

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

v

JESSIE RAY SMITH,

Defendant-Appellant/Cross-Appellee.

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UNPUBLISHED

May 26, 2000

No. 210021

Wayne Circuit Court

LC No. 97-002981

Before: Cavanagh, P.J., and Holbrook, Jr. and Kelly, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder. The trial court set aside his conviction and sentenced defendant as a second habitual offender to serve eight to twenty years' imprisonment. Defendant appeals his conviction as of right arguing insufficiency of the evidence and the defense of involuntary intoxication. The prosecution cross-appeals the trial court's downward departure from the sentencing guidelines. We affirm.

Defendant lived in a house with three other men, one of whom was the victim of a fatal stabbing. On the day of the stabbing, defendant claims he spent twelve hours at a local bar drinking. He and the victim had a fight concerning certain living arrangements, which fight the victim instigated. Defendant recalled pulling a knife from the victim's body, but he had no recollection of actually stabbing the victim. He remembered another roommate yelling at him and claims that he called 9-1-1, though he cannot recall anything from that point until after the police arrived.

The other roommates testified that they saw the victim come out of the bedroom and fall to the floor, dead, though neither witnessed the actual stabbing. Neither witness heard any yelling. They both left the apartment, but returned a short time later to find defendant "sleeping or drunk on the couch." One of the men testified that he called the police. He also testified that, earlier in the day, he had driven defendant to the bar and heard defendant state that he was going to stab the victim.

The officers who reported to the scene found defendant severely intoxicated and were unable to revive him. They also observed the victim lying on the living room floor and a trail of blood leading from

the bedroom. In the bedroom, they saw blood on the bed and a tear in the sheets. The prosecution theorized that defendant stabbed the victim while he was sleeping.

Defendant makes two arguments on appeal. First, he claims that a single stab wound and his version of the crime do not support an inference of malice. He also argues that the evidence only established that there had been an assault, and that, since assault is a specific intent crime, he did not and could not possess the requisite intent because of his severely intoxicated state. We review the sufficiency of the evidence by taking the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Vronko*, 228 Mich App 649, 654; 579 NW2d 138 (1998).

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. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). “Malice” is defined as “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.* Malice for second-degree murder can be inferred from evidence that the defendant “intentionally set in motion a force likely to cause death or great bodily harm.” *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998). The crime does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of life-endangering consequences. *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999), citing *Goecke*, *supra* at 466.

Defendant conceded having inflicted the fatal stab wound. The trial court took note of the argument between defendant and the victim, but also noted that quite a bit of time elapsed between that argument and the killing. The court opined that, had there not been such a significant time lapse between the argument and the killing, it would have found defendant guilty of manslaughter. However, despite defendant’s intoxication, the court found that “it was a volitional act, that he did commit the act, and that there was enough willfulness involved to satisfy the general intent requirement.” The trial court found that defendant “had the intent to do bodily harm or create a high risk of death or bodily harm knowing that death would possibly be the result of his actions.” We agree with the trial court’s findings and hold the evidence sufficient to support a conviction of second-degree murder. Moreover, since the defense of diminished capacity is not a defense to general intent crimes such as second-degree murder, we are not persuaded by defendant’s argument that his intoxication prevented him from forming the requisite intent. *People v Biggs*, 202 Mich App 450, 454 509 NW2d 803 (1993).

On cross-appeal, the prosecution argues that the trial court abused its discretion in departing downward from the sentencing guideline range because the court based its departure on time served for a prior, unrelated conviction. The sentencing court indicated that it did consider time served by defendant for a prior conviction of first-degree murder in reaching its sentence. The court also considered that the argument which precipitated the stabbing was caused by the victim. We are asked to decide whether consideration of time served for a prior invalid conviction of which a defendant is ultimately acquitted on retrial is justification for a downward departure from the sentencing guidelines.

The trial court set aside the second-degree murder conviction and sentenced defendant as a second habitual offender. Sentencing guidelines are not applicable to the sentencing of habitual offenders. *People v Alexander*, 234 Mich App 665, 579; 599 NW2d 749 (1999). "The fact that the trial court unnecessarily filled out a SIR departure reason form does not somehow make the underlying guidelines an issue." *People v Edgett*, 220 Mich App 686, 695; 560 NW2d 360 (1996). Our review is limited to whether the sentencing court abused its discretion. *Id.*, citing *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). A court abuses its discretion if the sentence imposed violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Under the principle of proportionality, the sentence imposed must be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id.* A sentencing court must articulate on the record the criteria considered and the reasons supporting its decision regarding the length and nature of the sentence imposed. *People v Sandlin*, 179 Mich App 540, 542; 446 NW2d 301 (1989). These factors should be balanced with the following sentencing objectives: (1) reformation of the offender, (2) protection of society, (3) punishment of the offender, and (4) deterrence of others from committing like offenses. *People v Rice*, 235 Mich App 429, 446; 597 NW2d 843 (1999), citing *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972). The sentencing court need not address each of these goals when imposing sentence. *People v Johnson*, 173 Mich App 706, 709; 434 NW2d 218 (1988).

Even if the sentencing guidelines were applicable to this case, a downward departure would have been appropriate if "objective and verifiable." *People v Hill*, 192 Mich App 102; 480 NW2d 913 (1991). The court may consider pre-arrest factors in determining a sentence. *People v Hill*, 192 Mich App 102, 115; 480 NW2d 913 (1991).

The record shows that the court considered the victim's role in this crime, and noted that the victim instigated the argument which preceded the stabbing. In addition, the court considered letters written in support of defendant, defendant's history of alcohol-related problems, and factors noted in defendant's sentencing memorandum. The memorandum indicated that defendant and the victim were friends, and that defendant inflicted only one stab wound with a kitchen knife while under the extreme influence of alcohol. The memorandum also indicated that defendant was convicted of unarmed robbery in 1975, and sentenced to serve probation.<sup>1</sup> It was during this probation period that the murder of which he was acquitted occurred. As noted, there was a gap of twenty-two years between convictions. These are factors that the court could properly take into consideration when imposing sentence. However, the court stated only two reasons for departure in the SIR departure form: the victim's role in the crime and time served for the prior conviction.

We reversed defendant's prior conviction, in part, based on our finding that he was denied effective assistance of counsel. *People v Jessie Ray Smith*, 158 Mich App 220, 232; 405 NW2d 156 (1987). The right to counsel comprehends the right to effective assistance of counsel. *Evitts v Lucey*, 469 US 387, 392; 105 S Ct 830; 83 L Ed 2d 821 (1985). Prior felony convictions obtained without counsel or a valid waiver of the right to counsel are constitutionally infirm and cannot be used for any purpose, including sentence enhancement. *People v Justice*, 216 Mich App 633, 640 n 3; 550 NW2d

562 (1996). Since defendant's prior conviction was constitutionally infirm, it could not be used for any purpose and it was not. The record is clear that only the time served was considered. The court did not indicate in any way that it was fashioning its sentence based on the prior conviction. Regardless of the court's gratuitous written reasons for its departure from the inapplicable sentencing guidelines, we cannot find an abuse of discretion in view of the studied analysis of other factors recited and relied on by the sentencing judge.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Donald E. Holbrook, Jr.

/s/ Michael J. Kelly

<sup>1</sup> The PSIR incorrectly noted that defendant was convicted of armed robbery.