

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN D. WILLIAMS,

Defendant-Appellant.

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UNPUBLISHED

April 13, 1999

No. 204918

Recorder's Court

LC No. 96-009620

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

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316; MSA 28.548, assault with intent to murder, MCL 750.83; MSA 28.278, and felony-firearm, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to concurrent terms of life imprisonment, and a two year consecutive term for felony-firearm. We affirm.

Defendant raises numerous issues concerning the trial court's instruction of the jury. Defendant's first claim of error is that the trial court erred in failing to instruct the jury on manslaughter, careless, reckless, or negligent use of a firearm with injury or death resulting, or reckless or wanton use of a firearm. We disagree. We review jury instructions in their entirety to determine if there is error requiring reversal. *People v Whitney*, 228 Mich App 230, 252; 578 NW2d 329 (1998). Even if jury instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected a defendant's rights. *Whitney, supra*. Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). Jury instructions must be read as a whole rather than extracted piecemeal to establish error. *Id.* Error does not result from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction. *Id.* A trial court need not give requested instructions that the facts do not warrant. *Id.*

Voluntary manslaughter is a cognate lesser included offense of murder. *People v Cheeks*, 216 Mich App 470, 479; 549 NW2d 584 (1996). A trial court must give an instruction for a cognate lesser included offense if: (1) the principal offense and the lesser offense are of the same class or category, and (2) the evidence adduced at trial would support a conviction of the lesser offense. *Id.* To give the

instruction, there must be more than a modicum of evidence supporting the lesser offense; sufficient evidence must be present so that the defendant could be convicted of the lesser offense. *Id.*

Our review of the lower court proceedings reveals that there was not sufficient evidence to support an instruction on voluntary manslaughter, because there was no evidence presented to show that defendant was adequately provoked. Adequate provocation is an element of the crime of voluntary manslaughter. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). Here, defendant claims that the fight in the Blue Note Lounge, coupled with the shot fired, was enough to satisfy the element of adequate provocation. We disagree. Although objects were thrown during a fight, the evidence established that the only person who threw anything was defendant. Furthermore, although a shot was fired inside of the bar, the shot was fired by someone unconnected with this incident, not by the victim. The trial court correctly refused to instruct the jury on voluntary manslaughter.

Defendant also argues that the trial court erred because it failed to give an instruction on careless, reckless, or negligent discharge of a firearm causing death. This crime is defined by statute in MCL 752.861; MSA 38.436(21), which provides:

Any person who, because of carelessness, recklessness or negligence, but not wilfully or wantonly, shall cause or allow any firearm under his immediate control, to be discharged so as to kill or injure another person, shall be guilty of a misdemeanor. . . .

Before a lesser included misdemeanor instruction will be given, the requested misdemeanor must be supported by a rational view of the evidence adduced at trial. *People v Dabish*, 181 Mich App 469, 470, 473; 450 NW2d 44 (1989). A rational view of the evidence presented in this case does not support an instruction on careless, reckless, or negligent discharge of a firearm. The witnesses' testimony demonstrated that defendant intended to fire his gun at the victim. Furthermore, the testimony established that numerous shots were fired. Therefore, the trial court did not err in refusing to instruct the jury on careless, reckless, or negligent discharge of a firearm.

For similar reasons, the trial court also did not err in refusing to instruct the jury on reckless, wanton use or negligent discharge of a firearm. MCL 752.863; MSA 28.436(24). The statute defines the crime as follows:

Any person who shall recklessly or heedlessly or willfully or wantonly use, carry, handle or discharge any firearm without due caution and circumspection for the rights, safety or property of others shall be guilty of a misdemeanor.

No evidence established that defendant acted in a reckless or wanton fashion. Instead, the evidence showed that defendant acted in an intentional manner, intentionally aiming his gun at the victim, and firing several shots at him. Therefore, the trial court did not err in failing to instruct the jury on reckless, wanton use or negligent discharge of a firearm.

Defendant next argues that the trial court erred because it did not properly instruct the jury on the term deliberation and that it also did not properly explain the malice element of second-degree

murder. We disagree. Defendant has failed to preserve these claims of error for appellate review because no objection was raised before the trial court, *People v Curry*, 175 Mich App 33, 39; 437 NW2d 310 (1989), and review is foreclosed absent manifest injustice. *People v Kuchar*, 225 Mich App 74, 78; 569 NW2d 920 (1997). There is no manifest injustice here. The trial court's instructions on deliberation and the malice element of second-degree murder fairly presented the issues to the jury and sufficiently protected defendant's rights.

Defendant next claims that the trial court's instructions on the intent element of aiding and abetting were erroneous. We disagree. Our review of the lower court record demonstrates that the trial court properly instructed the jury that a finding of aiding and abetting could be made only if the jury found that defendant or his accomplice knew that the other had the specific intent to commit a crime.

Defendant also claims that the trial court's instructions to the jury erroneously informed it that if the prosecution proved its case beyond a reasonable doubt, then the jury had to find defendant guilty. Defendant's argument regarding this instruction has not been properly preserved for appellate review. Although defendant did object to this instruction, he fails to cite any authority to support his position on appeal, and therefore, the issue is waived. *People v Peña*, 224 Mich App 650, 664; 569 NW2d 871 (1997), mod on other grounds 457 Mich 883 (1998). Furthermore, defendant fails to argue the merits of this claim of error on appeal. *People v Jones (On Remand)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). In any case, we find no error.

Defendant also argues that the trial court improperly instructed the jury on prior inconsistent statements, such that the jury was not permitted to consider a witness' prior testimony. We disagree. Our review of the lower court record reveals that the trial court properly informed the jury that it could not consider out of court statements as substantive evidence, but it was permitted to substantively consider statements made at a prior hearing in court and under oath.

Defendant's next claim of error is that the trial court erred because it did not instruct the jury with CJI2d 5.2, which informs a jury that it should not decide the case based upon which side presented more witnesses. We disagree. A review of the lower court record does not demonstrate that the number of the witnesses was called to the attention of the jury in such a fashion as to give the impression that numerical preponderance redounded to the benefit of the prosecutor's case. *People v Bender*, 124 Mich App 571, 575; 335 NW2d 85 (1983). Therefore, no error resulted from the failure to instruct the jury with CJI2d 5.2.

Defendant also argues that the trial court erred because it did not use CJI2d 3.9 and CJI2d 16.23 when it instructed the jury. We disagree. Defendant cites no authority for the proposition that a trial court is required to use the standard jury instructions when instructing a jury. Therefore, this issue is waived on appeal. *Peña, supra*, 224 Mich App 664. Furthermore, manifest injustice will not result from our failure to review this issue on appeal, because the trial court explained the concept of specific intent to the jury, which CJI2d 3.9 and CJI2d 16.23 cover. *Kuchar, supra*, 225 Mich App 78.

Defendant's claim that the trial court failed to explain which side had the burden of proving specific intent has no merit. The trial court's instructions to the jury left no doubt that defendant had

absolutely no burdens of proof to satisfy. Similarly, defendant's claim that the trial court did not explain that defendant could not be convicted if there was a reasonable doubt as to his state of mind must also fail. The trial court informed the jury that the prosecution had to prove its case beyond a reasonable doubt.

Finally, defendant claims that the trial court erred when it instructed the jury that it could presume that defendant had the intent to kill from his use of a gun. We disagree. Defendant's claim of error has no merit. The trial court's instruction is nearly identical to the instruction set forth in CJI2d 16.21(3), which allows a jury to infer that a defendant has the intent to kill from the use of a dangerous weapon.

Defendant's next issue on appeal is that the trial court improperly commented on defendant's decision not to testify. We disagree. We review a trial court's conduct to ensure that it does not pierce the veil of judicial impartiality, which occurs when a trial court's conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

Defendant argues that the trial court's statement that it was going to let the prosecutor "drive a truck through it," was an improper comment on defendant's decision not to testify. However, our review of this statement and the other statements made in connection with it lead us to the conclusion that the trial court was simply trying to prevent defense counsel from opening the door for the prosecution. Although a prosecutor may not comment on a defendant's failure to testify, *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996), improper remarks by a prosecutor may not require reversal when they are in response to an argument by the defendant. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Had defense counsel been allowed to continue with the argument, it appears as though counsel was going to argue that defendant did not testify because he would have been a poor witness due to his lack of education and inferior ability to articulate. The prosecution would have responded to this argument with a number of other reasons defendant did not testify. The trial court's statements were intended to head off such an argument by the prosecution and prevent error which could have potentially resulted in a mistrial.

Defendant also claims the trial court erred when it improperly commented on defendant's decision not to testify. We disagree. Defendant failed to raise this issue before the trial court, and therefore it has not been preserved for appellate review. *People v Malone*, 193 Mich App 366, 371; 483 NW2d 470 (1992). Furthermore, manifest injustice will not result from our failure to review the issue, as the trial court instructed the jury that defendant had the right not to testify and that the jury could draw no unfavorable inferences from this decision.

Defendant's next issue on appeal is that the prosecutor improperly vouched for defendant's guilt and made erroneous comments on the concept of reasonable doubt. We disagree. Appellate review of alleged improper remarks by the prosecution is precluded if a defendant fails to make timely and specific objections. *People v Vaughn*, 186 Mich App 376, 384; 465 NW2d 365 (1990). Defendant did not object to either of the prosecutor's statements which he claims as error on appeal; therefore, our review is precluded unless a curative instruction could not have eliminated the prejudicial effect of the

alleged misconduct or a miscarriage of justice would occur if the issue was not reviewed. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). A miscarriage of justice will not result from our failure to review this issue because the prosecutor did not personally vouch for the evidence or make erroneous comments on the reasonable doubt standard.

Defendant also claims that the trial court abused its discretion because it did not admit a lineup sheet or a photograph of a lineup into evidence. We disagree. The admission of evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Warren*, 228 Mich App 336, 341; 578 NW2d 692 (1998).

MRE 103(a) requires that error cannot be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. Here, defendant cannot show that a substantial right of his was affected. Although the trial court did not admit the lineup sheet or photograph into evidence, the substance of the lineup sheet and photograph were admitted into evidence through the testimony of a witness at trial.

Defendant's next claim of error on appeal is that the trial court erred when it refused to allow defendant to present an expert witness on the issue of identification. We disagree. A trial court's decision whether to admit expert testimony is reviewed for an abuse of discretion. *People v Daoust*, 228 Mich App 1, 10; 577 NW2d 179 (1998).

Before permitting expert testimony, a trial court must find that the evidence is from a recognized discipline, relevant and helpful to the trier of fact, and presented by a qualified witness. *Daoust, supra*, 228 Mich App 9-10. In the present case, the trial court determined that expert testimony on identifications would not assist the jury. The trial court was of the opinion that the jury was quite capable of determining the credibility of the identification testimony without the aid of an expert. The trial court did not abuse its discretion in reaching this conclusion.

Defendant also argues that his sentence of life in prison for his assault with intent to murder conviction is grossly disproportionate. We disagree. Sentencing decisions are subject to review by this Court on an abuse of discretion standard. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990); *People v Green*, 228 Mich App 684, 698; 580 NW2d 444 (1998). A sentence constitutes an abuse of the trial court's discretion if it violates the principle of proportionality. *Id.* The principle of proportionality requires sentences to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Milbourn, supra; Green, supra.* Here, defendant fired approximately four shots at the victim. After killing the victim, defendant removed the clip from his gun and loaded another clip into it. Defendant then began to chase another person, in a car. This person escaped by jumping a fence. However, defendant pulled up to the fence and fired three or four times as the person attempted to flee. Given the egregious nature of the crime and defendant's extensive criminal record, defendant's sentence of life imprisonment for assault with intent to murder does not violate the principle of proportionality.

Finally, defendant argues that the trial court failed to adequately explain its departure from the sentencing guidelines range. There is no merit to this issue. The trial court noted on the Sentencing

Information Report that the guidelines range “does not reflect gravity of offense.” Furthermore, when sentencing defendant, the trial court noted that defendant had a prior criminal history and that his crimes had escalated in seriousness, that the victim in this case had not threatened anyone, and that defendant fired the gun with “the slightest excuse.” The trial court’s explanation was more than adequate.

Affirmed.

/s/ Roman S. Gibbs  
/s/ Richard Allen Griffin  
/s/ Kurtis T. Wilder