

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

HENRY DONTEE ALLEN,

Defendant-Appellant.

UNPUBLISHED

August 25, 2000

No. 216173

Muskegon Circuit Court

LC No. 97-141434-FC

Before: McDonald, P.J., and Neff and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment without parole for the first-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the shooting death of Tawone Love, who was shot several times in the vicinity of Spring and Catherine Streets in Muskegon, a high drug trafficking area. The shooting was observed by several people who were in the area selling and purchasing narcotics. Defendant, along with codefendants William Vincon Madison and Tyree Edwards were identified as having shot the victim. Defendant was tried jointly with codefendant Madison, before separate juries. Edwards pleaded guilty to second-degree murder and, at trial, claimed sole responsibility for the shooting.

I

Defendant first argues that the evidence was insufficient to sustain his convictions for first-degree murder and felony-firearm, and to disprove beyond a reasonable doubt that he acted in self-defense. We disagree. Viewing the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could have found that the essential elements of first-degree murder and felony-firearm were proved beyond a reasonable doubt. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999); *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The evidence was likewise sufficient to disprove defendant's

claim of self-defense beyond a reasonable doubt. *People v Truong (After Remand)*, 218 Mich App 325, 337-338; 553 NW2d 692 (1996); *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993); *People v Fortson*, 202 Mich App 13, 19-20; 507 NW2d 763 (1993).

II

Next, defendant claims that he was denied his constitutional right to a fair trial when the trial court failed to excuse for cause a juror who had been exposed to extraneous matters. We disagree. A trial court's determination of a juror's ability to render an impartial verdict will be reversed by this Court only where we find a clear abuse of discretion. *People v Anderson*, 166 Mich App 455, 468; 421 NW2d 200 (1988).

"The trial court has an obligation to safeguard a defendant's right to a fair trial before an impartial jury." *People v Badour*, 167 Mich App 186, 188; 421 NW2d 624 (1988), rev'd on other grounds 434 Mich 691; 456 NW2d 391 (1990). "Jurors are presumed to be competent and impartial and the burden of proving otherwise is on the party seeking disqualification." *Id.*

In *People v Daoust*, 228 Mich App 1, 9; 577 NW2d 179 (1998), this Court held:

[W]e hold that when information potentially affecting a juror's ability to act impartially is discovered after the jury is sworn, the defendant is entitled to relief only if he can establish (1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause.

Upon learning that a juror had been exposed to extraneous information, the court questioned the juror, who assured the court that she could remain fair and impartial and decide the case based solely on the evidence presented at trial. The record does not support a finding that the juror was properly excusable for cause or that defendant was actually prejudiced by the presence of the juror in question. *People v Fox (After Remand)*, 232 Mich App 541, 558; 591 NW2d 384 (1998); *People v Fetterley*, 229 Mich App 511, 544-545; 583 NW2d 199 (1998), citing to *People v Nick*, 360 Mich 219, 230; 103 NW2d 435 (1960). Defendant failed to overcome the presumption that the juror was competent and impartial and the trial court did not abuse its discretion in allowing the juror to remain on the jury.

III

Defendant claims that he was denied his right to a fair trial by the introduction of certain statements made by codefendants Madison and Edwards pursuant to MRE 804(b)(3) (statements against penal interest) or MRE 801(d)(2)(b) (adoptive admissions). Defendant claims that the statements in question do not bear sufficient indicia of reliability to warrant admission under these rules. However, defendant did not preserve this issue for appeal with appropriate objections at trial to the testimony in question. Thus, defendant is not entitled to appellate relief absent a showing of plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

In *People v Poole*, 444 Mich 151, 153-154; 506 NW2d 505 (1993), our Supreme Court addressed the issue “whether a declarant’s noncustodial, out-of-court, unsworn-to statement, voluntarily made at the declarant’s initiation to someone other than a law enforcement officer, inculcating the declarant and an accomplice in criminal activity, can be introduced as substantive evidence at trial pursuant to MRE 804(b)(3).” The Court held:

We conclude, however, that where, as here, the declarant’s inculcation of an accomplice is made in the context of a narrative of events, at the declarant’s initiative without any prompting or inquiry, that as a whole is clearly against the declarant’s penal interest and as such is reliable, the whole statement — including portions that inculcate another — is admissible as substantive evidence at trial pursuant to MRE 804(b)(3). [*Poole, supra* at 161.]

