STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THEODORE JACKSON,

Defendant-Appellant.

UNPUBLISHED
May 12, 1998

No. 195516
Recorder's Court
LC No. 95-10733

Before: Jansen, P.J., and Kelly and Markey, JJ.

PER CURIAM.

Defendant appeals by of right his bench trial conviction for second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to fifteen to twenty-five years' imprisonment for the second-degree murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

During the evening of September 4, 1995, defendant was with Jerome Jackson, Ezell Moore and Braford Walton near the corner of East Canfield and Holcomb in Detroit. Defendant fired a handgun into a group of people standing near the intersection of East Canfield and Belvidere. Antonio Thomas Allen Conley was shot and killed as he stood in the group. Defendant was convicted of second-degree murder for killing Conley.

We recast defendant's single issue on appeal as follows: first, whether it was erroneous for the trial court to find that defendant did not have an intent to kill or inflict great bodily harm while at the same time finding that defendant knew death or great bodily harm would likely result from his act; second, whether there was sufficient evidence to convict defendant of second-degree murder when the trial court specifically found that defendant did not have an intent to kill or inflict great bodily harm. We disagree with defendant on both issues.

Defendant mischaracterizes the first issue on appeal as an erroneous fact finding by the trial judge. On the contrary, this issue presents a question of law that we review de novo. *People v Harris*, 224 Mich App 597, 599; 569 NW2d 525 (1997).

Defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, which has three elements: (1) the defendant caused the death of the victim; (2) the killing was done with malice; and (3) the killing was done without justification. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Malice may be inferred from the facts and circumstances surrounding the killing. *Id.* Malice is the intent to kill, the intent to do great bodily harm, or the intent to create a high risk of death or great bodily harm with knowledge that death or great bodily harm will be the probable result. *People v Dykhouse*, 418 Mich 488, 495; 345 NW2d 150 (1984); *Kemp, supra*. The Michigan Supreme Court has also defined the third form of intent as the wanton and wilful disregard of the likelihood that defendant's behavior has the natural tendency to cause death or bodily harm. *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980).

Defendant concedes that the only contested issue on appeal is his state of mind at the time of the shooting and his corresponding degree of guilt. Defendant argues, however, that it was clearly erroneous for the trial court to find that defendant did not have an intent to kill or inflict great bodily harm while at the same time finding that defendant knew death or great bodily harm would likely result from his act. We disagree. The trial court's findings of fact resulted from the evidence as compared to the alternative definitions of malice. The Court determined that the evidence did not support the first two definitions, i.e., that defendant intended to kill someone or intended to do great bodily harm to Conley. The trial court determined, however, that the third definition of malice was met because defendant knowingly created a very high risk of death or great bodily harm knowing that death or such harm was the likely result of shooting a gun toward a crowd of people.

The trial court based its determination on defendant's derogatory comments about the group of people standing at the intersection, pointing his gun at the group who stood as close as thirty feet from him, and emptying his gun by firing five shots at the group. A review of the entire record shows that the trial judge correctly applied an appropriate definition of malice to the evidence presented at trial. Thus, we find no error.

Defendant also argues that the trial court erred by finding him guilty of second-degree murder beyond a reasonable doubt when defendant did not have an intent to kill or inflict great bodily harm. Defendant urges this Court to review the trial judge's finding of guilt under a clearly erroneous standard. In reality, defendant challenges the sufficiency of the evidence because defendant claims the trial judge failed to find all of the elements of the offense. The Michigan Supreme Court has refused to apply the clear error standard in reviewing bench trials on insufficient evidence claims. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). When reviewing a claim of insufficient evidence following a bench trial, this Court must view the evidence in a light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*; *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

Defendant admitted to police that he retrieved a handgun from under the hood of a car, fired the gun once in the air in order to dissuade two people from fighting, made statements about the group of people standing at the intersection who were watching the alleged fight, and fired five times into the group at the intersection until he heard his gun click and knew it was empty. Two witnesses related to defendant, Jerome and Moore, testified that defendant fired one or two shots in the air, made

derogatory statements about the group at the intersection, and fired two or three shots at the intersection. Both saw someone hit by the gunshots. Walton also testified that defendant made similar derogatory statements about the group standing at least thirty feet away at the intersection before he fired the gun at the group. Viewing the evidence in a light most favorable to the prosecutor, we find sufficient evidence from which a rational trier of fact could determine beyond a reasonable doubt that defendant created a high risk of death or great bodily harm with knowledge that death or great bodily harm would be the probable result when he fired at the group of bystanders and killed one of them.

We affirm.

/s/ Kathleen Jansen
/s/ Michael J. Kelly
/s/ Jane E. Markey