

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN SMITH,

Defendant-Appellant.

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UNPUBLISHED

May 20, 2003

No. 234830

Genesee Circuit Court

LC No. 00-006167-FC

Before: Murray, P.J., and Neff and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree murder, MCL 750.317,<sup>1</sup> possession of a firearm during the commission of a felony, MCL 750.227b, and carrying a concealed weapon, MCL 750.227. Defendant was sentenced to life imprisonment without parole for the murder conviction, and consecutive terms of two years' imprisonment for the felony-firearm conviction and two to five years' imprisonment for the concealed-weapon conviction. We affirm.

I. Ex Parte Communication with the Deliberating Jury

Defendant asserts that he is entitled to a new trial without any showing of prejudice because the trial court violated his constitutional rights to be present and to have the assistance of counsel at a critical stage in his criminal trial. Specifically, defendant relies on *United States v Cronin*, 466 US 648, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984), and claims that the trial court's ex parte communication with the deliberating jury constitutes prejudice per se, warranting automatic reversal of his conviction. This issue presents a constitutional question that we review de novo. See *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

In this case, the alternate juror who was excused from serving on the jury informed the trial court of his understanding that defendant made a scene in the courtroom and shattered a window with his head. The trial court reconvened the jury to inform the jurors that the window was broken not by defendant, but by a different person unrelated to the case. The court requested the jury to put any question it may have in writing and stated that it had asked the lawyers not to be present at that time. In pertinent part, the court explained:

<sup>1</sup> Defendant was charged with open murder, MCL 750.316.

I'll remind you that you make your decision based only on the evidence that was properly introduced from the witnesses and from the exhibits, and not from any rumors or things that you heard about, that happened outside of your presence. Okay?

Now having said that, you may go back in there and continue your deliberations.

Defendant asserts that the *Cronic* decision renders the above communication with the jury as prejudice per se, requiring automatic reversal of his conviction. We disagree. As the Supreme Court explained in *Bell v Cone*, 535 US 685, 695-696; 122 S Ct 1843; 152 L Ed 2d 914 (2002):

. . . [In *Cronic*,] we identified three situations implicating the right to counsel that involved circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."

First and "most obvious" was the "complete denial of counsel." A trial would be presumptively unfair, we said, where the accused is denied the presence of counsel at "a critical stage," . . . a phrase we used . . . to denote a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused. [*Bell, supra* (citations omitted) (emphasis added).]

*Cronic* does not discuss the issue of a trial court's communication with a deliberating jury nor does *Cronic* call for a strict rule for automatic reversal in circumstances that are not "likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic, supra*, 466 US 658-659. Rather, the Supreme Court emphasized how seldom "circumstances of that magnitude" arise that justify a court in presuming prejudice. *Id.*, at 550 n 26. Accordingly, the Court has encouraged the forgoing of particularized inquiry into whether a denial of counsel undermined the reliability of a judgment. See *Mickens v Taylor*, 535 US 162, 166; 122 S Ct 1237; 152 L Ed 2d 291 (2002); *Bell, supra*. The only Sixth Amendment violations that fit within this narrowly circumscribed class are those that are pervasive in nature, permeating the entire proceeding. See *Roe v Flores-Ortega*, 528 US 470, 483; 120 S Ct 1029; 145 L Ed 2d 985 (2000); *Cronic, supra*, 466 US 550 n 26.

Although defendant relies on federal case law in support of his argument, we will analyze this issue in the context of Michigan case law. Our Supreme Court, in *People v France*, 436 Mich 138, 142; 461 NW2d 621 (1990), has squarely addressed this issue and has rejected the strict rule requiring the automatic reversal of a conviction where the trial court contacted a deliberating jury without the presence of counsel.<sup>2</sup> The *France* opinion directs this Court to first categorize the nature of the trial court's communication as "substantive, administrative, or housekeeping," and then analyze "whether a party has demonstrated that the communication was prejudicial or that the communication lacked any reasonable prejudicial effect." *Id.* at 163. Prejudice is broadly defined as "any reasonable possibility of prejudice." *Id.* at 142. The

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<sup>2</sup> We reject defendant's claim that the decision in *France* was not grounded on the Sixth Amendment.

prosecutor may rebut the presumption of prejudice by showing that the instruction “was merely a recitation of an instruction originally given without objection, and that it was placed on the record.” *Id.* at 163 n 34.

A substantive communication “encompasses supplemental instruction on the law given by the trial court to a deliberating jury.” It carries a presumption of prejudice that may only be rebutted by a showing of an absence of prejudice. An administrative communication includes jury instructions “regarding the availability of certain pieces of evidence and instructions that encourage a jury to continue its deliberations.” An administrative communication carries no presumption of prejudice and a defendant’s failure to object when he is made aware of the communication will be taken as evidence that the instruction was not prejudicial. Upon an objection, the prosecutor must demonstrate that the communication lacked any prejudicial effect. Finally, a housekeeping instruction is one that occurs between a jury and a court officer over matters that are unrelated “in any way to the case being decided” such as meal orders or restroom facilities. *France, supra* at 143.

The Court stated that it left the classifications that were not enumerated in *France* to be decided on a case by case basis. *France, supra* at 143 n 4. In this case, the instruction clearly is not a housekeeping matter because it involved a communication related to the case being decided. It is not a substantive communication because it does not encompass supplemental instructions on the law. Rather, we conclude that it is an administrative communication because it rejected what the jurors may have erroneously considered as evidence and directed the jury to ground its deliberations and decision on only properly admitted evidence.

Next, we must determine “whether a party has demonstrated that the communication was prejudicial or that the communication lacked any reasonable prejudicial effect.” *France, supra* at 163. In his reply brief on appeal, defendant claims that the communication was substantive and therefore, prejudicial per se. As discussed above, the communication was administrative and carried no presumption of prejudice. Accordingly, we consider defendant’s failure to object when he became aware of the administrative communication as evidence that the instruction was not prejudicial.<sup>3</sup> *Id.* at 143. Moreover, we conclude that this communication served to guarantee defendant’s right to a fair trial by ensuring that the jury consider only properly admitted evidence. Further, the communication was not a verbatim jury instruction, but it reflected the jury instruction that was originally given to the jury without objection.

## II. Sentencing Guideline Scores

Defendant next argues that he is entitled to resentencing because the trial court improperly scored offense variables (OV) 3, 6, 9 and prior records variables (PRV) 5 and 6. Because the offense occurred after January 1, 1999, the legislative sentencing guidelines apply. MCL 769.34.

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<sup>3</sup> We disagree with defendant’s claim that there was no need to object because the communication constituted the last event in the jury trial. See *People v Carines*, 460 Mich 750, 764-765, 767, 774; 597 NW2d 130 (1999).

Defendant has failed to preserve this issue. A party may not challenge the scoring of the sentencing guidelines or the accuracy of the presentence report on appeal unless he raised the issue at or before sentencing or demonstrates that the challenge was brought as soon as the inaccuracy could reasonably have been discovered. MCR 6.429(C); *People v McGuffey*, 251 Mich App 155, 165; 649 NW2d 801 (2002).<sup>4</sup> In this case, defendant did not object to the scoring of the variables below and he does not assert that he challenged the inaccuracies as soon as they could reasonably have been discovered. Therefore, this unpreserved issue will be reviewed for clear error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). We reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra*.

The prosecutor concedes that offense variable three was improperly scored at one hundred points. Defendant argues that OV 3 should be assessed at zero, while the prosecutor contends that it should be assessed at twenty-five. OV 3 provides that zero points are to be assigned when "[n]o physical injury occurred to a victim" and twenty-five points are to be assigned when "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c) and (f). MCL 77.33(2)(b) prohibits assigning points for a resulting death when "homicide is not the sentencing offense." In this case, the victim was killed after defendant placed the victim under life threatening circumstances. We conclude that the correct score for OV 3 is twenty-five points.

Offense variable six was assessed at fifty points. This variable requires the trial court to assess fifty points when the offender had premeditated intent to kill. MCL 777.36(1)(a). Defendant argues that OV 6 should have been assessed at ten points, while the prosecutor concedes that this variable should be assessed at twenty-five points. MCL 777.36(1)(c) provides that ten points are to be assessed when "the killing was committed in an extreme emotional state caused by an adequate provocation and before a reasonable amount of time elapsed for the offender to calm or there was gross negligence amounting to an unreasonable disregard for life." MCL 777.36(b) provides that twenty-five points are to be assigned when the offender "had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result." In this case, the evidence sufficiently showed that defendant had premeditated intent to kill when he departed from the location of the altercation with the victim, returned about ten minutes later with a gun, and showed it or pointed it at the victim before the fatal altercation occurred. The witnesses' testimony indicated that defendant was calm when he returned with the gun but that the victim again provoked defendant. The jury convicted defendant of second-degree murder. Accordingly, we conclude that OV6 would properly be assessed at twenty-five points.

<sup>4</sup> The statutory preservation provision, MCL 769.34(10), which prohibits a party from challenging the scoring of the guidelines or the accuracy of the information used in imposing a sentence within the guidelines range unless he raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed with this Court, MCL 769.34(10), conflicts with and is superseded by the court rule, *McGuffey, supra* at 165-166. But see *People v Wilson*, 252 Mich App 390, 399; 652 NW2d 488 (2002), where two of the three appellate judges in concurring opinions stated that *McGuffey* was wrongly decided because the statute should prevail over the court rule.

Offense variable nine requires the trial court to assess ten points when two to nine persons were placed “in danger of injury or loss of life as a victim.” MCL 777.39(1)(c) and (2)(a). The evidence showed that at least nine persons were placed in danger of injury when defendant returned to the basketball gym with a gun and when he shot the victim. We conclude that this offense variable was properly assessed at ten points.

The prosecutor concedes that PRV 5 and 6 were improperly scored at two and five points respectively. The parties agree that the two variables are properly scored at zero each. Nonetheless, even with zero points for these two variables, defendant is still classified as a Level C. From the above, the total offense variables is 105 points. Therefore, the correct guideline range remains at 225-375 or life imprisonment. The trial court sentenced defendant to life imprisonment for the second-degree murder conviction. This is within the range of the correct guidelines. Defendant’s sentence was proper.

### III. Defendant’s Supplemental Brief on Appeal

#### A. Imperfect Self-Defense Jury Instruction

Defendant argues that he was denied a fair trial because the trial court failed to sua sponte instruct the jury on the imperfect self-defense doctrine. Defendant failed to preserve this issue when he did not request a jury instruction relative to this doctrine. MCL 768.29; *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Where an alleged instructional error has not been preserved it is forfeited and appellate review is for plain error affecting substantial rights. *Carines, supra*.

Jury instructions in a criminal case must address each element of the offense charged, as well as defenses and theories of the parties that are supported by the evidence. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002); *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). Instructions that lack evidentiary support should not be given. *Id.* Defendant bears the burden of showing that as a result of the alleged error, when weighed against the facts and circumstances of the entire case, it affirmatively appears more probable than not that the error was outcome determinative. MCL 769.26; *Riddle, supra* at 124-125.

The doctrine of imperfect self-defense mitigates an act of second-degree murder to voluntary manslaughter by negating the element of malice. *People v Kemp*, 202 Mich App 318, 324; 508 NW2d 184 (1993); *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). The doctrine applies only where the defendant would have been entitled to self-defense had he not been the initial aggressor. *Id.* However, the Michigan Supreme Court has not recognized this doctrine. *People v Posey*, 459 Mich 960; 590 NW2d 577 (1999). This Court has applied several limitations to the doctrine. First, the doctrine applies only where the defendant would have had a right to self-defense but for his or her actions as the initial aggressor. *People v Amos*, 163 Mich App 50, 57; 414 NW2d 147 (1987). Second, the defendant may not use more force than is necessary even if he honestly and reasonably believes his life to be endangered. *Kemp, supra*, at 325 n2.

Defendant’s argument fails because the evidence does not support the doctrine. The evidence showed that defendant used excessive force in shooting the victim. Although able to retreat, defendant shot the unarmed victim and then stood over the victim who was lying on the

floor, and shot him three more times. Further, this Court has rejected the idea that a trial court must sua sponte instruct a jury on the doctrine of imperfect self-defense, and no Michigan appellate court has held that a trial court should have given an instruction on imperfect self-defense where none was requested. *Butler, supra; Amos, supra,*

#### B. Sufficiency of the Evidence

Defendant claims that the evidence was insufficient to sustain his conviction of second-degree murder.<sup>5</sup> He did not need to take any special steps to preserve this issue for appeal. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). By his argument, he invokes his constitutional right to due process of law. *Id.*

To determine whether the evidence presented at trial was sufficient to sustain the conviction, this Court views the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Grayer*, 252 Mich App 349, 355; 651 NW2d 818 (2002).

A conviction for the offense of second-degree murder requires proof of (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). Second-degree murder is a general intent crime, which mandates proof that the killing was “done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm.” *People v Herndon*, 246 Mich App 371, 386; 633 NW2d 376 (2001). This concept is also known as malice. *People v Stiller*, 242 Mich App 38, 43; 617 NW2d 697 (2000).

