STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE LAMONT JACKSON,

Defendant-Appellant.

UNPUBLISHED
September 26, 1997

No. 190128
Recorder's Court
LC No. 95-001485-FH

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

PER CURIAM.

Defendant was convicted in a jury trial of 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). He was sentenced to thirty-two months to four years in prison for the felonious assault conviction, and two years in prison for the felony-firearm conviction, the two sentences to run consecutively. He appeals as of right. We affirm.

Shortly after an episode in which defendant allegedly pulled up to a house and fired ten shots into it, killing one of the occupants, defendant was confronted at his own house by the brother of the victim who yelled, "I know you did it, you're going to jail." In response, defendant yelled "come on" and fired six or seven shots in the direction of the brother. The instant conviction is in connection with the latter incident.

Defendant's first argument on appeal is that there was insufficient evidence to support the trial court's instruction to the jury on assault with intent to murder. We disagree. When reviewing a sufficiency of the evidence argument, we must consider whether the evidence, when viewed in the light most favorable to the prosecution, was sufficient for a rational trier of fact to find that the elements of the offense were proven beyond a reasonable doubt. *People v Ricky Vaughn*, 200 Mich App 32, 35; 504 NW2d 2 (1993). "The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Johnson*, 215 Mich App 658, 672; 547 NW2d 65 (1996). "The intent to kill may be proved by inference from any facts in evidence." *Id*. Circumstantial evidence and reasonable inferences arising therefrom may

constitute satisfactory proof of the elements of the offense. *People v Lawton*, 196 Mich App 341, 350; 492 NW2d 810 (1992). In determining the defendant's intent, the trier of fact may take into account the nature of the defendant's acts, his disposition of mind, and his conduct and declarations before, during, and after the assault. *People v Guy Taylor*, 422 Mich 554, 568; 375 NW2d 1 (1985).

In the case at bar, a rational trier of fact could infer defendant's intent to kill from his declarations and conduct at the time of the assault. The deceased's brother, Shaun Steele, testified that he was yelling in the direction of defendant's house when an upstairs window broke out and defendant repeatedly yelled, "come on." Defendant then fired several shots and Steele began running. Defendant fired six or seven shots in total and, by the time defendant was done shooting, Steele was a considerable distance from the house. From the sound of the gun, the bullets could not have been far from striking him. Although Steele did not see the direction in which the gun was pointed, a rational trier of fact could infer defendant's intent to kill from his repeated statements to "come on," to Steele, his firing six to seven shots, the fact that Steele was running away, and the fact that Steele a considerable distance from the house before defendant finally stopped shooting. We conclude that there was sufficient evidence to support the trial court's instruction on assault with intent to commit murder.

Defendant's second argument on appeal is that the trial court erred in failing to sua sponte instruct the jury on self-defense. We disagree. "The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused." MCL 768.29; MSA 28.1052. Defendant did not request an instruction on self-defense at trial. We therefore review "this issue only to determine if there is manifest injustice." *People v Johnson*, 215 Mich App 658, 672; 547 NW2d 65 (1996). The theory of self-defense applies where the defendant claims that he used deadly force to defend himself when he honestly and reasonably believed that he was in imminent danger of serious bodily harm, forcible sexual penetration, or death. *People v Barker*, 437 Mich 161, 163; 468 NW2d 492 (1991); *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985). Defendant's own testimony indicates that his theory was not that he used deadly force against Steele for a legitimate reason, but rather that he did not use deadly force at all: he merely fired shots "in the upper way" to scare Steele away. We have previously held that manifest injustice does not result from the trial court's failure to sua sponte instruct on self-defense when the defendant's testimony indicates that the defense theory of the case is not self-defense. *People v Trammell*, 70 Mich App 351, 355; 247 NW2d 311 (1976). We therefore conclude that no manifest injustice resulted from the trial court's failure to so instruct in this case.

Defendant's third argument on appeal is that comments made by the prosecutor during closing argument effectively shifted the burden of proof and denied defendant a fair trial. We disagree. We review alleged instances of misconduct in context to determine whether they denied the defendant a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Where, as here, the defendant fails to object or to request a curative instruction, we will not review this issue "unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Defendant contends that the prosecutor's statement that a reasonable doubt must be a doubt to which the jurors could assign a

reason improperly shifted the burden of proof to the defense. Directly on point is the case of *People v Lee*, 212 Mich App 228, 254; 537 NW2d 233 (1995). There, the prosecutor made virtually the same comment that was made here, and we held that the statement was isolated and did not mislead the jury. *Id*. We further noted that the trial court properly instructed the jury concerning what constitutes a reasonable doubt. *Id*. The trial court in the instant case instructed the jury on the definition of reasonable doubt and instructed the jury to follow the court's instructions on the law rather than what the lawyers say. These instructions cured any prejudice. We conclude that defendant was not denied a fair trial. For the same reason, defendant's argument that he was denied effective assistance of counsel when his trial counsel failed to object to the prosecutor's comments must also fail, since defendant has not established a reasonable probability that the outcome of the trial would have been different had his counsel objected. *People v Eloby*, 215 Mich App 472, 476; 547 NW2d 48 (1996).

Defendant's fourth argument on appeal is that the trial court inaccurately scored offense variable (OV) 2 (physical attack and/or injury – "victim killed") and sentenced defendant based on improperly scored guidelines. Michigan Sentencing Guidelines, 2nd ed, at 26 (1988). We disagree. The Supreme Court recently held that "[t]here is no juridical basis for claims of error based on alleged misinterpretation of the guidelines, instructions regarding how the guidelines should be applied, or misapplication of guideline variables." *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). "Application of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate." *Id*. Because defendant has not challenged the proportionality of his sentence, there is no cognizable claim before this Court. We further reject defendant's argument concerning the fact that the sentence information report inaccurately lists the original offense title because the record makes clear that the trial court sentenced defendant on the offenses of which he was convicted.

Defendant's fifth argument on appeal is that the trial court at the time of sentencing erroneously made an independent finding of guilt of murder even though defendant was acquitted of that charge by the jury. We disagree. Defendant relies on the fact that the trial court scored one hundred points for OV 2 and thus determined that a death resulted from defendant's commission of the offense, and on the court's statement to defendant that "you've destroyed a number of people's lives." Whether the trial court made an independent finding of guilt and then sentenced defendant based upon that finding is a question of law. Questions of law are reviewed de novo. *Burgess v Clark*, 215 Mich App 542, 545; 547 NW2d 59 (1996). A sentencing court may take into account conduct underlying criminal charges of which a defendant was acquitted "because an acquittal does not necessarily mean that the defendant did not engage in criminal conduct, but only demonstrates a lack of proof beyond a reasonable doubt." *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). See also *People v Ewing*, 435 Mich 443, 473-474; 458 NW2d 880 (1990) (Boyle, J.). However, a "trial court may not make an independent finding of guilt and then sentence a defendant on the basis of that finding." *People v Dixon*, 217 Mich App 400, 410; 552 NW2d 663 (1996). In this case, there is no indication on the record that the court made an independent finding of guilt of murder. Even if the court's scoring decision constitutes a finding that death resulted, such a finding does not constitute an independent finding of guilt of murder since the court made no findings regarding any of the other elements of murder.

We conclude that there is no indication on the record that the trial court made an independent finding of guilt of murder and then sentenced defendant on the basis of that finding.

Defendant's final argument on appeal is that he is entitled to receive his jury voir dire transcript. We disagree. Under MCR 6.425(2)(a)(i), the trial court is required to direct the court reporter to prepare and file,

> [T]he trial or plea proceeding transcript, excluding the transcript of the jury voir dire, unless the defendant challenged the jury array, exhausted all peremptory challenges, was sentenced to a term of life imprisonment without the possibility of parole, or shows good cause.

See also MCR 6.433(A). Here, defendant was not provided a copy of the voir dire transcript but has failed to raise any issue on appeal that requires review of the voir dire transcript. Nor has he set forth any other basis for being provided the transcript under MCR 6.425(F)(2)(a)(i). As a result, we find no error on the part of the trial court.[1]

Affirmed in all respects.

/s/ Stephen J. Markman
/s/ Gary R. McDonald

[1] In *People v Bass*, 223 Mich App 241, 255; 565 NW2d 897 (1997), amended 7/25/97, this Court was confronted with the constitutionality of MCR 6.425(F)(2)(a)(i). There, the Court concluded that the "court rules governing the production of the voir dire transcript do not violate defendant's right to equal protection [because] defendant raises no issue on appeal that requires review of the voir dire transcript." *Id*., slip op at 8. However, it also went on to observe that under "the Due Process Clause of the Fourteenth Amendment, a criminal defendant is entitled to the effective assistance of counsel in his first appeal of right". *Id*. As a result, it concluded that the voir dire transcript must be provided in all cases where appointed counsel was not the indigent defendant's trial counsel. Subsequently, the Supreme Court by order stayed the precedential effect of *Bass* and granted leave to appeal. ___ Mich ___; ___ NW2d ___ (Docket No. 109511, issued 8/4/97). Although we are not bound by its decision, we are persuaded by and adopt the rationale of the Court in *Bass* that the equal protection clause does not compel preparation of the voir dire transcript. Rather, the "state is only required to provide transcripts of the portion of the proceedings germane to consideration of the issues raised on appeal." *Id*., slip op at 8. However, we do not agree with *Bass* in its conclusion that the due process clause requires something more. Whatever the substantive merits of the standards and directives of the State Appellate Defender Commission relating to standards of performance by appointed counsel, we do not believe that these have the effect of transforming the breadth of the state or federal constitutions. At most, these argue for reconsideration of MCR 6.425(F)(2)(a)(i), a matter within the jurisdiction of the Supreme Court. We do not believe that any "substantial injustice" will result from our failure to further consider defendant's appeal of this unpreserved issue.