STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSE MANUEL VAZQUEZ,

Defendant-Appellant.

UNPUBLISHED
May 22, 1998

No. 199219
Kent Circuit Court
LC No. 96-001727 FC

Before: Markey, P.J., and Griffin and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right his convictions by a jury of second-degree murder, MCL 750.317; MSA 28.549, carrying a concealed weapon, MCL 750.227; MSA 28.424, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant as a second felony offender to a term of two years for the felony-firearm conviction, 4 to 7 ½ years for the concealed weapon conviction, and twenty to sixty years for the murder conviction, with the two latter convictions to be served concurrent with one another and consecutive to the felony-firearm conviction. We affirm.

I. Insufficient Evidence

Defendant argues on appeal that the prosecutor presented insufficient evidence at trial to sustain his second-degree murder conviction. He claims that the evidence was conflicting and contradictory at best, and failed to establish that he possessed an intent to kill or a reckless disregard for life. We disagree.

When reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements were proven. We must not interfere with the jury's role in judging the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, modified 441 Mich 1201 (1992). Moreover, we leave the issue of intent to the trier of fact to resolve. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence and the reasonable

inferences which arise therefrom are sufficient. *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991).

To prove the crime of second-degree murder, the prosecution must establish that the defendant caused the death of another, that he did so without justification or excuse, and that he acted with either an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions. CJI2d 16.5; *People v Dykhouse*, 418 Mich 488, 508-509; 345 NW2d 150 (1984) (Cavanagh, J., dissenting).

Defendant argues that the shooting was an accident and therefore done without criminal culpability. However, as noted above, the jury is the sole trier of fact, and as such, is able to accept or reject any testimony or evidence presented at trial. Here, the jury rejected defendant's accident theory and found him culpable for the crime of murder. Based on the evidence presented at trial, we find that the jury's decision was justified.

The trial court record established that defendant purposely secured his .38-caliber revolver with the intent to confront the victim, that defendant stood glaring at the victim for several minutes before approaching him and asking him to go outside to talk, and that once outside defendant shot the victim twice, killing him. Several eye witnesses testified to the fact that they observed no physical altercation between the victim and defendant before the shooting occurred, that the victim was not touching defendant when the gun was fired, and that defendant shot directly at the victim as the victim attempted to get back on his feet after the first shot. Further, the forensic pathologist reported that the path of the second bullet that entered the victim's body was consistent with the victim having been in a kneeling position. The laboratory specialist concluded that the shooting was more than likely *not* accidental because a significant amount of pressure was needed to release the trigger of defendant's gun. Finally, both specialists opined that, based on the absence of gunpowder residue on the victim's body, defendant and the victim were not embracing one another at the time the victim was shot.

II. Effective Assistance of Counsel

Defendant argues that he is entitled to a new trial because he was denied effective assistance of counsel. Defendant claims that his counsel failed to perform in accordance to the professional norm because he allowed the prosecution to present other "bad acts" evidence without objection. After reviewing the record, we find that defendant has failed to establish any prejudice warranting a new trial. We find that the evidence was properly admitted by the trial court under MRE 404(b).

MRE 404(b) governs the admission of evidence of bad acts. It provides:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or

accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), bad acts evidence, in addition to being relevant, must also be offered for a proper purpose, and its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205; 520 NW2d 338 (1994). In *People v Flynn*, 93 Mich App 713, 721-722; 287 NW2d 329 (1979), this Court held that evidence of motive that suggests the purpose for which an act is done is always relevant and admissible, even though such evidence shows or tends to show the commission of another crime.

At trial, one witness testified that he and the victim had a recent encounter with defendant and some of defendant's Hispanic friends after defendant and another Hispanic male stole two bikes from the front porch of the victim's home. The witness stated that he and the victim chased defendant and were then confronted by a group of Hispanics that outnumbered them. According to the witness, the bikes had been severely damaged, a police report was filed, and the two groups were thereafter at odds with one another.

Defendant now argues on appeal that the testimony was irrelevant as to his motive and otherwise unnecessary because there was already sufficient evidence presented to establish motive, i.e., that defendant was angry with the victim for flirting and physically touching his girlfriend. Defendant argues that the testimony is inadmissible because it was unduly prejudicial, as the prosecution presented it merely to show defendant's bad character. We disagree.

At the trial defendant maintained his innocence, arguing that he secured possession of his gun in order to protect himself from the victim, a man that defendant claimed he feared. Defendant claimed that he fired two shots only after the victim struggled with him and caused the trigger to release accidentally. Defendant denied having any intent to kill the victim and, in fact, told the police that he did not know the victim and had no ill feelings toward him.

The witness's testimony, however, established that defendant and the victim did know one another and in fact shared "bad blood" as a result of their previous encounter. Moreover, the record contained some evidence concerning the victim's alleged inappropriate conduct toward defendant's girlfriend. However, rather than being presented on the issue of motive, the testimony was instead presented by the defense in order to bolster defendant's self-defense argument and to justify his reason for obtaining the gun. In short, we find that the bad acts testimony was highly probative. Because the trial court admitted this testimony for a proper purpose and specifically instructed the jury not to consider it in judging defendant's character, the evidence was not unduly prejudicial. Consequently, defendant is not entitled to a new trial; his trial counsel cannot now be faulted for failing to object to otherwise properly admitted evidence. See *People v Tullie*, 141 Mich App 156, 158; 366 NW2d 224 (1985).

Defendant also argues that his counsel was ineffective for failing to request a jury instruction on the doctrine of imperfect self-defense. However, because defendant was not entitled to invoke the defense, we find that the absence of a jury instruction regarding this defense did not prejudice defendant.

Before an instruction on defendant's theory of the case goes to the jury, not only must it first be requested, it must also be supported by the evidence. *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909, modified on other grounds 450 Mich 1212; 539 NW2d 504 (1995). More specifically, when determining whether such an instruction should be given to the jury, the trial court should consider whether the evidence adduced at trial would support a guilty verdict on that charge. See *People v Chamblis*, 395 Mich 408, 423; 236 NW2d 473 (1975), overruled in part on other grounds *People v Stephens*, 416 Mich 252, 259; 330 NW2d 675 (1982).

Here, defendant argues that the jury should have been instructed on the doctrine of "imperfect" self-defense. This is a qualified defense that can mitigate second-degree murder to voluntary manslaughter by negating the element of malice. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993) (Reilly, J.). In determining whether an initial aggressor is entitled to a claim of imperfect self-defense, the focus is on "'the intent with which the accused brought on the quarrel or difficulty.'" *Id*., 324 (citation omitted).

> "[I]f one takes life, though in defense of his own life, in a quarrel which he himself has commenced with the intent to take life or inflict grievous bodily harm, the jeopardy in which he has been placed by the act of his antagonist constitutes no defense whatever, but he is guilty of murder. But if he commenced the quarrel with no intent to take life or inflict grievous bodily harm, then he is not acquitted of all responsibility for the affray which arose from his own act, but his offense is reduced from murder to manslaughter." [*Id*. (citations omitted).]

Therefore, a defendant is not entitled to imperfect self-defense if he initiated the confrontation with the intent to kill or do great bodily harm. Moreover, under Michigan law, a defendant cannot raise the defense if he acted with excessive force or used more force than was necessary to defend himself from the danger he honestly believed would be perpetrated against him. *Kemp, supra*, 202 Mich App 325.

Here, not only is it questionable whether defendant's supposed fear of the victim was reasonable, there was no evidence on the record to indicate that defendant's life was in danger to the extent that he was justified in using deadly force against the victim. Defendant claimed that he feared the victim. However, at most, the evidence established only that the victim was taller than defendant and, according to defense witnesses, had exchanged "words" with defendant, gave him some "threatening" looks, and grabbed him by his arm and began physically struggling with him. The victim was without a weapon.

In addition, considering the fact that defendant admittedly retrieved his gun because he intended to confront the victim, it is reasonable to conclude that the defendant thereafter approached the victim

with the intent to kill him, or at least inflict great bodily harm if necessary. Hence, because defendant initiated the confrontation with an ill intent, and acted with excessive force given the circumstances surrounding the incident, he was not entitled to an instruction on the doctrine of imperfect self-defense. Therefore, defense counsel was not ineffective for failing to request it.

III. Jury Instructions

Defendant argues that the trial court committed error when it instructed the jury that the defense of accident was an absolute defense to murder, but not voluntary manslaughter. We agree with defendant that the court's instruction was inaccurate. See *People v Hess*, 214 Mich App 33, 37-38; 543 NW2d 332 (1995). However, the error was harmless and does not warrant reversal. After the trial court properly instructed the jury that accident was an absolute defense to the crimes of first- and second-degree murder, the jury nonetheless found defendant guilty of the latter. The jury thus rejected defendant's accident argument. Accordingly, the application of the defense of accident with respect to the lesser crime of voluntary manslaughter would not have changed the outcome of the trial.

IV. Sentencing

Defendant claims that the trial court abused its discretion when sentencing him because it failed to consider the likelihood of defendant's ability to be rehabilitated, it disregarded the presentence investigation report and the individual details contained therein, and it imposed a sentence that was disproportionate to the circumstances surrounding the case. Defendant's claims are unsupported by the record.

Our review of the sentencing hearing discloses that the trial court did indeed read and review both the sentencing information report and the presentence investigation report. The trial court also addressed the relevant factors of rehabilitation, deterrence, protection of society, and punishment before imposing defendant's sentence. In addition, the trial court considered defendant's prior record, noting that he had been involved in drugs and other illegal street activity, and stressed the fact that defendant had armed himself with a deadly weapon in the present case and killed someone simply because that person was flirting with his girlfriend. We find that the trial court more than adequately balanced the relevant factors and did not abuse its discretion in fashioning a sentence that was both proportionate to the circumstances surrounding the instant offenses and to defendant as the offender. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

Affirmed.

/s/ Jane E. Markey
/s/ Richard Allen Griffin
/s/ William C. Whitbeck