

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD RICE,

Defendant-Appellant.

UNPUBLISHED

May 19, 1998

No. 199962

Recorder's Court

LC No. 96-001231 FY

Before: Holbrook, Jr., P.J., and Gribbs and R.J. Danhof*, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of second-degree murder, MCL 750.317; MSA 28.549, assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b; MSA 28.424(2). Defendant was sentenced to concurrent prison terms of twenty-five to forty years for the second-degree murder conviction and five to fifteen years for the assault with intent to commit murder conviction, to be served consecutive to a two-year prison term for the felony-firearm conviction. We affirm.

The instant case arose out of a shooting that occurred at approximately 4:00 a.m. at an illegal after hours nightclub located in the City of Detroit. Defendant and decedent, Aubrey Bailey, were playing craps at a gambling table located on the second floor of the club when they got into an argument. After a heated exchange, Bailey walked away from the craps table and entered a second floor storage room. The argument was rejoined when Bailey returned to the craps table a couple of minutes later. At some point, defendant pulled a gun and fired four or five shots. One bullet struck Bailey in the chest and abdomen, and another struck Charles Thornton (the club DJ) in the thigh. Bailey eventually died from his gunshot wound.

Defendant first argues that the prosecution presented insufficient evidence to support his conviction for second-degree murder. Specifically, defendant asserts that the evidence adduced at trial showed that defendant did not act with the requisite malice, and that under the circumstances the most

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

defendant should have been convicted of in the killing of Bailey was voluntary manslaughter. We disagree with both assertions. To determine whether the prosecution presented sufficient evidence to sustain a conviction, this Court “view[s] the evidence in a light most favorable to the prosecution [to] . . . determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). “Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime.” *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Any questions regarding credibility of witnesses are properly left to the trier of fact. *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991).

“To establish the crime of second-degree murder, it must be determined that the defendant caused the death of the victim and that the killing was done with malice and without justification.” *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Malice is defined as “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. Malice may be inferred from the facts and circumstances of the killing.” *Id.* “Voluntary manslaughter is an intentional killing committed under the influence of passion or hot blood produced by adequate provocation and before a reasonable time has passed for the blood to cool.” *People v Hess*, 214 Mich App 33, 38; 543 NW2d 332 (1995).

We conclude that viewed in a light most favorable to the prosecution, there was sufficient evidence from which a reasonable trier of fact could find that defendant acted with malice in the killing of Bailey. Three witnesses testified that defendant pointed and fired a gun at the decedent after the decedent had returned from the storage room. The medical examiner who performed the autopsy on Bailey testified that defendant’s gun was pressed against the decedent when the fatal shot was fired. At the very least, a rational trier of fact could conclude that the natural tendency of firing a gun at an individual at such close range is to cause death or great bodily harm. We believe, however, that a rational trier of fact could also conclude from such evidence that defendant had the specific intent to kill. E.g., *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993) (“The intent to kill may be proven by inference from any facts in evidence.”) Accordingly, a rational trier of fact could properly infer that defendant acted with the requisite malice. E.g., *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995) (“Malice is a permissible inference from the use of a deadly weapon.”).

We further conclude that the evidence does not support the theory that defendant acted in the heat of passion after being provoked by decedent. Thorton testified that after the decedent and defendant exchanged heated words at the craps table, the decedent slapped defendant across the face before going to the storage room.¹ Approximately two minutes later, the decedent returned and began to walk toward defendant. It was then that defendant pulled his gun and fired at the decedent. When viewed in a light most favorable to the prosecution, we do not believe that in these circumstances the evidence is sufficient to support either a finding of adequate and reasonable provocation, *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991), or that defendant did not have sufficient time in which he could control his passions, *Hess, supra* at 38.²

Next, defendant argues that the evidence presented at trial was insufficient to support his conviction of assault with intent to commit murder. “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 Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995). Defendant asserts that the prosecution failed to present sufficient evidence on either the second or third elements of the crime. We disagree. Under the doctrine of transferred intent,³ *People v Youngblood*, 165 Mich App 381, 388; 418 NW2d 472 (1988), proof of defendant’s intent to kill Bailey satisfies the intent requirement for the charge of assault with intent to commit murder with respect to Thornton. *People v Hodges*, 196 Mich 546, 550-551; 162 NW 966 (1917). We also find defendant’s assertion that the prosecution failed to establish the third element of assault with intent to commit murder because Thornton only suffered a leg wound to be without merit. The fact that Thornton only suffered a leg wound should be seen as a blessing for Thornton, not as an appellate escape hatch for defendant.

Defendant also argues that the verdict must be reversed because the trial court erred in failing to instruct the jury that mitigating circumstances could have reduced the second-degree murder charge to manslaughter. We disagree “This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. . . . Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant’s rights.” *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Given that defendant did not raise an objection at trial to the alleged error in instructing the jury, the “verdict will not be set aside on the basis of such error unless it has resulted in a miscarriage of justice.” *People v Chatfield*, 170 Mich App 831, 835; 428 NW2d 788 (1988).

Defendant argues that the trial court erred in failing to read to the jury the fourth paragraph of CJI2d 16.5, which provides that to establish second-degree murder, the prosecution must prove “that the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime.” CJI2d 16.5(4). Preliminarily, we observe that because “the Michigan Criminal Jury Instructions do not have the official sanction of” the Michigan Supreme Court, “[t]heir use is not required.” *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). Moreover in the case at hand, while it is true that the trial court did not read verbatim the cited paragraph from CJI2d 16.5, we believe that when viewed in their entirety, the trial court’s jury instructions fairly presented defendant’s theory of the case to the jury and sufficiently protected his rights. The trial court instructed the jury on the lesser included offenses of voluntary manslaughter, assault with intent to murder, and assault with intent to do great bodily harm less than murder. Furthermore, the trial court instructed the jury on self-defense, specifically noting that defendant could not be found guilty of any crime if the jury found that he acted in self-defense. Therefore, we conclude that the trial court’s failure to read CJI2d 16.5(4) to the jury did not result in a miscarriage of justice.

Finally, we address defendant’s two pronged attack to the sentence imposed by the trial court for defendant’s second-degree murder conviction. First, defendant argues that the trial court erred in scoring offense variables (“OV”) 3 and 13. However, given that defendant’s challenge to the scoring of each OV is based upon the assertion that the trial court misinterpreted the facts before it, we conclude that defendant’s OV challenge fails to state a cognizable claim for appellate relief. *People v Mitchell*,

454 Mich 145, 176; 560 NW2d 600 (1997) (observing that a challenge “to the judge’s calculation of the sentencing variable on the basis of his discretionary interpretation of undisputed facts . . . does not state a cognizable claim for relief”). Second, defendant argues that his sentence violates the principle of proportionality. We disagree. Defendant’s sentence falls within the minimum sentence range suggested by the guidelines, and is therefore presumptively proportionate. *People v Borden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Because defendant failed to identify at sentencing any unusual circumstances to overcome this presumption, *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992), we hold that defendant’s sentence is “proportionate to the seriousness of the circumstances surrounding [this] . . . offense and [this] . . . offender.” *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Accord *Daniel, supra*, 207 Mich App at 54.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Roman S. Gibbs

/s/ Robert J. Danhof

¹ We acknowledge that two other witnesses testified that the decedent slapped defendant after the decedent exited the storage room, and that defendant shot the decedent right after defendant had been slapped. However, the appropriate standard of review calls for this Court to review the evidence in a light most favorable to the prosecution. *Jaffray, supra* at 296.

² Defendant also argues that because there was insufficient evidence to support a finding of malice, the trial court erred when it denied his motion for a directed verdict on the second-degree murder charge. Given our conclusion that there was sufficient evidence to support defendant’s second-degree murder conviction, we also conclude that the trial court did not err when denying defendant’s motion for a directed verdict on this same charge.

³ “[W]hen one person (A) acts . . . with intent to harm another person (B), but because of bad aim he instead harms a third person (C) whom he did not intend to harm, the law considers him (as it ought) just as guilty as if he had actually harmed the intended victim.” LaFave & Scott, *Handbook on Criminal Law*, ch 3, § 3.12, p 284 (Abridgment, 1986).