

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTWAIN DESHAWN WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
September 17, 2009

No. 285214
Genesee Circuit Court
LC No. 07-020759-FC

Before: Sawyer, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317,¹ and carrying a concealed weapon, MCL 750.227.² He was sentenced to 22 to 33 years' imprisonment for the murder conviction, and one year in jail for the CCW conviction. He appeals as of right. We affirm.

I. Basic Facts

On July 15, 2006, defendant, codefendant Devonte Thomas, and Vincent Cordell were together in defendant's Suburban; defendant was driving, Thomas was in the front seat, and Cordell was in the back seat, behind the driver. Cordell and Thomas testified that, at one point, defendant observed Earthly Knight, who had allegedly robbed one of defendant's family members. Knight was driving a Chevy Tahoe, and the victim was in the passenger seat. Thomas testified that defendant phoned someone, "asked the description of the truck," and then said, "yeah, that's him." Cordell and Thomas explained that defendant followed the Tahoe until it stopped at a drive-thru convenience store, cut it off, and blocked it in with his vehicle. Knight testified that he saw the three occupants in the Suburban and twice heard "somebody say shoot or something." According to both Cordell and Thomas, after blocking in the Tahoe, defendant pulled out a gun to shoot Knight. Thomas testified that defendant told him to kill Knight. Cordell testified that defendant and Thomas exchanged words about who would shoot Knight, but Thomas ultimately took the gun. Thomas and Cordell both testified that Thomas fired

¹ Defendant was originally charged with first-degree premeditated murder, MCL 750.316(1)(a).

² Defendant was acquitted of additional charges of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b.

several shots at Knight's SUV from the back seat. Knight ducked, but the victim was shot in the head. Both Cordell and Thomas testified that after the shooting, defendant phoned someone and said that he "got him." On cross-examination, Cordell stated that either defendant or Thomas made the phone call.

In a written statement made to the police, defendant admitted that he observed Knight in a truck as they were "driving around smoking weed." He phoned someone, asked for a description of Knight's truck, and then followed the vehicle. He claimed that Thomas brandished his gun, got into the back seat, and fired several shots. Defendant phoned someone after the shooting and said that Thomas had "shot up" Knight's truck. Defendant denied having a gun, denied telling Thomas to shoot, denied knowing that Thomas planned to shoot anyone, and denied that there was any conversation about shooting anyone. He claimed that Thomas was the person who threatened to kill Cordell if he told anyone about the shooting. Defendant testified at trial in a manner basically consistent with his statement, but he indicated that it was Thomas and Cordell who pointed out Knight's SUV, that Thomas made a phone call, and that he followed the truck only because Thomas wanted to see the driver. He further indicated that he was unaware that Thomas had a gun in the car, and claimed that he "had no idea" who Knight was, or that anyone had been robbed. On rebuttal, a police officer testified that defendant told him that a family member's house had been broken into and that Knight may have been involved.

II. Refusal to Instruct on "Disputed Accomplice"

Defendant argues that the trial court abused its discretion when it declined to give the disputed accomplice jury instruction, CJI2d 5.5, with regard to Cordell. We disagree. Although this Court reviews questions of law pertaining to jury instructions de novo, a trial court's decision whether an instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006); *People v Young*, 472 Mich 130, 135; 693 NW2d 801 (2005). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

An "accomplice" is a "person who knowingly and willfully helps or cooperates with someone else in committing a crime." *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993), quoting CJI2d 5.5. Here, as the trial court observed, there was "not sufficient evidence . . . that would allow the jury to conclude that [Cordell] is an accomplice." The testimony of Cordell, defendant, and Thomas, does not disclose any evidence of an agreement between Cordell and the defendants regarding the events that culminated in the victim's death. Cordell and Thomas both testified that after observing Knight, defendant phoned someone regarding the description of his vehicle. Although defendant claimed that Thomas made the phone call, there was no testimony that Cordell made the call. Thereafter, defendant followed the SUV, cut it off, and blocked it in. Cordell and Thomas testified that defendant brandished a gun and defendant claimed that Thomas pulled out a gun, but no witness testified that Cordell possessed a gun. Further, Cordell testified that Thomas and defendant exchanged words about who would shoot Knight, Thomas testified that defendant told him to shoot, and defendant testified that there was no discussion between any of the three occupants about anyone shooting. Despite the differing testimony about what conversation occurred before the shooting, there was no testimony that Cordell participated in any conversation or made any remarks to instigate or encourage the

shooting. Further, although there was conflicting testimony about whether it was defendant or Thomas who phoned someone after the shooting, there was no testimony that Cordell made that phone call. Finally, there was testimony that, after the shooting, one of the defendants threatened to kill Cordell if he told anyone about the incident. In the absence of any evidence that Cordell knowingly and willfully helped or cooperated in the shooting, the trial court did not abuse its discretion when it declined to give the disputed accomplice instruction.

III. Effective Assistance of Counsel

Defendant further argues that he is entitled to a new trial because defense counsel was ineffective for failing to object to the trial court's CCW instruction.³ We disagree. Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

The offense of CCW in a vehicle requires: (1) the presence of a weapon in a vehicle operated or occupied by the defendant, (2) that the defendant knew or was aware of the presence of the weapon, and (3) that the defendant was carrying the weapon. *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999). Defendant argues that the trial court's instructions allowed the jury to convict him for driving a car in which a weapon was merely present. The trial court instructed the jury as follows:

The defendant is charged with the crime of carrying a concealed weapon. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt.

First, that a pistol was in a vehicle that the defendant was in.

Second, that the defendant knew the pistol was there.

Third, that the defendant took part in carrying or keeping the instrument in the vehicle.

Defendant cites *People v Butler*, 413 Mich 377; 319 NW2d 540 (1982), in support of his position. In *Butler*, the defendant was arrested after driving a vehicle where a pistol was found, and claimed that he was unaware of the pistol and that a passenger had placed it there. The trial court instructed the jury to convict the defendant if the weapon was in a vehicle owned, operated, or occupied by the defendant, and if the defendant knew that the weapon was in the vehicle. *Id.* at 383. There was no mention of the defendant's having otherwise taken part in keeping or carrying the weapon. *Id.* at 389. Our Supreme Court held that "carrying" is an independent and essential element of the offense. *Id.* at 384. Consequently, presence in a vehicle with knowledge

³ In denying defendant's motion for a new trial on this basis, the trial court held that the standard instruction was sufficient, and that defense counsel was not ineffective in this regard.

of a weapon therein does not automatically establish guilt. *Id.* at 385-386. Rather, a separate instruction on carrying must be provided. *Id.* at 390.

In this case, the trial court's instructions provided, as a separate element, the requirement "that the defendant took part in carrying or keeping the instrument in the vehicle." This instruction distinguishes this case from *Butler*. Because the instructions fairly presented the issues to be tried and adequately protected defendant's rights, defendant cannot demonstrate a reasonable probability that, but for counsel's failure to object to the CCW instruction, the result of the proceeding would have been different. See *Frazier, supra*. Defendant is not entitled to a new trial.

IV. Scoring of Offense Variable 3

Defendant lastly argues that resentencing is required because the trial court should have scored zero points for offense variable (OV) 3. The trial court originally scored OV 3 at 50 points. In denying defendant's "motion to correct invalid sentence," the trial court ruled that it was required to score 25 points for OV 3, which would not change the guidelines range, and, therefore, defendant's sentence was not invalid. We agree. When scoring the guidelines, "[a] sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id.* (citation omitted).

OV 3 addresses physical injury to a victim. MCL 777.33(1)(c) provides that 25 points should be scored for OV 3 if "[l]ife threatening or permanent incapacitating injury occurred to a victim," and homicide is the sentencing offense. MCL 777.33(1)(c); *People v Houston*, 473 Mich 399, 404; 702 NW2d 530 (2005). A score of zero points for OV 3 is appropriate "only when 'no physical injury occurred to a victim.'" *Id.*, citing MCL 777.33(1)(f). The statute mandates assessment of "the highest number of points possible." *Houston, supra* at 402.

Here, in accord with defendant's actions, Thomas discharged a weapon several times toward Knight's vehicle, resulting in the victim's death by a gunshot wound to her head. Because the victim was killed, there was permanent injury to her. Given the evidence, 25 points is the correct score for OV 3 because the victim's death resulted from a crime, and homicide was the sentencing offense. See *Houston, supra* at 407 (trial court properly scored 25 points for OV 3 where the victim received a fatal gunshot wound to the head). Defendant is not entitled to resentencing.

Affirmed.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra