STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSE DAVID HERNANDEZ,

Defendant-Appellant.

UNPUBLISHED
October 27, 1998

No. 202406
Oakland Circuit Court
LC No. 96-149405 FC

Before: Holbrook, Jr., P.J., and Markey and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant 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(1); MSA 28.424(2)(1). The trial court sentenced defendant to fifteen to thirty years' imprisonment for the assault conviction and two years' imprisonment for the felony-firearm conviction. Pursuant to statute, the sentences are consecutive. MCL 750.227b(2); MSA 28.424(2)(2). Defendant appeals as of right, and has filed a brief in propria persona in addition to the brief filed by appellate defense counsel. We affirm.

I. Basic Facts

Defendant's convictions arise out of the shooting of Ruben Colon on June 19, 1996, in Pontiac. As a result of the shooting, Colon is paralyzed from the chest down. Defendant claimed that he shot Colon in self-defense and that his intoxication negated any intent to harm Colon.

II. Discovery Requests

A. Standard of Review

We review a trial court's decisions on discovery requests, including its decision regarding the appropriate remedy for noncompliance with a discovery order, for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998); *People v Davie (After Remand)*, 225 Mich App

592, 597-598; 571 NW2d 229 (1997). In exercising its discretion, the trial court must inquire into all relevant circumstances to balance the interests of the courts, the public, and the parties. *Id.*, 598.

B. The Alleged Violation

Defendant argues that he was denied due process because the prosecutor violated a discovery request by failing to provide him with a copy of a written statement made by Milagros Nieves, one of the witnesses who testified at the trial. On direct examination, Nieves testified that she heard three to four shots. On cross-examination, she admitted that she told Detective Patton, one of the investigating officers, that she had heard two to three shots. On redirect examination, the prosecutor provided Nieves with a copy of the written statement that she had made on November 21, 1996, in which she stated that she had heard three to four shots. The trial court permitted the statement to be introduced, over defendant's objection.

C. MCR 6.201(A)(2) and MCR 6.201(B)

MCR 6.201(A)(2) requires a party, upon request, to provide to all other parties "any written or recorded statement by a lay witness whom the party intends to call at trial, except that a defendant is not obliged to provide the defendant's own statement." Pursuant to MCR 6.201(B), the prosecutor must provide the defendant, upon request, with:

> (1) any exculpatory information or evidence known to the prosecuting attorney;
>
> (2) any police report concerning the case, except so much of a report as concerns a continuing investigation;
>
> (3) any written or recorded statements by a defendant, codefendant, or accomplice, even if that person is not a prospective witness at trial;
>
> (4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and
>
> (5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

A defendant's due process rights to discovery are implicated:

> (1) where a prosecutor allows false testimony to stand uncorrected; (2) where the defendant served a timely request on the prosecution and material evidence favorable to the accused is suppressed; or (3) where the defendant made only a general request for exculpatory information or no request and exculpatory evidence is suppressed. [*People v Tracey*, 221 Mich App 321, 324-325; 561 NW2d 133 (1997).]

Before a party is required to produce discovery under MCR 6.201, the information must be requested. After reviewing the lower court file and preliminary examination transcripts, the trial court determined

that the prosecutor could introduce the Nieves written statement because there was no lower court order that required the prosecutor to produce the statement. While the trial court was correct that no order was ever entered, we note that defendant did file a broad motion for discovery in the district court on July 15, 1996. Therefore, we will assume for the sake of this issue that defendant did request the statement and address the issue in the context of whether the trial court abused its discretion by permitting the statement to be introduced.

D. MCR 6.201(J)

MCR 6.201(J) permits the trial court, in its discretion, to exclude testimony or order another remedy for a party's failure to comply with the rule.[1] In the present case, the trial court permitted defense counsel to review the one-paragraph written statement over the lunch hour and to cross-examine Nieves on the written statement when the trial resumed. We conclude that this remedy was not an abuse of discretion and that defendant's argument that he was denied due process by the admission of the written statement is without merit. First, Nieves' written statement that she heard two to three shots does not directly contradict her testimony that she heard three to four shots. Second, several witnesses testified that they heard three shots. Third, while the evidence may be somewhat relevant to Nieves' credibility, it is not exculpatory. See *Tracey, supra* at 324-325.

