STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HASAIN RASHID BUNNELL, a/k/a
HASIN RASHID BUNNELL,

Defendant-Appellant.

UNPUBLISHED
June 21, 1996

No. 178607
LC No. 94-000493

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KHORI JOHNSON,

Defendant-Appellant.

No. 178608
LC No. 94-000493

Before: Taylor, P.J. and Murphy and E. J. Grant,* JJ.

PER CURIAM.

In Docket No. 178607, defendant Bunnell was convicted by a jury of two counts of assault with intent to murder, MCL 750.83; MSA 28.278 and was sentenced to concurrent terms of ten to twenty years' imprisonment. We affirm.

In Docket No. 178608, defendant Johnson was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, and two counts of assault with intent to murder, MCL 750.83; MSA 28.278. He received concurrent sentences of twenty to forty years' imprisonment for the convictions. We affirm.

* Circuit judge, sitting on the Court of Appeals by assignment.

This Court consolidated these cases for purposes of appeal.

On or about December 25, 1993, defendant Johnson was approached by Tyrone Edmond, Antoine Edmond, and Shaunte Dobbs regarding his treatment of their sister, Tambra Edmond, who was defendant Johnson's girlfriend. The three Edmond siblings were accompanied by the decedent, Christopher Glass, who was a friend of the family. On the night of December 26 or the early morning of December 27, 1993, defendant Johnson arrived at the home where the Edmond siblings, their mother Betty Gray and her husband Aulton Gray resided. Accompanying defendant Johnson was defendant Bunnell, DuJuan Turner, and two other individuals. One of the individuals accompanying defendants knocked on the door and asked for Tyrone Edmond and Shaunte Dobbs. After Aulton Gray stated that Tyrone Edmond and Shaunte Dobbs were not home, bullets were fired at the house. Members of the household testified that they witnessed defendants shooting at the house, but defendant Johnson testified that DuJuan Turner was solely responsible for the gunfire. Defendant Johnson claimed to have had no previous knowledge that Turner was carrying a weapon. Christopher Glass, who was visiting the Gray home, was fatally wounded by two of the bullets fired at the house during the incident.

I

Defendant Bunnell's first claim of error is that the trial court erroneously instructed the jury that, to convict, they must find an intent to murder, whereas the proper instruction would have stated that the jury needed to find an intent to kill. However, defendant Bunnell failed to object to the jury instructions and has thus waived this issue for appeal absent manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Crawford*, 187 Mich App 344, 352; 467 NW2d 818 (1991). Manifest injustice will not result from our failure to address this issue. *People v Johnson*, 187 Mich App 621, 628; 468 NW2d 307 (1991). Indeed, the instruction benefited defendant making it more difficult to convict as an intent to murder is more difficult to find than an intent to kill. Defendant is not entitled to any relief where the alleged error was in his favor. *People v Jankowski*, 130 Mich App 143, 150; 342 NW2d 911 (1984). Finally, defendant's reliance on *People v Burnett*, 166 Mich App 741; 421 NW2d 278 (19881) is misplaced. The Court's reversal in *Burnett* had nothing to do with the distinction between an intent to kill and intent to murder.

II

Defendant Bunnell's remaining issues concern his sentence. Defendant argues that the trial court abused its discretion in assessing 100 points under Offense Variable two (OV 2). OV 2 is to be scored at 100 points when the victim is killed. In this case, the victims of the assaults with intent to murder, for which defendant Bunnell was found guilty, were Betty and Aulton Gray. Defendant claims that since these victims were not killed, OV 2 should not have been scored at 100 points. We disagree. The instructions to OV 2 provide:

> A. In multiple offender cases when one offender is assessed points for physical attack and/or injury, all offenders shall be assessed the same number of points.

B. Score "100" when death results from the commission of a crime and homicide is not the conviction offense.

This was a multiple-offender case where a death resulted. Thus, there was record evidence for the court's scoring. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993). We also reject defendant's claim that his sentences, which are within the sentencing guidelines, are disproportionate. We are satisfied that defendant's sentences are proportionate to the seriousness of the matter. *People v Houston*, 448 Mich 312, 319; 532 NW2d 508 (1995).

III

Defendant Johnson argues that the trial court erroneously instructed the jury on two occasions regarding the malice element of second-degree murder. We find defendant is not entitled to any relief regarding this issue. In order for a perpetrator to be convicted of second-degree murder, malice must be shown. *People v Hughey*, 186 Mich App 585, 594; 464 NW2d 914 (1990). Defendant Johnson complains about the trial court's instruction regarding the third type of intent, which requires an "*intent* to create a very high risk of death or great bodily harm with the *knowledge* that death or great bodily harm will probably result," *People v Flowers*, 191 Mich App 169, 176; 477 NW2d 473 (1991), or "the wanton and willful disregard of the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm." *People v Goecke*, 215 Mich App 623, 629-630; ___ NW2d ___ (1996).

In instructing the jury, the trial court defined the malice element of second-degree murder as follows:

> It is a killing that's done with intent to kill or with intent to do great bodily harm to another person, *or doing an act, the natural tendencies of that act would be to cause death or great bodily harm.*
>
> * * *
>
> You either intend to kill someone, or you intend to do great bodily harm to that person; *or you do an act, a dangerous act, the natural tendencies of that act would be to cause death or great bodily harm***.** That is the definition of Murder in the Second Degree (emphasis added).

After the jury had deliberated for twenty-five minutes it asked the court to "define [the] charges." At this point, the court gave the following definition of third type of intent:

> [defendant] knowingly created a very high risk of death or great bodily harm, knowing that death or such harm was the likely result of his actions.

The initial instructions given by the trial court omitted the "with a wanton and willful disregard of the likelihood that" language. The instruction given in response to the jury's question was entirely proper. CJI 2d 16.5. We normally conclude that a jury followed an incorrect charge when it is accompanied by a correct charge. *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995). We question whether this rule should apply where the jury asks for a clarification or re-instruction and the court gives a correct instruction.

In any event, we find that the initial instructions, while imperfect, did not produce a manifest injustice. Defendant did not specifically object to the court's initial instructions, and therefore, even if we assume the jury ignored the correct charge and followed the initial imperfect charge, we reverse only for manifest injustice. *Van Dorsten, supra* at 544-545. Although the imperfect initial instructions theoretically made it easier to convict defendant, manifest injustice did not occur because, under the facts presented at trial, no reasonable juror could have concluded that defendant committed a dangerous act whose natural tendency was to cause death or great bodily harm that was not done with a wanton and willful disregard of the likelihood that the natural tendency of the act would be to cause death or great bodily harm. If defendant shot a weapon at the occupied house, no reasonable juror could conclude this was not a wanton and willful disregard that the shooting had a natural tendency to cause death or great bodily harm. If defendant did not fire a weapon, but aided and abetted (the jury found defendant guilty after having been instructed that defendant was not guilty if he was merely present) in the shooting of an AK-47 at an occupied house, no reasonable juror could conclude this was not done in wanton and willful disregard that a death or great bodily harm might have resulted.

IV

Defendant Johnson also argues that the trial court failed to instruct the jury that it could not convict him unless it found an actual intent to kill. This argument lacks merit as the trial court properly and repeatedly gave the jury the proper instruction regarding assault with intent to murder.

V

Defendant Johnson next argues that the trial court gave erroneous or incomplete instructions on the burden of proof, reasonable doubt, the use of out-of-court statements, the defense of mere presence, and by instructing the jury on first-degree murder when he was only charged with second-degree murder. However, defendant Johnson failed to object to the majority of these instructions. Failure to object to a jury instruction as given waives the issue for appellate review, absent manifest injustice. *Van Dorsten, supra,* at 544-545. Manifest injustice will not result from our failure to address this issue. After reviewing all of the jury instructions that were given, we are satisfied that the challenged jury instructions adequately protected defendant's rights and do not require reversal. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993).

VI

Next, defendant Johnson argues that Aulton Gray's trial testimony contained inadmissible hearsay evidence. The attorney for defendant Bunnell objected to the testimony, but defendant Johnson's attorney made no such objection. The objection by the codefendant's attorney was insufficient to preserve the issue for defendant Johnson. *People v Poindexter*, 138 Mich App 322, 331; 361 NW2d 346 (1984). Thus, the issue was not preserved for appellate review. MRE 103(a)(1). In any event, a majority of the testimony did not contain assertions offered to establish the truth of the matters asserted. Assuming, arguendo, that the statements were hearsay, we find that admission of this evidence was not outcome determinative. *People v Grant*, 445 Mich 535, 553-554; 520 NW2d 123 (1994).

VII

Finally, defendant Johnson argues that his sentences were based on improper factors and were disproportionately harsh. We disagree.

The trial court specifically set forth the bases for the sentences, and its reasons were proper. In addition, the sentences were within the guidelines' range and thus presumptively proportionate. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Defendant Johnson's claims of a relatively clean record and minimum culpability are not unusual circumstances that would overcome that presumption. *Id.* The sentences were proportionate to the seriousness of the matter. *Houston, supra*, at 319.

CONCLUSION

In Docket No. 178607, defendant Bunnell's convictions and sentences are affirmed.

In Docket No. 178608, defendant Johnson's convictions and sentences are affirmed.

/s/ Clifford W. Taylor
/s/ William B. Murphy
/s/ Edward J. Grant