

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESSIE JAMES ROSS,

Defendant-Appellant.

UNPUBLISHED
October 29, 1996

No. 178501
LC No. 93-4006-FC

Before: Gribbs, P.J., and Markey and T. G. Kavanagh,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, carrying a concealed weapon, MCL 750.227; MSA 28.424, and possession of a firearm during the commission of a felony, MCL 750.277b; MSA 28.424(2). Defendant was sentenced to twenty to sixty years in prison for the second-degree murder conviction, one to five years for carrying a concealed weapon, and a mandatory two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first contends that there was insufficient evidence to support his conviction of second-degree murder because the evidence was neither credible nor compelling enough to establish beyond a reasonable doubt that he intended to kill anyone or that he fired the fatal bullet. We disagree. In reviewing the sufficiency of the evidence, 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 (1992), modified on other grounds 441 Mich 1201 (1992).

The elements of murder are (1) the killing of a human being (2) with the intent to kill, or to do great bodily harm, or with wilful and wanton disregard of the likelihood that the natural tendency of one's actions will be to cause death or great bodily harm. [*People v Johnson (On Reh)*, 208 Mich App 137, 140; 526 NW2d 617 (1994).]

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

The prosecution does not have to prove defendant's actual intent to kill, but the prosecution must establish that he created and disregarded a very high risk of death when he acted. *People v Bailey*, 207 Mich App 8, 9; 523 NW2d 798 (1994). Therefore, malice is an essential element of murder, and "[a] jury can properly infer malice from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm." *People v Flowers*, 191 Mich App 169, 176, 177; 477 NW2d 473 (1991). Moreover, "[m]alice is a permissible inference from the use of a deadly weapon." *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995). A gun is a dangerous weapon.

We find that sufficient evidence existed for a jury to infer defendant's intent to at least create and disregard a very high risk of death. Defendant was in a car and shot at a group of men as he rode past them. Furthermore, expert testimony established that the victim died from a bullet fired from defendant's gun. Viewing this evidence in a light most favorable to the prosecution, there was sufficient evidence for a jury to find that defendant acted with malice and fired the fatal bullet. The evidence was sufficient to sustain defendant's conviction.

Second, defendant maintains that the trial court committed error warranting reversal when it permitted the prosecution to ask defendant about two prior misdemeanor convictions contrary to the provisions of MRE 609 and MRE 404b. We find no error.

The decision whether to admit or exclude evidence is within the trial court's discretion. This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

In this case, defendant provided an unresponsive answer to a question posed by the prosecution, and the trial court determined that it created a false light that defendant had never been incarcerated or had any problems. Our Supreme Court has said that MRE 609 is inapplicable when evidence is used to rebut specific testimony given by a defendant. *People v Douglas Taylor*, 422 Mich 407, 414-415; 373 NW2d 579 (1985). We have followed that reasoning in *People v Oscar*, 164 Mich App 378, 383; 417 NW2d 508 (1987), modified on other grounds 433 Mich 851 (1989):

A defendant cannot claim under oath to be a "law-abiding citizen" and ask the court to shield his blatant perjury from the jury's view under the guise of MRE 609. MRE 609 does not govern the use of evidence of prior criminal conduct to refute affirmative evidence of a criminal defendant's good character. Nor is MRE 609 "intended to apply where evidence of prior convictions is offered to rebut specific statements of the defendant who testifies at trial." [*Id.* at 383, quoting *Douglas Taylor, supra* at 422 Mich 414.]

Furthermore, MRE 404 is inapplicable because the information was not being used to show that defendant acted in conformity therewith, but to rebut specific testimony that gave the jury the impression that defendant was a law-abiding citizen.

Third, defendant argues that the trial court committed error warranting reversal when it failed to properly instruct the jury on a lesser included misdemeanor of reckless discharge of a firearm, MCL 752.861; MSA 28.436(21). We find no error.

When properly requested, a trial court should instruct a jury on appropriate lesser included misdemeanors if a rational view of the evidence could support a verdict of guilty of the misdemeanor and not guilty on the felony, provided that the defendant has proper notice or has made the request, and the instruction would not result in confusion or injustice. Failure to give such an instruction is an abuse of discretion if a reasonable person would find no justification or excuse for the ruling made. *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993).

In this case, defendant admitted that he aimed the gun in the victim's direction and fired it. Therefore, the facts do not support a conviction of reckless discharge of a firearm because defendant intentionally discharged the firearm. See *People v Todd*, 186 Mich App 625, 631-632; 465 NW2d 380 (1990); *People v Dabash*, 181 Mich App 469, 474; 450 NW2d 44 (1989).

Last, defendant contends that his sentence was disproportionate for his second-degree murder conviction. A sentence must be proportional to the seriousness of the circumstances of the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentence imposed within the sentencing guidelines range is presumptively neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1978). However, a sentence within a guidelines range can conceivably violate proportionality in unusual circumstances. *Milbourn*, *supra* at 435 Mich 661. Defendant failed to establish "unusual circumstances" in order to overcome the presumption of validity accorded a sentence within the guidelines. Furthermore, defendant's claims that the trial court failed to discuss his potential for reformation and sentenced him as though he had been convicted of premeditated murder are unsupported by the record.

Affirmed.

/s/ Roman S. Gribbs

/s/ Jane E. Markey

/s/ Thomas Giles Kavanagh