

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FLOYD LEE MCMURRAY,

Defendant-Appellant.

UNPUBLISHED

July 1, 2010

No. 291355

Wayne Circuit Court

LC No. 2008-010504-FC

Before: METER, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felony murder, MCL 750.316(b), felon in possession of a firearm, MCL 750.224f, and felony firearm, MCL 750.227b. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to a term of life imprisonment on the felony murder conviction, to be served concurrent to a 48-100 month term on the felon in possession conviction, both of which are to be served consecutive to a two year term for the felony firearm conviction. Because the trial court did not abuse its discretion in denying defendant's request for substitute counsel, the evidence did not support a jury instruction on self-defense, and there was sufficient evidence to convict defendant of felony murder, we affirm.

Defendant was charged in this matter in connection with the shooting death of James Johnson. Defendant and Mr. Johnson had been friends for many years and both were engaged in the buying and selling of cocaine. In the early morning hours of May 1, 2008, defendant contacted Mr. Johnson and an agreement was made whereby defendant would get a ride from a friend from defendant's home in Ann Arbor to Mr. Johnson's home in the city of Detroit so that defendant could purchase a quantity of cocaine from Mr. Johnson. After entering Mr. Johnson's home, Mr. Johnson and defendant began arguing. During the argument, a gun was drawn. Mr. Johnson was ultimately shot in the head, three times, and died from his injuries. Defendant left the home, taking the gun with him and disposing of it. He was later charged with murder, felony firearm, and felon in possession of a firearm.

On appeal, defendant first contends that the trial court abused its discretion when it denied his request for substitute counsel. We disagree.

This Court reviews a trial court's decision regarding substitute counsel for an abuse of discretion. *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003). An indigent defendant is entitled to appointed counsel; he is not, however, entitled to appointed counsel of his own choice. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Appointment of substitute counsel is warranted only upon a showing of good cause and if substitution will not unreasonably disrupt the judicial process. *Id.* “Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic.” *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001), quoting *People v Mack*, 190 Mich App 14.

Here, defendant made no showing of good cause for the substitution of appointed counsel. Defense counsel moved to withdraw from representation, and, at the hearing on his motion, indicated that defendant wanted his family to retain counsel for him and when they could not, defendant took his frustration out on appointed counsel. Defense counsel also indicated that defendant had a different attorney appointed to represent him in a separate matter and counsel believed defendant’s goal was to have that counsel appointed in this matter as well.

Defense counsel advised the trial court that he did not believe he did anything to incur defendant’s disrespect, but felt that he could not make defendant happy. Counsel further stated that he had been asked to do things he did not agree with and felt that he could not ethically pursue the courses of action defendant requested. Counsel also admitted, however, that if the court appointed someone in his stead, new counsel would likely end up in the same situation. Counsel also confirmed that he was not willing to put up with defendant’s discourtesy and disrespect.

In a motion for reconsideration filed by defendant in pro per, defendant indicated that counsel was ineffective, had been deceitful to defendant, and had rejected defendant’s assistance. Defendant did not detail, however, what assistance had been rejected, how counsel was deceitful, and provided no sound basis for his claim that counsel was ineffective. Furthermore, defendant has neither asserted nor demonstrated any prejudice resulting from the trial court's decision.

Moreover, when defendant’s pro per motion was effectively denied, the trial court asked him if she wished to proceed in pro per or remain represented by the counsel appointed him. Defendant stated that he felt it would be best if he remained represented by his counsel. Counsel thereafter met with defendant on several occasions, and filed pre-trial motions and argued the same vigorously on defendant’s behalf. It appears from the record that counsel engaged in meaningful discovery, again filing motions on defendant’s behalf to obtain relevant evidence, when necessary, and strongly advocated on defendant’s behalf at trial. If, in fact, defendant’s dissatisfaction with counsel stems from his desire to have had counsel engage in conduct counsel felt was unethical, this does not equate to a difference of opinion with respect to trial strategy. Having one’s counsel engage in unethical conduct cannot be considered a legitimate trial strategy.

In short, the record reflects that counsel adequately and competently represented defendant. Defendant has not explained what counsel should have done differently or how the outcome might have been different had substitute counsel been retained. Having failed to establish good cause for the substitution of counsel, the trial court did not abuse its discretion in denying defendant’s request for the appointment of the same.

Defendant next claims entitlement to a new trial on the basis of the trial court's failure to instruct the jury on the defense of self-defense. We review claims of instructional error de novo. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). However, we review a trial court's determination that a jury instruction is not applicable to the facts of the case for an abuse of discretion. *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003).

Jury instructions must include all elements of the charged offenses, and must not exclude relevant issues, defenses, and theories if supported by the evidence. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). Further, before the trial court is required to instruct the jury regarding an affirmative defense, the defendant must produce some evidence on all of its elements. *People v Crawford*, 232 Mich App 608, 620; 591 NW2d 669 (1998). "Instructional errors that directly affect a defendant's theory of defense can infringe a defendant's due process right to present a defense." *People v Kurr*, 253 Mich App 317, 326-327; 654 NW2d 651 (2002). However, erroneous instructions will only warrant reversal if the defendant can demonstrate that the error undermined the reliability of the verdict. *People v Hawthorne*, 474 Mich 174, 184-185; 713 NW2d 724 (2006).

At the conclusion of trial testimony, defense counsel requested an instruction on self-defense. The prosecutor argued that self-defense was not an appropriate instruction, given that the defendant testified that he never engaged in any intentional act to cause the death of the victim. The trial court agreed, instead instructing the jury on the defense of accident. After a review of the record, we are satisfied that the trial court did not abuse its discretion in determining that a self-defense instruction was not applicable to the facts of the case, and that there was thus no instructional error.

A defendant acts in self-defense when he "honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm." *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). The use of deadly force in self-defense is justified if each of the following is shown: (1) the defendant honestly and reasonably believed that he was in danger, (2) the danger which the defendant feared was serious bodily harm or death, and (3) the action taken by the defendant appeared at the time to be immediately necessary, i.e., the defendant is only entitled to use the amount of force necessary to defend himself. MCL 780.972(1)(a); *Heflin*, 434 Mich at 502;

The evidence here showed that defendant and Mr. Johnson engaged in a somewhat lengthy argument that escalated into a physical struggle over a gun. Defendant testified at trial that Mr. Johnson grabbed a gun and pointed it toward defendant, causing defendant to believe that Mr. Johnson was going to kill him. Defendant testified that he grabbed Mr. Johnson's wrist and the two struggled over the gun, falling to the floor. Defendant testified that as they fell, the gun went off. According to defendant, they both had their hands on the gun, but Mr. Johnson's finger was on the trigger when it went off. Defendant's own testimony, then, suggests Mr. Johnson was accidentally shot during the struggle. "A finding that a defendant acted in justifiable self-defense necessarily requires a finding that the defendant acted intentionally, but that the circumstances justified his actions." *Heflin*, 434 Mich at 503. At no time did defendant testify that he ever had his finger on the trigger, let alone that he intentionally shot Mr. Johnson. The only person to testify as to how the gun discharged was defendant, and his testimony is inconsistent with self-defense.

Additionally, defendant has not shown that if, in fact, the failure to give a self-defense instruction was erroneous, that the error undermined the reliability of the verdict. *Hawthorne*, 474 Mich at 184-185. While defendant testified that the gun went off during a struggle between him and Mr. Johnson, the medical examiner testified that Mr. Johnson's wounds did not come from shots fired at close range. The medical examiner testified that the shots were fired from at least 2-3 feet away from Mr. Johnson. Moreover, while defendant testified that a female friend named Tammy drove him to Mr. Johnson's home on the morning of the incident, another female, Christina, testified that she was the one who drove defendant to the home, that she remained outside for the approximately 30 minutes while defendant was inside, that she heard gunshots during the 30 minute period, and that defendant thereafter walked calmly back to the car. Christina also testified that she later heard defendant say to another person that he did not need to "worry about that nigga anymore" and it made her believe he was talking about Mr. Johnson. Given the testimony that contradicted defendant's testimony, the jury may have reasonably disregarded defendant's entire account of the incident.

Defendant's final argument on appeal is that there was insufficient evidence to convict him of felony murder or, alternatively, that his motion for directed verdict should have been granted.

A challenge to the sufficiency of the evidence is reviewed de novo. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). In reviewing such a claim, we view the evidence in the light most favorable to the prosecutor to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). Appellate review of a challenge to the sufficiency of the evidence is deferential. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The reviewing court must draw all reasonable inferences and examine credibility issues that support the jury verdict. *Id.* This Court must not interfere with the jury's role as the sole judge of the facts when reviewing the evidence. *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to establish the elements of a crime." *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

We review a decision on a directed verdict motion de novo and, similarly, review the evidence in a light most favorable to the prosecution in order to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Gillis*, 474 Mich. 105, 113; 712 NW2d 419 (2006). Challenges raised in a directed verdict motion to the sufficiency of the evidence are resolved by considering all of the evidence presented up to the time the defendant moved for a directed verdict. *People v Allay*, 171 Mich App 602, 605; 430 NW2d 794 (1988).

Felony murder is:

(1) the killing of a human being; (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result; (3) while committing [or] attempting to commit. . .any of the felonies specifically enumerated in MCL 750.316. . .

People v Hutner, 209 Mich App 280, 282-283; 530 NW2d 174 (1995).

It is not necessary that the murder be contemporaneous with the enumerated felony; only that the defendant intended to commit the underlying felony at the time the homicide occurred. *People v Brannon*, 194 Mich App 121, 125; 486 NW2d 83 (1992).

Here, the predicate felony for charging defendant with felony murder was larceny—one of the felonies enumerated in MCL 750.316. “The basic elements of larceny are (1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the subject matter must be the goods or personal property of another, (5) the taking must be without the consent and against the will of the owner.” *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999).

Defendant moved for a directed verdict on the felony murder charge, arguing that there was no evidence that defendant committed a larceny at Mr. Johnson’s home. The trial court denied the motion based upon the evidence that defendant took the gun that was used to shoot Mr. Johnson with him when he left Mr. Johnson’s home. We note, however, that there was no evidence whatsoever that defendant formulated an intent to take the gun before or at the time of the actual killing. Given that the felony murder statute requires a killing *while or at the time* the defendant committed or attempted to commit a larceny (CJI2d 16.4), and all evidence indicates that defendant took the gun after the completion of the murder in order to dispose of it as the murder weapon, the taking of the gun does not fall within the meaning and intent of the felony murder statute. However, as indicated by the prosecutor, there was evidence that defendant took drugs from Mr. Johnson, and this Court will not reverse where the trial court reached the right result for the wrong reason. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

The witness who testified to taking defendant to Mr. Johnson’s house on the morning of the murder testified that when defendant returned to her vehicle, after having been in Mr. Johnson’s home for approximately 30 minutes, he had cocaine with him that she had not seen him with prior to entering the home. A police officer who interviewed the witness testified that the witness told her about overhearing defendant speaking to another individual about no longer having to worry about someone taking his clientele. Defendant later testified that he went to Mr. Johnson’s for the purpose of buying drugs, and that both he and Mr. Johnson bought and sold drugs. Defendant testified that when he entered Mr. Johnson’s home, he saw a casserole dish containing cocaine. Defendant testified that Mr. Johnson threw the casserole dish in the sink, breaking it, while the two were arguing. An evidence technician who gathered evidence at Mr. Johnson’s home several hours after the murder testified, however, that there were only liquor bottles in the sink, at least one of which was broken. The technician and other officers who collected evidence at Mr. Johnson’s home testified that there was no cocaine or money found in Mr. Johnson’s home. The evidence that defendant went to Mr. Johnson’s home to purchase cocaine, defendant saw cocaine at Mr. Johnson’s home, defendant possessed cocaine when he left Mr. Johnson’s home and, following Mr. Johnson’s death, no cocaine was found in the home, is sufficient circumstantial evidence to convince a reasonable juror that defendant intended to steal cocaine from Mr. Johnson and that Mr. Johnson’s killing occurred when defendant was committing or attempting to commit a larceny.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Jane M. Beckering