

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALLEN KEITH SNELL,

Defendant-Appellant.

UNPUBLISHED

May 22, 1998

No. 197152

Recorder's Court

LC No. 95-007097

Before: Whitbeck, P.J., MacKenzie and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for one count of second-degree murder, MCL 750.317; MSA 28.549, one count of assault with intent to murder, MCL 750.83; MSA 28.278, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to life in prison for the second-degree murder conviction, life in prison for the assault with intent to commit murder conviction, and two years in prison for the felony-firearm conviction. The second-degree murder and assault with intent to murder sentences are to run concurrently with each other, but consecutively to defendant's felony-firearm sentence. We affirm.

I. Ineffective Assistance of Counsel

Defendant argues that he received ineffective assistance of counsel because counsel failed to request an instruction on intoxication as a defense to assault with intent to murder. We disagree.

In order to establish a denial of effective assistance of counsel, a defendant is required to demonstrate that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Torres (On Remand)*, 222 Mich App 411, 424; 564 NW2d 149 (1997).

Although the prosecution presented evidence at trial that defendant consumed alcohol as well as some marijuana and cocaine prior to committing the assault, we conclude that the evidence clearly

showed that defendant was able to form the intent necessary to be convicted of assault with intent to murder. *People v Mills*, 450 Mich 61, 82-83; 537 NW2d 909, modified on other grounds 450 Mich 1212 (1995). Defendant's testimony at trial revealed that he was in control of his actions when he shot one victim twice as that victim attempted to climb out of the apartment window to escape the gun fire. Because the evidence did not support an intoxication instruction, counsel was not ineffective in failing to request it. Therefore, defendant's ineffective assistance of counsel argument is without merit.

We need not review defendant's claim that the trial court had a sua sponte obligation to give the instruction for intoxication. Defendant did not preserve this issue for appeal because he did not set it forth in his statement of questions involved. MCR 7.212(C)(5); *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995). In any event, in light of our above analysis, an instruction on an intoxication defense would have been inappropriate.

II. Voluntary Manslaughter

Defendant argues that the trial court erred in failing to give a requested instruction for voluntary manslaughter. We disagree.

This Court reviews jury instructions in their entirety for error requiring reversal. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). "Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *Id.* Jury instructions should be read as a whole. *Id.* Even if somewhat imperfect, jury instructions do not constitute error requiring reversal if they fairly present the issues for trial and sufficiently protect the defendant's rights. *Id.* A trial court need not give requested instructions unwarranted by the facts. *Id.*

We conclude that there was insufficient evidence to warrant the reading of the instruction for voluntary manslaughter because there was no evidence that defendant killed the victim in the heat of passion. *People v Pouncey*, 437 Mich 382, 387-388; 471 NW2d 346 (1991). Therefore, the trial court properly denied defendant's request for the voluntary manslaughter instruction.

III. Sentencing

Defendant argues that the trial court improperly calculated his score for Offense Variable (OV 9) under the sentencing guidelines. However, "appellate relief is not available for claimed errors based on alleged misinterpretation or misapplication of the scoring guidelines." *People v Peerenboom*, 224 Mich App 195, 201; 568 NW2d 153 (1997). Defendant's position is that the trial court misapplied OV 9 by determining that he was the leader in a multiple offender situation. This is a type of claimed error in applying or interpreting the sentencing guidelines for which appellate relief is not permitted under *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997) as the "guidelines do not have the force of law."

Affirmed.

/s/ William C. Whitbeck
/s/ Barbara B. MacKenzie
/s/ William B. Murphy