STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERVIN EUGENE BELL,

Defendant-Appellant.

UNPUBLISHED
December 4, 1998

No. 204294
Kalamazoo Circuit Court
LC No. 96-001154 FC

Before: Whitbeck, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for second-degree murder, MCL 750.317; MSA 28.549, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and resisting and obstructing an officer in the discharge of his duty, MCL 750.479; MSA 28.747. Defendant was sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to forty to sixty years for the second-degree murder conviction, two years for the felony-firearm conviction, and two to four years for the resisting and obstructing a police officer conviction, the second-degree murder and resisting and obstructing sentences to run concurrently with each other and consecutive to the felony-firearm sentence. We affirm.

I

Defendant first argues that the evidence presented by the prosecution was insufficient to sustain the jury's verdict that he was guilty of second-degree murder. "The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). On appeal, defendant admits that he caused the death of the victim, but insists that the prosecution failed to establish the element of malice. We disagree.

Malice in the context of second-degree murder is defined as either the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *Id*. at 464. Accordingly, "[t]he intent to do an act in obvious disregard of life-endangering consequences is a malicious intent."

Id. at 466. The evidence in the present case, viewed in a

light most favorable to the prosecution, *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998), establishes that defendant deliberately shot the victim in the head. Several witnesses testified that defendant first hit the victim with the barrel of the gun, and then pointed the gun at the victim's head and fired. We find that when presented with this evidence, a rational trier of fact could have found the essential elements of second-degree murder, including malice, were proved beyond a reasonable doubt.

II

Defendant next argues that the trial court erred when it failed to instruct the jury on the defense of accident. We disagree.

Because defendant neither submitted an accident instruction nor objected to the jury instructions given by the trial court, he has waived this issue for purposes of appellate review unless relief is necessary to avoid manifest injustice. *People v Swint*, 225 Mich App 353, 376; 572 NW2d 666 (1997). "Manifest injustice occurs where the erroneous or omitted instruction pertains to a basic and controlling issue in the case." *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Our review of the record reveals that although the word "accident" was used by defendant and his counsel, the defense of accident was not a basic and controlling issue in the case. Rather, the defense focused on the lack of planning or premeditation, in an attempt to avoid a conviction of first-degree murder. See MCL 750.316; MSA 28.548. Accordingly, we find that no manifest injustice resulted from the trial court's failure to sua sponte instruct the jury on the defense of accident.

Defendant likens his case to that in *People v Jones*, 395 Mich 379, 236 NW2d 461 (1975), in which our Supreme Court held that it was error to not instruct the jury on the theory of accident. We find *Jones* easily distinguishable from the present case. In *Jones*, the defendant's version of events was that he never aimed the gun at the victim, did not know it was loaded, and that it accidentally discharged when he was bumped by a person fleeing the scene. *Id*. at 385. In contrast, defendant testified that although he did not intend for the gun to discharge, he deliberately and repeatedly struck the victim in the head with a cocked and loaded handgun which defendant believed had a "hair trigger."

As our Supreme Court has held, the accused need not actually intend the death of his victim to be guilty of second-degree murder. *Goecke*, *supra* at 466. We find that defendant's own version of the events at issue demonstrate the mens rea for second-degree murder. Accordingly, an instruction that the jury should find defendant not guilty if it found that the gun fired accidentally would not have been appropriate. See *People v Fiorini*, 85 Mich App 226, 230; 271 NW2d 180 (1978) ("The court should not give instructions not supported by the evidence.").

Furthermore, even if we were to determine that the trial court should have given an instruction on the defense of accident, we would find the error harmless because, in light of the strong evidence of defendant's guilt – including testimony that a safety feature prevented the gun from being fired without the trigger being pulled, forensic testimony that the fatal shot was fired approximately eighteen inches from the victim's head, eyewitness testimony that defendant aimed the gun at the victim's head and deliberately fired, and defendant's own testimony – it is highly probable that the alleged instructional

error did not contribute to the jury's verdict that defendant was guilty of second-degree murder. *People v. Gearns*, 457 Mich 170, 205, 207; 577 NW2d 422 (1998).

III

Defendant also argues that his forty- to sixty-year sentence violates the doctrine of proportionality. Again, we disagree.

The sentencing guidelines do not apply to habitual offenders like defendant, and it would be inappropriate to use them in any way when reviewing defendant's sentence. *People v Gatewood (After Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). Nonetheless, the principle of proportionality announced in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), applies, which requires sentences to be "proportionate to the seriousness of the circumstances surrounding the offense and the offender."

We have reviewed carefully the record in this case, and conclude that in light of defendant's extensive criminal history, which demonstrates his repeated refusal to conform his actions to the law, and the seriousness of the instant offense, in which defendant shot the victim in the head at close range, defendant's forty- to sixty-year sentence is proportionate to the offense and the offender, and does not constitute an abuse of discretion. *Milbourn, supra*.

Affirmed.

/s/ William C. Whitbeck
/s/ Janet T. Neff