Once a court determines that a statement is admissible pursuant to MRE 804(b)(3), it must also consider whether admission of the statement violates the defendant’s Sixth Amendment right of confrontation. *Poole, supra* at 162. “Admitting [a] statement as substantive evidence thus does not violate the Confrontation Clause if the prosecutor can establish that [the declarant] is unavailable as a witness and his statement bears adequate indicia of reliability *or* falls within a firmly rooted hearsay exception.” *Id.* at 163. Because MRE 804(b)(3) is not a “firmly rooted hearsay exception,” *id.*, citing to *Lee v Illinois*, 476 US 530; 106 S Ct 2056; 90 L Ed 2d 514 (1986), the evaluation centers around whether the statement bears sufficient indicia of reliability. In *Poole*, the Court explained:

In evaluating whether a statement against penal interest that inculcates a person in addition to the declarant bears sufficient indicia of reliability to allow it to be admitted as substantive evidence against the other person, courts must evaluate the circumstances surrounding the making of the statement as well as its content.

The presence of the following factors would favor admission of such a statement: whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates — that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant a without prompting or inquiry by the listener.

On the other hand, the presence of the following factors would favor a finding of inadmissibility: whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth.

Courts should also consider any other circumstance bearing on the reliability of the statement at issue. [*Poole, supra* at 164-165; citations omitted.]

Here, some of the challenged statements were admitted pursuant to MRE 801(d)(2)(B), governing adoptive admissions. In *Shemman v American Steamship Co*, 89 Mich App 656, 673; 280 NW2d 852 (1979), this Court, citing *Durbin v K-K-M Corp*, 54 Mich App 38; 220 NW2d 110 (1974), explained:

An adoptive admission is the express adoption of another's statement as one's own. It is conduct on the *part of a party* which manifests circumstantially that party's assent in the truth of a statement made by another. The mere fact that a party had declared that he or another person made the statement is not in and of itself sufficient for a finding of adoption. In order to find adoptive approval of the other's statement the circumstances surrounding the other's declaration must be examined. [Emphasis in original.]

Our review of the record fails to disclose any plain error in the admission of the challenged statements under either MRE 804(b)(3) or MRE 801(d)(2)(B). The challenged statements are clearly against the declarants' penal interests, and they were made in "the context of a narrative of events, at the declarant's initiative without any prompting or inquiry." *Poole, supra* at 161. Further, the circumstances surrounding the statements manifested defendant's assent in their truth so as to permit their consideration as adoptive admissions. *Shemman, supra* at 673. Thus, appellate relief is not warranted on the basis of this issue.

IV

Next, defendant alleges three claims of error involving the admission of codefendant Edwards' prior police statement. We find no error.

Tyree Edwards' trial testimony claiming sole responsibility for the shooting was inconsistent with a prior recorded statement that he had given to the police. As such, the trial court did not abuse its discretion in admitting Edwards' prior statement for impeachment purposes only, which was accompanied by a cautionary instruction to the jury, and where Edwards was afforded an opportunity to explain or deny the prior statements and defense counsel was afforded the opportunity to interrogate Edwards regarding the statements. MRE 613.

Second, we find no merit to defendant's claim that the court's cautionary instruction failed to sufficiently inform the jury that the prior statements could not be considered as substantive evidence. The court instructed the jury, in pertinent part, as follows:

Neither the recording nor the transcript are substantive evidence. The evidence is introduced for impeachment purposes; in other words, to help you assess Mr. Edwards' credibility and other things relating to his testimony here.

