

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEANDRE L. KING,

Defendant-Appellant.

UNPUBLISHED

January 17, 2008

No. 274173

Wayne Circuit Court

LC No. 06-006791-01

Before: Saad, C.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, receiving and concealing a stolen firearm, MCL 750.535b, discharging a firearm in an occupied building, MCL 750.234b, possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b, failure to obtain a license for a pistol, MCL 750.232a(1), and failure to present a pistol for safety inspection, MCL 750.228. He was sentenced for the felony firearm conviction to two years' imprisonment, to be served consecutively to the following concurrent prison sentences: 15 to 25 years for second degree murder, 108 months to 15 years for assault with intent to commit murder, one to 10 years for receiving and concealing a stolen firearm, one to four years for discharging a firearm in an occupied building, and 93 days each for the misdemeanor pistol license and safety violations. For the reasons set forth below, we affirm the convictions and sentences of defendant.

This case arises from a shooting that occurred on February 12, 2006, which resulted in the death of Leonard Brown. On that evening, defendant was at the apartment of his former girlfriend, Yasia Woodley, as she and her daughter awaited the arrival of Brown who had been told by Woodley to come and pick-up his belongings from her apartment. When Brown arrived at Woodley's apartment, defendant heard Woodley scream and he approached the hallway where Brown and his friend Lewis Armstrong were located. Once he arrived at their location, defendant pointed a gun at Brown, spoke a few words, then according to defendant, Brown lunged at him and defendant fired one shot, causing Brown to fall into the bathroom. According to defendant, as the second person (Armstrong) approached the door, he fired two shots at him, but the gun jammed. Following the shooting, defendant hid the gun in an apartment and ran to his mother's house. After being arrested by the police, defendant admitted to the shooting, but claimed that he did so in self-defense.

Defendant first argues that the assault with intent to murder charge should have been quashed at the preliminary examination and dismissed at trial because of a violation of the “corpus delicti rule.”

At the preliminary examination, a statement by defendant was read into evidence without objection. In his statement, defendant admitted shooting the decedent in self-defense and also trying to shoot Armstrong. However, the gun jammed so defendant cocked it two times, which caused two bullets to fall out. Other evidence included testimony from Armstrong, who stated he saw defendant standing in a way that indicated he had a gun, heard a gunshot, and saw the decedent fall. As Armstrong fled from the scene, defendant ran after him so he shut the door in defendant’s face before getting away. Police officers testified that they found two live cartridges of ammunition at the scene of the shooting. Based on this evidence, defendant was bound over on charges that included attempted assault with intent to commit murder. In a later motion by the prosecution to amend this charge to the completed offense of assault with intent to commit murder, defense counsel unsuccessfully opposed the motion and attempted to quash this charge on the basis of the corpus delicti rule. At trial, defense counsel again was unsuccessful when she raised the corpus delicti rule and opposed the admission of defendant’s statement into evidence. On appeal, defendant argues the corpus delicti rule was violated at both the preliminary examination and the trial since defendant’s confession was used to establish the crime of assault with intent to commit murder.

The corpus delicti rule is designed to prevent the use of a defendant’s confession to convict him of a crime that did not occur. See *People v Williams*, 422 Mich 381, 391; 373 NW2d 567 (1985); *People v Hughey*, 186 Mich App 585, 587-588; 464 NW2d 914 (1990). Specifically, the rule provides that a defendant’s confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury (for example, death in cases of homicide) and (2) some criminal agency as the source of the injury. *People v Cotton*, 191 Mich App 377, 394; 478 NW2d 681 (1991); [as quoted in *People v Konrad*, 449 Mich 263, 269-270; 536 NW2d 517 (1995)]. In this case, Armstrong indicated he was in fear for his well-being as he fled the scene and, as such, provided independent evidence of the corpus delicti of the offense of assault. Once that was established, the examining magistrate and the trial court could properly use defendants’ confession to establish defendant’s intent to shoot the fleeing man and elevate the offense to assault with intent to commit murder. Therefore, the corpus delicti rule was not violated.¹

Defendant also argues that the trial court abused its discretion in amending the information to charge the completed offense of assault with intent to commit murder rather than the original charged offense of attempted assault. Defendant’s counsel argued against the amendment, maintaining that the only evidence supporting the charge of assault with intent to commit murder came from defendant’s statement. The trial court responded by stating that an

¹ The prosecution concedes that at the preliminary examination the order of proofs was faulty. However, this error did not constitute plain error that affected defendant’s substantial rights since the purpose behind the corpus delicti rule was met when the assault crime was established by independent evidence. *Konrad, supra*.

amendment was necessary to correct a variance between the evidence presented at the examination of a completed assault and the count listed in the information (an attempted assault). We concur with the trial court.

A trial court may amend the information at any time during the trial to cure any defect, imperfection, or omission in form or substance, including a variance between the information and the proofs, so long as the amendment does not unduly prejudice the defendant. MCL 767.76; *People v Goecke*, 457 Mich 442, 459-460; 579 NW2d 868 (1998). An amendment is unduly prejudicial if it causes the defendant “unfair surprise, inadequate notice, or insufficient opportunity to defend.” *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

In this case, defendant does not argue that the amendment unduly prejudiced him; rather he simply contends that the court erred in its amendment of the information. Furthermore, defendant fails to produce any evidence which would serve as a basis for this Court’s holding that the trial court abused its discretion by allowing an amendment of the information. Accordingly, we reject defendant’s argument on this issue.

Defendant next argues that the prosecution presented insufficient evidence to overcome his theory of self-defense in that the evidence established that defendant was not the aggressor in the attack, and he shot the decedent only after retreating into a bathroom and only after the decedent lunged at him.

“Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt.” *People v James*, 267 Mich App 675, 677; 705 NW2d 724 (2005), lv den 474 Mich 982 (2005) (internal quotation omitted). The killing of another person in self-defense qualifies as justifiable homicide only if the defendant honestly and reasonably believes that he faces an imminent danger of death or 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). In deciding whether the defendant reasonably feared for his safety, the jury must consider the circumstances as they appeared to the defendant at the time. *Id.* at 127. A claim of self-defense normally requires that the defendant try to avoid the use of deadly force if he can safely and reasonably do so, including through the use of non-deadly force or by retreat. *Id.* at 119. The law will condone a killing only when it constitutes the sole available means of escape from death or serious bodily harm. *People v Godsey*, 54 Mich App 316, 318; 220 NW2d 801 (1974). “A defendant is not entitled to use any more force than is necessary to defend himself.” *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993).

The first question is whether defendant honestly and reasonably believed that he faced an imminent danger of death or serious bodily harm. The evidence suggests that Brown was entering the apartment to see if there was another man present. The next question is whether it was necessary for defendant to exercise deadly force to prevent such harm to himself from Brown. On this issue, there was little, if any evidence to support defendant’s claim of self-defense. Nothing suggested that Brown had a weapon, or that defendant could not have retreated to the daughter’s bedroom (which was his original plan) or that he could have barricaded himself in the bathroom. Even if we were to conclude that the evidence supported defendant’s claim that he shot Brown only after Brown lunged at him and only after Brown neared the bathroom, defendant failed to retreat in other ways. Based on this evidence, or lack of it, a rational jury

could find the prosecution presented sufficient evidence to disprove defendant's claim of self-defense.

Defendant argues that his minimum sentences for his second-degree murder and assault with intent to commit murder convictions constituted cruel and unusual punishment, even though they were admittedly within the low end of the guidelines, since the convictions were based on insufficient evidence because defendant had acted in self-defense. Lastly, defendant claims that the sentencing court should have made a downward departure at sentencing due to the "substantial and compelling" reason that defendant acted in self-defense. Defendant's arguments concerning his sentences are without merit. It is well established that a proportionate sentence is not cruel and unusual. *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002). A claim of self defense does not meet the definition of a "substantial and compelling" reason for a downward departure as defined in *People v Babcock*, 469 Mich 247, 270; 666 NW2d 231 (2003).

Affirmed.

/s/ Henry William Saad
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher