STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 23, 2001
v	No. 220759 Calhoun Circuit Court
WILLIAM ALLEN WOLTER, Defendant-Appellant.	LC No. 98-004521-FC

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

PER CURIAM.

Defendant appeals as of right from his jury convictions of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and felony-firearm, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to four to ten years' imprisonment on the assault conviction, consecutive to a two-year term on the felony-firearm conviction. We affirm.

This prosecution arose out of the events surrounding a confrontation between defendant, his girlfriend, Ginger Dowdle, and the victim, Danny McDonald, a new friend of Dowdle's. Defendant had confronted Dowdle in the parking lot of her place of employment, seeking to discuss their faltering relationship. The victim arrived during this discussion, whereupon defendant accused him of trying to steal Dowdle away from defendant. Although the victim denied this accusation, defendant suddenly reached into his car, retrieved a .22 caliber, pump-action rifle, and fired two shots, hitting the victim once in the face and once in the chest.

The victim testified that before the shooting he had neither approached defendant nor raised his fist. Dowdle likewise testified that the victim had made no threatening gesture. She further denied telling defendant that the victim would "kick his ass." However, defendant stated to the arresting officer that he did not do anything and that it was self-defense. He essentially repeated this claim in his official statement. In that statement defendant indicated that Dowdle had told him to leave because the victim would "kick his ass," that the victim had started walking toward him and drawn back a fist, and that defendant had only then pulled the gun out of his car, loaded shells as fast as he could, and fired two shots from close range. Defendant was charged with assault with intent to murder, MCL 750.83; MSA 28.278, but was ultimately convicted of the aforementioned lesser offense.

Defendant first contends that the trial court abused its discretion in excluding the testimony of his proposed expert witness. We disagree.

This Court reviews decisions regarding the admissibility of expert testimony for an abuse of discretion. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling. *Id.*

Pursuant to MCL 768.20a; MSA 28.1043(1), which requires that a defendant file notice of intent to raise an insanity defense at least thirty days before trial, on November 30, 1998, defendant filed notice that he intended to "offer in his defense testimony to establish diminished capacity and/or insanity at the time of the alleged offense." The prosecution responded on December 2, 1998, filing notice of rebuttal of the defenses and indicating its intent to conduct its own forensic examination. On December 10, 1998, the trial court entered an order requiring defendant to undergo an examination at the Center for Forensic Psychiatry. However, defendant filed a withdrawal of his notice on December 23, 1998 and the trial court accordingly canceled its order.

Despite his subsequent withdrawal of notice, defendant had been examined by David J. Forsythe, M.D., P.C., on December 7 and 11, 1998. Dr. Forsythe's evaluation concluded that defendant had "acted in self-defense" and that defendant "had no intention of harming" the victim. On December 29, 1998, defendant filed an amended disclosure adding Dr. Forsythe to his witness list as an "expert witness."[1] Defendant sought to have Dr. Forsythe testify in support of a claim of self-defense. The prosecution moved to exclude this testimony, noting that Dr. Forsythe's opinions and conclusions were based on determinations regarding defendant's limited intelligence and subjective mental state. The prosecution contended that such testimony fell within the scope of a diminished capacity or insanity defense, and that given defendant's formal withdrawal of notice to present such defenses it would be inappropriate to allow the proposed testimony simply because defendant gave it a different name.

Defendant responded to the prosecution's motion by arguing that it had been in possession of Dr. Forsythe's report for three months, and contending that despite defendant's withdrawal of notice it could still have conferred with its own mental health experts to rebut the likely testimony. The trial court, in ruling on the motion, determined that the proper question was whether the testimony would fit within the statutory notice requirement. Finding that the testimony would be relevant to the self-defense claim, the court nevertheless concluded that it would ultimately be used to negate defendant's specific intent. The court found that the totality of Dr. Forsythe's report implied, through the background information regarding defendant and his intellectual ability, that defendant's state of mind would not support a finding of specific intent. Relying on *People v Atkins*, 117 Mich App 430; 324 NW2d 38 (1982), the court found

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[1] Dr. Forsythe had not been specifically identified in defendant's November 30, 1998 notice filing. Rather, that notice had listed six individuals, most apparently family members, and had included as a catchall the statement, "Other witnesses will be disclosed to the prosecutor when they are known to the defendant."

that because the testimony would ultimately go to negate intent at the time of the incident, the failure to comply with the notice requirements mandated exclusion of the testimony.

In *Atkins*, this court noted that the statutory requirements could not be avoided simply by creative nomenclature:

> [P]sychiatric testimony on the issue of a defendant's capacity to form the requisite specific intent comes within the codified definition of legal insanity. Such testimony can only be presented when the statutory notice requirements are fulfilled. It is irrelevant whether such a defense is labeled as insanity, diminished capacity, or some other name. [*Id.* at 435-436.]

Here, defendant asserted his intention to proffer the evidence at issue for the purpose of establishing his state of mind as it related to his claim of self-defense. Defendant contends that the evidence, including Dr. Forsythe's opinions regarding his "limited mental capacity," "intelligence level," "past history of a lack of violent encounters," and "perception of the danger he faced," would have supported a finding that defendant "honestly and reasonably" believed he was in imminent danger. See *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). As similarly determined in *Atkins*, however, the proposed evidence ultimately relates to defendant's capacity to form a specific intent. *Id.* at 436. Accordingly, the statutory requirements were applicable and the court did not abuse its discretion in excluding the testimony where defendant formally withdrew his previously filed notice.

Defendant next argues that the trial court erred in failing to provide requested jury instructions on lesser included misdemeanor offenses. We again disagree.

"Whenever an adequate request for an appropriate misdemeanor instruction is supported by a rational view of the evidence adduced at trial, the trial judge shall give the requested instruction unless to do so would result in a violation of due process, undue confusion, or some other injustice." *People v Stephens*, 416 Mich 252, 255; 330 NW2d 675 (1982). A court's decision to deny a requested jury instruction is reviewed for an abuse of discretion. *Id.* at 265.

Defendant requested instruction on the misdemeanor offenses of careless, reckless, or negligent use of a firearm with injury or death resulting, MCL 752.861; MSA 28.436(21), and discharge of a firearm causing injury while intentionally aimed without malice, MCL 750.235; MSA 28.432. The trial court, relying on *Stephens, supra*, and *People v Steele*, 429 Mich 13; 412 NW2d 206 (1987), concluded that there was no appropriate relationship between the two requested misdemeanors and a charge of assault with intent to murder, and that the evidence did not support a finding that defendant was either reckless or careless, notwithstanding the existence of some question regarding defendant's specific intent. The court, therefore, denied defendant's request and instead gave the jury four options, instructing that it could find defendant guilty of assault with intent to murder, guilty of assault with intent to do great bodily harm less than murder, guilty of assault with a dangerous weapon, or not guilty.

A trial court may provide a jury instruction on a lesser included misdemeanor offense where (1) a party makes a properly specific request for the lesser offense instruction; (2) there is an appropriate relationship between the charged offense and requested misdemeanor, in that they

both protect the same interests and involve similar evidentiary proofs; (3) the requested offense is supported by a rational view of the evidence; (4) if the prosecutor requests the instruction, the defendant must have adequate notice of it as one of the charges against which he may have to defend; and (5) the requested offense instruction would not result in undue confusion or injustice." *Steele, supra* at 19-22; *Stephens, supra* at 261-264. Our Supreme Court vested the trial court with "substantial discretion in determining whether the cause of justice would be served by giving lesser included misdemeanor instructions on the facts of any given case." *Stephens, supra* at 265.

Defendant relies on *People v Taylor*, 195 Mich App 57; 489 NW2d 99 (1992), in arguing that the trial court erred by finding that these conditions were not satisfied on the facts of this case. In *Taylor* the defendant was likewise charged with assault with intent to commit murder and the trial court similarly instructed on assault with intent to commit great bodily harm and felonious assault. *Id.* at 62. The trial court also denied the defendant's request for the same misdemeanor instructions requested in the instant matter. *Id.* The jury ultimately found the defendant guilty of felonious assault. *Id.* at 59. On appeal, with respect to the defendant's challenge to the failure to provide the requested misdemeanor instructions, this Court found that although most of the elements of the *Stephens* test were satisfied, a rational view of the evidence could possibly support only the offense of reckless discharge. *Id.* at 63. This Court reversed the defendant's conviction and remanded the case, holding that the failure to provide the requested reckless discharge instruction was error and that the error was not harmless because defendant was convicted of the least serious of the instructed charges. *Id.*

Contrary to defendant's contentions, we conclude that reversal is not warranted in this case because there is a complete absence of evidence supporting either misdemeanor offense. While the *Taylor* panel opined that the defendant in that case could have been found to have recklessly discharged the weapon because her eyes were closed, here defendant admitted that he intentionally fired his weapon and knew at the time of his arrest that he had shot the victim in the face and chest. Additionally, defendant's claim that he acted in self-defense, a defense asserting justification for an intentional action undertaken with malice, rendered impossible a finding that defendant discharged his firearm causing injury while intentionally aimed without malice. Accordingly, the court did not abuse its substantial discretion in denying defendant's request for additional instructions. *Stephens, supra* at 265.

Moreover, we note that had we deemed the court's failure to provide the requested instructions an abuse of discretion, we would nevertheless conclude that such error was harmless. Although the jury did not convict defendant of the original charge of assault with intent to commit murder, it did determine that defendant was guilty of the intermediate level offense of assault with intent to commit great bodily harm less than murder. Thus, defendant was not convicted of the "least serious" offense charged. *Taylor, supra* at 63.

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder