STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES BURTON,

Defendant-Appellant.

UNPUBLISHED
January 30, 1998

No. 196717
Recorder's Court
LC No. 95-002518

Before: McDonald, P.J. and Wahls and J.R. Weber*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82, MSA 28.277 (as a lesser offense to assault with intent to murder), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was subsequently adjudicated a fourth-felony habitual offender, MCL 769.12; MSA 28.1084, and sentenced to an enhanced term of seven to fifteen years' imprisonment for the felonious assault conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm. This case has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the trial court erred in rejecting his request for an instruction on the lesser misdemeanor offense of careless, reckless or negligent use of a firearm, MCL 752.761; MSA 28.436(21). We disagree.

A trial court need not instruct on a lesser included misdemeanor offense where the requested misdemeanor is not supported by a "rational view" of the evidence. *People v Steele*, 429 Mich 13, 20; 412 NW 2d 206 (1987); *People v Stephens*, 416 Mich 252, 261-265; 330 NW2d 675 (1982).

The reckless use of a firearm statute, MCL 752.861; MSA 28.436(21) states:

> Any person who, because of carelessness, recklessness or negligence, *but not wilfully or wantonly*, shall cause or allow any firearm under his immediate

---

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

> control, to be discharged so as to kill or injure another person, shall be guilty of a misdemeanor . . . .

Thus, in order to be entitled to a jury instruction on careless, reckless or negligent use of a firearm, the evidence, rationally viewed, must support a conclusion that the defendant's conduct amounted to carelessness, recklessness or negligence. Additionally, the evidence must support the conclusion that the defendant's conduct was not willful *or* wanton. Willfully "means that the defendant knowingly created the danger and intended to cause injury," and wantonly "means that the defendant knowingly created the danger and knew what would probably happen when he did it." CJI2d 11.22, citing *People v McCarty*, 303 Mich 629, 633; 6 NW2d 919 (1942); *People v Orr*, 243 Mich 300, 308; 220 NW 777 (1928); *People v Campbell*, 237 Mich 424, 428-429; 212 NW 97 (1927).

Defendant cites *People v Taylor*, 195 Mich App 57; 489 NW2d 99 (1992), for the proposition that failure to give the requested misdemeanor instruction constituted error. In *Taylor*, this Court held that failure to instruct on reckless use of a firearm constituted error where the "[d]efendant testified that she threatened her husband with the shotgun in self-defense, then intentionally fired the gun without aiming it while her eyes were closed." *Id.* at 63. The evidence in this case likewise indicates that defendant intentionally or deliberately fired a gun. We are not convinced that *Taylor* is correct in its conclusion that the "reckless use of a firearm" statute may apply when a weapon is intentionally discharged. That issue aside, however, what distinguishes this case from *Taylor* is that, in *Taylor*, there was testimony that the defendant fired the gun "*without aiming it* while her eyes were closed." Evidence that the defendant fired the gun "without aiming it" and with her eyes closed arguably could support a finding that the defendant did not intend to cause injury or know that injury probably would happen when she acted and, thus, did not act willfully or wantonly.

In contrast to *Taylor*, here both prosecution witnesses testified that defendant pointed the gun at the victim, Richard Johnson, before firing. More significantly, defendant himself admitted that he "pointed it [the gun] at Mr. Johnson." Viewed as a whole, defendant's testimony indicates that he intended to shoot Johnson, albeit in self-defense.[1] In this context, this case is similar to *People v Dabish*, 181 Mich App 469, 474; 450 NW2d 44 (1989), wherein this Court stated:

> Defendant testified that he made a conscious, mental decision to aim the gun at Jackson and pull the trigger so that the pellets would strike the victim. We conclude that this willful or conscious and knowing action by defendant precludes application of the reckless discharge instruction in this case. See CJI 11:3:03. Moreover, we note that defendant does not argue that he did not intend to shoot Officer Jackson, only that he did it with the belief that it was necessary for self-defense or the defense of his property. Therefore, as the evidence was not appropriate to support an instruction on reckless discharge of a firearm, the court did not err in refusing to give that instruction.

Accordingly, we conclude that this case is distinguishable from *Taylor* and that the trial court did not err in determining that the evidence did not support an instruction on the misdemeanor offense of careless, reckless or negligent use of a firearm.

Defendant's remaining assertion is that the trial court erred in precluding him from cross-examining the victim regarding pending charges. Defendant contends that under *People v Whitty*, 96 Mich App 403, 418; 292 NW2d 214 (1980) and *People v Torrez*, 90 Mich App 120, 124-125; 282 NW2d 252 (1979), even without laying a foundation, he was entitled to cross-examine regarding possible interest or bias the victim may have had in testifying for the prosecution, absent proof that there was any bargain or deal with the prosecution. *Whitty* and *Torrez* were cases in which the witness in question had been arrested and arraigned on the outstanding charges; here, defense counsel advised the court at trial that the victim had never yet been arrested. Thus, there had been no occasion for the victim to even know that such charges were pending, let alone to have colored his testimony in exchange for some prosecutorial promise. *Whitty* and *Torrez* are therefore distinguishable on the facts. Furthermore, given the prosecutor's representation that there was no arrangement of any kind with the victim to provide consideration in exchange for his testimony, any error in restricting cross-examination on this point was clearly harmless. *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994).

Affirmed.

/s/ Gary R. McDonald
/s/ Myron H. Wahls
/s/ John R. Weber

[1] Although defendant testified that he closed his eyes, he explained that he did so because he was afraid of being shot, not because of any ambivalent intent.