

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY RALPH VELT,

Defendant-Appellant.

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UNPUBLISHED

February 5, 1999

No. 203706

Recorder's Court

LC No. 95-003967

Before: Hoekstra, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2).<sup>1</sup> He was sentenced to life imprisonment for the second-degree murder conviction, two to four years' imprisonment for the felonious assault conviction, and two years' imprisonment for the felony-firearm conviction. Defendant now appeals as of right. We affirm defendant's convictions and sentences.

Defendant first argues that the trial court's denial of his request for a jury instruction on self-defense violated his right to a fair trial. We disagree. We review jury instructions in their entirety to determine whether the trial court committed error requiring reversal. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). Jury instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is evidence in support. *Id.* A trial court need not give a requested instruction that is not warranted by the facts. *Id.*

Self-defense requires both an honest and reasonable belief that defendant's life was in imminent danger or that there was a threat of serious bodily injury. *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990); *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). A defendant's honest belief in the danger need not comport in fact with the circumstances, and must be measured by the circumstances as they appeared to the defendant rather than as they actually existed. *People v Burkard*, 374 Mich 430, 437-438; 132 NW2d 106 (1965). "[A] defendant may show his state of mind by circumstantial evidence to establish that he acted in self-defense." *People v Hoskins*, 403 Mich 95, 100; 267 NW2d 417 (1978).

We agree with the trial court's conclusion that the facts did not support the giving of a self-defense instruction. We acknowledge that Amina Atkinson testified, in direct contradiction to the testimony of several other witnesses, that Carroll walked toward defendant with his right hand near his waistband immediately before the shooting. However, assuming Atkinson's testimony was true, we find her testimony insufficient to support the giving of a self-defense instruction. Despite Atkinson's testimony, neither she nor any other witness testified that Carroll appeared to be armed. The evidence presented did not justify a finding that defendant had an honest and reasonable belief that he was in imminent danger of death or serious bodily harm from Carroll. Under these circumstances, the trial court did not err in denying defendant's request for a self-defense jury instruction. Furthermore, even if the trial court's refusal to give the self-defense instruction were error, in light of the overwhelming evidence that defendant did not act in self-defense, the error would not have resulted in a miscarriage of justice and, thus, would not constitute a basis for reversal. MCL 769.26; MSA 28.1096; *People v Dumas*, 454 Mich 390, 409; 563 NW2d 31 (1997) (Riley, J).

Defendant next argues that certain statements made by the prosecutor during his closing argument regarding defendant's expert witness denied him a fair trial. We disagree. When reviewing instances of alleged prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* However, because defendant did not object at trial to the prosecutor's remarks he now claims as error, appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect of the comments or where failure to consider the issue would result in a miscarriage of justice. *Id.* Here, the prosecutor's arguments were based on the evidence and the reasonable inferences arising from it. Thus, the remarks were not improper. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Furthermore, any prejudice resulting from the remarks could have been cured by an appropriate instruction to the jury and did not result in a miscarriage of justice. Accordingly, we will not further review the issue.

Finally, defendant argues that his sentence of life in prison for the second-degree murder conviction violated the principle of proportionality. We disagree. A trial court's imposition of a particular sentence is reviewed on appeal for an abuse of discretion, which will be found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Although a trial court enjoys considerable latitude when deciding on a sentence, a sentence must be proportionate to the seriousness of the crime. *Id.* at 650. A court upwardly departing from the sentencing guidelines must place its reasons for doing so on the record at the time of sentencing. *People v Fleming*, 428 Mich 408, 417-418; 410 NW2d 266 (1987). The crucial test for proportionality is not whether the sentence departs from, or adheres to, the recommended range under the sentencing guidelines, but whether it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 319; 532 NW2d 508 (1995). A court may justify an upward departure by reference to factors considered, but adjudged inadequately weighed, within the guidelines, as well as by introducing legitimate factors not considered by the guidelines. See *People v Granderson*, 212 Mich App 673,

680-681; 538 NW2d 471 (1995). A sentence outside the recommended range that is imposed without reference to legitimate factors not adequately considered by the guidelines may be disproportionate. *Houston, supra*, at 320.

In the present case, the guidelines' range for defendant's conviction for second-degree murder was ten to twenty-five years. At sentencing, the trial court gave its reasons for departing from that range:

Be that as it may, the Court in imposing sentence feels that the punishment ought to be consistent with the crime. And this was not an accidental murder. This was not a manslaughter. Quite frankly, were I deciding this as trier of fact, [defendant] would likely have been convicted of first degree murder. He did have the opportunity to consider his actions.

He shot not once, but twice, and took the life of the victim in this case, Terry Carroll.

Nothing that any Court can do can alleviate the grief and the pain on the part of the family. Nothing that this Court can do can rewrite history or change the background of [defendant], and what may have contributed to his twisted sense that by carrying that gun and responding to words that were uttered by Terry Carroll, which were not words of violence, which were not words of confrontation, but whether it's a matter of rationalization on his part in order to justify what was a cold-blooded act, that's not my concern either.

I don't believe the sentencing guidelines are adequate. I know they're enacted to avoid disparities in sentencing around the state where one person gets a much more lenient sentence than another. And I believe that the maximum allowed by law is the only appropriate sentence for the act he committed.

He took that person's life. He took Terry Carroll's life. He shot and killed him in cold blood. And accordingly, it's the judgment and sentence of the Court that he be committed to the Michigan Department of Corrections for life. [STr, pp 19-21.]

Additionally, the trial court listed: "Cold blooded vicious murder w/o [sic] reason or provocation" as the aspects leading to its departure from the guidelines.

Defendant incorrectly argues that the sentence is disproportionate because it was error for the court to discuss the fact that the defendant was found guilty of second-degree murder although the trial court, if sitting as the trier, would have found the defendant guilty of first-degree murder, based on the facts of this trial. Because defendant was originally charged with first-degree murder and significant evidence was introduced at trial indicating defendant may have acted with premeditation and deliberation, the court may consider that crime in sentencing, although the defendant was convicted of a lesser offense. *People v Purcell*, 174 Mich App 126, 130-131; 435 NW2d 782 (1989); see *People v Shaver*, 448 Mich 389, 393-394; 531 NW2d 165 (1995). A matter established by a

preponderance of the evidence satisfies due process. *People v Gahan*, 456 Mich 264, 275; 571 NW2d 503 (1997).

We conclude that, under the circumstances of the instant case, the trial court's imposition of a life sentence was proportionate to the offense and the offender, and did not violate the principle of proportionality.

Defendant's convictions and sentences are affirmed.

/s/ Joel P. Hoekstra

/s/ Martin M. Doctoroff

/s/ Peter D. O'Connell

<sup>1</sup> Defendant was acquitted of first-degree murder, MCL 750.316(1)(a); MSA 28.548(1)(a).