

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SIDNEY EUGENE CHANDLER, III,

Defendant-Appellant.

UNPUBLISHED

September 20, 1996

No. 178600

LC No. 94-036832-FC

Before: White, P.J., and Sawyer, and R.M. Pajtas,* JJ.

PER CURIAM.

Defendant was charged with open murder, MCL 750.316; MSA 28.548, MCL 767.71; MSA 28.1011, assault with intent to commit murder, MCL 750.83; MSA 28.278, and two counts of felony-firearm, MCL 750.227b; MSA 28.424(2), in connection with the shooting death of Kenneth Sharp and the assault of Lyn Young. A jury convicted defendant of second-degree murder, MCL 750.317; MSA 28.549, assault with intent to commit murder and two counts of felony-firearm. The trial court sentenced defendant to terms of life imprisonment on both the murder and assault convictions, and to two concurrent two year terms on the felony-firearm convictions, to be served before the concurrent life sentences. Defendant appeals, challenging the sufficiency of the evidence, the jury instructions, an evidentiary ruling, the effectiveness of counsel, and his sentences. We affirm defendant's convictions and remand for resentencing.

I

Lyn Young, the brother of Easter Young, who was defendant's girlfriend and the mother of his two children, testified that on February 19, 1994, he and his friend, Kenneth Sharp, left the residence of another of Young's sisters, Inet Young, to pick up Young's daughter and bring her back to Inet's home. Young and Sharp left in Sharp's vehicle.

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

Young was unable to locate his daughter and on the return trip to Inet's residence, Sharp's vehicle passed defendant's. Defendant turned his vehicle around and began to follow Sharp's vehicle. Sharp and Young returned to Inet's residence and Sharp parked in the driveway. Shortly after, Young observed defendant's vehicle "flyin'" up the block and then stop in front of Inet's residence. Young exited the Sharp vehicle and saw defendant exit his vehicle with a gun in his hand. Young turned to run and saw defendant fire a shot in his direction. Young then ran along the side of the house, towards the back, and began banging on the side of the house to get his family's attention.

Young testified that once he reached the back of the house, he saw defendant fire a shot at Sharp, who had exited the vehicle. The bullet struck Sharp's vehicle's roof and ricocheted. Young observed Sharp grab defendant by the waist and engage in a brief struggle. Defendant then grabbed Sharp by the neck, held Sharp down and fired three shots in the direction of Sharp's body. Sharp's body jumped and fell to the ground. Defendant returned to his vehicle and drove away.

An autopsy revealed that Sharp had suffered three bullet wounds: one in the left back, one in the left side of the neck and one in the right side of the head -- the latter wound being one inch above, and one inch behind, the right ear.

Defendant's testimony was similar to Young's, with several distinctions. Defendant testified that it was Sharp who followed his vehicle, and not the other way around. Defendant also testified that he went to Inet's residence to pick up Easter and their children and that he arrived before Sharp and Young. Once defendant was at the residence, Sharp and Young arrived and Sharp parked in the driveway. Young exited the vehicle with a gun in his hand. Defendant turned to run and Young fired a shot at defendant. Defendant then ran to his vehicle and retrieved Easter's .380 automatic pistol, which he knew she had left in the vehicle. Defendant did not return fire at Young, who had run towards the back of the house.

Defendant further testified that Sharp then told defendant, 'Yeah, if you didn't have that heater (gun), I'd beat your big ass.' Defendant then put the gun in his pocket, or tried to do so. Sharp rushed defendant. Defendant threw Sharp against Sharp's vehicle. Sharp then came at defendant a second time "tackle style." Sharp told defendant that if he got the gun he was going to "smoke" defendant. Both men grabbed the gun. Two shots fired. Sharp fell against the vehicle, but then rushed defendant again. Another "tussle" ensued and a couple more shots were fired. Defendant pushed Sharp. Sharp took a swing at defendant, missed and fell against a nearby fence. The gun discharged two more times and Sharp fell.

Defendant denied any intent to shoot or kill Sharp. Both Young and defendant admitted that they had had hostile encounters before the day of the shooting.

II

A

Defendant first argues that there was insufficient evidence to sustain a conviction for second-degree murder because the evidence failed to establish that defendant possessed the requisite intent or that defendant caused Sharp's death. We disagree.

When determining whether sufficient evidence has been presented to sustain a conviction, this Court 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992).

