STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELVIN LEE WALKER,

Defendant-Appellant.

UNPUBLISHED
September 2, 1997

No. 185538
Muskegon Circuit Court
LC No. 94-037534-FH

Before: Cavanagh, P.J., and Holbrook, Jr. and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of two counts of second-degree murder, MCL 750.317; MSA 28.549, and subsequent concurrent sentences of thirty to ninety years' imprisonment. We affirm.

In an attempt to flee from police, defendant drove his car at a speed of fifty miles an hour in a twenty-five mile an hour speed zone in Muskegon Heights, disregarding three stop signs, and colliding with another car as he sped through an intersection without stopping. Latoia Walker and Shannesha Green were passengers in the car with which defendant collided and they died as a result of the collision. At trial, defendant testified that he had no intention of harming or killing anyone, and therefore lacked the requisite intent to be convicted of second-degree murder.

I

Defendant contends that insufficient evidence was presented at trial to establish that he acted with the requisite intent to be guilty of second-degree murder.

Second-degree murder is a general intent crime which encompasses all murder other than first-degree murder. *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996). A death caused by a defendant with malice and without justification or excuse is second-degree murder. *People v Goecke*, 215 Mich App 623, 629; 547 NW2d 338 (1996), lv gtd 454 Mich 852 (1997). An actor acts with malice if he entertains one of three possible intents: 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 would cause death or great bodily harm. *Id*. Therefore, the elements of second-degree murder are: (1) a death; (2) caused by an act of the defendant; (3) absent circumstances of justification, excuse or mitigation; and (4) 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 would cause death or great bodily harm. *Id*.

The element of malice may be found where a defendant attempts to elude capture by using an automobile in a dangerous fashion. *People v Vasquez*, 129 Mich App 691, 694-695; 341 NW2d 873 (1983). Further, where the conduct complained of naturally tends to result in death or great bodily harm, malice may be implied. *People v Goodchild*, 68 Mich App 226, 236; 242 NW2d 465 (1976). In *Goodchild*, this Court held that "[d]riving a vehicle at approximately 100 m.p.h. while repeatedly swerving the vehicle to block passage of the pursuing police car, striking the vehicle in which the officers were riding, and running them off the road, is conduct which obviously tended to cause either death or great bodily harm." *Id*. This Court also found sufficient evidence to prove the element of malice in *People v Miller*, 198 Mich App 494, 496, 498; 499 NW2d 373 (1993), where the defendant was speeding down a road, straddling lanes, and running red lights before colliding with another vehicle that was lawfully in the intersection. This Court reasoned that "[d]efendant's reckless driving on the night in question evidenced a wilful and wanton disregard of the likelihood that he would cause death or great bodily harm." *Id*. at 498.

In the present case, defendant admits that he was driving approximately fifty miles per hour through the intersection of Hume and Wood, after nightfall, in an attempt to elude a police officer. The posted speed limit at the intersection is twenty-five miles an hour. Defendant stated that he did not stop for the stop signs at the two intersections preceding the intersection where the collision occurred and that as he approached the intersection of Hume and Wood he "really got speed" and "pushed the accelerator to the floor." Evidence was also presented that defendant made no attempt to brake before the collision occurred. Therefore, sufficient evidence was presented to establish the element of malice required for a conviction of second-degree murder.

II

Next, defendant argues that the trial court abused its discretion by refusing defense counsel the right to cross-examine a police officer regarding whether his actions in pursuing defendant were consistent with department policies or the ordinary standard of care.

A defendant's constitutional right to confront witnesses is violated when limitations are placed on his ability to cross-examine a witness to bring out facts from which bias, prejudice or lack of credibility can be inferred. *People v Mack*, 218 Mich App 359, 360; 554 NW2d 324 (1996). While the proper scope of cross-examination lies within the sound discretion of the trial court, the bias or interest of a witness is always a relevant subject of inquiry upon cross-examination. *People v Morton*, 213 Mich App 331, 334; 539 NW2d 771 (1995). A claim that a denial of cross-examination has prevented the exploration of a witness' bias is subject to harmless error analysis. *Mack*, *supra* at 364;

Morton, supra at 335. In this case, even if the trial court abused its discretion in limiting testimony on cross-examination, the error was harmless.

> Harmless-error analysis, when constitutional issues are involved, calls for a two-step inquiry. First, we must determine whether the error is harmless beyond a reasonable doubt. This test is met if the error had no effect on the verdict. Second, we must determine whether the error was so offensive to the maintenance of a sound judicial system that it can never be regarded as harmless. This standard is met when the error was deliberately injected by the prosecutor, if it deprived defendant of a fundamental element of the adversarial process, or if it was particularly persuasive or inflammatory. [*Mack, supra* at 360.]

Where evidence supporting the defendant's conviction is overwhelming, and therefore the trial court's error in restricting defendant's ability to impeach witnesses could not have affected the verdict, the error is harmless beyond a reasonable doubt. *Id*.

In this case, defendant acknowledged that he initiated a high-speed chase after nightfall in an attempt to elude the police, driving at a speed more than twice the posted speed limit, disregarding three traffic signals, on a main traffic artery of general access, resulting in two deaths. Defendant testified that he was the cause of the collision and that he was attempting to elude a police officer after recognizing the officer as someone with whom he had had trouble previously. Defendant's sister, a passenger in defendant's car, testified that defendant became afraid and started driving faster when the police car pulled up behind defendant's car. Defendant's sister stated to police at the scene of the crash that defendant had been driving and had fled from the scene of the collision. Another police officer testified that during his interview of defendant's sister the day after the collision, she stated that defendant was going as fast as the car would go. No evidence was presented that the driver of the car with which defendant collided was violating any traffic rules. Given the overwhelming evidence against defendant, the exclusion of the police officer's testimony had no effect on the verdict and, therefore, the error was harmless beyond a reasonable doubt.

