STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC DWAYNE HATCHER,

Defendant-Appellant.

UNPUBLISHED
March 3, 1998

No. 193346
Recorder's Court
LC No. 95-003178

Before: McDonald, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial 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). The trial court sentenced defendant to seventeen to thirty-five years' imprisonment for the murder conviction, and to the statutory two-year term for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred reversibly when it refused to instruct the jury on the lesser offenses of involuntary manslaughter-gross negligence, MCL 750.321; MSA 28.553, and careless and reckless or negligent discharge of a firearm causing death, MCL 752.861; MSA 28.436(21). This Court reviews jury instructions in their entirety. *People v Ullah*, 216 Mich App 669, 677; 550 NW2d 568 (1996). Even if the instructions are imperfect, reversal is not required if they fairly presented the issues and sufficiently protected the defendant's rights. *Id.* The trial court is not required to instruct the jury on a cognate lesser included offense where the evidence presented at trial is insufficient to support a conviction of the lesser offense. *People v Hendricks*, 446 Mich 435, 444; 521 NW2d 546 (1994); *People v Cheeks*, 216 Mich App 470, 479; 549 NW2d 584 (1996).

At trial, the prosecution presented evidence that defendant told the police several different versions of how the victim was shot and killed. Defendant argues the evidence of his statement to the arresting officer that the gun accidentally fired when he tripped over a wire while walking downstairs supported giving the requested instructions. We disagree. This evidence was insufficient to support a conviction of either involuntary manslaughter-gross negligence or careless and reckless or negligent

discharge of a firearm causing death. See *People v Richardson*, 409 Mich 126; 293 NW2d 332 (1980). Instead, this evidence supported the theory that the killing was an accident. The trial court instructed the jury that the theory of accident was a defense to murder, and that if defendant did not intend to pull the trigger, he was not guilty of murder. We think that these instructions gave the jury the chance to convict defendant in accordance with his theory of the case. If the jury had believed that the shooting was an accident, it would have acquitted defendant outright. In any event, the fact that the jury convicted defendant of second-degree murder rather than the instructed lesser offense of involuntary manslaughter-firearm intentionally aimed indicates that it found defendant acted with malice. Accordingly, any error in the trial court's refusal to give defendant's requested lesser offense instructions was harmless. *People v Beach*, 429 Mich 450, 491-492; 418 NW2d 861 (1988).

Next, defendant argues the trial court gave an erroneous and confusing instruction which essentially required that the jury acquit defendant of second-degree murder before considering the lesser offense of involuntary manslaughter. We disagree. Because defendant failed to object to the instruction at trial and indicated he was satisfied with the instructions, our review of this issue is precluded absent manifest injustice. MCL 768.29; MSA 28.1052, *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Manifest injustice is not present because the trial court's order of deliberations instruction did not instruct the jury that it could not consider the lesser offense unless it first found him not guilty of the principal offense. See *People v Hurst*, 396 Mich 1, 10; 238 NW2d 6 (1976); *People v West*, 408 Mich 332, 342; 291 NW2d 48 (1980); *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982). Although the trial court apparently misspoke in giving the instruction, stating "but you cannot agree about that crime" rather than "or you cannot agree about that crime," taken as a whole, the instruction was proper.[1]

Defendant also argues that he was denied due process and a fair trial because the police lost the jacket the decedent was wearing when he was shot. We disagree. In *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988), the United States Supreme Court held that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute denial of due process. Michigan courts have agreed that absent intentional suppression or a showing of bad faith, the loss of evidence which occurs prior to a defense request for the evidence does not require reversal. *People v Somma*, 123 Mich App 658, 663; 333 NW2d 117 (1983); *People v Tate*, 134 Mich App 682, 692; 352 NW2d 297 (1984). The trial court found that the jacket, although material to the issues presented at trial, was lost prior to defendant's request for its production, and that the police did not harbor any bad faith or intentionally destroy the evidence. Defendant does not challenge this finding and does not argue that the police acted in bad faith; therefore, his argument is without merit. We note that although the jacket itself was not produced, defendant was able to introduce evidence that the jacket had a tear in its back. Moreover, the trial court instructed the jury that it could infer that the jacket would have been evidence unfavorable to the prosecution's case. Accordingly, defendant was not denied a fair trial.

Next, defendant argues the trial court erred when it denied his motion to suppress several statements he made to the police. Defendant first claims that the statement he made when police officers first arrived on the scene should not have been admitted because it was not preceded by

Miranda[2] warnings. Defendant's argument is without merit. Defendant was not in custody at the time he made this statement; therefore, the police were not required to give him *Miranda* warnings. *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995).

Defendant also argues that his four custodial statements should not have been admitted because he was not given *Miranda* warnings prior to making those statements. The trial court held a *Walker*[3] hearing, at which both of the questioning officers testified that they gave defendant proper *Miranda* warnings before talking to him. Defendant did not present any evidence to the contrary. The trial court believed the officers' testimony and admitted defendant's statements. We defer to the trial court's resolution of this credibility issue. *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992).

Defendant also challenges the admission of his statements on the ground that they were taken in violation of his Fifth and Sixth Amendment rights to counsel. Defendant claims that the police's failure to inform him that his mother had called the station and requested that he have a retained attorney present precluded him from making a knowing and intelligent waiver of his right to counsel. We disagree. *People v Bender*, 452 Mich 594, 620-621; 551 NW2d 71 (1996), established a prophylactic rule requiring the police to inform suspects that counsel had been retained for them and was available for consultation. However, the facts of the present case distinguish it from *Bender*. Defendant's mother testified that no attorney had been retained to represent defendant and that to her knowledge no attorney had attempted to contact defendant.

Finally, defendant argues he was denied a fair trial by prosecutorial misconduct. We disagree. Defendant first contends the prosecutor improperly shifted the burden of proof during rebuttal argument. The trial court interrupted the prosecutor and properly instructed the jury regarding the burden of proof. Accordingly, the remarks did not deny defendant a fair and impartial trial. *Ullah, supra* at 681. Defendant also argues the prosecutor improperly gave his personal opinion regarding the evidence and sought a conviction based on sympathy. Defendant failed to object to these allegedly improper comments at trial; therefore, this Court is precluded from reviewing them absent a miscarriage of justice. *People v Rivera*, 216 Mich App 648, 651; 550 NW2d 593 (1996). A miscarriage of justice is absent here because we find that the comments, when viewed in light of defense arguments and the evidence at trial, were not improper. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Moreover, any prejudice resulting from the allegedly improper comments could have been eliminated by a timely curative instruction. *Rivera, supra* at 652. Finally, defendant argues the cumulative effect of the prosecutor's misconduct denied him a fair trial. This argument is without merit because we have found that the allegedly improper conduct was either proper or did not result in prejudice.

Affirmed.

/s/ Gary R. McDonald
/s/ Henry William Saad
/s/ Michael R. Smolenski

[1] The trial court gave the following instruction regarding the order of deliberation:

In this case there are several different crimes you may consider in Count I. In discussing the case you must consider the principal charge of murder in the second degree first. If all of you agree that the defendant is guilty of that crime, you may stop your discussions and return your verdict. If you agree that the defendant is not guilty of murder in the second degree, but you cannot agree about that crime, you should then consider the less serious crime of involuntary manslaughter.

You decide how long to spend on the principal charge of murder in the second degree before discussing involuntary manslaughter. You may go back to the principle [sic] charge of murder in the second degree after discussing the less serious charge of involuntary manslaughter if you want to.

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).