Second-degree murder is established where the defendant causes a death with malice and without provocation. *People v Spearman*, 195 Mich App 434, 438; 491 NW2d 606 (1992), rev'd in part on other grounds. 443 Mich 870 (1993). Malice is defined as the intent to kill or to do great bodily harm, or the willful and wanton disregard of the likelihood that the natural tendency of the defendant's action will be to cause death or great bodily harm. *Id.* Intent may be inferred from all the facts and circumstances. *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987).

Young testified that when he exited Sharp's vehicle he had no weapon. He denied saying anything to defendant or making any provocative gesture towards defendant. Young further testified that he did not see a weapon in Sharp's hand. Nor did he see Sharp make any threatening gestures towards defendant. He denied hearing any conversation exchanged between defendant and Sharp before the shooting. Young also testified that it did not appear that the gun was accidentally pointed at Sharp or that the gun was accidentally discharged in Sharp's direction.

Michael Thompson, Inet Young's neighbor's son, testified that when his mother indicated that there was a man outside with a gun, he went to the window and observed a black male approaching Inet's house. He did not see anything in the man's hand at this point. He then observed Sharp exit the vehicle and a second man run to the back of the house. He did not see a weapon in Sharp's hands. Nor did he see Sharp make a threatening gesture. However, at this point, he saw a gun in the hand of the man approaching Sharp's vehicle.

Thompson further testified that defendant stood at the edge of Sharp's vehicle and Sharp then grabbed defendant by the waist and a struggle ensued. Defendant threw Sharp to the ground and held Sharp on the ground with one hand. Defendant then fired his gun as it was pointed at Sharp's head. Thompson believed that the gun was a foot or so away from Sharp when fired. (A firearms expert testified that the distance was at least two feet.) He saw defendant fire two shots and believed he heard a third shot as he went to the telephone to call the police. It did not appear to him that the gun was discharged accidentally.

Jamie Baker, Thompson's girlfriend, testified that she looked out a living room window after Thompson's mother said that she saw a man with a gun. She observed a black male walking up to the

vehicle parked in the driveway. As he approached the vehicle, the passenger exited the vehicle and ran towards the rear of the house. The approaching male then extended his arm in the fleeing man's direction and Baker heard what sounded like a firecracker. She assumed that the man had shot at the fleeing man. Before the shot was fired, she did not observe the fleeing man undertake any threatening act. Nor did she see anything in the fleeing man's hands.

Baker further testified that defendant then walked to the other side of the vehicle parked in the driveway. Sharp did nothing threatening. Defendant and Sharp struggled. It looked to her like defendant was pulling Sharp down while Sharp was struggling to get up. Sharp held onto defendant by the waist. Defendant managed to "struggle" Sharp to the ground and hold Sharp on his hands and knees with one hand. According to Baker, defendant then pointed the gun in the direction of Sharp's head and fired. The shooting did not look like an accident.

Henry Deleeuw, the Muskegon County Medical Examiner, testified that Sharp died as a result of three bullet wounds, one in the back, one in the neck and one in the back of the head.

We conclude that a reasonable trier of fact could have found beyond a reasonable doubt that defendant possessed the requisite malice to support a second-degree murder conviction. Given that none of the witnesses saw Sharp with a weapon or engage in any threatening behavior before the shooting, that there was evidence that defendant exited his vehicle with a gun in hand and approached Sharp with the gun still in his hand after firing at Young, and that defendant held Sharp on the ground and fired the gun three times while the gun was pointed at Sharp's head and upper body, the jury could have concluded beyond a reasonable doubt that defendant intended to kill Sharp, or that he intended to do great bodily harm to Sharp or that he wantonly and willfully disregarded the likelihood that the natural tendency of pointing a gun at Sharp's head and upper body and discharging the gun would be to cause death or great bodily harm to Sharp.

Further, there was ample evidence that defendant caused Sharp's death.

B

Defendant also argues there was insufficient evidence to sustain his assault with intent to commit murder conviction. The elements of assault with intent to murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). Circumstantial evidence and reasonable inferences arising therefrom may constitute satisfactory proof of the elements of the offense. The intent to kill may be proven by inference from any facts in evidence. *Id.*

The evidence could lead a rational trier of fact to conclude that defendant exited his vehicle with a loaded pistol in his hand, that defendant fired once at Young as Young fled, and that Young engaged in no threatening behavior immediately before defendant shot at him. Additionally, there was testimony

that Young and defendant had had several hostile encounters before the day of the shooting. A rational trier of fact could conclude that defendant shot at Young with the intent to kill him.

