

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY DEVERE HARDISON,

Defendant-Appellant.

UNPUBLISHED

August 17, 2001

No. 218910

Wayne Circuit Court

LC No. 98-011099

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of premeditated first-degree murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to life imprisonment without the possibility of parole for the first-degree murder conviction, and a mandatory consecutive term of two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first contends that the trial court erred in failing to instruct the jury regarding the defense theory of accident. This Court reviews de novo claims of instructional error, considering the instructions in their entirety to determine whether error requiring reversal exists. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). The instructions must include all elements of the crimes charged and must not exclude consideration of material issues, defenses and theories if evidence supports them. MCR 6.414(F); *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). When an instruction is requested on any theory or defense and is supported by the evidence, the trial court must properly instruct the jury on that theory or defense. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909, modified on other grounds 450 Mich 1212 (1995). The decision whether the facts or evidence support the giving of a requested instruction rests within a trial court's sound discretion; therefore, this Court reviews the trial court's refusal to give a requested instruction for an abuse of discretion. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

Defendant requested that the trial court instruct the jury according to CJI2d 7.1, which an instructional use note describes as "designed for use where the defendant alleges that the act itself was entirely accidental." Even according to defendant's testimony regarding the events leading to

the victim's shooting,¹ however, the victim's death did not represent "an event which under the circumstances is unusual and unexpected . . . ; [or] an unusual, fortuitous, unexpected, unforeseen or unlooked for event, happening or occurrence," or "something . . . extraordinary or phenomenal, taking place not according to the usual course of things or events, out of the range of ordinary calculations." *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995). Defendant acknowledged carrying a gun, that he knew was loaded, to a confrontation with the victim. Defendant aimed the gun at the victim intending to scare him, causing the victim to try grabbing the gun from defendant. The gun subsequently fired three times. According to defendant, the first shot was caused by the victim's lunge for the gun, while defendant deliberately fired a second shot to make the victim "back up off me." Regarding the third shot, defendant explained, "*I got control of the gun. I tried to hit [the victim] in the head with the bottom . . . of the gun, and the gun goes off,*" striking the victim in the head. [Emphasis added.] Under these circumstances, which demonstrate defendant's willful assault on the victim with a loaded gun, we cannot conclude that the trial court abused its discretion in finding that the evidence did not support defendant's requested involuntary accident instruction. *Ho, supra*. Because the evidence did not support defendant's requested instruction, the trial court properly denied it.² *Canales, supra*.

We further note that the jury considered and rejected the lesser charges of second-degree murder and involuntary manslaughter. The jury thus bypassed the opportunity to characterize defendant's mens rea as an intent to inflict great bodily harm, wanton and willful disregard of the likelihood that death would result from his actions, or even gross negligence, instead finding that defendant specifically intended to kill the victim with premeditation and deliberation.

Defendant next argues that the trial court erroneously admitted three photographs that depicted blood, brain matter and bullet holes or indentations on the hood of the victim's vehicle. The decision to admit photographs rests within the trial court's sound discretion. *Mills, supra* at 76.

¹ We note that overwhelming evidence demonstrated that defendant intended to fire the gun at the victim's head. Shortly before the shooting, defendant collided a vehicle he was driving with a telephone pole while attempting to pass a vehicle driven by the victim. A witness to the accident testified that after defendant inspected the damage to the vehicle, he explicitly proclaimed his intent to kill the victim, or "get that n****r." Defendant entered a back yard where a small group of people, including the victim, was present, pulled a gun from his waistband, then aimed it toward the victim's head. Several witnesses present during the shooting testified that, after a very brief physical struggle between the victim and defendant, defendant pinned the victim to the hood of his car, aimed the gun toward the victim's head, and fired the gun three times, striking the victim's head with the third bullet.

² To the extent defendant argues on appeal that the trial court's instructional ruling somehow rendered his defense counsel's assistance ineffective, we reject this contention. In determining whether counsel provided a defendant constitutionally effective assistance, a court objectively considers the conduct of counsel. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Defendant asserts no objectively unreasonable conduct by defense counsel, and we fail to discern within the record any such conduct.

The disputed photographs were not provided for this Court's review. Even assuming that the challenged photographs depicted the victim's blood and brain matter on the hood of his vehicle, neither asserted gruesomeness alone nor the availability of oral testimony regarding the contents of the photographs renders them inadmissible. *Id.* Where photographs are otherwise admissible for a proper purpose, "[t]he proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice." *Id.* at 76-77; see also MRE 403. We conclude that the trial court acted within its discretion in admitting the photographs, which showed bullet markings on the hood of the victim's vehicle, because of their significant probative value (1) tending to establish the relevant element of first-degree murder that defendant intended to kill the victim; (2) supporting witness testimony that defendant pinned the victim to the hood of his vehicle then fired two shots at the victim's head before successfully striking him on the third shot; and (3) consequently contradicting defendant's testimony that the victim was standing when shot and that the shots were fired in self-defense or inadvertently. MRE 401. Any danger that the photographs might arouse jury sympathy did not outweigh, substantially or otherwise, the photographs' significant probative value. MRE 403; *Mills, supra* at 75-77.

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder