

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EUGENE CLARK POSEY,

Defendant-Appellant.

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UNPUBLISHED

July 8, 2010

No. 291075

Wayne Circuit Court

LC No. 08-014249-FC

Before: MURRAY, P.J., and SAAD and M. J. KELLY, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to concurrent prison terms of 25 to 60 years for the second-degree murder and assault convictions, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions arise from a family dispute in which he shot two of his cousins, one fatally. With respect to the fatal shooting, defendant was charged with first-degree premeditated murder, MCL 750.316(1)(a), but the trial court considered the lesser offenses of second-degree murder and voluntary manslaughter. It also considered whether defendant acted in self-defense, but refused to consider imperfect self-defense.

Defendant first argues that the trial court erred by refusing to consider imperfect self-defense. In reviewing a verdict in a bench trial, this Court reviews the trial court's factual findings for clear error and its conclusions of law de novo. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006).

A murder is essentially an intentional killing committed with malice that is neither justified nor excused. *People v Mendoza*, 468 Mich 527, 538-540; 664 NW2d 685 (2003); *People v Mesik (On Reconsideration)*, 285 Mich App 535, 545-546; 775 NW2d 857 (2009). A killing done without malice is manslaughter. *Mendoza*, 468 Mich at 535. A killing is justified or excused if it is done in self-defense. *People v Dupree*, 284 Mich App 89, 100-101; 771 NW2d 470 (2009) (opinion by M.J. KELLY, J.); *People v Kurr*, 253 Mich App 317, 320; 654 NW2d 651 (2002). "A claim of self-defense first requires proof that the defendant has acted in response to

an assault.” *People v Elkhoja*, 251 Mich App 417, 442; 651 NW2d 408 (2002), vacated in part on other grounds 467 Mich 916 (2003). “Imperfect self-defense is a qualified defense that can mitigate second-degree murder to voluntary manslaughter.” *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992).

Defendant contends that he was entitled to claim imperfect self-defense because there was evidence that he acted without a reasonable belief of danger or reacted with excessive force. We disagree. While other jurisdictions have allowed the qualified defense where the defendant “was the aggressor, or maintained an unreasonable belief of danger, or reacted with an unreasonable amount of force[,]” *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985), the doctrine as recognized in Michigan “applies only where the defendant would have been entitled to self-defense had he not been the initial aggressor[,]” *Butler*, 193 Mich App at 67. “Under Michigan law, defendant would not be entitled to claim imperfect self-defense if he acted with excessive force.” *People v Kemp*, 202 Mich App 318, 325; 508 NW2d 184 (1993) (footnote omitted). Because defendant does not claim to have been the initial aggressor and because defendant acted with excessive force when neither victim had a gun or other weapon, the defense was not applicable and the trial court did not err by refusing to consider it.

Defendant next argues that the trial court erred in scoring offense variables (OV) 3, 5, and 6 of the statutory guidelines. 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 Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision “for which there is any evidence in support will be upheld.” *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Thus, this Court reviews the trial court’s scoring decisions to determine whether the court properly exercised its discretion and whether the evidence adequately supported the trial court’s scores. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

“A sentencing court may consider all record evidence before it when calculating the guidelines,” *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993), remanded 447 Mich 984 (1994), including hearsay information unchallenged by the defense. *People v Uphaus (On Remand)*, 278 Mich App 174, 183-184; 748 NW2d 899 (2008); *People v Beard*, 171 Mich App 538, 548; 431 NW2d 232 (1988).

Defendant first argues that the trial court improperly scored 25 points for OV 3, which considers physical injury to the victim. MCL 777.33. Although defendant contends that it is improper to score 25 points where the victim is killed, the trial court’s scoring of this variable is consistent with our Supreme Court’s decision in *People v Houston*, 473 Mich 399, 405-407; 702 NW2d 530 (2005), and so there was no scoring error.

Defendant next argues that it was improper to score 15 points for OV 5, which considers psychological injury to a victim’s family members. MCL 777.35. Fifteen points are to be scored when a family member suffers “[s]erious psychological injury requiring professional treatment . . .” MCL 777.35(1)(a). According to the presentence report, the victim’s brother indicated that the victim’s death “turned his whole family upside down” and the loss had been especially difficult for him and his mother. The prosecutor reported at sentencing that the victim’s mother had “described the incident as tearing her family apart.” Both relatives had sought counseling to deal with their loss. This evidence was sufficient to support the 15-point score for OV 5.

Defendant also argues that the trial court improperly assessed 25 point for OV 6, which considers the defendant's intent to kill or injure. MCL 777.36(1). At sentencing, defense counsel expressly agreed that OV 6 was properly scored at 25 points, so the issue has been waived, extinguishing any error. *People v Carter*, 462 Mich 206, 219-220; 612 NW2d 144 (2000); *People v Witherspoon*, 257 Mich App 329, 333-334; 670 NW2d 434 (2003).

Defendant's final argument is that the trial court erred in scoring the offense variables on the basis of facts not proven beyond a reasonable doubt at trial, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, *Blakely* does not apply to Michigan's indeterminate sentencing scheme, in which a defendant's maximum sentence is set by statute and the sentencing guidelines affect only the minimum sentence. *People v McCuller*, 479 Mich 672, 676-678; 739 NW2d 563 (2007); *People v Harper*, 479 Mich 599, 603-604; 739 NW2d 523 (2007); *People v Drohan*, 475 Mich 140, 162-164; 715 NW2d 778 (2006). Thus, there is no merit to this issue.

Affirmed.

/s/ Christopher M. Murray  
/s/ Henry William Saad  
/s/ Michael J. Kelly