STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TAVAR RENARD CURRY,

Defendant-Appellant.

UNPUBLISHED
July 27, 2004

No. 247134
Wayne Circuit Court
LC No. 02-010414-01

Before: Griffin, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by jury of second-degree murder, MCL 750.317, for the stabbing death of Ishmail Muhammad. We affirm.

On appeal, defendant argues that his conviction was not supported by sufficient evidence. We disagree. Based on the evidence presented, a rational trier of fact could have found the elements of the crime proved beyond a reasonable doubt. See *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

The elements of the general intent crime of second-degree murder are: (1) a death, (2) caused by defendant's act, (3) with malice—an intent to kill, inflict great bodily harm, or create a very high risk of death with knowledge that death is a likely result of the act, and (4) without justification or excuse. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003); *People v Herndon*, 246 Mich App 371, 386; 633 NW2d 376 (2001). It is undisputed that defendant stabbed the victim; however, he claims he did so without malice and with justification.

Malicious intent may be inferred from all of the facts and circumstances of the killing, including the use of a deadly weapon, as well as the nature, extent, severity, and location of the injuries. See *People v Carines*, 460 Mich 750, 759-760; 597 NW2d 130 (1999); *People v Geiger*, 10 Mich App 339, 345; 159 NW2d 383 (1968). Here, the evidence included that there was a disagreement between defendant and the victim and defendant threatened to harm or kill the victim before leaving the scene. A short time later, defendant and the victim again engaged in a dispute and defendant stabbed the victim in the face, shoulder, and armpit and then bragged to the eyewitnesses about the stabbing, mocking the victim as he ran from the scene bleeding, until he collapsed and bled to death. The evidence was sufficient to establish malice. Further, the evidence did not support a conclusion that the killing was justified. Accordingly, defendant's conviction was adequately supported by the evidence.

Next, defendant argues that the prosecutor committed misconduct by questioning defendant's mother about why she did not contact the police before trial with her information that defendant had acted in self defense. Ordinarily, it is improper for the prosecution to inquire about reasons why a non-alibi witness did not come forward with testimony that would be considered exculpatory, unless there would be a natural tendency for a witness to come forward with that evidence. *People v Perkins*, 141 Mich App 186, 194-196; 366 NW2d 94 (1985). In the past, this Court has considered the relationship of the witness to the defendant, the witness' personal knowledge of the criminal events, whether police had sought the witness out, and whether it would have been reasonable for the witness to come forward with the exculpatory information. *People v Emery*, 150 Mich App 657, 666-667; 389 NW2d 472 (1986).

Here, the prosecutor's questioning of defendant's mother as to why she did not come forward with her potentially exculpatory testimony sooner was not improper. Defendant claims there was no evidence of a close relationship between him and his mother. However, defendant lived with his family, including his mother, and his mother had intervened in the initial dispute between defendant and the victim by trying to remove defendant from the scuffle – factors that belie defendant's assertion and indicate that there was a reasonably close relationship between mother and son. Although the police were unable to reach defendant's mother, homicide investigator Tawnya King testified that (1) she had made more than one attempt to speak with people in defendant's household while there were cars in the driveway, (2) she had left a card with her name and phone number on the door, and (3) no one spoke with her. Additionally, eyewitness testimony that would exculpate one's offspring is evidence that a person would have a natural tendency to offer before trial. In sum, defendant's claim is without merit.

Next, defendant argues that he was denied due process of law when the trial court allowed the prosecutor to endorse a witness after the trial was well under way. However, the witness was originally on the defense witness list, and the prosecutor asserted that the people had been unable to find the witness before trial. The trial court found that, because the witness had originally been on the defense witness list, there was no possibility of prejudice to defendant, and granted the motion. We review the trial court's decision for an abuse of discretion. *Herndon*, *supra* at 402.

"The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." MCL 767.40a(4). Where the content of the witness' testimony did not result in unfair surprise to the defendant, and the defendant did not request a continuance of the proceedings to speak with the witness at greater length, the trial court did not abuse its discretion in allowing the late endorsed witness. *Herndon*, *supra* at 402-403. Although the trial court did not make an explicit finding of good cause for the late endorsement of the witness, the prosecutor stated that the people had been unable to locate the witness before the trial began. Additionally, because the defense knew of the witness, and presumably knew the content of the witness' testimony, no prejudice accrued to defendant. Thus, the trial court did not abuse its discretion when it granted the prosecution's motion to endorse the witness. See *People v Callon*, 256 Mich App 312, 325-329; 662 NW2d 501 (2003).

Defendant next contends that the trial court abused its discretion when scoring offense variables (OV) 5 and 6. Again, we disagree. Although we review for clear error the trial court's factual findings at sentencing, we will uphold the trial court's scoring of the sentencing

guidelines if there is any evidence in the record to support it. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003); *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003).

Defendant argues that the trial court abused its discretion when it scored OV 5 at 15 points which is proper when "[s]erious psychological injury requiring professional treatment occurred to a victim's family." MCL 777.35(1)(a). Both the victim's mother and sister told the court that they were receiving counseling as a result of the victim's death, therefore, the trial court did not abuse its discretion.

Defendant also claims an abuse of discretion because OV 6 was scored at 25 instead of 10 points. The scoring of OV 6 must be consistent with the jury verdict unless the trial court was privy to information not presented to the jury. MCL 777.36(2)(a). Where "[t]he offender had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result," OV 6 should be scored at 25 points. MCL 777.36(1)(b). Defendant contends that OV 6 should have been scored at 10 points because the stabbing occurred during a combative situation and while he was in an extreme emotional state. MCL 777.36(1)(c); MCL 777.36(2)(b). The trial court scored 25 points for OV 6 on the basis that the jury had evidently rejected defendant's claims that he had stabbed the victim during a combative situation after adequate provocation. This is an appropriate basis to justify its scoring of OV 6 thus we uphold the trial court's decision.

Finally, defendant submits that he is entitled to a new trial based on newly discovered evidence that one of the people's eyewitnesses, Brian McWilliams, offered perjured testimony after being pressured to do so by the victim's family and law enforcement. This new evidence consists of an affidavit by defendant's mother, who swears that McWilliams approached her and apologized for his testimony, adding that he really did not see the events of the evening, but had testified otherwise because he was being pressured to do so by the police and the victim's brother. Perjured testimony may be grounds for a new trial if defendant demonstrates that the evidence: (1) is newly discovered, (2) not merely cumulative, (3) would probably have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994).

Defendant cannot establish that this alleged evidence of perjured testimony would have caused a different result at trial since the contested testimony was not significantly different from that offered by three other eyewitnesses. McWilliams himself testified at trial that he did not see the actual stabbing occur. Assuming that the possibility of perjury is implicated by defendant's arguments, although the witness' testimony was damaging to defendant, it was not crucial to the people's case. In sum, reversal of defendant's conviction is not warranted. See *People v Williams*, 77 Mich App 119, 131-132; 258 NW2d 68 (1977).

Affirmed.

/s/ Richard Allen Griffin
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood