STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GAYLIN T. JOHNIGAN,

Defendant-Appellant.

UNPUBLISHED
March 19, 1999

No. 200601
Recorder's Court
LC No. 96-001139

Before: Markman, P.J., and Jansen and J. B. Sullivan*, JJ.

PER CURIAM.

Following a bench trial, defendant was found guilty of 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). The convictions stemmed from defendant's shooting of a neighbor in his apartment building following shortly after a dispute between the two. The trial court sentenced defendant to consecutive sentences of ten to twenty years' imprisonment for the assault with intent to murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant now appeals as of right. We affirm.

Defendant first argues that his convictions were not supported by sufficient evidence and that the prosecution failed to establish beyond a reasonable doubt that defendant did not act in self-defense. We disagree. This Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). Reasonable inferences and circumstantial evidence may constitute satisfactory proof of the elements of the offense. *Id.*

In order to prove assault with intent to commit murder, the prosecution must prove beyond a reasonable doubt "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). "[T]he

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

jury may infer an intent to kill from the manner of use of a dangerous weapon." *People v Dumas*, 454 Mich 390, 403; 563 NW2d 31 (1997). The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempt to commit a felony. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).

Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt. *People v Truong*, 218 Mich App 325, 337; 553 NW2d 692 (1996). To be lawful self-defense, the evidence must show that: (1) the defendant honestly and reasonably believed that he was in danger; (2) the danger feared was death or serious bodily harm; (3) the action taken appeared at the time to be immediately necessary; and (4) the defendant was not the initial aggressor. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993); *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985). Further, a defendant is not entitled to use any more force than is necessary to defend himself. *Kemp*, *supra*, at 322.

The prosecutor here presented evidence that the victim approached defendant and asked to borrow $10, which led to an argument. The argument escalated and, at one point, the victim picked up a chair, held it over his shoulder ready to swing it at defendant, but then put it down. The victim then left the scene and returned to his apartment. Approximately thirty minutes after this confrontation, the victim left his apartment, without any weapon, and went to get the mail. On his way to the mailbox, he passed defendant's apartment, heard a door open, and felt pain in his back. The victim had been shot and, as a result, spent three months in the hospital. Shortly thereafter, defendant told two police officers that there had been a struggle and that there was an accidental gun shot. Defendant also stated that when he shot the victim, the victim did not have a gun, and they did not struggle. This evidence, viewed in the light most favorable to the prosecutor, was sufficient for a reasonable factfinder to find that all the elements of assault with intent to commit murder and felony-firearm had been established beyond a reasonable doubt. This evidence, viewed in the light most favorable to the prosecutor, was also sufficient for a rational factfinder to find beyond a reasonable doubt that the prosecutor disproved defendant's self-defense theory.

Defendant next claims that the trial court clearly erred by failing to find that he was not guilty by reason of insanity or guilty but mentally ill. We again disagree. On appeal, this Court will not disturb a trial court's findings of fact unless they are clearly erroneous MCR 2.613(C); *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). This Court will give regard to the "special opportunity of the trial court to judge the credibility of the witnesses who appear before it." MCR 2.613(C).

Considering the various rational actions of defendant, including hiding his gun before the police arrived and his detailed confession regarding why he shot defendant, in conjunction with Dr. Charles Clark's testimony that defendant's capacity was not diminished at the time of the shooting, the trial court's finding that defendant did not suffer from diminished capacity or mental illness at the time of the shooting was not clearly erroneous.

Defendant's final argument is that the trial court abused its discretion when it allowed defendant's pre-*Miranda* statement into evidence.[1] We disagree. Whether to admit evidence is within

the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

"The failure to give *Miranda* warnings prior to a statement made during a custodial interrogation renders the statement inadmissible for purposes other than impeachment." *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997). To determine whether a defendant was "in custody" at the time of the interrogation, this Court looks at the totality of the circumstances to determine whether the defendant reasonably believed that he was not free to leave. *People v Mendez*, 225 Mich App 381, 382-83; 571 NW2d 528 (1997). "Interrogation refers to express questioning and to any words or actions on the part of police that the police should know are reasonably likely to elicit an incriminating response from the subject." *Raper, supra*, at 479. Volunteered statements of any kind are not barred by the Fifth Amendment and are admissible. *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995).

Defendant's inculpatory statement was not made while defendant was in custody or even in response to an interrogation. Two police officers testified that they merely arrived at defendant's apartment and announced that they were investigating the shooting when defendant immediately volunteered his statement. Immediately after defendant offered his incriminating statement, one of the officers read defendant his *Miranda* rights. Because defendant was not in custody or being interrogated, the trial court did not abuse its discretion when it admitted into evidence defendant's statement to the police.

Affirmed.

/s/ Stephen J. Markman
/s/ Kathleen Jansen
/s/ Joseph B. Sullivan

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).