STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH KENNETH MANNI,

Defendant-Appellant.

UNPUBLISHED
January 22, 1999

No. 200795
Ogemaw Circuit Court
LC No. 96-001068 FH

Before: Saad, P.J., and Kelly and Bandstra, JJ.

PER CURIAM.

Defendant appeals of right from convictions by a jury of intentional discharge of a firearm at a dwelling or occupied structure, MCL 750.234b(1); MSA 28.431(2)(1), intentional discharge of a firearm in a dwelling or occupied structure, MCL 750.234b(2); MSA 28.431(2)(2), and possession of a firearm at the time of commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). Defendant was adjudicated and sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to two concurrent terms of three to fifteen years and to a consecutive two year term for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred when it denied his motion for a directed verdict on the intentional discharge of a firearm charges. There was sufficient evidence that defendant intentionally discharged a gun in his own dwelling and evidence from which the jury could infer that he intentionally discharged a gun at the complainant's home. Therefore, "a rational trier of fact could find that the elements of [these crimes] were proven beyond a reasonable doubt." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

Defendant next argues that the trial court abused its discretion when it qualified the chief of police as an expert in firearms safety and when it allowed him to testify as to a "pencil and string" test to determine the bullets' trajectories into the complainants' home. An expert may be qualified as such based on "knowledge, skill, experience, training, or education[.]" MRE 702. A sufficient foundation was laid to qualify the police chief as an expert based on his knowledge, experience and training. Further, the police chief's testimony is relevant because the discharge of a firearm in a dwelling or an occupied structure requires a determination that defendant discharged the gun "in reckless disregard for

the safety of any individual[.]" MCL 750.234b(2); MSA 28.424(2)(2). Also, defendant's claim that the "pencil and string" test did not meet scientific standards is inappropriate for review since defendant's objection at trial was based on irrelevance and unfair surprise. See *People v Asevedo*, 217 Mich App 393; 551 NW2d 478 (1996).

Defendant next challenges the trial court's denial of his motion to suppress firearms and other evidence seized during a warrantless search of his home. Since defendant had given the police his consent to enter his home, the rifle and shell casings located within the plain-view of the police were properly seized without need of a warrant. *People v Cook*, 194 Mich App 534, 536; 487 Nw2d 497 (1992). Further, the .22 pistol was voluntarily given to the police by either defendant or his roommate.

Defendant next argues that the trial court abused its discretion when it refused to give the jury instruction for the lesser included misdemeanor of reckless discharge of a firearm, MCL 752.a863; MSA 28.436(24), and when it failed to give the instruction for specific intent in conjunction with the instructions on the other charges. The five part test to determine if a misdemeanor instruction is supported by the evidence has not been met. See *People v Stephens*, 416 Mich 252; 330 NW2d 675 (1982). Further, the trial court did not err in refusing to give an instruction for specific intent since the intentional discharge of a firearm in or at a dwelling or occupied structure are general intent crimes requiring only the intent to commit the physical act of discharging a firearm. MCL 750.234b; MSA 28.42(2).

Finally, defendant argues that the trial court abused its discretion when it denied defendant's motion for a new trial based on newly discovered evidence. The evidence that Cindy Fuller's youngest daughter fired the shots that entered complainants' home was discoverable at trial; thus, failing the forth prong of the *Miller*[1] test. Defendant, Cindy Fuller and Audrey Peter knew of this evidence but failed to inform defense counsel or produce it at trial. Additionally, Fuller and Peter would have been recanting their testimony resulting in testimony of a suspect and untrustworthy nature. *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992).

Affirmed.

/s/ Henry William Saad
/s/ Michael J. Kelly
/s/ Richard A. Bandstra

[1] *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995).