

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL JEROME BRANDT,

Defendant-Appellant.

UNPUBLISHED

January 16, 2001

No. 218588

Macomb Circuit Court

LC No. 98-002469-FC

Before: Neff, P.J., and Holbrook, Jr., and Jansen, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to murder, MCL 750.83; MSA 28.278, carrying a concealed weapon (CCW), MCL 750.227; MSA 28.424, and possession of a firearm during the commission of a felony (“felony-firearm”), MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent prison terms of fifteen to thirty years for the assault conviction and two to five years for the CCW conviction, and a consecutive two-year term for the felony-firearm conviction.¹ He appeals as of right. We affirm defendant’s convictions and remand to the trial court for modification of his sentences.

I

First, defendant claims that the trial court erroneously instructed the jury on the defenses of accident and intoxication, and on the offense of assault with intent to commit murder.

Defendant failed to object below to the jury instructions that he now challenges on appeal. Therefore, review of defendant’s claims are forfeited unless he demonstrates plain instructional error that adversely affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994).

¹ The judgment of sentence has contradictory statements regarding whether the various sentences run concurrently or consecutively, as discussed *infra*, section III.

It is error for a trial court to give an erroneous or misleading jury instruction, including one taken from the Criminal Jury Instructions, which are neither officially sanctioned by our Supreme Court nor required to be used by a trial court. *People v Stephan*, 241 Mich App 482, 495-496; 616 NW2d 188 (2000). However, even if somewhat imperfect, jury instructions do not require reversal if, when viewed in their entirety, they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000); *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997).

Defendant has not established that the trial court committed plain instructional error. Viewed in their entirety, the court's instructions on accident, intoxication and assault with the intent to murder, based respectively on CJI2d 7.3a, 6.2, and 17.3/17.4(1), sufficiently protected defendant's rights and fairly presented the issues to the jurors.

The instructions on accident and intoxication clearly directed the jury's attention to the central issue of whether the shooting was done with the intent to kill or whether that intent was lacking. Cf. *People v Ora Jones*, 395 Mich 379, 394; 236 NW2d 461 (1975). Contrary to defendant's suggestion, the court's accident instruction was complete, and it was unnecessary here for the court to define "accident" for the jury. Further, no manifest injustice resulted from the trial court's failure to inform the jury that the defense of accident applied to defendant's felonious assault charge where the jury *was* properly instructed that the defense of accident applied to the higher offense of assault with intent to murder, for which defendant was convicted. Cf. *People v Owens*, 108 Mich App 600, 608-609; 310 NW2d 819 (1981). With regard to the trial court's instruction on intoxication, the instruction conveyed the applicable law regarding this defense and adequately protected defendant's rights. See *People v Lipps*, 167 Mich App 99, 106; 421 NW2d 586 (1988). Finally, the trial court's instructions to the jury on assault with intent to murder adequately informed the jury of the requisite intent—a specific intent to kill—that is required for the offense. *Id.* at 105-107. As in *Lipps*, "far from causing any manifest injustice, the instructions [on assault with intent to kill] given to the jury by the trial court accurately summarized the applicable law." *Id.* at 107.

II

Next, defendant argues that the prosecutor engaged in misconduct and denied him a fair trial, first, by his remarks during jury voir dire concerning the effects of alcohol and an intoxicated individual's culpability for his behavior and, second, by his remarks in closing argument that, to find defendant guilty of assault with intent to murder, the jury would have to find, among other things, that defendant would have been guilty of murder if the victim had died.

Unless defendant demonstrates that the prosecutor's remarks constituted plain error that adversely affected his substantial rights, our review of the allegedly improper remarks is precluded because, once again, defendant failed to timely and specifically object below to the challenged remarks. *Carines, supra* at 763; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Defendant has not carried his burden of showing plain error that affected substantial rights. *Carines, supra*. As we have concluded, the trial court appropriately instructed the jurors

on the defense of intoxication. Thus, defendant has shown no prejudice. Further, any prejudice that might have occurred with regard to the prosecutor's remarks could have been cured by an appropriate instruction following a timely objection. See *Schutte, supra* at 720-721.

Regarding the prosecutor's remarks in closing argument, the challenged remarks comport with the relevant jury instruction, CJI2d 17.4(1), and with the applicable law. See *Lipps, supra* at 106-107. Therefore, the remarks did not constitute plain error and did not adversely affect defendant's substantial rights.

III

Defendant contends that his judgment of sentence must be corrected because it is contradictory regarding whether his sentences run concurrently or consecutively, and it erroneously credits jail time served only to his felony-firearm conviction. We agree, and the prosecutor concedes this issue to the defendant. See *People v Cortez*, 206 Mich App 204, 207; 520 NW2d 693 (1994).

Defendant's two-year sentence for his felony-firearm conviction must run concurrently with his sentence for carrying a concealed weapon; his two-year felony-firearm sentence may run consecutively only to the sentence for his conviction of assault with intent to commit murder. Defendant is to receive a single credit of 227 days for jail time served, to be applied concurrently against both the felony-firearm and the CCW sentences. Accordingly, the judgment of sentence entered in this case is to be modified consistent with this opinion. MCR 7.216(A)(1) and (A)(7).

Affirmed and remanded for modification of the judgment of sentence. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen