

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIMMY WIGGINS,

Defendant-Appellant.

UNPUBLISHED
February 25, 1997

No. 185682
Wayne Circuit Court
LC No. 93-014405

Before: White, P.J., and Cavanagh and J.B. Bruff,* JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317; MSA 28.549, assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). We affirm.

Defendant first argues that the trial court erred in denying defendant's motion for directed verdict on the second-degree murder charge when it concluded on the record that there was no evidence that the shooting was intentional or negligent in origin. We disagree. It is evident from the whole of the trial court's statements and rulings that the trial court misspoke itself or was misquoted by the court reporter when making this statement. On a motion for directed verdict, the trial court must consider the evidence presented by the prosecutor up to the time the motion was made in light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). After reviewing the record, we find that the trial court properly denied defendant's motion for directed verdict. To establish second-degree murder, the prosecution must show that defendant caused the death of another and that the killing was done with malice and without legal justification. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Malice is defined as the intent to kill, intent to do great bodily harm, or intent to create a high risk of death or great bodily harm with knowledge that death or great bodily harm will be a probable result. Malice may be inferred from the facts and circumstances of the killing. *Id.* Evidence of these elements was

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

presented in the instant case. Defendant caused the death of the decedent by shooting him. Defendant's malice, or intent to create a high risk of death or great bodily harm with knowledge that death or great bodily harm will be a probable result, could be inferred by the fact that defendant pulled out a gun and shot the decedent at close range. The trial court did not err in denying defendant's motion for a directed verdict.

Defendant next argues that the trial court erred in rejecting his request for a jury instruction on the lesser offense of manslaughter. We disagree. If there is evidence to support a conviction of the lesser offense, then the trial court must give the instruction. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). The elements of voluntary manslaughter are (1) the defendant must kill in the heat of passion; (2) the passion must be caused by an adequate provocation; and (3) there cannot be a lapse of time during which a reasonable person could control his passions. *Id.* at 388. Adequate provocation is provocation that would cause a reasonable person to lose control and act out of passion rather than reason. *Id.* at 389-390. In the instant case, there is no evidence of heat of passion or provocation for the murder, other than a conversation between defendant and a victim wherein expletives were exchanged. This is insufficient to establish that defendant was adequately provoked. Consequently, defendant was not entitled to a jury instruction on manslaughter.

Defendant next argues that he is entitled to resentencing because he was assessed a score of twenty-five points for offense variable three (OV 3), when he should have been assessed ten points because the death occurred in a combative situation. We disagree. The sentencing guidelines instruct a court to assess twenty-five points for OV 3 where there was "unpremeditated intent to kill; or an intent to do great bodily harm; or creation of a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result." Michigan Sentencing Guidelines (2d ed), p 77. The guidelines further instruct a court to assess ten points where a killing is intentional, but the death occurred in a combative situation or in response to victimization of the offender by the decedent. *Id.* In the instant case, defendant had a conversation with a victim in which they exchanged expletives. The conversation did not constitute a combative situation. The trial court properly rejected defendant's request to score OV 3 at ten points.

Affirmed.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ John B. Bruff