

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEROHN BOWDEN,

Defendant-Appellant.

UNPUBLISHED
October 17, 1997

No. 185203
Recorder's Court
LC No. 94-001205

Before: Fitzgerald, P.J., and Markey and J. B. Sullivan*, JJ.

PER CURIAM.

Defendant was convicted by a jury 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). He was sentenced to a prison term of twenty-five to forty years for the murder conviction and to a mandatory consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's conviction arises from the shooting death of his mother. Defendant allegedly shot his mother multiple times with a semi-automatic weapon. Defendant claimed that his actions were in self-defense and in defense of a third party who had accompanied him to his mother's home.

Defendant first argues that he was deprived of a fair trial by several prosecutorial comments during closing arguments. Defendant failed to preserve this issue by objecting to the allegedly improper comments. Thus, appellate review is foreclosed in the absence of manifest injustice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Manifest injustice will not result from our declination to review this issue because any prejudicial effect of the comments could have been cured by a cautionary instruction. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996). Defendant also claims that trial counsel was ineffective for failing to object to the remarks challenged on appeal. We disagree, because defendant has failed to establish that the ultimate result would have been altered if counsel had made timely objections to the remarks. *Id.* at 687-688.

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

Defendant next argues that his ability to have a fair trial was compromised by the admission into evidence of two guns that were apparently discovered during the course of trial. We disagree. Error requiring reversal may not be based on an evidentiary ruling unless a substantial right was affected. MRE 103(a); *Chmielewski v Xermac, Inc*, 216 Mich App 707, 710-711; 550 NW2d 797 (1996). Here, defendant admitted that he shot his mother. We fail to see how advance notice of this physical evidence would have substantially affected defense counsel's ability to prepare his opening statement or otherwise represent defendant. The introduction of the weapon used and the corroborating ballistics evidence did not affect defendant's ability to have a fair trial.

Defendant also argues that his due process rights were violated by the state's failure to preserve the jacket he was wearing at the time of his arrest. We disagree. A defendant's right to due process is violated if the state fails to disclose exculpatory evidence to the defendant. *People v Leigh*, 182 Mich App 96, 98; 451 NW2d 512 (1989). Here, the jacket was lost after testing had been performed on it, and the results of that testing were not only made available to defendant but were presented at trial by the prosecution. The record contained sufficient evidence with respect to the condition of the jacket and the fact that the jacket had a hole that was consistent with the passage of a bullet. Further, defendant has failed to show that the police acted in bad faith by losing the jacket. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992).

Defendant next argues that the trial court erred by failing to instruct the jury on the law of imperfect self-defense. We disagree. This issue was not preserved and review is not necessary to avoid manifest injustice because there was no factual or legal basis for an instruction on imperfect self-defense. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Imperfect self-defense is a qualified defense that can mitigate second-degree murder to voluntary manslaughter, but it only applies when the defendant would have been entitled to a claim of self-defense except for the fact that the defendant was the initial aggressor. *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). The evidence adduced at trial indicated that defendant was not the initial aggressor. Defendant argues that this rule should be extended to include situations where the defendant's belief that he was in danger was unreasonable or where the defendant acted with excessive force. However, a panel of this Court has explicitly stated that a defendant would not be entitled to claim imperfect self-defense if he acted with excessive force. *People v Kemp*, 202 Mich App 318, 325; 508 NW2d 184 (1993). Therefore, we decline to extend the concept of imperfect self-defense beyond the limits previously set by this Court. Further, defendant's claim that counsel was ineffective by failing to request the instruction is without merit. Counsel is not required to make a request for an instruction that is not supported by the facts or law. See *Stanaway*, *supra* at 687-688.

Defendant next argues that the trial court erred by failing to instruct the jury on the lesser included cognate offenses of involuntary manslaughter and careless, reckless, or negligent use of a firearm. We disagree. Both involuntary manslaughter, MCL 750.329; MSA 28.561, and reckless use of a firearm, MCL 752.861; MSA 28.436(21), require that a defendant fire his weapon involuntarily. Defendant testified that he pointed a loaded weapon at his mother and intentionally pulled the trigger at least one time. Therefore, the evidence did not support the instructions. *People v Bailey*, 451 Mich 657, 671; 549 NW2d 325 (1996).

Finally, defendant argues that his sentence, which was within the guidelines' range and therefore presumptively proportionate, *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987), was excessive. We disagree. Defendant has failed to demonstrate unusual circumstances that would overcome the presumption. The sentence is proportionate to the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 659; 461 NW2d 1 (1990).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Joseph B. Sullivan