III. Sentencing

A. Standard of Review

We review a sentence imposed by the trial court for an abuse of discretion. The sentence must be proportionate to the seriousness of the crime and defendant's background. *People v Phillips (On Rehearing),* 203 Mich App 287, 290-291; 512 NW2d 62 (1994).

B. Disproportionate Sentencing

Defendant argues that his sentence is disproportionate. Under the sentencing guidelines, the range for defendant's minimum sentence was seven to fifteen years. Defendant received a minimum sentence of fifteen years' imprisonment. A sentence within the guidelines is presumptively proportionate. *People v Cotton,* 209 Mich App 82, 85; 530 NW2d 495 (1995). Defendant contends his work history and remorse are mitigating circumstances which make the sentence disproportionate. However, because defendant failed to present any unusual circumstances at sentencing, he has waived this issue. *People v Sharp,* 192 Mich App 501, 505-506; 481 NW2d 773 (1992). Moreover, even if defendant had not waived the issue, we would conclude that his sentence is proportionate to the seriousness of the crime and his background. *Phillips, supra* at 290. Defendant fired three shots at Colon at close range. One of the bullets resulted in Colon's paralysis.

C. The Two-Thirds Rule

Defendant also argues that his sentence violated the two-thirds rule of *People v Tanner,* 387 Mich 683; 199 NW2d 202 (1972) and that the trial court improperly raised his minimum sentence to cure the violation, an action prohibited by *People v Thomas,* 447 Mich 390, 392-394; 523 NW2d

215 (1994), where the Court stated that the proper remedy for violations of the two-thirds rule is to reduce the minimum sentence. We find that defendant's argument is without merit. Although the trial court initially stated that it was sentencing defendant to fifteen to twenty years' imprisonment, it is apparent from the record that this was simply a misstatement and the trial court subsequently clarified that it was sentencing defendant to fifteen to thirty years' imprisonment. Because Defendant had not been remanded to jail to await the execution of his sentence, the trial court had authority to clarify the sentence it was imposing. *In re Dana Jenkins*, 438 Mich 364, 368-369; 475 NW2d 279 (1991).

IV. Sufficiency of the Evidence

A. Standard of Review

Viewing the evidence in the light most favorable to the prosecution, this Court must determine whether a reasonable jury could find that the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Medlyn*, 215 Mich App 338, 340; 544 NW2d 759 (1996). This Court should not interfere with the jury's role in determining the credibility of witnesses and weighing the evidence. *Wolfe, supra*, at 514-515.

B. Elements of Assault With Intent To Commit Murder

The elements of assault with intent to commit murder are: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). The elements may be proven by circumstantial evidence and the reasonable inferences which may be derived from that evidence. *Id.* Intent to kill may be inferred from all the facts in evidence, including the seriousness of the injury and the use of a lethal weapon. See *People v Curry*, 175 Mich App 33, 45; 437 NW2d 310 (1989) (noting that the seriousness of the injury is relevant to intent) and *People v Ray*, 56 Mich App 610, 615; 224 NW2d 735 (1974) (finding that testimony that the defendant fired five shots at police officers from close range supported the inference of an intent to kill). However, the defense of intoxication will negate the requisite specific intent "if the degree of intoxication is so great as to render the accused incapable of entertaining the intent." *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995).

C. Evidence That Defendant Acted With The Intent To Kill

We conclude that there was sufficient evidence from which to infer that defendant acted with the intent to kill. The testimony at the trial established that defendant aimed his gun at Colon, firing three shots at close range. Two of the shots hit Colon in the chest and arm. Moreover, Colon testified that before firing, defendant stated "I gonna shoot you, mother f---r." The trial testimony indicated that defendant did not tell his girlfriend that he did not *intend* to shoot Colon, but that he did not *want* to do it. Although defendant suggested that he was too intoxicated to know what he was doing or that it was self-defense, other witnesses testified that defendant did not stagger or fall or appear intoxicated. Further, Colon stated that defendant left the area and returned with a gun. The jury was free to reject defendant's testimony and find other witnesses more credible.

V. Jury Instructions

A. Standard of Review

This Court reviews jury instructions in their entirety to determine whether there is an error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994); *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). "The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them." *Daniel, supra* at 53. If the instructions presented the issues fairly and sufficiently protected defendant's rights, there is no error even if the instructions are imperfect. *Id.*

B. Mitigating Circumstances And Lack Of Duty To Retreat

Defendant argues that the trial court erred in failing to instruct the jury sua sponte on mitigating circumstances and the lack of a duty to retreat. Defendant failed to request the mitigating circumstances instruction and to object to the instructions that were given regarding self-defense and the duty to retreat. Therefore, we may review this issue only for manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995).