The trial court properly cautioned the jury on the limited use of Edwards' prior statements through the foregoing instruction. *Avant, supra* at 511; *People v McIntire*, 232 Mich App 71, 113; 591 NW2d 231 (1998), rev'd on other grounds, 461 Mich 147; 599 NW2d 102 (1999). Accordingly,

defendant's claim of prosecutorial misconduct on the basis of this issue also fails. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Third, because Edwards' prior inconsistent statements were properly admitted into evidence, defendant cannot prevail on his claim of ineffective assistance of counsel in connection with this issue. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999), citing to *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

V

Next, defendant alleges three claims of instructional error. However, because defendant did not object to the challenged instructions at trial, appellate relief is precluded absent a showing of plain error, i.e., a clear or obvious error, affecting defendant's substantial rights, i.e., error affecting the outcome of the trial. *Carines, supra* at 763-764; *Grant, supra* at 553. The determination whether an instruction is applicable to a case is in the sound discretion of the trial court. There is no error requiring reversal if, on balance, the instructions fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v McFall*, 224 Mich App 403, 414; 569 NW2d 828 (1997).

CJI2d 5.6

First, defendant contends that the trial court erred in giving a modified jury instruction on accomplice testimony. Defendant argues that the instruction unfairly prejudiced him because it diminished the impact of Edward's favorable testimony. We disagree.

The record indicates that defendant agreed, without objection, to the trial court's modification of CJI2d 5.6, which deleted language regarding possible plea bargain promises and the accomplice's criminal record and reflected the fact that Edwards testified favorably on behalf of defendant.

In *People v McCoy*, 392 Mich 231; 220 NW2d 456 (1974), our Supreme Court stated that a trial court *may* have an obligation to give a cautionary instruction sua sponte on accomplice testimony "if the issue is closely drawn." *Id.* at 240. The rule is motivated by the inherent weakness of accomplice testimony that is presented by the prosecution. *People v Reed*, 453 Mich 685, 691; 556 NW2d 858 (1996). In *Reed*, the Court found that the rationale for the obligation to instruct sua sponte did not apply where the accomplice was the codefendant who voluntarily testified in his own defense and was obviously not the beneficiary of any favorable deals. *Id.* at 693. Defendant contends that this case is analogous to *Reed* and, accordingly, the modified instruction should not have been given. We disagree.

The similarities between this case and *Reed*, i.e., that Edwards was not a prosecution witness and was obviously not the beneficiary of any favorable deals from the prosecution, are not dispositive. There are two distinguishing features between this case and *Reed*. First, defendant, although jointly tried with codefendant Madison, had his own separate jury that understood it was to consider the evidence with respect to him only. In *Reed*, the defendant and codefendant were tried before a single jury. Second, Edwards was not a codefendant. In *Reed*, the accomplice was the codefendant. Thus, *Reed* stands for the proposition that the cautionary instruction on accomplice testimony should not be given

when the defendant and the accomplice are tried jointly before a single jury and the accomplice takes the stand in his own defense. Neither of these qualifying factors are present in this case.

We also note that federal cases addressing this issue have determined that a trial court has discretion to instruct the jury to accept the testimony of an accomplice with caution, whether the accomplice testifies for the prosecution or the defense. *Booker v Israel* 610 F Supp 1310, 1318 (ED Wis, 1985), and cases cited therein. See especially *United States v Nolte*, 440 F2d 1124, 1126-1127 (CA 5, 1971).

Accordingly, in light of the foregoing, we find no plain error affecting defendant's substantial rights with regard to this issue.

CJI2d 3.11(5)

Defendant next contends that the trial court erred in giving CJI2d 3.11(5), which reflects the decision in *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982), a case in which the Court required mandatory instructional language for the order of jury deliberation where there are both principal and lesser included offenses. Defendant claims that this instruction is not applicable where, as here, he was charged with "open murder." We disagree.

Here, the information charged defendant with "open murder," but cited to MCL 750.316; MSA 28.548, which is the first-degree murder statute. Thus, it is clear that, from the beginning, the principal charge was first-degree murder even though, under *People v Johnson*, 427 Mich 98, 107-109; 398 NW2d 219 (1986), specificity was not required for the preliminary examination. This situation here is identical to *People v Spalla*, 83 Mich App 661, 663-665; 269 NW2d 259 (1978), rev'd on other grounds 408 Mich 876 (1980), wherein the defendant was charged with "open murder," but the information cited the first-degree murder statute. The *Spalla* Court found that the information was sufficient to advise the defendant that "he must prepare to defend himself against both first- and second-degree murder." *Id.* at 664.

Moreover, by following the order of consideration set forth in *Handley*, a jury does not give up its obligation to "decide what degree of murder has been proven." It merely considers the greater offense first. See *People v Fisher*, 166 Mich App 699, 712-713; 420 NW2d 858 (1988).

CJI2d 3.7

Defendant contends that CJI2d 3.7, or a modified version of it, should have been given to guide the jury on how to consider evidence of the conduct of Madison and Edwards, so that the jury would not convict him by association with "bad men." The use note to CJI2d 3.7 provides that this instruction must be given when there are two or more defendants. Here, although there were two defendants, they were tried before separate juries. Arguments were made separately to each jury and the court instructed each jury separately. Defendant's jury considered only evidence pertinent to defendant. We find that CJI2d 3.7 is not applicable in this context.

Ineffective assistance of counsel

Finally, defendant claims that he was denied the effective assistance of counsel by counsel's failure to either request or object to the foregoing instructions. However, having found no error associated with the challenged instructions, we conclude that defendant's ineffective assistance of counsel claim is without merit. *Hoag, supra* at 5-6.

VI

Next, defendant claims that he was denied the effective assistance of counsel because trial counsel failed to request an instruction on imperfect self-defense. We disagree.

In *Kemp, supra* at 323-325, this Court discussed the doctrine of imperfect self-defense, explaining:

Imperfect self-defense is a qualified defense that can mitigate second-degree murder to voluntary manslaughter. Where imperfect self-defense is applicable, it serves as a method of negating the element of malice in a murder charge. Although the Michigan Supreme Court has not yet considered the viability of the theory of imperfect self-defense, panels of this Court have recognized the doctrine where a defendant would have been entitled to invoke the theory of self-defense had he not been the initial aggressor.

* * *

[W]e believe that the inquiry regarding the applicability of the doctrine of imperfect self-defense requires more than just a determination whether defendant was the initial aggressor. In determining whether an initial aggressor is entitled to a claim of imperfect self-defense, the focus is on “*the intent with which the accused brought on the quarrel or difficulty.*” *State v Partlow*, 90 Mo 608, 617; 4 SW 14 (1887).

* * *

[D]efendant . . . is not entitled to invoke the doctrine of imperfect self defense to mitigate his crime to manslaughter if the circumstances surrounding the incident indicate that he initiated the confrontation between himself and the victim with the intent to kill or to do great bodily harm. [Emphasis in original; citations omitted.]

In this case, the evidence demonstrated that defendant, Madison and Edwards confronted the victim armed, demonstrating the intent to kill or do great bodily harm. Further, the number of shots fired into the victim’s body, and the continued kicking and beating of the victim even after he was shot, demonstrate excessive force. Under the facts and circumstances of this case, the qualified defense of imperfect self-defense is not applicable. *Kemp, supra; People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). Thus, trial counsel was not ineffective for failing to request an instruction on imperfect self-defense. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994); *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996).

VII

Having found no error on any single issue, defendant’s claim that he was denied a fair trial due to the cumulative effect of several errors is without merit. *Daoust, supra* at 16; *People v Malone*, 180 Mich App 347, 362; 447 NW2d 157 (1989).

Affirmed.

/s/ Gary R. McDonald

/s/ Janet T. Neff

/s/ Brian K. Zahra