

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIESE VASHUNN GANT,

Defendant-Appellant.

UNPUBLISHED

December 27, 1996

No. 185856

LC No. 95-071106-FC

Before: Hood, P.J., and Neff and Chrzanowski*, JJ.

PER CURIAM.

Defendant was charged with assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was convicted by a jury of both charges and pleaded guilty to habitual offender, third offense, MCL 769.11; MSA 28.1083. The trial court sentenced defendant to eighteen to thirty years' imprisonment for the assault conviction, to follow the mandatory two-year sentence for felony-firearm. Defendant appeals as of right. We affirm in part and remand.

On November 19, 1994, several people gathered at the flat where defendant's girlfriend was temporarily residing. When defendant visited his girlfriend, they shared her bedroom. The victim was among those people at the party, and eventually he, defendant's girlfriend and two other people were talking in defendant's girlfriend's bedroom. The victim testified that he had known the young woman for many years and did not know that she and defendant were dating. Defendant came in and asked them all to leave, which they did. Defendant's girlfriend told the victim that the room was not defendant's, and the victim and his friend went back to defendant and apparently joked to defendant about it. The victim told defendant that the woman said the room was not defendant's, and he and his friend joked to defendant that the room was theirs. The victim and his friend moved down the hallway from the bedroom to the kitchen, and the victim noticed that defendant had a gun. The victim testified that defendant said, "Whose room is it now?" and fired the gun at the victim from approximately eight feet away. The victim suffered life threatening injuries from gunshot wounds, but survived.

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

Defendant first argues that his counsel was ineffective for failure to request an instruction on provocation. We disagree.

Because no record on defendant's claim of ineffective assistance was created in the trial court, we are limited to errors contained in the record. *People v Dixon*, 217 Mich App 400, 408; ___ NW2d ___ (1996). "Counsel must provide effective representation under an objective standard of reasonableness. If there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,' the assistance is considered ineffective." *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996).

Although a criminal defendant has the right to have the evidence considered by a properly instructed jury, the trial court is not required to present a specific instruction regarding the defendant's theory unless it is requested by the defendant. *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909, modified and remanded 450 Mich 1212 (1995). If there is evidence to support a theory and an instruction is requested, it must be given; conversely, where the theory upon which an instruction is requested is not supported by the evidence, the trial court is not required to present the instruction. *Id.* at 81.

Defendant asserts that his counsel should have requested the instruction on mitigating circumstances, CJI2d 17.4, because the evidence supported the theory that he was provoked.¹ To

¹ That instruction reads:

(1) The defendant can only be guilty of the crime of assault with intent to commit murder if he would have been guilty of murder had the person he assaulted actually died. If the assault took place under circumstances that would have reduced the charge to manslaughter if the person had died, the defendant is not guilty of assault with intent to commit murder.

(2) Voluntary manslaughter is different from murder in that for manslaughter, the following things must be true:

(3) First, when the defendant acted, his thinking must have been disturbed by emotional excitement to the point that an ordinary person might have acted on impulse, without thinking twice, from passion instead of judgment. This emotional excitement must have been caused by something that would cause an ordinary person to act rashly or on impulse. The law does not say what things are enough to do this. That is for you to decide. . . .

(4) Second, the killing itself must have resulted from this emotional excitement. The defendant must have acted before a reasonable time had passed to calm down and before reason took over again. the law does not say how much time is

establish provocation, the evidence must have demonstrated that the provocation must have amounted to “that which would cause the reasonable person to lose control.” *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). We find that the facts of this case do not support the existence of provocation. The evidence indicates that the victim and his friend joked with defendant about to whom the bedroom belonged and that they were laughing. The exchanges between the victim and defendant were simply inadequate to support the theory that defendant was provoked. His counsel was not ineffective for failing to request the instruction.

Defendant next argues that the trial court erred in denying his motion for a directed verdict as to assault with intent to murder. We disagree.

