

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY W. RUFFIN,

Defendant-Appellant.

UNPUBLISHED

August 20, 1996

No. 175396

LC No. 93-007201

Before: Bandstra, P.J., and Markman and M.D. Schwartz,* JJ.

PER CURIAM.

Defendant appeals as of right his convictions of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two years in prison for the felony-firearm conviction and to a consecutive life sentence for the second-degree murder conviction. We remand.

Defendant first argues that the evidence presented at trial was insufficient to support his conviction of second-degree murder. We disagree. When determining whether sufficient evidence has been presented to sustain a conviction, we view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992). Defendant contends that, considering the imperfect self-defense theory he advanced at trial, there was insufficient evidence of malice to support a conviction for second-degree murder. Malice is an element of second-degree murder that can be established with evidence showing that defendant acted with an intent to kill or to cause great bodily harm or did an act in wanton and willful disregard of the likelihood that the natural tendency of the act was to cause death or great bodily harm. *People v Miller*, 198 Mich App 494, 497; 499 NW2d 373 (1993). Malice can be inferred from the facts and circumstances of the killing. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993).

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

Considered in the light most favorable to the prosecution, the evidence in this case shows that defendant aimed his handgun at the victim and fired upon him as he was walking away from defendant. After the victim fired back, defendant continued to shoot until the victim fell to the ground, at which point defendant fled. Defendant admitted to a police officer that he fired at the victim. Evidence showed that the victim was killed with a .38 caliber slug and that defendant fired a .38 caliber handgun. The act of shooting a firearm at another person is clearly an act from which a rational trier of fact can infer an intent to kill or cause great bodily harm.

Defendant argues that the second-degree murder charge should have been mitigated to voluntary manslaughter under an imperfect self-defense theory. See *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). However, this theory is inapplicable where a defendant initiates a confrontation with the intent to kill or do great bodily harm. *Kemp, supra* at 324. The evidence in this case was sufficient for a rational trier of fact to conclude that defendant had initiated the confrontation with that intent.

Defendant argues that the trial court's findings of fact were insufficient. In a bench trial, the trial court must make specific findings of fact and state its conclusions of law; however, remand will not be necessary if it clear that the court was manifestly aware of the factual issues and correctly applied the law. *People v Shields*, 200 Mich App 554, 558-559; 504 NW2d 711 (1993). In the court's findings of fact, the court stated:

The court finds him guilty as charged of murder in the second degree and felony firearm. He shot the man in the back. He had no right to do that. He had no imperfect self-defense. No right of self-defense. The man was walking away, posing no threat to him whatsoever when he fired at him and shot and killed him, shot the man in the back.

It is clear that the court resolved the factual issues. The court concluded that the evidence did not support the theory of an imperfect self-defense. The court found that the victim was posing no threat to defendant and the victim was shot in the back. It is clear that the court was aware of the factual issues and correctly applied the law, making remand for further findings of fact unnecessary. *Id.*

Defendant next argues that the prosecutor failed to fulfill a statutory obligation to produce Derrick Newsome as a witness. However, a claim that the res gestae witness statute has been violated is properly preserved for appeal only if it is raised in a motion for a new trial. *People v Simpson*, 207 Mich App 560, 561-562; 526 NW2d 33 (1994); *People v Calhoun*, 178 Mich App 517, 520; 444 NW2d 232 (1989). As a general rule, issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Defendant did not complain about the failure to produce Derrick Newsome at trial although a due diligence hearing was held with respect to another witness, Edward Anderson. We find no compelling or extraordinary circumstances to justify our reviewing this unpreserved issue on appeal.

Defendant argues that offense variable (OV) 3 of the sentencing guidelines was improperly scored twenty-five points rather than ten points because the death occurred as part of a combative situation. Appellate review of a scoring decision is very limited, and we will not disturb a score if there is evidence to support it. *People v Hoffman*, 205 Mich App 1, 24; 518 NW2d 817 (1994). According to the instructions for OV 3, twenty-five points are to be imposed when there is an "[u]npremeditated intent to kill; or intent to do great bodily harm; or creation of a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result." The evidence that defendant initiated the confrontation by shooting at the victim while he was walking away from defendant supports scoring twenty-five points under this standard. With respect to defendant's "combative situation" argument, the trial court could reasonably have concluded that the act of defendant that resulted in the victim's death occurred before any combative situation developed. There was evidence to support scoring twenty-five points under OV 3, and we will not disturb that scoring on appeal.

Finally, defendant contends that his second-degree murder sentence was disproportionate, arguing that a life sentence exceeds the sentencing guidelines' range of 120 to 300 months and the trial court did not articulate adequate reasons for a guidelines departure. We agree. Where the sentence imposed exceeds the recommended minimum range, the trial court must articulate both on the record at sentencing and on the sentencing information report its reasons for departing from the guidelines. *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987); *People v Adams*, 195 Mich App 267, 280; 489 NW2d 192 (1992), modified in part 441 Mich 916; 497 NW2d 182 (1993). The court failed to do so in this case only stating what is true for every second degree murder case, that the victim is dead and he didn't deserve to die.¹ Upon remand, the trial court should articulate on the record its rationale for departing from the sentencing guidelines or vacate the sentence and resentence within the guidelines.

In the absence of any indication of the trial court's reasoning for departing from the guidelines, we do not further consider defendant's proportionality argument at this time.

We remand. Defendant's convictions are affirmed. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Michael D. Schwartz

¹Contrary to the dissent's suggestion, this case does not involve a departure explained by reference to a guideline factor or any reweighing of any guideline variable