III

Defendant also argues that the prosecutor's comments during his closing argument constituted misconduct requiring reversal of defendant's convictions and a new trial. Defendant did not object during the prosecutor's closing argument; therefore, appellate review is precluded unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Review of the prosecutor's closing remarks in context reveals that the remarks complained of were either properly made or could have been cured by a timely objection. Therefore, review of this issue is foreclosed. *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995).

IV

Defendant contends that he was denied his right to a fair trial because the trial court did not instruct the jury on the limitation of the use of evidence of defendant's flight, escape and concealment, and defendant's out-of-court statements. Further, defendant argues that defense counsel's assistance was ineffective for failing to request such instructions.

Although a criminal defendant has the right to have a properly instructed jury consider the evidence against him, the trial court is not required to present an instruction on the defendant's theory of the case unless the defendant makes such a request. *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909, modified 450 Mich 1212 (1995). According to MCR 2.516(B)(3), the court shall instruct the jury on the applicable law, the issues presented by the case, and if a party requests, that party's theory of the case. Furthermore, MCL 768.29; MSA 28.1052 reads in pertinent part that "t]he failure of the court to instruct on any point of law shall not be ground for setting aside a verdict of the jury unless such instruction is requested by the accused."

Whether defendant caused the collision was not an issue in this case inasmuch as defendant admitted at trial that he caused the accident and stated that he fled from the scene simply because he was scared. Defendant's flight from the scene of the accident was raised only tangentially by the prosecutor in his closing argument, and neither party argued that defendant's flight from the scene justified a verdict of guilty of second-degree murder as opposed to any other crime. Because defendant did not request an instruction regarding his flight from the scene of the accident and neither the reason for defendant's flight nor the cause of the collision was at issue at trial, the trial court did not err in failing to instruct on the issue of flight, and such failure is not grounds for setting aside the verdict. Further, because defendant's flight from the scene was not an issue at trial, it is unlikely that a reasonable juror would be convinced that defendant was entitled to acquittal had an instruction on flight been provided. Consequently, counsel should not be faulted for failing to request such an instruction. *People v Tullie*, 141 Mich App 156, 158; 366 NW2d 224 (1985).

Regarding defendant's out-of-court statements, evidence was presented at trial that when asked why he had fled from the scene of the collision and why he had not stopped for the police, defendant responded by saying, "I don't know." Again, defendant admitted at trial that he had fled from the police in his vehicle, and subsequently on foot after the collision. Whether defendant had fled from police or his reason for doing so, as well as defendant's role is causing the accident, were not issues raised at trial. The prosecutor never argued that defendant's in-court statements were inconsistent with his out-of-court statements. Therefore, defendant's out-of-court statements were not pertinent to basic or controlling issues in the case and the trial court did not err by not providing such instructions to the jury. Therefore, it is unlikely that a reasonable juror would be convinced that defendant was entitled to acquittal had an instruction on out-of-court statements by a defendant been provided. Consequently, counsel should not be faulted for failing to request such an instruction. *Tullie, supra* at 158.

V

Finally, defendant argues that his sentence was disproportionate because the sentencing court failed to consider established sentencing factors and failed to individualize defendant's sentence.

The record reveals that the trial court articulated its reasons for defendant's sentence and properly considered the severity of the crime, *People v Hunter*, 176 Mich App 319, 321; 439 NW2d 334 (1989); the nature of the crime, *id*.; the circumstances surrounding the crime, *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985); defendant's criminal history, *id*.; and the

effect of defendant's crime on the victims, *People v Girardin*, 165 Mich App 264, 266; 418 NW2d 453 (1987). These factors should be balanced with the objectives of imposing the sentence, which include discipline of the defendant, protection of society, reformation of the defendant, deterrence of others, and retribution. *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972). While the sentencing court must reveal the factors taken into consideration, there is no requirement that the court consider any certain factor or group of factors. *People v Coles*, 417 Mich 523, 550; 339 NW2d 440 (1983). Because the sentencing court considered permissible factors in imposing defendant's sentence and articulated its reasons for the sentence on the record, it did not abuse its discretion in sentencing defendant.

The trial court's discretion in imposing sentence is broad, to tailor each sentence to the circumstances of the case and the offender in an effort to balance society's need for protection against its interest in rehabilitating the offender. *People v Van Etten*, 163 Mich App 593, 595; 415 NW2d 215 (1987). The sentencing court specifically addressed defendant's lack of intent to kill and, for that reason, sentenced defendant within the guidelines. The sentencing court also noted the need to protect society from defendant and to discipline defendant, but that a sentence which would incarcerate defendant for the rest of his life was too harsh. Therefore, the record reveals that the trial court properly tailored defendant's sentence to the circumstances of the case and the offender, and did not abuse its discretion in sentencing defendant.

The habitual offender statutes, MCL 769.10 *et seq*.; MSA 28.1082 *et seq*., provide for escalating penalties for persons repeatedly convicted of felonies. *People v Stoudemire*, 429 Mich 262, 264; 414 NW2d 693 (1987), modified by *People v Preuss*, 436 Mich 714; 461 NW2d 703 (1990). The sentencing guidelines do not apply to habitual offenders, *People v Gatewood*, 450 Mich 1025; 546 NW2d 252 (1996), and may not be considered on appeal in determining an appropriate sentence for a habitual offender, *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). Before sentencing, defendant was found to be a fourth habitual offender. While defendant's sentence could have been enhanced based on his status as an habitual offender, the trial court imposed a sentence which was within the sentencing guidelines. Considering the seriousness of the crime defendant committed and defendant's prior record, the sentence is proportionate. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen