

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO CORNELL NELSON,

Defendant-Appellant.

UNPUBLISHED

March 7, 1997

No. 191258

Recorder's Court

LC No. 95-004416

Before: White, P.J., and Cavanagh, and J.B. Bruff,* JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to eighteen to thirty years' imprisonment for the assault with intent to commit murder conviction, to be served consecutive to a two-year term for the felony-firearm conviction. We affirm.

Defendant first claims that the trial court erred in failing, sua sponte, to instruct the jury that adequate provocation would mitigate the charged offense to assault with intent to commit great bodily harm. Defendant's failure to object to the trial court's instructions or request that a specific instruction be given limits our review to the question whether relief is necessary to avoid a manifest injustice to defendant. MCR 2.516(C); *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996); *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Moreover, even if the trial court's instructions are imperfect, reversal is not required if they "fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). Upon review of the record, we find no manifest injustice. The trial court's instruction, which was virtually identical to the instruction contained in CJI2d 17.3, apprised the jury that it had to find that the "circumstances did not legally excuse or reduce the crime." Moreover, the court gave a special instruction, in accord with the Use Note to CJI2d, on specific intent. Finally, the trial court immediately followed the instruction on the charged offense with instructions on the lesser offenses of

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

assault with intent to commit great bodily harm and felonious assault. These instructions, when viewed in their entirety, “fairly presented the issues to be tried and sufficiently protected the defendant’s rights.” *Bell, supra* at 276. Defendant was not denied a fair trial.

Defendant next argues that the trial court abused its discretion in refusing his request for an instruction on the lesser misdemeanor offense of careless, reckless, or negligent discharge of a firearm. We agree, but conclude that the error was harmless.

Defendant was charged with assault with intent to commit murder, MCL 750.83; MSA 28.278. The trial court also instructed the jury on the lesser included offenses of assault with intent to commit great bodily harm, MCL 750.84; MSA 28.279, and felonious assault. MCL 750.82; MSA 28.277. However, the trial court denied defendant’s request for an instruction on the misdemeanor offense of careless, reckless, or negligent use of a firearm, MCL 752.861; MSA 28.436(21).

“[W]hen properly requested, a trial court should instruct a jury on appropriate lesser included misdemeanors if a rational view of the evidence could support a verdict of guilty of the misdemeanor and not guilty of the felony, the defendant has proper notice or has made the request, and the instruction would not result in confusion or injustice.” *People v Taylor*, 195 Mich App 57, 62; 489 NW2d 99 (1992); *People v Stephens*, 416 Mich 252, 261-265; 330 NW2d 675 (1982). In this case, defendant’s request for the instruction was properly made. There is an appropriate relationship between the charged offense and the misdemeanor offense of careless, reckless, or negligent use of a firearm; an instruction on the misdemeanor offense of careless use of a firearm would have not created undue confusion or injustice; and a jury viewing the evidence could have found defendant not guilty of assault with intent to commit murder and guilty of careless discharge. *Taylor, supra* at 62.

Nevertheless, we conclude that any resulting error was harmless. Error in refusing a lesser included offense instruction may be deemed harmless if the jury had “sufficient alternatives with which to express doubts about the defendant’s guilt of the charged offense.” *People v Beach*, 429 Mich 450, 467; 418 NW2d 861 (1988); see also *People v Herbert Ross*, 73 Mich App 588, 592; 252 NW2d 526 (1977). In this case, the trial court apprised the jury of defendant’s theory of the case by instructing the jury on both accident and self-defense. Had the jury accepted defendant’s assertion that the gun discharged accidentally, it could have found defendant guilty of felonious assault. However, the jury rejected both lesser offenses and convicted defendant of the charged offense. Clearly, the jury had no reasonable doubt regarding defendant’s intent to murder. Defendant was not prejudiced by the trial court’s refusal to give his requested instruction.

Defendant’s final claim of error is that the prosecutor engaged in impermissible disparagement of the defense, and that the misconduct denied defendant a fair trial. Defendant did not object to the prosecutor’s remarks at trial. Therefore, appellate review is precluded unless a cautionary instruction could not have cured the prejudicial effect, or unless failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Lee*, 212 Mich App 228, 245; 537 NW2d 233 (1995). Upon review of the record, we conclude that the prosecutor’s remarks did not exceed the permissible scope of prosecutorial conduct, and our refusal

to review the claim would not result in a miscarriage of

justice. Further, any alleged prejudice was cured by the trial court's instruction that the arguments of counsel are not evidence. *People v Ullah*, 216 Mich App 669, 683; 550 NW2d 568 (1996).

Affirmed.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ John B. Bruff