

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANE ALLEN ERIC ISCARO,

Defendant-Appellant.

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UNPUBLISHED

April 29, 2004

No. 246077

Oakland Circuit Court

LC No. 2002-183790-FC

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to fourteen to forty years' imprisonment for the assault with intent to commit murder conviction and two years' imprisonment for felony-firearm conviction. Defendant appeals as of right, and we affirm.

On December 16, 2001, the victim and his friend, Andrew Berndt, arranged a meeting with defendant to purchase marijuana. They met at the Red Lobster restaurant in Novi. Defendant came to the restaurant in a purple Ford Explorer driven by codefendant Bobby Hall. Defendant approached the vehicle, a Cadillac STS, driven by the victim. Defendant presented marijuana, but the victim rejected the marijuana based on quality. The victim and defendant walked over to the Ford Explorer while Berndt remained in the victim's Cadillac. The victim returned to the Cadillac and showed Berndt a bag of marijuana. The victim told defendant that he would call him in an hour. The victim did not pay for the marijuana. Defendant asked for payment for the drugs. When he did not obtain payment from the victim, defendant pleaded with Berndt for payment for the drugs. Berndt stated that he had nothing to do with the transaction.

Later that evening, defendant telephoned Berndt, angry because the men had failed to pay him for the marijuana. The next day, defendant tried to locate the victim's home and told various individuals that he was going to find and shoot the victim. Defendant was observed carrying a gun that he had stolen. Defendant was driven to a local high school by Hall. They were there to pick up Joseph Guerin and take him to work at a local car wash. When Guerin arrived at the Explorer, defendant was not in the vehicle, but was talking to a group of students. Berndt arrived at the school in a vehicle driven by friend, Nick O'Dell. Berndt saw defendant and waved to him. Defendant ran to the Explorer and indicated that he wanted to follow Berndt.

Guerin stated that he needed to go to work, and Hall needed to get to an appointment, but he followed defendant's direction.

Defendant, Hall, and Guerin were traveling in the Explorer when they observed the victim's vehicle backed into the driveway of O'Dell's home. The victim was sitting in the car talking to his friend Dominic Fonte. Hall backed the Explorer into the driveway, and defendant got out of the car. The victim and Fonte also got out of their car. After the victim told defendant that he did not have any money and additional words were exchanged, defendant reached into the Explorer and pulled out a gun. The victim turned to flee and was struck in the abdomen by a bullet. The victim managed to get off the ground and flee, but was shot a second time in the elbow. Fonte hid behind the rear of the victim's vehicle. The victim ran into the home and dialed 911. Hall and Guerin began to leave the scene when defendant jumped back into the vehicle. Defendant reportedly stated that it was not hard to kill someone for the first time. Later that evening, defendant took the gun he used in the shooting to a relative's home. Defendant was apprehended near a friend's home late that night with the aid of a canine tracking unit.

Defendant first alleges that the trial court abused its discretion by admitting evidence that the gun utilized by defendant in the shooting was stolen. We disagree. The decision to admit evidence is within a trial court's discretion and is reviewed for an abuse of that discretion.<sup>1</sup> *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A trial court's admission of acts or conduct is proper where it is so connected to the charged crimes and explains the circumstances underlying the charged crimes. See *People v Scholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). Although evidence of motive is not essential in a prosecution for murder, it is always relevant, and evidence of other acts to prove motive is admissible. *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999). Evidence of defendant's motive to commit the crime is relevant to establish identity, actus reus, and mens rea. *People v Sabin (After Remand)*, 463 Mich 43, 68; 614 NW2d 888 (2000).

On this record, we cannot conclude that the trial court abused its discretion in admitting the evidence of the stolen gun. *Katt, supra*. Defendant did not dispute the fact that an assault occurred and that the elements of felony-firearm were established. Rather, the issue presented to the jury by the defense was whether he had the requisite intent to satisfy the charged offense. To negate the elements of assault with intent to commit murder, the defense alleged that defendant feared the victim. The evidence that defendant carried a stolen gun, showed the gun to

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<sup>1</sup> "To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1)." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). On appeal, defendant contends that the prosecutor sought to admit evidence of the stolen gun as improper MRE 404(b) evidence for which the prosecutor did not provide notice. There was no objection on this basis in the trial court. Moreover, the record does not support the assertion. The prosecutor stated that he decided to seek admission of the stolen gun after learning in the defense opening statement that defendant feared the victim and did not have the requisite intent to kill. The prosecutor never utilized the stolen gun as evidence of propensity or character evidence. The only objection raised at trial was a challenge based on relevancy. Because the record does not support the MRE 404(b) objection, we limit our review to the issue raised at trial.

witnesses, and threatened to kill the victim was relevant to establish intent. *Rice, supra*. The fact that defendant acquired a gun that was not legally registered or traceable to him and carried the gun on his person contradicted defendant's claim of fear of the victim. Accordingly, the decision to admit the evidence was not an abuse of discretion. *Katt, supra*.

Defendant next alleges that the trial court erred in refusing to provide the self-defense instruction to the jury. We disagree. "The killing of another person in self-defense is justifiable homicide only if the defendant honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself." *People v Riddle*, 467 Mich 116, 127; 649 NW2d 30 (2002). The first requirement of a claim of self-defense or defense of others is that a defendant act in response to an assault. *Detroit v Smith*, 235 Mich App 235, 238; 597 NW2d 247 (1999). To act in lawful self-defense when a defendant uses deadly force, the defendant must have an honest and reasonable belief of the danger of serious bodily harm or death and may only employ the amount of force necessary to defend himself. *People v Heflin*, 434 Mich 482, 507-509; 456 NW2d 10 (1990). To satisfy the necessary element of self-defense, the defendant must try to avoid the use of deadly force if he can safely do so by applying nondeadly force or utilizing an avenue of retreat. *Riddle, supra* at 119.

Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Jury instructions must include the charged offense elements and must not exclude material issues, defenses, and theories if the evidence supports them. *Id.* Review of the record reveals that the evidence did not support a self-defense instruction. There was no evidence that defendant acted in response to an assault by the victim. *Smith, supra*. There was no evidence that the victim or his friend, Fonte, possessed a weapon or were advancing on defendant. Moreover, defendant did not retreat from the situation. *Riddle, supra*. Accordingly, the trial court did not err in denying the request for a self-defense instruction where the evidence did not support the instruction. *Canales, supra*.

Affirmed.<sup>2</sup>

/s/ Hilda R. Gage  
/s/ Patrick M. Meter  
/s/ Karen M. Fort Hood

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<sup>2</sup> Defendant raises additional issues in a Standard 11 Brief, all of which lack merit. Defendant contends that his apprehension with the aid of a tracking dog was prejudicial evidence because the evidence that he was the shooter was “thinly circumstantial.” Defendant was identified as the shooter by the victim, Fonte, and Guerin. Moreover, defense counsel conceded that he was the shooter, but disputed the type of assaultive crime that occurred. The trial court’s admission of the photographs was not an abuse of discretion. *People v Ho*, 231 Mich App 178, 187-188; 585 NW2d 357 (1998). The prosecutor sought to admit the photographs for a proper purpose, not to arouse the sympathies or prejudices of the jury. *Id.* There was nothing improper about the prosecutor’s rebuttal argument, and the failure to object to the rebuttal was not ineffective assistance of counsel. Lastly, there was sufficient evidence to support the scoring of the variables, and the sentence was proportionate to the circumstances surrounding the offense and the offender. See *People v Babcock*, 469 Mich 247, 263-264; 666 NW2d 231 (2003).