STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY DALE HARRIS, SR.,

Defendant-Appellant.

UNPUBLISHED
October 25, 1996

No. 161477
LC No. 92-001794

Before: MacKenzie, P.J., and Markey, and J.M. Batzer,* JJ.

PER CURIAM.

On May 28, 1992, defendant and Wildean Holbrook (hereinafter "the victim") had been drinking heavily. After an argument, defendant fatally stabbed the victim once in the chest. Defendant was charged with open murder, MCL 750.316; MSA 28.548. At trial, defendant presented the defenses of intoxication, self-defense, and accident. The jury found defendant guilty of voluntary manslaughter, MCL 750.321; MSA 28.553. The trial judge sentenced defendant to seven to fifteen years of imprisonment for the conviction. Defendant appeals as of right from his conviction and sentence. We affirm.

I

Defendant argues that the trial court abused its discretion when it denied, on the ground that the evidence in question was hearsay, defendant's request to introduce evidence pertaining to a restraining order issued against the victim. Defendant asserts that this evidence was non-hearsay that could have bolstered his self-defense claim. Although defendant's claim has some merit, the trial court's error was harmless.

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

Specific instances of violence may be admitted "if directly connected with and involved in the homicide or if known by the defendant." *People v Nichols*, 125 Mich App 216, 220-221; 335 NW2d 665 (1983). In contrast, hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). The evidence was not offered to prove the truth of the matter asserted. Nevertheless, we believe that the trial court did not abuse its discretion when it denied defendant an opportunity to introduce the restraining order into evidence because the restraining order can be likened to specific instances of violence that are inadmissible because they are too remote to show that the deceased was the aggressor. *Nichols, supra* ("[i]f there are many such instances of violent behavior, presumably the deceased will have acquired a reputation for such behavior, which would be admissible by laying the proper foundation."); see *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

Even assuming, arguendo, the erroneous exclusion of this evidence, we will not reverse a defendant's conviction unless the error was prejudicial. MCL 769.26; MSA 28.1096. Thus, the inquiry becomes was "the error harmless beyond a reasonable doubt?" *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995). An error will be found to be harmless beyond a reasonable doubt when it had no effect on the verdict. *Id*. Our review of the record shows that the trial court's error was harmless beyond a reasonable doubt because defendant's action of stabbing an unarmed man negated his claim to self-defense. See *People v Kemp*, 202 Mich App 318, 322-323; 508 NW2d 184 (1993). Consequently, we find no error requiring reversal.

II

Defendant also argues that the trial court abused its discretion when it denied his motion for a directed verdict on the first-degree murder component of the open murder charge. Defendant asserts that the prosecution failed to introduce sufficient evidence that he acted with premeditation when he stabbed the victim. We disagree. When reviewing a trial court's ruling on a motion for directed verdict, this Court tests the validity of the motion by the same standard as the trial court. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992). When ruling on a motion for a directed verdict, the trial court must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

To establish a charge of first-degree murder, the prosecution must prove that the defendant killed the victim with deliberation and premeditation. *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995). By taking the evidence in a light most favorable to the prosecution, our review of the record shows that sufficient evidence was introduced for the jury to find the elements of deliberation and premeditation. Because the evidence supported the element of premeditation and deliberation, the trial court did not err when it denied defendant's motion for a directed verdict.

III

Defendant next argues that the trial court improperly scored OV 4 when it calculated his sentence. We disagree. The guidelines provide that OV 4 in homicide situations will be scored at twenty-five points when an aggravated physical injury is present. Michigan Sentencing Guidelines (2d ed), p 77. Our review of the case law leads us to conclude that a single fatal stab wound may constitute "aggravated physical injury." We believe that "aggravated physical injury" should be evaluated on the basis of not only the number of stab wounds inflicted, *People v Hoffman*, 205 Mich App 1, 24; 518 NW2d 817 (1994), but also the location or situs of the wound. Here, defendant stabbed the victim directly in the heart. Indeed, stabbing someone in the heart is much "more serious or more severe" than stabbing that person in the arm or the leg and is likely to have immediate, fatal consequences, as it did in this case. See *Daniels*, *supra* at 674. Further, the emergency room physician testified that the victim was dead on arrival and that while attempting to perform heart massage, he and a thoracic surgeon found the victim's heart to be heavily damaged by the single knife wound. Because the trial court properly scored OV 4 at twenty-five points, we find no abuse of discretion. See *People v Derbeck*, 202 Mich App 443, 449; 509 NW2d 534 (1993).

IV

We also reject defendant's assertion that he was denied due process or is entitled to resentencing because the trial court failed to properly resolve his challenges to the accuracy of the presentence report. The trial court has a duty to resolve any challenge to the presentence report and must strike any challenged information that is inaccurate or irrelevant. *People v Hoyt*, 185 Mich App 531, 533-534; 462 NW2d 793 (1990); *People v Swartz*, 171 Mich App 364, 381; 429 NW2d 905 (1988). The failure to strike disregarded information can be harmless error, however. *People v Fisher*, 442 Mich 560, 567 n 4; 503 NW2d 50 (1993).

Here, after reviewing the sentencing record, we find that the judge did not specifically refer to any particular comment from anyone in reaching his conclusion that defendant had a general propensity to be "a pretty aggressive person." Defendant does not challenge any factual background matters contained in the presentence report. Instead, defendant disagrees with comments he supposedly made to his wife, family and jail inmates as well as their opinions regarding his temperament. The judge duly noted defendant's disagreement and permitted him to append a denial to the report. A remand is, therefore, of no value because neither these opinions regarding defendant nor such statements can be proven or disproven.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Jane E. Markey
/s/ James M. Batzer