STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRE WHEAT,

Defendant-Appellant.

UNPUBLISHED
April 22, 1997

No. 178363
Wayne Circuit Court
LC No. 93-012114

Before: Marilyn Kelly, P.J., and Jansen and M. Warshawsky,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree felony murder and possession of a firearm during the commission of a felony. MCL 750.316; MSA 28.548, MCL 750.227b; MSA 28.424(2). The judge sentenced defendant to a mandatory two years' imprisonment for the felony-firearm conviction, to be followed by life imprisonment for the first-degree murder conviction. Defendant was awarded credit for 251 days served.

On appeal, defendant claims that the trial court erred by refusing to give the jury disputed accomplice and voluntary manslaughter instructions. We affirm.

I

Defendant first argues that the trial court erred by refusing to instruct the jury pursuant to CJI2d 5.5 and 5.6, the disputed accomplice instructions. We disagree.

Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). The reviewing court must balance the general tenor of the instructions in their entirety against the potentially misleading effect of a single isolated clause. *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989). Even if somewhat imperfect, instructions do not create error if they fairly present the issues to be tried and

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

sufficiently protect the defendant's rights. *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991).

In this case, the trial court properly declined to give a disputed accomplice instruction. Neither side presented Roger Jones as an accomplice, even though he was present at the shooting. The prosecutor argued that defendant acted alone, and the defense argued that Jones was responsible for the killing. However, the testimony showed that Jones was merely present when defendant, of his own accord, robbed and killed Leon Taylor. There was insufficient evidence to warrant an accomplice instruction. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994); *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993).

II

Defendant also contends that the trial court erred in declining to instruct the jury on the lesser offense of voluntary manslaughter. We disagree.

The trial court properly declined to instruct the jury on the crime of voluntary manslaughter, as there was insufficient evidence to warrant giving this charge to the jury. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). Voluntary manslaughter is an intentional killing committed under the influence of passion or hot blood, produced by adequate provocation, and before a reasonable time has passed for the blood to cool and reason to resume control. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991); *People v Fortson*, 202 Mich App 13, 19; 507 NW2d 763 (1993). There is no evidence here, other than an alleged "bump," of any provocation, adequate or otherwise. There was no evidence that defendant killed Taylor in the heat of passion. *Fortson*, *supra* at 19. To the contrary, the evidence shows that defendant had stated to Jones that he intended to rob someone. Minutes later, he ordered Taylor to give him his coat. Then cold-bloodedly, he placed his gun to Taylor's head and shot him four times in the chest and back. The trial court thus properly declined to give a voluntary manslaughter charge to the jury, there being insufficient evidence to warrant it. *People v Veling*, 443 Mich 23, 36; 504 NW2d 456 (1993).

Even had there been enough evidence to warrant giving the voluntary manslaughter instruction, the failure to instruct on a lesser cognate offense could have been harmless error if the jury had had a choice to convict on another intermediate charge and yet convicted on the greater offense. *People v Mosko*, 441 Mich 496, 502; 495 NW2d 534 (1992); *People v Beach*, 429 Mich 450, 481, 490-491; 418 NW2d 861 (1988); *People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990). Because defendant was convicted of first-degree murder and not the intermediate charge of second-degree murder, the failure to instruct on voluntary manslaughter, even if improper, does not warrant reversal of his convictions. *Mosko*, *supra* at 502.

Affirmed.

/s/ Marilyn Kelly
/s/ Kathleen Jansen
/s/ Meyer Warshawsky