STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EUGENE BERNARD SMITH,

Defendant-Appellant.

UNPUBLISHED
January 10, 1997

No. 188814
LC No. 94-013679-FH

Before: MacKenzie, P.J., and Wahls and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of voluntary manslaughter, MCL 750.321; MSA 28.553, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to serve eight to fifteen years' imprisonment for the voluntary manslaughter conviction, consecutive to two years for the felony-firearm conviction. We affirm.

Defendant argues that the trial court abused its discretion in foreclosing defendant's attempt to testify regarding specific prior acts of violence by the decedent. We disagree. We review a trial court's decision regarding the admission of evidence for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *Id*.

At trial, defendant asserted a claim of self-defense and, in support of his claim, defendant attempted to testify regarding prior acts of violence by the decedent. The prosecution objected to defendant's testimony on hearsay grounds and the trial court sustained the objection. Prior acts of violence by the victim may be relevant to the issue of self-defense. *People v Taylor*, 195 Mich App 57, 61; 489 NW2d 99 (1992). Evidence of other bad acts may be admitted if: (1) the evidence is offered for a proper purpose under MRE 404(b), (2) the evidence is relevant under MRE 402, (3) the probative value of the evidence is not substantially outweighed by unfair prejudice pursuant to MRE 403, and (4) the trial court, upon request, provides a limiting instruction to the jury. *People v*

McMillian, 213 Mich App 134, 137-138; 539 NW2d 553 (1995). However, as with other forms of evidence, the party introducing prior bad acts evidence must have "personal knowledge of the matter." MRE 602.

Here, defendant solely attested to prior bad acts evidence made known to him by the decedent's girlfriend, Autumn Sukey. At trial, defendant unequivocally stated that, prior to the incident in question, he did not know and had never seen the decedent. Because defendant lacked personal knowledge of the alleged prior bad acts, we conclude that the trial court did not abuse its discretion in excluding defendant's hearsay testimony.

Defendant also contends that the trial court inadequately instructed the jury. First, defendant argues that the trial court erred in reading CJI2d 7.18, the deadly aggressor instruction. We disagree. We review jury instructions as a whole to establish if error has been committed. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991).

In Michigan, the defense of self-defense is not available when a defendant is the initial aggressor unless he withdraws from any further encounter with the victim and communicates such withdrawal to the victim. *People v Kemp*, 202 Mich App 318, 322-323; 508 NW2d 184 (1993). Accordingly, a court's failure to sua sponte charge the jury on the deadly aggressor instruction where the facts surrounding the confrontation are conflicting with regard to who initiated the encounter has been held to be reversible error. See *People v Peoples*, 75 Mich App 616, 622-625; 255 NW2d 707 (1977). In the present case, there was conflicting testimony regarding the encounter between the victim and defendant. Both defendant and Sukey testified that the decedent forced his way inside Sukey's apartment. Calvin Pruitt, the man who accompanied the victim to Sukey's apartment, testified that the victim withdrew from Sukey's doorway at defendant's request and that, notwithstanding the victim's withdrawal, defendant fired his gun through the door, striking the victim in the chest. Moreover, defendant admitted that, prior to the victim's forceful entry into Sukey's apartment, he retrieved his gun from Sukey's bedroom and placed it on the victim's hand as the victim attempted to remove the chain lock from the front door while standing in the hallway. Because there was some evidence to show that defendant initiated the attack, we conclude that the initial aggressor instruction was both proper and necessary.

Second, defendant argues that the trial court erred in failing to specifically define the term "firearm" in its charge to the jury. We disagree.

The crime of felony-firearm requires proof (1) that the defendant carried or possessed a firearm, (2) during the commission or attempted commission of a felony. *People v Williams*, 212 Mich App 607, 608; 538 NW2d 89 (1995). Here, the trial court instructed the jury in accord with CJI2d 11.34, the standard felony-firearm instruction. Because the charge clearly and concisely set forth the requisite elements of the offense, as well as the prosecution's burden of proof, and because it was uncontested that defendant wielded a firearm, we conclude that defendant's rights were sufficiently protected

notwithstanding the court's failure to specifically define "firearm." See *People v Parker*, 133 Mich App 358, 361; 349 NW2d 514 (1984).

Lastly, defendant challenges the propriety of the sentence imposed for his voluntary manslaughter conviction. First, defendant takes issue with the sentencing court's factual findings. Here, the court departed from the recommended guidelines' range of one to five years and sentenced defendant to a minimum term of eight years' imprisonment for his voluntary manslaughter conviction. The court articulated several reasons for its upward departure, including the fact that defendant carried a weapon containing fifty rounds of ammunition into Sukey's apartment. Defendant claims that there was no evidence to support the court's finding. We disagree. We review a sentencing court's findings of fact for clear error. *People v Hellis*, 211 Mich App 634, 650; 536 NW2d 587 (1995). We will not find error if the court's findings were objectively made and verified. *Id*. Upon review of defendant's own testimony, we conclude that the court's finding was supported by the evidence and, therefore, we fail to find clear error.

Second, defendant argues that his sentence is disproportionate. Again, we disagree. We review a trial court's sentencing decision for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 635-636, 656-657; 461 Mich 1 (1990). A sentencing court has abused its discretion when a sentence is not proportionate "to the seriousness of the circumstances surrounding the offense and the offender." *People v Poppa*, 193 Mich App 184, 187; 483 NW2d 667 (1992).

When a sentencing court departs from the sentencing guidelines, this Court must ask whether the case involves circumstances that are not adequately embodied within the variables used to score the guidelines. *People v Phillips (On Rehearing)*, 203 Mich App 287, 290-291; 512 NW2d 62 (1994). Further, this Court must consider the extent of the departure, but not simply the departure itself, in deciding whether a sentence is violative of the principle of proportionality. *Id.* Here, the trial judge based his upward departure from the recommended guidelines' range upon the fact that defendant carried an extremely lethal weapon into Sukey's apartment, defendant lacked remorse, defendant fled from the crime scene, and defendant concealed physical evidence. Because these factors are not embodied within the variables used to score the guidelines for homicide (see Michigan Sentencing Guidelines (2d ed, 1988), pp 77-78), we conclude that the sentencing court sufficiently justified its departure from the guidelines. Given that defendant wielded an AK-47 within the confines of a residence and fired the weapon through a closed door thereby taking the life of the decedent and endangering the lives of others, the one to five-year minimum sentence range recommended by the guidelines would have been a mere slap on the wrist and would likely have been ineffective in deterring defendant from similar future conduct. In sum, the sentence imposed, a departure from the recommended guidelines range, was not an abuse of discretion.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Myron H. Wahls
/s/ Jane E. Markey