victim's manner of death, premeditation may be established through evidence of: 1) the parties' prior relationship; 2) defendant's prior actions; 3) the circumstances of the killing; and 4) defendant's actions after the killing.[7]

Viewed in the light most favorable to the prosecution, the evidence presented at trial was sufficient for a rational juror to conclude that Hill killed Haley with premeditation and deliberation. Although Hill told Williams that he only intended to rob the victims and that he did not intend to kill them, there is no evidence of a struggle, an attack by Haley, or any other occurrence that would prompt Hill's unthinking use of a firearm.[8] Moreover, evidence that, after

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[3] *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005); *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

[4] *People v Saunders*, 189 Mich App 494, 496; 473 NW2d 755 (1991).

[5] *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003).

[6] *People v Bowman*, 254 Mich App 142, 151-152; 656 NW2d 835 (2002).

[7] *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992).

[8] *People v Jones*, 115 Mich App 543, 553; 321 NW2d 723 (1982).

Hill had already shot Terrell, Hill shot Haley multiple times in the back as Haley staggered away indicates that Hill not only intended to kill Haley, but that he had time to contemplate his actions between shots.[9] Based on this evidence, a rational juror could conclude that there was sufficient time for Hill to take a "second look."[10]

Hill suggests that Williams' testimony lacked credibility because he was a federal prisoner at the time of the trial. However, it is a well-settled principle that, "[i]n reviewing a sufficiency argument, this Court must not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses."[11]

We conclude that, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

III. Ineffective Assistance Of Counsel

Hill argues that his trial counsel rendered ineffective assistance of counsel by failing to request an instruction on the lesser-included offense of voluntary manslaughter. Because Hill failed to move for a new trial or a *Ginther*[12] hearing, we must limit our review to the existing record.[13]

To establish ineffective assistance of counsel, a defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial.[14] Furthermore, a defendant must show that, but for defense counsel's error, it is likely that the proceeding's outcome would have been different.[15] Effective assistance of counsel is presumed; therefore, a defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy.[16]

Because voluntary manslaughter is a necessarily included lesser offense of murder, Hill was entitled to such an instruction, if supported by a rational view of the evidence.[17] "[T]o show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a

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[9] See *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

[10] *Gonzalez*, *supra* at 641.

[11] *People v Stiller*, 242 Mich App 38, 42; 617 NW2d 697 (2000).

[12] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[13] *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

[14] *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999).

[15] *Id*. at 146.

[16] *Id*.

[17] *People v Mendoza*, 468 Mich 527, 542; 664 NW2d 685 (2003).

reasonable person could control his passions."[18] "The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes a defendant to act out of passion rather than reason."[19] The provocation must be that which would cause a reasonable person to lose control.[20]

Here, defense counsel was not ineffective for failing to request a voluntary manslaughter instruction because the evidence did not permit a jury to convict Hill of that charge. Terrell's act of "jumping" in his seat and Haley's act of "jumping" out of the car was not provocation sufficient to cause a reasonable person to lose control and react by shooting one person in the head and then repeatedly shooting another person in the back. There is no evidence that an argument took place, that Hill believed the victims had weapons, or that any other circumstance occurred which would make Hill act in the heat of passion. Because a rational view of the evidence did not support a voluntary manslaughter instruction, defense counsel cannot be deemed ineffective for failing to request such an instruction. Trial counsel is not required to advocate a meritless position.[21]

Moreover, Hill has failed to overcome the presumption that defense counsel's failure to request a voluntary manslaughter instruction constituted sound trial strategy. The defense strategy was to argue that Hill was not the shooter. Defense counsel's decision to pursue this defense and not request a manslaughter instruction falls within the purview of trial strategy,[22] and we will not second-guess that strategy.[23]

Regardless, "where a defendant is convicted of first-degree murder, and the jury rejects other lesser included offenses, the failure to instruct on voluntary manslaughter is harmless."[24] Here, the trial court instructed the jury on the law concerning both first- and second-degree murder. Because the jury rejected the lesser-included offense of second-degree murder, any error arising from the failure to instruct the jury on voluntary manslaughter was harmless.[25]

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Brian K. Zahra

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[18] *Id*. at 535.

[19] *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998).

[20] *Id*.

[21] *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

[22] *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996)

[23] *People v Rice* (*On Remand*), 235 Mich App 429, 445; 597 NW2d 843 (1999).

[24] *Sullivan, supra* at 520.

[25] *Id*.