STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED March 16, 2001
v	No. 220413 Saginaw Circuit Court
CHARLES GEORGE LAWRENCE, Defendant-Appellant.	LC No. 98-015188-FC

Before: Griffin, P.J., and Neff and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of voluntary manslaughter, MCL 750.321; MSA 28.553, carrying a concealed weapon, MCL 750.227; MSA 28.424, and felony-firearm, MCL 750.227b; MSA 28. 424(2). The trial court sentenced defendant to 6 to 22½ years for the voluntary manslaughter conviction, 2 to 7½ years for the carrying a concealed weapon conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant's convictions arise out of an armed confrontation between defendant and several acquaintances, including the victim. Several shots were fired by defendant, one of which hit the victim in the left shoulder and killed him. At trial, defendant maintained that he fired in self-defense when the victim, armed with a sawed-off shotgun, approached him as defendant was seated in his car. Although defendant was originally charged with murder, MCL 750.36; MSA 28.548, he was convicted of the cognate lesser included offense of voluntary manslaughter.

Defendant first argues that the trial court's failure to instruct on the element of specific intent necessary to convict of voluntary manslaughter was error because it impermissibly shifted the prosecutor's burden of proving defendant's guilt by removing from consideration the only seriously contested element of the offense – intent. We disagree.

Because defendant did not object below, this Court will grant relief only if necessary to avoid manifest injustice. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). We find no manifest injustice as the instructions as a whole adequately set forth the requisite mental state. The jury was instructed on the intent required for first- and second-degree murder, and was instructed on voluntary manslaughter as a lesser offense, distinguished by the element of provocation.

Defendant also asserts that the trial court erred in failing to sua sponte instruct on defense counsel's theory of accident, and that defense counsel's failure to request the instruction was ineffective and prejudiced defendant's right to a fair trial. We disagree.

The trial court is required to instruct the jury concerning the law applicable to the case and to fully and fairly present the case to the jury in an understandable manner. MCL 768.29; MSA 28.1052; *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999). These instructions are to include all elements of the crime charged and must not exclude from consideration by the jury material issues, defenses, or theories if there is evidence to support them. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). If there is no evidentiary support, the request should not be given. *Id*. Furthermore, a trial court is not required to present an instruction on defendant's theory of the case to the jury absent a request for the instruction. *People v Maleski*, 220 Mich App 518, 521; 560 NW2d 71 (1997). A review of the record establishes that defendant failed to request the instruction or object to its absence, thus, forfeiting review absent a demonstration of manifest injustice. *People v Rice (On Remand)*, 235 Mich App 429, 443; 597 NW2d 843 (1999).

Defendant contends that the court's instructions should have included defendant's alternative defense of accident and now asserts that this was his primary defense and an issue central to the case. Our review of the record indicates that defense counsel's theory of the case was that the victim was shot in self-defense when he approached defendant's car armed with a shotgun. This theory, not accident, is reiterated in counsel's closing arguments as a complete defense to the crimes charged. In contrast, the only suggestion of an alternative defense theory is where counsel requested CJI2d 16.16 to support a theory that the delay in taking the victim to the hospital was an intervening cause of death.

Defendant fails to establish that there was manifest injustice because the omitted instruction does not pertain to a basic and controlling issue at trial. The prosecution's theory was that this was an intentional killing; defendant alleged self-defense. The evidence supported defendant's theory that he intentionally fired his gun in the belief that he was in danger of imminent harm from the victim whom defendant said was armed with a shotgun. In light of the circumstances presented, the trial court was not required to instruct on defense theories unsupported by the evidence. *Wess, supra* at 243.

Alternatively, defendant contends that if the failure of defense counsel to object or request the instruction is deemed controlling, then failure to object or request was ineffective assistance by counsel.

Here, contrary to defendant's assertions, accident was never a primary defense theory and it is imminently plausible that defense counsel abandoned a theory unsupported by the evidence adduced in favor of self-defense. This strategy was reasonable because evidence was presented that the victim was armed either prior to or when he was shot and is consistent with a theory of self-defense. That this strategy did not result in defendant's acquittal does not make its use ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Furthermore, a request for an instruction on accident is unsupported by the evidence and counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). This Court will not substitute its judgment for that of

counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Rice*, *supra* at 445. Accordingly, we conclude that counsel's actions were trial strategy because they are supported by a rational view of the evidence presented.

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Helene N. White