

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH EARL FLOWERS,

Defendant-Appellant.

UNPUBLISHED

January 14, 2003

No. 232940

Berrien Circuit Court

LC No. 2000-404544-FC;

2000-404545-FH

Before: Meter, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and first-degree fleeing and eluding a police officer causing death, MCL 257.602a(5). He was sentenced to concurrent prison terms of fifteen to forty years for the second-degree murder conviction and 86 to 180 months for the fleeing and eluding conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the death of an eleven-year-old boy, who was struck by defendant's vehicle while defendant was fleeing a police officer.

I

Defendant first argues that the prosecution failed to present sufficient evidence of his intent to support a conviction of second-degree murder. We disagree. The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror in finding guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). Circumstantial evidence and reasonable inferences that arise therefrom may be sufficient to prove the elements of an offense. *Id.* at 400. A defendant's intent may be inferred from all the facts and circumstances. *People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991).

"The elements of second-degree murder are (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). In discussing the element of malice, the Supreme Court in *Goecke* explained:

Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.

* * *

One way of expressing this concept is that malice may be established even absent an actual intent to cause a particular result if there is wanton and willful disregard of the likelihood that the natural tendency of a defendant's behavior is to cause death or great bodily harm.

* * *

Another way to conceptualize this mental state is to recognize that because malice is implied when the circumstances attending the killing demonstrate an abandoned and malignant heart, "[t]his simply means that malice may be implied when the defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with wanton disregard for human life. [*Id.* at 464, 466-467.]

See also *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999).

In this case, the evidence indicated that defendant intentionally drove his vehicle recklessly and at excessive speeds while fleeing from a police officer because there supposedly were outstanding warrants for his arrest. During the pursuit, defendant drove at speeds of more than twice the posted speed limits and narrowly missed striking another vehicle. Nonetheless, defendant continued his reckless course of driving, swerving around a corner, which caused his vehicle to go into a yaw. Upon regaining control of the vehicle, defendant, who was then in a parking lot, headed directly toward two boys who were at the end of the lot. One of the boys was able to run away, but the other was struck and killed. Significantly, there were no signs of braking before the impact.

In his statement to the police, defendant estimated his speed during the pursuit at between eighty and one hundred miles an hour. Although the evidence indicated that defendant was not actually traveling that fast, the fact that defendant thought he was demonstrates his awareness, and willful disregard, of safety considerations. Defendant's willful disregard of the gravity of the situation is further reflected by the fact that he ignored the pleas of two passengers in his car, who told him to stop before the collision.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant knowingly drove with "a base antisocial motive," in wanton and willful disregard of the likelihood that the natural tendency of his behavior would cause death or great bodily harm. *Goecke, supra* at 467. Thus, there was sufficient evidence of malice to support defendant's conviction of second-degree murder.

II

Next, defendant argues that the prosecutor's use of the word "malice" in closing arguments, when describing the intent necessary for second-degree murder, was improper and denied him a fair trial. Defendant did not preserve this issue by objecting to the prosecutor's remarks at trial. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Therefore, to avoid forfeiture, defendant must show a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Although the Court in *People v Woods*, 416 Mich 581, 625-627; 331 NW2d 707 (1982), noted that "malice" was often defined in jury instructions by arcane and potentially misleading language, and directed that the word "malice" no longer be used when instructing the jury on the state of mind required for second-degree murder, the Court did not prohibit all references to that term. Here, the prosecutor referred to the word "malice" in a manner consistent with the law, explaining that it meant "[a]n intent to do an act that is obviously in disregard of life-endangering consequences" and an intent "to create a very high risk of death or great bodily harm." Further, the trial court properly instructed the jury on the states of mind required for second-degree murder in accordance with CJI2d 16.5. Juries are presumed to follow the instructions they are given. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Considered in this context, the prosecutor's use of the term "malice" did not constitute plain error. Additionally, under the circumstances, defense counsel was not ineffective for failing to object to the prosecutor's use of the term "malice." *People v Rogers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

III

Next, defendant argues that his sentences are disproportionate considering the circumstances of this case and his background. Defendant was sentenced within the recommended ranges of the statutory sentencing guidelines. Because defendant does not allege a scoring error, or argue that his sentences were based on inaccurate information, we must affirm his sentences; they are not to be reviewed for proportionality. MCL 769.34(10); *People v Pratt*, ___ Mich App ___; ___ NW2d ___ (Docket No. 228081, issued 12/17/02), slip op pp 2-3; *People v Babcock*, 244 Mich App 64, 73-75; 624 NW2d 479 (2000).

IV

Defendant argues that MCL 769.34(10), which requires an appellate court to affirm a sentence within the guidelines range absent a scoring error or consideration of inaccurate information, is unconstitutional. Defendant failed to preserve this issue for appellate review by raising it below; our review is therefore limited to plain error that affected defendant's substantial rights. *Carines, supra* at 763.

The constitutionality of a statute is a question of law which we review de novo. *People v Jensen (On Remand)*, 231 Mich App 439, 444; 586 NW2d 748 (1998). A statute is accorded a strong presumption of validity and the Court has a duty to construe it as valid absent a clear showing of unconstitutionality. *Id.*

MCL 769.34(10) provides:

If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

First, defendant argues that MCL 769.34(10) unconstitutionally denies him his right to appeal, as guaranteed by Const 1963, art 1, § 20. We disagree.

MCL 769.34(10) does not abolish a defendant's right of appeal. It merely limits the circumstances in which a defendant may challenge a sentence that adheres to certain legislatively prescribed requirements. The ultimate authority to provide for sentencing is constitutionally vested in the Legislature. Const 1963, art 4, § 45; *Babcock, supra* at 71. A defendant is not prohibited on appeal from challenging a sentence on the basis that the legislatively prescribed requirements were not met, i.e., by demonstrating a scoring error or that inaccurate information was relied upon in determining the sentence.

We also reject defendant's claim that MCL 769.34(10) unconstitutionally violates the separation of powers doctrine because it usurps this Court's discretion to make decisions regarding sentences within the guidelines. See Const 1963, art 3, § 2. The Supreme Court has the power to determine the practice and procedure of this Court, but the Legislature establishes by law the Court's jurisdiction. Const 1963, art 6, § 10. As noted previously, "[t]he ultimate authority to provide for sentencing is constitutionally vested in the Legislature, Const 1963, art 4, § 45, and delegated by the Legislature to the trial courts." *Babcock, supra* at 68 (footnote omitted). As this Court observed in *Babcock*, "there has never been any legitimate dispute that the Legislature holds ultimate authority for determining the appropriate sentencing scheme for our state." *Id.* at 71. Although the authority to administer the sentencing statutes enacted by the Legislature lies with the judiciary, it must do so only *within the limits* set by the Legislature. *People v Hegwood*, 465 Mich 432, 436-437; 636 NW2d 127 (2001).

Contrary to defendant's argument, the Legislature may impose restrictions on a judge's exercise of discretion in imposing sentences. *Id.* at 439-440. In *People v Conat*, 238 Mich App 134, 147; 605 NW2d 49 (1999), this Court explained:

The judicial power to hear and determine controversies includes the power to exercise discretion in imposing sentences. However, this sentencing discretion is limited by the Legislature, which has the power to establish sentences. For example, the Legislature may set a minimum and a maximum sentence for a particular offense. Courts have no sentencing discretion "unless it be conferred upon them by law." In other words, the Legislature has the exclusive power to determine the sentence prescribed by law for a crime, and the function of the court is "only to impose [a] sentence under and in accord with the statute." ... For example, no violation of the separation of powers doctrine results from the Legislature's requiring a mandatory life sentence without the possibility of parole

for first-degree murder. Such a sentence clearly limits the sentencing discretion of the court. [Citations omitted.]

The Legislature has reasserted its constitutional authority over the sentencing process by enacting MCL 769.34. *Babcock, supra* at 71-72. Accordingly, defendant's argument that the statute violates the separation of powers doctrine is without merit.

In light of our above analysis, we likewise find no substantive or procedural due process violation. We reject defendant's claim that MCL 769.34(10) is unconstitutional.

Affirmed.

/s/ Patrick M. Meter

/s/ Janet T. Neff

/s/ Pat M. Donofrio