III

Defendant next argues the trial court erred in ruling inadmissible computer records defendant offered to substantiate that he was at Tim Barclay's residence as late as 5:00 p.m. on February 19, 1994 under MRE 803(5) or 803(6)

Defendant argues that the evidence was relevant to the issue of premeditation and deliberation. Vonda Davis had testified that she observed defendant driving up and down the block at four p.m., over an hour before the shooting. Defendant sought to introduce the computer records to show he was at the Barclay's working on the computer and was not "stalking" the victims at that time. We conclude that any error in the failure to admit this evidence was harmless. Barclay testified that defendant arrived at his home sometime after 2 p.m. on February 19, 1994 and did not leave until shortly after Barclay's wife left to attend church services at 4:55 p.m. Further, the jury convicted defendant of second-degree murder, thereby rejecting the assertion that the murder was premeditated. There was no question that defendant was, in fact, the shooter.

IV

Defendant next argues that his trial counsel was ineffective in failing to request that the jury be instructed on defendant's theory of the case and the concept of imperfect self-defense.

Defendant's failure to create a testimonial record below forecloses appellate review of his ineffective assistance of counsel claims unless the record contains sufficient detail to support defendant's claims and, if so, this Court's review is limited to the facts contained in the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced defendant as to deprive defendant of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

Imperfect self-defense is a qualified defense that can mitigate second-degree murder to voluntary manslaughter. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993). Where imperfect self-defense is applicable, it serves as a method of negating the element of malice in a murder charge. Although the Michigan Supreme Court has not yet considered the viability of this theory, panels of this Court have recognized the doctrine where a defendant would have been entitled to invoke the theory of self-defense had he not been the initial aggressor. *Id.* at 323. However, a defendant is not entitled to invoke the doctrine if he initiated the confrontation between himself and the victim with the intent to kill or do great bodily harm. *Id.* at 324.

Under a “perfect” self-defense theory, the killing of another in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm. *Id.* at 322. The defense is not available when a defendant is the aggressor unless he withdraws from any further encounter with the victim and communicates such withdrawal to the victim. *Id.*, 322-323. Under either theory, a defendant is not entitled to use any more force than is necessary to defend himself.

Defense counsel did not request instructions on self-defense or imperfect self-defense, and did not ask that the court recite defendant’s theory of the case for the jury. Defense counsel argued that defendant’s acts constituted manslaughter, rather than murder, because defendant acted under the influence of uncontrollable emotional excitement caused by his being shot at by Young and being tackled by Sharp. The jury rejected this argument. Assuming, *arguendo*, that counsel should have requested the instructions at issue, we are unable to conclude, given the overwhelming evidence that the shooting did not occur as contended by defendant and the jury’s rejection of counsel’s manslaughter argument, that there is a reasonable probability that, absent the alleged error, the jury would have had a reasonable doubt respecting defendant’s guilt of second-degree murder. *Pickens* at 312, 327.

We therefore reject defendant’s claim of ineffective assistance of counsel.

V

Defendant next argues that the standard jury instructions read by the trial court, which permitted the inference of intent to kill by the mere use of a dangerous weapon, did not adequately inform the jury that they could not find defendant guilty of assault with intent to murder under the alternate states of mind contained in CJI 2d 16.5—intent to inflict great bodily harm or intent to create a very high risk of death with the knowledge that the act will probably cause death or great bodily harm.

Defendant argues that the jury was instructed, with regard to second-degree murder, that it could infer that defendant intended to kill if he used a dangerous weapon in a way likely to cause death and that it could infer that defendant intended the usual results that follow from the use of a dangerous weapon such as a gun. The trial court then instructed the jury with the “Mitigating Circumstances” instruction and informed the jury that defendant could be found guilty of assault with intent to commit murder only if he would have been guilty of murder had the person assaulted actually died, and that defendant is not guilty of assault with intent to murder if the assault took place under circumstances that would have reduced the charge to manslaughter had the person died. Defendant argues that the order in which these instructions were given, without further elaboration, did not permit the jury to avoid considering the alternate two state of mind other than the intent to kill, i.e., an intent to inflict great bodily harm and an intent to create a very high risk of death with the knowledge that the act will probably cause death or great bodily harm, when determining whether defendant was guilty of assault with intent to commit murder. Defendant asserts the trial court should have instructed the jury that if it concluded

that defendant had one of these other states of mind it must find defendant not guilty of assault with intent to commit murder.

