

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK DWAYNE GILFORD,

Defendant-Appellant.

UNPUBLISHED

March 4, 1997

No. 178191

Recorder's Court

LC No. 93-002235

Before: Marilyn Kelly, P.J., and Jansen and M. Warshawsky,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of voluntary manslaughter, MCL 750.321; MSA 28.553, two counts of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was inadvertently sentenced to three to fifteen years for involuntary manslaughter, MCL 750.321; MSA 28.553, three to ten years for each assault conviction, and a mandatory two years for the felony-firearm conviction. Defendant appeals as of right. We affirm defendant's convictions, but remand for resentencing on the correct conviction offense of voluntary manslaughter.

Defendant first argues that the prosecution presented insufficient evidence that, when defendant shot Dionysus Sanders, defendant intended to kill him. Therefore, defendant contends, the submission of the charge of assault with intent to murder Sanders to the jury resulted in a compromise verdict of guilty on the charge of assaulting Sanders with the intent to commit great bodily harm less than murder.

We review a trial court's ruling on a motion for a directed verdict by looking at the evidence up to the time the motion was made, in the light most favorable to the prosecution, and determining whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). There was testimony from a witness that defendant was seen following after Sanders with a shotgun in his hand. That same

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

witness testified that he saw defendant walk up to and fire the shotgun towards Sanders, who had no weapon in his outstretched hands. Another witness testified that he saw Sanders trying to break up the fight just before defendant shot him. In addition, Sanders testified that although he approached the fight, announcing that he did not want any trouble, defendant turned around and fired the shotgun at him. Thus, there was sufficient evidence from which a rational trier of fact could have inferred that when defendant shot Sanders, his intent was to kill Sanders. *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991); *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

Defendant's final argument is that the prosecutor misstated the law concerning the defense of self-defense and defense of others. We agree, but find the error harmless.

"In Michigan, the killing of another in self-defense is justifiable if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm." *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). The right of self-defense includes the right to defend another person. *People v Wright*, 25 Mich App 499, 503; 181 NW2d 649 (1970). In deciding whether the defendant feared for his or some third person's safety, the jury must consider the circumstances as they appeared to the defendant at the time, rather than as they actually existed. CJI2d 7.15; CJI2d 7.21; *People v Green*, 113 Mich App 699, 704; 318 NW2d 547 (1982); *People v Perez*, 66 Mich App 685, 692; 239 NW2d 432 (1976).

"[W]here the prosecution's clear misstatement of the law remained uncorrected and severely undermined a viable defense theory, the defendant has been deprived of a fair trial." *People v Matulonis*, 115 Mich App 263, 267-268; 320 NW2d 238 (1982). However, in such a case, the defendant's right to a fair trial is not violated when the trial court later instructs the jury to disregard statements of law by counsel in their closing arguments and gives an adequate instruction of the applicable law. *People v Smith*, 87 Mich App 18, 28-29; 273 NW2d 573 (1978); *People v Warren*, 65 Mich App 197, 201-202; 237 NW2d 247 (1975).

Defendant is correct when he asserts that the prosecutor misstated the law with regard to the defense of self-defense and defense of others. CJI2d 7.15; CJI2d 7.21; *Green, supra*, 113 Mich App 704; *Perez, supra*, 66 Mich App 692. However, because the trial court properly instructed the jury, defendant's right to a fair trial was not violated. *Smith, supra*, 87 Mich App 28-29; *Warren, supra*, 65 Mich App 201-202.

Finally, we note that although neither defendant nor the prosecution raised as an issue on appeal the trial court's sentencing of defendant for involuntary manslaughter when he had been convicted of voluntary manslaughter, we find it necessary to do so. MCR 7.216(A)(7). A review of the record shows that defendant was found guilty of voluntary manslaughter. For a reason not apparent from the record, the Sentencing Information Report (SIR) from the probation department indicated that defendant's conviction was for involuntary manslaughter. Based on that SIR and no objection from counsel, the trial court inadvertently sentenced defendant for involuntary manslaughter. That sentence is therefore invalid. *People v Whalen*, 412 Mich 166, 169-170; 312 NW2d 638 (1981). Accordingly, remand is necessary so that the SIR can be corrected and the trial court can sentence defendant on the

correct manslaughter conviction. MCR 6.429(A); *People v Thomas*, 447 Mich 390, 393; 523 NW2d 215 (1994); *Whalen, supra*, 412 Mich 169-170.

Defendant's convictions are affirmed, but we remand for resentencing in accordance with this opinion. Jurisdiction is not retained.

/s/ Marilyn Kelly

/s/ Kathleen Jansen

/s/ Meyer Warshawsky