STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EFRAIM GARCIA,

Defendant-Appellant.

UNPUBLISHED
June 30, 1998

No. 195122
St. Clair Circuit Court
LC No. 95-002601 FC

Before: Griffin, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of conspiracy to commit felonious assault, MCL 750.157a; MSA 28.354(1), MCL 750.82; MSA 28.277, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and three counts of felonious assault, MSA 750.82; MSA 28.277. Defendant was sentenced to concurrent terms of two to four years' imprisonment for the conspiracy conviction and for each of the three felonious assault convictions. Defendant was also sentenced to two consecutive years' imprisonment for the felony-firearm conviction. We affirm.

Defendant argues that the trial court should have granted his motion for a mistrial after one of the prosecution's witnesses and an early suspect in the case, testified to having taken a polygraph examination. We do not agree. This Court considers the following five factors in evaluating a trial court's decision regarding polygraph evidence: (1) whether the defendant objected or sought a cautionary instruction; (2) whether the reference to a polygraph test was inadvertent; (3) whether repeated references took place; (4) whether the reference was used to bolster a witness' credibility; and (5) whether the results of the test were admitted instead of just the fact that a test had taken place. *People v Rocha*, 110 Mich App 1, 9; 312 NW2d 657 (1981); *People v Kiczenski*, 118 Mich App 341, 347; 324 NW2d 614 (1982). Here, although defendant did object to the witness' polygraph reference and the result of the test was indirectly alluded to, the reference was inadvertent and amounted to a nonresponsive answer on the part of the witness. Generally, an unresponsive, volunteered answer to a proper question is not cause for granting a mistrial. *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988). Furthermore, the witness' reference to his polygraph

test was not an attempt to bolster the believability of his testimony. The trial court did not err in denying defendant's motion for a mistrial.

Next, defendant argues that the trial court improperly refused to instruct the jury on the lesser-included misdemeanor of reckless use of a firearm, MCL 752.a863; MSA 28.436(24), as an alternative to defendant's felony charge of assault with intent to murder. There is no merit to this claim. Instruction on a lesser offense is not appropriate when, on the facts of the case, the lesser offense is entirely encompassed by completion of the greater. *People v Stephens*, 416 Mich 252, 261-265; 330 NW2d 675 (1982). The trial court's decision is reviewed for an abuse of discretion. *Id.* Here, the evidence established that defendant brought a gun from Detroit to Port Huron. Late at night, defendant put on a pair of rubber gloves, covered his face with a piece of cloth, and took the loaded weapon into a neighborhood. When police confronted defendant, he purposely fired his weapon. Defendant asserts that he fired warning shots in the air and the police officers testified that he leveled the gun and fired directly at them. We find no abuse of discretion.

Defendant also argues that the trial court erred by using the word "immediate" instead of "imminent" when instructing the jury on the duty to retreat before acting in self-defense. Generally, the term "immediate" refers to something that is to occur at once and without delay, while "imminent" refers to something which is impending or threatening to happen at once. See Black's Legal Dictionary, 6th ed (1990), pp 749-750. These definitions are so similar as to be practically identical. Given the similarity between these two terms and given that the voluminous remaining jury instructions were not misstated, the instructions as a whole fairly presented the issues to the jury and protected the rights of defendant. See *People v Brown*, 179 Mich App 131, 135; 445 NW2d 801 (1989). We find no error.

Finally, defendant argues that the trial court abused its discretion in sentencing defendant to two to four years in prison for his conspiracy and felonious assault convictions, when the sentencing guidelines calculation produced a minimum range of zero to twelve months. We do not agree. In making the sentence departure evaluation, the trial judge indicated that he was exceeding the guidelines because (1) defendant's actions were life-threatening; (2) defendant substantially disregarded the lives of others by shooting toward two police officers and a cadet; (3) the offense was gang-related and retaliation-oriented; and (4) defendant was a stranger in Port Huron, where the crime was committed, and he was led there by friends to be a "hit man". The judge did not make an independent finding of guilt on another charge; rather, he properly took into account factors that had not been addressed by the sentencing guidelines. *People v Milbourn*, 435 Mich 630, 659-660; 461 NW2d 1 (1990).

Furthermore, given defendant's two prior misdemeanors and the very serious nature of the shooting that occurred, defendant's sentence did not violate the principle of proportionality. *Id*. at 635-636, 654.

Affirmed.

/s/ Richard Allen Griffin
/s/ Roman S. Gribbs
/s/ Michael J. Talbot