A mitigating circumstances instruction precludes the jury from convicting a defendant of assault with intent to commit murder if the defendant would have been guilty of manslaughter had the assault resulted in death. CJI2d 17.4; *People v Lipps*, 167 Mich App 99, 106-107; 421 NW2d 586 (1988). We conclude that there was no manifest injustice caused by the trial court's failure to give this instruction because the instruction was not supported by the evidence. The testimony at trial established that Colon immediately apologized after he hit defendant in the face and that defendant did not immediately respond to Colon's punch. In fact, before he shot Colon, defendant left the area in which they had been drinking and returned shortly thereafter. Thus, a reasonable time had passed for passions to subside. Moreover, defendant could not explain why or how he had shot Colon. While he referred to his anger over Colon's behavior, his theory focused primarily on his intoxication and his fear of Colon as reasons why he lacked the specific intent to kill.

Defendant also argues that the trial court improperly instructed the jury that he had a duty to retreat when it should have instructed the jury he had no duty to retreat because he was within the curtilage of his home. However, this Court has stated that the right of self-defense without the duty to retreat extends only to inhabited physical structures located within the curtilage of the home. *People v Wytcherly*, 172 Mich App 213, 221; 431 NW2d 463 (1988), *(on reh)*, 176 Mich App 714; 440 NW2d 107 (1989); *People v Godsey*, 54 Mich App 316, 320-321; 220 NW2d 801 (1974). The evidence established that, at all times, the parties were drinking in the yard outside the home. Therefore, defendant was not entitled to an instruction that he had no duty to retreat from his home. Moreover, we note that the trial court did instruct the jury that defendant had no duty to retreat if he honestly and reasonably believed that it was immediately necessary to use deadly force to protect himself from an immediate threat of death or serious injury.

C. Intoxication

Defendant, although he did not object to the instruction, argues that the following paragraph of the trial court's intoxication instruction misled the jury:

> The prosecutor must prove beyond a reasonable doubt that the defendant could and did specifically mean to murder Ruben Colon or you must find the defendant not guilty of assault with intent to murder or any of the lesser included offenses.

Defendant contends that he was prejudiced because the instruction prevented the jury from convicting him of a lesser offense. We disagree.

Jury instructions may not be extracted piecemeal to establish error, but must be read as a whole. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). If the instructions presented the issues fairly and sufficiently protected defendant's rights, there is no error even if the instructions are imperfect. *Daniel, supra* at 53. We conclude that when the instructions are considered as a whole, there was no manifest injustice caused by the instruction. Prior to instructing the jury on the intoxication defense, the trial court instructed the jury on three assault crimes: assault with intent to commit murder, assault with intent to commit great bodily harm less than murder, and felonious assault. When instructing the jury on these offenses, the trial court properly instructed the jury as to the requisite intent for each offense. Moreover, after giving the instruction, the trial court explained the process by which the jury must reach its decision concerning the three offenses and informed the jury that it could return "a verdict of guilty of the alleged crime, guilty of a less serious crime, or not guilty."

VI. Abuse of Discretion

A. Standard of Review

We review a trial court's decision to exclude evidence for an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). The trial court abuses its discretion only "when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *Id.*

B. Exclusion Of Evidence Of Colon's Character For Violence

Defendant argues that the trial court abused its discretion by excluding evidence of Colon's character for violence. We disagree.

MRE 404(a)(2) permits the introduction of evidence relating to a pertinent trait of character of the victim of a crime (other than a sexual conduct crime). MRE 405 states that character may be proven by reputation or opinion testimony and by specific instances of conduct in cases "in which character or a trait of character of a person is an essential element of a charge, claim or defense." This Court has stated that evidence of a victim's character for violence is admissible where the defendant is claiming self-defense. *People v Fortson*, 202 Mich App 13, 19; 507 NW2d 763 (1993). In articulating when specific instances of conduct are admissible under the rules, this Court has stated that:

> where a claim of self-defense in a homicide case raises an issue of who was the aggressor, in order to show the deceased's quarrelsome and turbulent nature, evidence of specific instances of violence by the deceased may be admitted if directly connected with and involved in the homicide or if known by the defendant. However, specific instances of violence and lawlessness are generally inadmissible. [*People v Nichols*, 125 Mich App 216, 220-221; 335 NW2d 665 (1983).]

Therefore, before Colon's assault on his wife could be admitted as a specific instance of conduct, defendant was required to demonstrate that he was aware of the assault. Defendant asserts on appeal, by way of an affidavit attached to his brief, that he was aware of Colon's assault on his wife and Colon's assaultive behavior. However, defendant made no such offer of proof when the trial court refused to permit him to question Detective Patton about the assault because it concluded that there was no foundation that the assault was known by defendant. Therefore, we conclude that the trial court did not abuse its discretion in excluding evidence of Colon's assault on his wife.

VII. Effective Assistance of Counsel

A. Standard of Review

In evaluating an ineffective assistance of counsel claim, we are highly deferential in our scrutiny of counsel's performance and should not second guess counsel's strategic decisions. *People v Mitchell*, 454 Mich 145, 156, 163; 500 NW2d 600 (1997).

B. The Two-Part Test For Ineffective Assistance Of Counsel

To establish an ineffective assistance of counsel claim, defendant must satisfy a two-part test. First, defendant must demonstrate "that counsel's performance fell below an objective standard of reasonableness," and second, defendant must show the deficient representation deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In analyzing prejudice, the court must inquire whether there is a reasonable probability that absent counsel's unprofessional errors, the result would have been different. *Id.* at 312.

C. Failure To Request An Instruction On Mitigating Circumstances

Defendant argues that he was denied effective assistance of counsel because counsel failed to request an instruction on mitigating circumstances. However, we have already concluded that such an instruction was not supported by the evidence or by defendant's theory of the case. Therefore, failure to request this instruction cannot constitute ineffective assistance. See *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997) (defense counsel not required to assert frivolous position).

D. Failure To Object To Sentence Or To Argue For Mitigation Of Sentence

Defendant argues that he was denied effective assistance because counsel failed to object to his sentence or argue for mitigation of the sentence. We disagree. First, we find that counsel's failure to

object to defendant's sentence based on the two-thirds rule cannot be ineffective assistance because his sentence did not violate the two-thirds rule of *Tanner*, *supra*. Second, we conclude that counsel was not ineffective because he requested that defendant be sentenced within the guidelines. The trial court stated that it had intended to exceed the guidelines. Moreover, the present case is distinguishable from *People v Harris*, 185 Mich App 100, 105; 460 NW2d 239 (1990), in which defense counsel in effect recommended that the defendant be sentenced to a prison term despite the fact that the defendant had requested probation. In the present case, counsel not only requested a sentence within the guidelines, but also noted defendant's alleged remorse for what had occurred. Further, unlike the sentencing court in *Harris*, that exceeded the sentencing guidelines range by imposing a minimum sentence of twelve years where the guidelines range was eighteen months to three years, *id.*, the sentencing court here did not exceed the guidelines.

E. Failure To Inform The Trial Court That Defendant Was Aware Of Colon's Character For Violence

Defendant argues that he was denied effective assistance of counsel by counsel's failure to inform the trial court that defendant was aware of Colon's character for violence. We disagree. This Court should not second guess counsel's strategic decisions. See *Mitchell*, *supra* at 163 (counsel's failure to call witnesses is presumed to be trial strategy). Moreover, as noted earlier, any error in excluding the testimony was harmless because there was other evidence from which the jury could have determined that defendant's fear of Colon was reasonable. Therefore, we find that counsel's performance does not undermine confidence in the reliability of the verdict. *Id.* at 163, 166.

F. Failure To Request A Mistrial

Defendant argues that he was denied effective assistance of counsel when counsel failed to request a mistrial on the basis of the prosecutor's question, "So this was what, an act of God that made you point the gun at him, if you didn't intend on doing it?" Defendant asserts that this constituted an improper religious question. We conclude that this argument is entirely without merit and that the question did not constitute an improper inquiry into defendant's religious beliefs. Rather, the comment is more properly characterized as a sarcastic comment by the prosecutor. Defense counsel did object on the grounds that the question was argumentative, and his objection was sustained. Therefore, defendant was not denied effective assistance of counsel because counsel failed to bring a frivolous motion for a mistrial on this basis. *Torres*, *supra* at 425.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Jane E. Markey
/s/ William C. Whitbeck

[1] MCR 6.201(J) was formerly MCR 6.201(I).