We review a trial court’s decision on a motion for directed verdict by examining the evidence presented up until the motion was made in a light most favorable to the prosecution to determine whether a rational finder of fact could conclude that the essential elements of the crime had been proved beyond a reasonable doubt. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996). To prove assault with intent to murder, the prosecution must present evidence that there was “(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The element of intent can be proved through inference drawn from the evidence. *People v Johnson*, 215 Mich App 658, 672; 547 NW2d 65 (1996).

Defendant asserts that the fact that he fired several shots at the victim from a close range and hit the victim in the shoulders demonstrates that he did not hold the requisite intent to kill, but intended only to injure the victim. This argument is without merit. The injuries sustained by the victim were the type that were, in over seventy percent of cases, fatal; the surgeon did not believe that he was going to survive. Defendant also fired several shots at the victim from close range. This in itself is sufficient evidence to infer defendant’s intent to kill. The trial court did not err in denying defendant’s motion for directed verdict.

Finally, defendant argues that the trial court was without authority to order restitution to Foote Hospital and erred in failing to consider defendant’s ability to pay when ordering restitution. We find that the trial court was permitted to order restitution, but remand for consideration of the appropriate statutory factors.

Defendant was ordered to pay \$68,431 for medical restitution. The Crime Victim’s Rights Act, MCL 780.751 *et seq.*; MSA 28.1287(751) *et seq.*, authorizes a court to order payment of restitution

needed. That is for you to decide. The test is whether a reasonable time passed under the circumstances of this case.

(5) If you find that the crime would have been manslaughter had the person died, then you must find the defendant not guilty of assault with intent to murder

to victims. MCL 780.766; MSA 28.1287(766) and MCL 780.767; MSA 28.1287(767). It provides, in part,:

If a crime results in physical or psychological injury to a victim, the order of restitution may require that the defendant do 1 or more of the following, as applicable:

- (a) Pay an amount equal to the cost of actual medical and related professional services and devices relating to physical and psychological care.
- (b) Pay an amount equal to the cost of actual physical and occupational therapy and rehabilitation. [MCL 780.766(5); MSA 28.1287(766)(5).]

Clearly, the trial court was authorized to order payment of costs associated with the victim's hospitalization as a result of defendant's criminal conduct.

The statute provides: "In determining the amount of restitution, the court shall consider the defendant's earning ability, financial resources, and any other special circumstances that may have bearing on the defendant's ability to pay." MCL 780.766(13); MSA 28.1287(766)(13). Additionally:

The court, in determining whether to order restitution under [MCL 780.766; MSA 28.1287(766)] and the amount of that restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources and earning ability of the defendant, the financial needs of the defendant and the defendant's dependents, and such other factors as the court considers appropriate. [MCL 780.767(1); MSA 28.1287(767)(1).]

This Court has recently concluded that a trial court must, at a minimum, consider the factors included in MCL 780.767(1); MSA 28.1287(767)(1), even in the absence--or ambiguity--of a defendant's objections to restitution. *Grant, supra* 210 Mich App 471-473; *People v Hart*, 211 Mich App 703, 707 (1995). *Grant* distinguished the restitution provisions of the Crime Victim's Rights Act from the statute at issue in *People v Music*, 428 Mich 356; 408 NW2d 795 (1987), where the Supreme Court held that "the trial court did not err in failing to hold a hearing *or* to make an express determination regarding the defendant's ability to pay under MCL 771.3(5)(a); MSA 28.1133(5)(a)."² *Grant, supra* 210 Mich App 472.

² MCL 771.3(5)(a); MSA 28.1133(5)(a) pertains to probationers. The particular section at issue in *Music* has been amended. At the time *Music* was decided, it read:

The court shall not require a probationer to pay restitution or costs unless the probationer is or will be able to pay them during the term of probation. In determining the amount and method of payment of restitution and costs, the court shall take into account the financial resources of the probationer and the nature of the burden that

Here, as in *Grant*, the trial court gave no consideration to defendant's ability to pay, his earning capacity or his financial needs. Thus, it appears appropriate for this Court to vacate the restitution order and remand the matter for reconsideration by the trial court.

Affirmed in part and remanded. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Janet T. Neff

/s/ Mary A. Chrzanowski

payment of restitution or costs will impose, with due regard to his or her other obligations. [*Grant, supra* at 472 n 2.]