

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR JASON YOUNG,

Defendant-Appellant.

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UNPUBLISHED

May 20, 2003

No. 231707

Macomb Circuit Court

LC No. 2000-002009-FC

Before: Cooper, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317; involuntary manslaughter, MCL 750.321; and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 25-50 years' imprisonment for the murder conviction, 71-180 months' imprisonment for the manslaughter conviction, and 2 years' imprisonment for each felony-firearm conviction. He appeals as of right. We affirm defendant's convictions and sentences, but remand for the limited purpose of correcting the judgment of sentence.<sup>1</sup>

The charges in this case arise out of the deaths of Frank Tipton and defendant's girlfriend, Misty McGinnis. Defendant fired several shots into a parked van outside of his home during the early morning hours of January 25, 2000. Mr. Tipton and Ms. McGinnis were in the van at the time and were either engaged, or about to be engaged, in sexual activity. Defendant and Ms. McGinnis had met Mr. Tipton earlier that evening when they went to purchase drugs at a home in Detroit. The prosecution argued that defendant shot Mr. Tipton as a result of a bad drug deal.

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<sup>1</sup> The trial court's judgment of sentence is inconsistent with regard to whether the felony-firearm sentences are to be served concurrently or consecutively with defendant's other sentences. According to notes in the lower court file, it appears that the court subsequently realized this discrepancy, noting that defendant's felony-firearm sentences were to be served concurrently with each other, but consecutive to the sentences for murder and manslaughter. See MCL 750.227b. However, an amended judgment of sentence reflecting the proper sentences does not appear in the lower court record. We remand for the limited purpose of directing the trial court to review the record to determine whether a corrected judgment of sentence has been entered and, if not, to enter an appropriate judgment.

Conversely, defendant claimed that Mr. Tipton had robbed him and took a ring and a necklace from Ms. McGinnis earlier in the evening. He further claimed that Mr. Tipton held them hostage for part of the evening. According to defendant, he shot Mr. Tipton in self-defense and in defense of Ms. McGinnis, whom he believed Mr. Tipton was planning to sexually assault.

### I. Evidentiary Issues

Defendant challenges several of the trial court's evidentiary rulings on appeal. However, defendant has not provided appropriate citations to the record in support of his arguments. It is not for this Court to discover and rationalize the basis for defendant's claims. MCR 7.212(C)(7); *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Nevertheless, a review of the record fails to disclose that the trial court's evidentiary rulings amounted to an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Initially, we find that defendant was properly prohibited from eliciting opinion testimony from Detective Jerome Urbaniak regarding whether he believed that defendant acted in self-defense. Detective Urbaniak was not a witness to the charged offenses. Consequently, his proffered testimony would not have been based on his own perceptions as required by MRE 701. Moreover, Detective Urbaniak could not provide expert testimony concerning defendant's state of mind at the time of the shootings. The detective did not have any specialized knowledge in this area and the jury could render a decision without his testimony. See MRE 702.

Additionally, the trial court did not abuse its discretion by excluding defendant's hearsay statements made at the crime scene and in his subsequent police interviews.<sup>2</sup> These statements were inadmissible under MRE 803(1) because they were not "substantially contemporaneous" with the perceived event. *People v Hendrickson*, 459 Mich 229, 235; 586 NW2d 906 (1998). Further, they were not admissible under MRE 803(2) because there was an opportunity for reflective thought before the statements were made.<sup>3</sup> *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). We also note that the statements did not refer to defendant's "then existing" state of mind and, therefore, were inadmissible under MRE 803(3). *People v Hackney*, 183 Mich App 516, 527, n 2; 455 NW2d 358 (1990). Finally, the statements did not bear circumstantial guarantees of trustworthiness to be admissible under the catchall hearsay exception, MRE 803(24).

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<sup>2</sup> The derogatory statements defendant made at the scene and during his interviews were properly presented by the prosecution as statements of a party opponent. MRE 801(d)(2)(A); *People v Jensen*, 222 Mich App 575, 581; 564 NW2d 192 (1997), vacated in part on other grounds, 456 Mich 935 (1998).

<sup>3</sup> To the extent that defendant's statements to his neighbor Tracy Height could arguably be considered excited utterances, we note that an abuse of discretion will not be found on close evidentiary questions. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Further, Ms. Height was permitted to testify about defendant's actions and his concern for Ms. McGinnis.

Defendant next opines that the trial court erred when it improperly prevented him from impeaching certain witnesses' testimony. However, the record does not substantiate defendant's allegations. Rather, defendant was able to offer some testimony from Detective Urbaniak to impeach Doris Tipton's testimony. It appears that the trial court prohibited defendant from presenting testimony about Ms. Tipton's statements to the officer that were irrelevant to any of the issues and did not amount to impeachment. Further, it does not appear that defense counsel attempted to question Detective Urbaniak regarding any statements made to him by Claire May or Cecil Costner. Accordingly, we find no error.

Defendant has also failed to show that evidence of Mr. Tipton's prior record or propensity for violence was admissible. The defense theories of self-defense and defense of others were dependent on defendant's state of mind at the time of the shooting. Because defendant claimed that he did not know Mr. Tipton prior to the shooting, Mr. Tipton's character for violence was irrelevant. See *People v Harris*, 458 Mich 310, 315-317; 583 NW2d 680 (1998). Moreover, defendant failed to make an offer proof of Mr. Tipton's character, consistent with MRE 405(a).

## II. Fleeing-Felon Defense

Defendant next argues that the trial court erroneously refused his request to present the fleeing-felon defense at trial. We disagree. Whether a defendant was denied his constitutional right to present a defense is reviewed de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

In this case, the trial court granted the prosecutor's pre-trial motion to preclude defendant from arguing that he was attempting to arrest a fleeing felon, as the evidence failed to support such a theory.

This area of the law was summarized in *People v Hampton*, 194 Mich App 593, 596-597; 487 NW2d 843 (1992):

MCL 764.16; MSA 28.875 provides, among other things, that private persons may make an arrest for felonies committed in their presence. However, the statute fails to address the issue whether a private person may use deadly force. We therefore turn to the common law.

The common law recognizes two categories of justifiable deadly force used by a private person: where the person making the arrest is met with force from the person being arrested and where force is necessary to prevent the flight of a suspected felon. *People v Whitty*, 96 Mich App 403, 411; 292 NW2d 214 (1980). Because the facts here do not indicate that defendant perceived any threat of force by the decedent, resolution of this case hinges upon the latter category. According to this Court, the use of deadly force to prevent the escape of a fleeing felon is justifiable where the following three circumstances are present: (1) the evidence must show that a felony actually occurred, (2) the fleeing suspect against whom force was used must be the person who committed the felony, and (3) the

use of deadly force must have been “necessary” to ensure the apprehension of the felon. *Whitty, supra*, pp 411, 413.

Recently, the Michigan Supreme Court addressed the issue of the use of deadly force in situations involving a fleeing felon. In *People v Couch*, 436 Mich 414, 421; 461 NW2d 683 (1990), the Court held that the common law regarding a private person's use of deadly force to apprehend felons was adopted by the Legislature through its fifty-year acquiescence following the decision in *People v Gonsler*, 251 Mich 443; 232 NW 365 (1930). Moreover, the Supreme Court, responding to *Tennessee v Garner*, 471 US 1; 105 S Ct 1694; 85 L Ed 2d 1 (1985), ruled that private citizens, unlike peace officers acting under the color of state law, are not subject to the Fourth Amendment restraints that *Garner* imposed. Finally, the Court reversed the Court of Appeals ruling that would permit a private citizen to use deadly force only if he reasonably believed that the felon posed a threat of serious harm to himself or others.

After carefully reviewing the instant record, we conclude that the evidence did not support a fleeing-felon defense. The evidence failed to establish that defendant shot Mr. Tipton under circumstances suggesting that defendant was attempting to effectuate an arrest or stop Mr. Tipton from fleeing. Rather, the evidence revealed that Mr. Tipton was sitting in a stationary vehicle when defendant approached from behind and shot him multiple times. Accordingly, the trial court’s ruling did not deprive defendant of his right to present a defense. *Kurr, supra* at 327.

### III. Scott Miller’s Testimony

Defendant further contends that the trial court erroneously allowed Scott Miller to testify. Specifically, defendant alleges that the prosecution violated the trial court’s pre-trial scheduling and discovery order. He also asserts that the testimony was irrelevant and unfairly prejudicial. We disagree. A trial court’s decision to admit evidence is reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002).

The prosecution added Mr. Miller to its witness list approximately two weeks before trial. On the first day of trial, defendant was provided with a police report detailing Mr. Miller’s proposed testimony. When defendant complained about the lack of notice, the trial court allowed defense counsel an opportunity to speak to Mr. Miller before he testified. Defense counsel did not contend that the amount of time allowed was inadequate.

