

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ORLANDO DAMON MAY,

Defendant-Appellant.

UNPUBLISHED

December 29, 1998

No. 206340

Recorder's Court

LC No. 96-009865

Before: Holbrook, Jr., P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony (hereinafter "felony-firearm"), MCL 750.227b; MSA 28.424(2). Defendant was sentenced to twenty-five to fifty years' in prison for the second-degree murder conviction, and two years' in prison for the felony-firearm conviction. Defendant's felony-firearm conviction is to precede and run consecutively to his sentence for second-degree murder. We affirm.

On September 13, 1996, defendant and two other men spent part of the evening celebrating defendant's upcoming twenty-sixth birthday. As the evening wore on, an argument broke out between defendant and the decedent. After a brief scuffle, defendant got into his car and drove away. The decedent and the other man then proceeded to take a cab to where the decedent had parked his car. Shortly after they arrived, defendant drove up and confronted the decedent. After decedent struck or shoved defendant, defendant pulled a gun and fired, striking the decedent in the chest. Defendant admitted at trial that he had fired the gun, but he indicated that he did so only in an attempt to scare off the decedent.

Defendant first argues that the trial court erred in refusing his request to instruct the jury regarding careless, reckless, or negligent use of a firearm causing death, MCL 752.861; MSA 28.436(21). "This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. 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." *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994) (citation omitted).

After reviewing the instructions and the evidence introduced at trial, we conclude that the trial court did not error. There was no evidence to support the giving of an instruction on careless, reckless, or negligent use of a firearm causing death. Defendant testified that although he did not intend to kill anyone, he nonetheless intentionally fired the gun. Just recently, the Michigan Supreme Court noted that when the firing of a gun is intentional, an instruction on careless, reckless, or negligent use of a firearm causing death is inappropriate. *People v Cummings*, 458 Mich 876 (1998) (*Cummings II*). The purpose or motive underlying the discharge is irrelevant. *Id.*¹

Next, defendant argues that the trial court abused its discretion by admitting evidence of a prior bad act by defendant (i.e., that he had carried a gun on some day other than the date of the offense). Defendant argues that the admission of this evidence was erroneous because the prosecution failed to provide notice of its intent to introduce such evidence, and because the prosecution offered no legitimate justification for its introduction. “The decision to admit [bad acts] evidence is within the sound discretion of the trial court and should not be disturbed absent an abuse of discretion.” *People v Daoust*, 228 Mich App 1, 12; 577 NW2d 179 (1998). Because defendant did not raise a timely and specific objection at trial to the testimony being challenged, MRE 103(a)(2), the trial court did not have the opportunity to exercise its discretion on this matter. Accordingly, appellate review is precluded absent a showing of manifest injustice. *City of Troy v McMaster*, 154 Mich App 564, 567-568; 398 NW2d 469 (1986).

After reviewing the record, we find no evidence that manifest injustice would ensue from our failure to review this evidentiary matter. Defendant has offered no reason to believe that he was prejudiced by the lack of notice or by the admission of the evidence. Because defendant admitted that he possessed on the night in question the gun that fired the fatal shot, we find no basis for believing that defendant was prejudiced by testimony that defendant had a gun on a prior occasion.

Defendant’s final argument on appeal is that he received ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, defendant “must show that counsel’s performance was below an objective standard of reasonableness under prevailing norms . . . [and] that there is a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.” *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Accord *People v Reed*, 198 Mich App 639, 646; 499 NW2d 441 (1993), *aff’d* 449 Mich 375; 535 NW2d 496 (1995). Because defendant failed to move for either a new trial or a *Ginther*² hearing, review is limited to the existing record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

Defendant raises a five prong attack to the effectiveness of his trial counsel. Defendant argues that counsel’s ineffectiveness is evidenced by counsel’s: (1) lack of diligence in representing defendant’s interests; (2) lack of contact with defendant, which negatively affected defendant’s knowledge of the proceedings, as well as his relationship with counsel; (3) failure to have certain ballistic evidence suppressed; (4) guarantee of a lighter sentence than that imposed; and, (5) dissemination of misinformation to defendant. Initially, we note that defendant has failed to support these allegations with any reference to the existing record. MCR 7.212(C)(7). Further, in none of the five has defendant established either that counsel’s performance was objectively unreasonable, or that he was prejudiced by the alleged errors of his counsel. Accordingly, because defendant has failed to establish that the

outcome of the trial would have somehow been different if not for counsel's alleged poor performance, reversal is unwarranted. *People v Ramsdell*, 230 Mich App 386, 407; 585 NW2d 1 (1998).

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Peter D. O'Connell

/s/ William C. Whitbeck

¹ In *Cummings II*, the Supreme Court reversed this Court's decision in *People v Cummings*, 229 Mich App 151; 580 NW2d 480 (1998) (*Cummings I*). The decision in *Cummings I* was predicated on the conclusion that such an instruction is proper where there is evidence that the defendant did not discharge the firearm "so as to kill or injure another person" *Cummings I, supra* at 160, quoting MCL 752.861; MSA 28.436(21).

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).