Defense counsel did not request the “clarifying” instruction defendant now argues should have been given regarding the state of mind necessary to convict of assault with intent to murder, and did not request that the instructions be read in a set sequence. Defendant does not argue that the instructions as read were incorrect. Rather, he argues that the standard jury instructions on the elements of assault with intent to murder, CJ12d 17.3, should be clarified by adding language. He asserts that notwithstanding his failure to object, reversal is required because manifest injustice will result absent appellate review because the instructional error relates to the essential elements of a charged offense. We disagree.

Defendant has not shown manifest injustice. When read as a whole, the instructions clearly stated that in order to convict of assault with intent to murder, the jury must find that defendant specifically intended to kill the person assaulted. Further, the jury was instructed on the lesser offenses of assault with intent to do great bodily harm less than murder and felonious assault, and rejected these options.

VI

Defendant next argues that he is entitled to resentencing because the trial court (1) failed to discuss defendant’s potential for reformation and rehabilitation, and instead focused on the negatives of the offense and the message that needed to be sent to the community; (2) made an impermissible independent finding of guilt of first-degree murder; (3) impermissibly considered defendant’s parole eligibility as a basis for his conclusion that the life sentences imposed were within the sentencing guidelines recommendation; and (4) imposed sentences that violated the principle of proportionality.

We reject defendant’s argument that the trial court based the sentences imposed on an improperly made independent finding of guilt of first-degree murder. We conclude that defendant has taken the court’s comments out of context. The court did not sentence defendant based on a finding of guilt of first-degree murder, but rather based on the cold-blooded and unjustified nature of offense. The court concluded that while the jury may have concluded that the murder was not premeditated, the court thought there was “some degree of malice in defendant’s heart.” Malice is an element of second-degree murder.

The trial court’s comments find adequate support in the record. Evidence was presented at trial that defendant exited his vehicle with a loaded pistol in his hand, that defendant fired a shot at Young without Young engaging in any provocation, that defendant turned his attention to Sharp when Young ran, that defendant fired a shot at Sharp which struck Sharp’s vehicle although Sharp had not engaged in any threatening behavior, and that defendant held Sharp to the ground and fired three shots into Sharp’s head and upper body while holding Sharp down. Such testimony supports the court’s belief that defendant committed a cold-blooded act. The circumstances of the murder presented aggravating factors legitimately considered when fashioning defendant’s sentences.

Nevertheless, we remand for resentencing. It appears that the trial court may have mistakenly believed that the life sentences would realistically result in a lesser sentence than a guidelines minimum sentence if defendant proves himself to be worthy of parole. The court stated:

* * *

It is preferable to this Court that I do this, than sentence you up to 25 years on the minimum under the guidelines to some higher number [sic], taking a chance that you will be -- you will -- or should I say, not taking the chance, on any change in your character or any examination of the activities that you commit in prison.

I note that the guidelines are 10 to 25 years on the bottom end. This sentence gives you the opportunity to be released, in my estimation, prior to that, upon recommendation of the parole board to the sentencing judge or his successor. It also allows you to be incarcerated longer than the minimum sentencing guidelines if Mr. Chandler's conduct in prison doesn't conform to what we would consider to be civilized behavior, showing an improvement over the kind of terrible, heinous act that you've committed and wrought upon our society.

* * *

However, experience has shown that this is not the case. *People v Lino* (after remand) 213 Mich 89, 96-99; 539 NW2d 545 (1995).¹ Because defendant's sentences appear to have been the result of a misconception regarding the real opportunities for release, we remand for resentencing.

Affirmed, but remanded for resentencing.

/s/ Helene N. White
/s/ David H. Sawyer
/s/ Richard M. Pajtas

¹ We note that we do not regard the conflict between *Lino, supra* and *People v Carlson*, ___ Mich ___ (No. 159501 issued 6/4/96) to be pertinent given the facts presented here, where the circuit court's statement revealed a belief that the life sentences would provide a realistic possibility of release before a guidelines sentence. Whether this Court should adopt a rule that in all cases a life sentence is more harsh than a term of years is left to be decided by a conflict panel under AO 1996-4. In our view, this case presents the separate question whether the trial court was under a misconception regarding the real opportunities for release on parole when fashioning defendant's sentences.