

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

STEVEN LAMARR CARTER,

Defendant-Appellant

UNPUBLISHED

July 18, 1997

No. 192600

Saginaw Circuit Court

LC No. 95-011146

Before: Gage, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carrying a concealed weapon (CCW), MCL 750.227; MSA 28.424, discharging a firearm from a motor vehicle, MCL 750.234a; MSA 28.431(1), second-degree murder, MCL 750.317; MSA 28.549, felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). According to the judgment of sentence, defendant was sentenced to three to five years' imprisonment for CCW, two to four years for discharging a firearm, twenty-five to fifty years for second-degree murder, two to four years for felonious assault, and two years for felony-firearm. The judgment of sentence provides that the CCW and felonious assault sentences are to run concurrently with the felony-firearm sentence, but that the discharging a firearm and murder sentences, although concurrent to each other, are consecutive to the felony-firearm sentence, which is to be served first. The convictions arose from the fatal shooting of Demetrius Childs. While defendant acknowledged firing the shot, he claimed that he merely intended to scare Childs, not to shoot him. Defendant appeals by right. We affirm.

First, defendant argues that there was insufficient evidence to support his conviction of second-degree murder and that the trial court erred by denying him a directed verdict on the charged offense of first-degree premeditated murder. With regard to both claims, we review the evidence presented to determine if a rational factfinder could find guilt proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified 441 Mich 1201 (1992); *People v Davis*, 216 Mich App 47, 52-53; 549 NW2d 1 (1996).

The elements of second-degree murder are (1) a death; (2) caused by an act of the defendant; (3) absent circumstances of excuse, justification or mitigation; (4) with the intent to kill, inflict great bodily harm or create a very high risk of death with the knowledge that the act probably would cause death or great bodily harm. *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996). The testimony of a forensic pathologist that the victim died of a gunshot wound to the chest, coupled with the eyewitness testimony of the victim's brother that defendant shot a gun during the incident and that he saw a wound in the victim's chest, was sufficient to establish the first two elements. There was no evidence presented to justify, excuse or mitigate a proscribed intent. Testimony from another eyewitness that the shooter fired the gun while aimed at the victim supported a finding that defendant had the requisite intent for second-degree murder because that is a permissible inference from the use of a deadly weapon. *People v Turner*, 213 Mich App 558, 566-567; 540 NW2d 728 (1995). Thus, there was sufficient evidence to support the second-degree murder conviction.

To establish first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was deliberate and premeditated. *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995). Premeditation and deliberation require enough time for a second look. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). However, the necessary length of time is incapable of precise determination. *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993).

From the testimony that the shooter aimed the gun directly at the victim when he fired, a factfinder could properly find that defendant acted with the intent to kill because firing a gun at a person constitutes an instrument and means naturally adapted to produce death. *People v Drayton*, 168 Mich App 174, 177; 423 NW2d 606 (1988). There was also sufficient evidence of premeditation. Testimony established that defendant's sister identified the victim and his brother to defendant as they were walking down the street and that defendant subsequently directed that the car in which he was riding be pulled over near them, at which point he immediately aimed and fired the gun. A reasonable factfinder, viewing the evidence most favorably to the prosecution, could have inferred beyond a reasonable doubt that defendant's intent to kill did not suddenly materialize when he shot the gun, but rather that defendant thought over or formulated his intent to kill while the car was being driven toward the victim. This was sufficient time for defendant to take a second look. See *People v Tilley*, 405 Mich 38, 39; 273 NW2d 471 (1979). Thus, the trial court correctly denied defendant's motion for a directed verdict on the charge of first-degree premeditated murder.

Next, defendant challenges his twenty-five to fifty year sentence for second-degree murder. Contrary to defendant's argument, the trial court provided a sufficient articulation of reasons for that sentence by noting that it was within the sentencing guidelines. *In re Dana Jenkins*, 438 Mich 364, 375-376; 475 NW2d 279 (1991). Defendant cites nothing to establish that the court completely disregarded the presentence report. He asserts that the court disregarded the factor of rehabilitation. However, because the trial court was not required to articulate reasons for its sentence beyond indicating that the minimum sentence was within the guidelines range, it would be improper for us to conclude that the court disregarded the presentence report or the factor of rehabilitation merely because it did not explicitly discuss those matters at the sentencing hearing.

Defendant also argues that the murder sentence was disproportionately severe. However, a sentence within the guidelines is presumptively proportionate. *People v Tolbert*, 216 Mich App 353, 356; 549 NW2d 61 (1996). Various degrees of intent may support a finding of second-degree murder, and it is unclear whether the jury concluded that defendant created a risk of death with knowledge that it would likely cause death or whether the jury concluded that he acted with the intent to kill. Defendant suggests that he would be entitled to a lesser sentence if he did not act with the intent to kill. Even if we were to adopt this premise, which we do not, we do not find that defendant has overcome the presumption of proportionality because there was evidence that he acted with an intent to kill. Eyewitness testimony that defendant fired the gun while aimed directly at the victim would reasonably support a conclusion that he intended to kill the victim. The trial court could reasonably have concluded that such conduct was extremely severe and, accordingly, that a minimum sentence at the top of the guidelines range was not too severe. Thus, defendant has not established that the trial court abused its discretion by imposing a disproportionately severe sentence for second-degree murder. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Merriweather*, 447 Mich 799, 806; 527 NW2d 460 (1994).

Finally, defendant argues that the trial court erred by failing to impose his three to five year sentence for CCW in open court. However, a careful review of the sentencing transcript and judgment of sentence indicates that the trial court did impose that sentence at the sentencing hearing, but mistakenly referred to it as a sentence for discharging a firearm from a motor vehicle. This misstatement constituted harmless error. *People v Lane*, 453 Mich 132, 134; 551 NW2d 382 (1996); see *People v Miles*, 454 Mich 90, 101; 559 NW2d 299 (1997). Contrary to defendant's position that the trial court improperly imposed a three to five year sentence for discharging a firearm, which carries a maximum sentence of only four years, the judgment of sentence provides that defendant received only one sentence of two to four years for that offense.

Affirmed.

/s/ Hilda R. Gage

/s/ Gary R. McDonald

/s/ E. Thomas Fitzgerald