

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LUS ANDRES YBARRA,

Defendant-Appellant.

UNPUBLISHED

May 27, 1997

No. 188970

Lenawee Circuit Court

LC No. 95-6443-FC

Before: Cavanagh, P.J., and Reilly and White, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of second-degree murder, MCL 750.317; MSA 28.549, receiving and concealing stolen property over one hundred dollars, MCL 750.535; MSA 28.803, carrying a dangerous weapon with unlawful intent, MCL 750.226; MSA 28.423, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to concurrent terms of fifteen to fifty years' imprisonment on the second-degree murder conviction, and one to five years' imprisonment on both the receiving and concealing and carrying a dangerous weapon with unlawful intent convictions, consecutive to two years' imprisonment on the felony-firearm conviction. Defendant challenges the trial court's failure to instruct the jury on self-defense, withdrawal of a deadly aggressor, and past violence by the decedent; the court's voluntary manslaughter instruction; the sufficiency of the evidence that the stolen property had a fair market value over one hundred dollars; and the court's scoring of offense variable three. We affirm.

I

Defendant first argues that the trial court erred by refusing to instruct the jury on self-defense and withdrawal of a deadly aggressor. We disagree.

Defendant requested instructions on use of deadly force in self-defense (CJI2d 7.15); deadly aggressor - withdrawal (CJI2d 7.18); and past violence by complainant or decedent (CJI2d 7.23). The defense of "perfect" self-defense is not available when the defendant is the initial aggressor unless he withdraws from any further encounter with the victim and communicates such withdrawal to the victim.

People v Kemp, 202 Mich App 318, 322-323; 508 NW2d 184 (1993). The defense was not available in this case because, as defendant concedes, he was the initial aggressor.

Nor did the trial court err by refusing to instruct the jury on withdrawal of a deadly aggressor. There was no evidence that defendant either withdrew or communicated his withdrawal to decedent. *People v Kerley*, 95 Mich App 74, 83; 289 NW2d 883 (1980). An instruction on decedent's past violence was not appropriate either because there was no issue of self-defense. *People v Cellura*, 288 Mich 54, 64; 284 NW 637 (1939). Moreover, defendant was allowed to introduce evidence of the victim's history of violent acts and argued this history in closing argument.

Defendant also argues that the record contained sufficient evidence to support an instruction on imperfect self-defense.

Imperfect self-defense is a qualified defense that can mitigate second-degree murder to voluntary manslaughter and, where it is applicable, serves as a method of negating the malice element of murder. *Id.* at 323. Although the Michigan Supreme Court has not yet considered the viability of this defense, panels of this Court have recognized the doctrine as applicable where a defendant would have been entitled to invoke the theory of self-defense had he not been the initial aggressor. A defendant must request an instruction on imperfect self-defense, *People v Fuqua*, 146 Mich App 133, 140; 379 NW2d 396 (1985).

Because defendant did not request such an instruction, we decline to review this issue beyond noting that defendant maintained at trial that the shooting was accidental, not that he shot decedent in self-defense.

II

Defendant next argues that the trial court incorrectly defined voluntary manslaughter in its instructions to the jury. As defendant did not object to the instructions below, appellate review is precluded absent manifest injustice. *People v Ferguson*, 208 Mich App 508, 510; 528 NW2d 825 (1995). We find no manifest injustice.

We conclude that the instructions as a whole fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Harris*, 190 Mich App 652, 664; 476 NW2d 767 (1991). This is especially so under the circumstance that defendant's defense that the gun accidentally discharged, resulting in Alcorta's death, pertained only to involuntary manslaughter.

III

We also reject defendant's argument that the prosecution failed to present sufficient evidence to permit a reasonable jury to find that the stolen property had a fair market value over one hundred dollars. Detective Richardson testified at trial that he had worked on the streets of Adrian for a long time and that the stolen gun was "most definitely" worth more than one hundred dollars on the street. Richardson also testified that, when new, the gun cost more than one hundred dollars.¹ Defendant points to no contrary evidence.

The value of stolen goods is their market value at the time of the receiving or possession by a defendant. *People v Toodle*, 155 Mich App 539, 553; 400 NW2d 670 (1986). This value is to be determined by the jury by consideration of all the testimony that has been presented in the case, and applying its judgment to that testimony to determine the value. *Id.* We conclude that detective Richardson's testimony was sufficient evidence of value to support defendant's conviction for receiving and concealing stolen property over one hundred dollars.

IV

Defendant's final argument, that resentencing is required because the trial court improperly scored offense variable 3 at twenty-five points, is unavailing. Appellate courts are not to interpret the guidelines or to score and rescore the variables for offenses and prior record to determine if they were correctly applied. *People v Mitchell*, 454 Mich 145, 178; ___ NW2d ___ (1997). Guidelines' scoring errors are not a basis for review and reversal unless (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate. *Id.* at 175-177. As none of these is applicable here, defendant has not stated a cognizable claim. *Id.* at 176.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Helene N. White

¹ The PSIR states that on September 25, 1994, the .380 caliber handgun was reported stolen by Antonio Terrazas. Terrazas testified at trial that he believed he had purchased the gun in the summer of 1994.