

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT DARRELL PORTIS,

Defendant-Appellant.

UNPUBLISHED

July 16, 1996

No. 178921

LC No. 93-014063

Before: Gribbs, P.J., and Saad and J. P. Adair,* JJ.

PER CURIAM.

Defendant was charged with second-degree murder, MCL 750.317; MSA 28.549 and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). After a jury trial, defendant was convicted of involuntary manslaughter, death by firearm intentionally pointed, MCL 750.329; MSA 28.561, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to five and one-half to fifteen years imprisonment for the involuntary manslaughter conviction and to a consecutive two-year prison term for the felony firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred by denying his motion for directed verdict as to the charge of second-degree murder. Specifically, defendant argues that the prosecution failed to present sufficient evidence that defendant acted with malice and without justification. We disagree.

When reviewing a denial of a motion for directed verdict, this Court views the evidence in the light most favorable to the prosecution to determine whether the evidence was sufficient to permit a rational trier of fact to find the essential elements of the crime proven beyond a reasonable doubt. *People v Partridge*, 211 Mich App 239, 240; ___ NW2d ___ (1995).

To establish the crime of second-degree murder pursuant to MCL 750.317; MSA 28.549, the prosecution must prove that the defendant caused the death of the victim and that the killing was done with malice and without justification. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184

* Circuit judge, sitting on the Court of Appeals by assignment.

(1993). Malice is defined as the intent to kill, the intent to do great bodily harm, or the intent to create a high risk of death or great bodily harm with knowledge that death or great bodily harm will be the probable result. *Kemp, supra* at 322. A jury may properly infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. *People v Flowers*, 191 Mich App 169, 177 (1991).

Defendant's statement to the police, which was read into evidence at trial, indicated that he intentionally raised a shotgun in the direction of the victim and intentionally pulled the trigger. Viewed in the light most favorable to the prosecution, this evidence was sufficient to establish malice.

Defendant also argues that his motion for directed verdict should have been granted because the prosecution failed to establish that the killing was without justification. The killing of another in self-defense is justified if the defendant honestly and reasonably believes that his life is in danger or that there is a threat of serious bodily harm. *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). The right to self-defense includes the right to defend others. *People v Wright*, 25 Mich App 499, 503; 181 NW2d 649 (1970).

Officer Smith testified that the victim was found approximately 150 feet away from the house and would not have been a threat at such a distance. The fact that no weapon was found on the victim also tends to disprove defendant's claim of self-defense. Viewed in a light most favorable to the prosecution, this evidence was sufficient to prove that the killing was without justification.

Defendant next argues that the jury should have been instructed on the misdemeanor offense of careless, reckless, or negligent use of a firearm, MCL 752.861; MSA 28.436(21). We disagree.

When properly requested, a trial court should instruct the jury on appropriate lesser included misdemeanor if a rational view of the evidence could support a verdict of guilty of the misdemeanor and not guilty of the felony, and the instruction would not result in confusion or injustice. *People v Taylor*, 195 Mich App 57, 62; 489 NW2d 99 (1992).

In this case, the evidence did not support an instruction on careless, reckless, or negligent use of a firearm. MCL 752.861; MSA 28.436(21) does not apply to a willful or wanton discharge of a firearm. Regardless of whether he intended the bullet to hit the victim, the evidence indicated that defendant willfully fired the gun in the direction of the victim. There was no evidence that the actual firing of the gun was the result of carelessness, recklessness, or negligence.

Affirmed.

/s/ Roman S. Gribbs
/s/ Henry William Saad
/s/ James P. Adair