The prosecution complied with MCR 6.201(H), by notifying defendant that it intended to call Mr. Miller as a witness. Moreover, the prosecutor provided good cause for Mr. Miller’s late endorsement as a witness.<sup>4</sup> MCR 6.201(I). Although the police report regarding Mr. Miller’s

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<sup>4</sup> Apparently, the prosecutor only learned about Mr. Miller’s testimony shortly before trial when he met with him, as the father of Ms. McGinnis’ child, to answer any questions he may have had about the case. The prosecutor also explained to the trial court that he did not conduct the preliminary examination in this case.

testimony was not turned over until the first day of trial, defendant had notice of Mr. Miller's identity as a possible witness and could have interviewed Miller earlier if desired. Under the circumstances, the trial court fashioned an appropriate remedy. MCR 6.201(J).

We further conclude that Mr. Martin's testimony was relevant because it rebutted defendant's claim that Mr. Tipton was sexually assaulting Ms. McGinnis at the time of the shooting. See MRE 401; MRE 402; *People v Campbell*, 236 Mich App 490, 503; 601 NW2d 114 (1999). We also find that the probative value of this testimony was not substantially outweighed by the danger of unfair prejudice to defendant. MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 58, 71; 614 NW2d 888 (2000); *People v Pickens*, 446 Mich 298, 335-337; 521 NW2d 797 (1994).

Moreover, we reject defendant's claim, made for the first time on appeal, that the rape-shield statute, MCL 750.520j, barred this testimony. In this regard, defendant has failed to establish plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

#### IV. Discovery

Defendant also opines that numerous discovery violations occurred throughout the trial that merit reversal of his convictions. We disagree. Because defendant failed to raise this issue in the trial court, our review is limited to plain error affecting his substantial rights. *Id.*

Defendant lists several items that the prosecution allegedly failed to produce. However, because defendant failed to address this issue below it is not apparent from the record that any of the items constitute properly discoverable materials that the prosecution refused to produce. Because defendant has failed to establish a factual basis for his arguments, we find no plain error. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000); *People v Daniel*, 207 Mich App 47, 56; 523 NW2d 830 (1994).

#### V. Jury Instructions

Defendant next challenges the trial court's instructions to the jury. This Court reviews de novo a defendant's claim of instructional error. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). Jury instructions are reviewed in their entirety to determine if the trial court made an error requiring reversal. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if somewhat imperfect, jury instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. *People v Grayer*, 252 Mich App 349, 352; 651 NW2d 818 (2002).

Generally, a defendant's request for a jury instruction on a theory or defense must be granted if supported by the evidence. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). "However, if an applicable instruction was not given, the defendant bears the burden of establishing that the trial court's failure to give the requested instruction resulted in a miscarriage of justice." *Id.* Nevertheless, reversal is unwarranted unless it appears that it is more probable than not that the error was outcome determinative. *Id.* at 124-125.

The trial court in this case instructed the jury on voluntary manslaughter according to CJI2d 16.9. Defendant alleges that the trial court should have instructed the jury that it could not convict defendant of voluntary manslaughter if it found that Mr. Tipton's death was justifiable or excusable. However, the omission of defendant's instruction does not require reversal. The trial court instructed the jury that it could not convict defendant of any offense if it believed that he acted in self-defense or defense of another. Viewed as a whole, the trial court's instructions sufficiently protected defendant's rights. *Grayer, supra* at 352.

The trial court also acted properly when it limited the jury instructions on self-defense and defense of others to the charges involving the death of Mr. Tipton, despite the language in CJI2d 7.15(1) and CJI2d 7.21(1). A defendant's conduct is only excused under these theories for crimes committed against individuals who actually posed a deadly threat. See *People v Gregory Johnson*, 112 Mich App 483, 486-487; 316 NW2d 247 (1982). In the charge involving the death of Ms. McGinnis, defendant could not rely upon self-defense or defense of others. He was ultimately claiming accident with regard to Ms. McGinnis. Nevertheless, any error was harmless given the fact that the jury ultimately rejected defendant's claims of self-defense and defense of others with regard to Mr. Tipton.

Further, because the evidence did not support the fleeing-felon defense, the trial court properly refused to provide a jury instruction on that affirmative defense. *Riddle, supra* at 124; *People v Lemons*, 454 Mich 234, 250; 562 NW2d 447 (1997). Moreover, the trial court logically denied defendant's request to provide an instruction on character evidence, CJI2d 7.23, because it had previously concluded that defendant was not permitted to present evidence of Mr. Tipton's character.

Affirmed, but remanded for any necessary corrections of the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper  
/s/ David H. Sawyer  
/s/ William B. Murphy