Defendant specifically contends that the evidence was insufficient for the second-degree murder verdict because he was acting in self-defense and because the testimony by the prosecutor’s witnesses was unreliable. We disagree. This case presented witness credibility contest. Defendant’s testimony, which conflicted with the testimony of several of the prosecutor’s witnesses, created a question of witness credibility. Questions of credibility and intent should be left to the trier of fact and will not be resolved anew by this Court. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Further, it was undisputed at trial that defendant and the victim exchanged words after the victim fouled one of defendant’s moves during a basketball game. Defendant left the gymnasium and returned about ten minutes later with a gun. It was also undisputed that the victim struck defendant in what appeared to be an attempt to disarm him. Defendant did not dispute the prosecutor’s witnesses who testified that, after the first gunshot, the victim fell to the floor; defendant stood over the victim and shot him two or three more times. Defendant’s aunt testified that defendant tended to “get even” with those who provoked him. We conclude that this evidence was sufficient for a finding by a rational trier of fact of the element of malice in that “the killing was done with an intent to kill,

<sup>5</sup> Defendant also cursorily asserts that the conviction was against the great weight of the evidence. Because defendant failed to preserve this issue by moving for a new trial below, and because it is not properly briefed or argued, we do not address this claim. MCR 2.611(A)(1)(e); *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997).

an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm.” *Herndon, supra*.

### C. Proportionality of Defendant's Sentence

Defendant argues that his sentence to life imprisonment is disproportionate in light of the offense and his background. Because defendant committed the offenses of which he was convicted in the year 2000, the legislative sentencing guidelines were used to determine the recommended range of defendant's minimum sentence. MCL 769.34(2). However, we note here that it is evident from defendant's argument on appeal that he is under the incorrect assumption that he was sentenced under the judicial guidelines.

Defendant does not dispute that the life sentence for his second-degree murder conviction was within the appropriate guidelines sentencing range. “[T]he ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature.” *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001), citing Const 1963, art 4, § 45. Under MCL 769.34(10), this Court may not consider challenges to a sentence based exclusively on proportionality if the sentence falls within the guidelines. *People v Pratt*, 254 Mich App 425, 429-430; 656 NW2d 866 (2002). Accordingly, for cases governed by the Legislature's sentencing guidelines, proportionality review is inappropriate except where the trial court has exercised its statutorily granted discretion to depart from the sentencing range recommended by the guidelines. *Hegwood, supra* at 437, n 10. Because defendant's life sentence falls within the appropriate legislative guidelines range, this Court may not consider a challenge to the proportionality of defendant's sentence.

Nonetheless, defendant argues that his life sentence is disproportionately high because the trial court did not consider the fact that defendant had no prior record and because defendant expressed remorse at sentencing. The Legislative guidelines already takes into account the absence of a prior criminal record. Further, the lower court record shows that defendant did not express remorse at sentencing. Rather, he explained that the shooting occurred out of self-defense. Defendant also argues that the trial court failed to articulate its reasons for imposing a life sentence. Because this sentence was not a departure, the trial court did not need to articulate substantial and compelling reasons for the sentence. MCL 769.34(3); *Hegwood, supra*. Defendant also claims that the trial court failed to take into account the fact that defendant was mentally impaired. This misstates the record. A competency evaluation of defendant had concluded that defendant was neither mentally ill or mentally retarded at the time of the offense.

Defendant next asserts that his life sentence constitutes cruel and unusual punishment. Defendant's sentence is proportionate to the offense and the offender, and thus it is not cruel or unusual. *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002).

### D. Cumulative Error

Defendant finally argues that that the cumulative effect of the asserted and other errors denied him a fair trial. We review a cumulative error claim to determine if the combination of alleged errors denied the defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). The cumulative effect of several minor errors may warrant reversal even where the individual errors in the case would not warrant reversal. *People v Cooper*, 236 Mich

App 643, 659-660; 601 NW2d 409 (1999). In order for reversal to be warranted on the basis of cumulative error, the errors at issue must be of consequence. *Id.* In this case, the instances of arguably questionable argument by the prosecutor were not errors of consequence, and reversal is unwarranted. We are not persuaded that any of the errors that defendant proffers affected the outcome of the trial.

Affirmed.

/s/ Christopher M. Murray

/s/ Janet T. Neff

/s/ Michael J. Talbot