

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DEANDRE BALDWIN,

Defendant-Appellant.

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UNPUBLISHED

December 27, 2002

No. 236318

Wayne Circuit Court

LC No. 01-001926-01

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

PER CURIAM.

Following a jury trial in the circuit court, defendant was convicted of involuntary manslaughter, MCL 750.321, assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant, sixteen years old at the time the offenses were committed, was sentenced by the trial court as an adult offender, to concurrent terms of six to fifteen years for the involuntary manslaughter conviction, two to ten years for the assault conviction, and a consecutive prison term of two years for the felony-firearm conviction. Defendant now appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I

Defendant first contends on appeal that the trial court abused its discretion in sentencing him as an adult offender because the preponderance of the evidence established that he should be sentenced as a juvenile. We disagree.

Pertinent to the present appeal, MCL 769.1(3) provides that a juvenile offender convicted of a felony not enumerated in MCL 769.1(1) shall be sentenced as an adult unless the trial court determines by a preponderance of the evidence that the interests of the public would be best served by placing the juvenile on probation and committing him to a juvenile facility. In determining whether a defendant should be sentenced as a juvenile or adult, the trial court must consider the six factors set forth in MCL 769.1(3)(a)-(f):

In making the determination required under this subsection, the judge shall consider all of the following, giving greater weight to the seriousness of the alleged offense and the juvenile's prior record of delinquency:

(a) The seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim.

(b) The juvenile's culpability in committing the alleged offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines.

(c) The juvenile's prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior.

(d) The juvenile's programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming.

(e) The adequacy of the punishment or programming available in the juvenile justice system.

(f) The dispositional options available for the juvenile.

The prosecution has the burden of establishing by a preponderance of the evidence that the defendant should be sentenced as an adult offender, taking into consideration the best interests of the juvenile and the public. MCR 6.931(E)(2).<sup>1</sup>

This Court employs a bifurcated procedure when it reviews a trial court's decision to sentence a juvenile offender to an adult sentence. *People v Thenghkam*, 240 Mich App 29, 41; 610 NW2d 571 (2000). In the first part of the inquiry, we review the trial court's factual findings supporting its determination with regard to each statutory factor for clear error. *Id.* The second part of the inquiry focuses on the ultimate decision whether to sentence the minor as a juvenile or as an adult, scrutinizing the trial court's decision for an abuse of discretion. *Id.* at 42.

In the instant case, defendant first contends that the trial court abdicated its role as fact finder at the disposition hearing, essentially making only cursory conclusions with regard to the pertinent statutory factors and rendering its decision without a thorough review of the evidence. We disagree.

The charges against defendant arose from the shooting death of Dwayne Beck and the wounding of Carlos Strong on the same evening in a house in Detroit in January 2001. There were twenty to thirty people gathered in the upper flat of the house, including defendant. Defendant, under the influence of alcohol and drugs, had an argument with Strong that led to a physical altercation where defendant cut Strong's face with a Corona bottle. Defendant then left

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<sup>1</sup> Arguably, the court rule and statute are in conflict in regard to the burden of proof. However, we need not resolve the conflict because under either the court rule or the statute, defendant was properly sentenced as an adult.

the apartment and returned about five minutes later, carrying a long-barreled pistol. He fired the gun through the floor of the upper flat, resulting in the death of Beck, who lived in the flat below.

At the disposition hearing, the prosecutor and defense counsel stipulated to the admission of three reports: 1) the presentence investigation report, 2) the Family Independent Agency (FIA) report, and 3) the psychiatric report prepared by the Third Circuit Court's Psychiatric Clinic. In addition to the three stipulated reports, there was also a letter introduced from Luke Bergmann, a Ph.D. candidate from the University of Michigan. Two of these documents recommended sentencing as an adult (the FIA report and the presentence report) and two recommended sentencing as a juvenile. The record of the disposition hearing reflects that in rendering its decision, the trial court thoroughly reviewed and weighed each of these reports and often incorporated the details of the reports by reference in its findings concerning each statutory factor.

The court noted that while the shooting of the victim in this case was certainly unintentional, defendant had engaged in a fight with Strong and cut him with a bottle, and later returned with every intention of doing more violence to that person, this time with a gun. The court further observed that there was really no issue regarding defendant's culpability and found defendant's juvenile record to be extensive. The trial court's conclusions that past efforts to curtail further criminal activity on defendant's part and defendant's willingness to participate had been a complete failure, as reflected in the FIA and presentence investigation reports. With regard to the adequacy of the punishment or programming available in the juvenile justice system, the trial court noted that dispositional options were spelled out in the FIA report and found that defendant would be dangerous to the public when he was released from the juvenile system at age twenty-one, making the system inadequate for purposes of the protection of the public. In so finding, the trial court referenced that portion of the presentence investigation report which stated that although defendant expressed remorse and the victim's family agreed that the shooting was an accident, defendant's later comments appeared to be exculpatory in nature and "[a]t this point, it is felt that the defendant must take responsibility for his actions."

With regard to the final statutory factor, the dispositional options available for the juvenile, defendant contends that the trial court erred in not recognizing the option of sentencing defendant to a juvenile facility while retaining the option of placing defendant with the Department of Corrections at some future point in time, particularly in light of defendant's positive progress while on detention for the present offenses. However, the reports considered by the trial court indicate that this was not a viable alternative given defendant's past unwillingness to cooperate with prior counseling efforts.

In sum, our review of the trial court's remarks at sentencing establishes that the court fulfilled its duty to make the requisite findings of fact with regard to the statutory factors. *Thenghkam, supra* at 41-42. These findings are supported by the record and are not clearly erroneous. *Id.* Moreover, the court properly considered and balanced the statutory factors, giving appropriate weight to particular factors under the circumstances of this case. Therefore, we find no abuse of discretion in the trial court's ultimate decision to sentence defendant as an adult offender. *Id.*

## II

Next, defendant contends that error requiring reversal occurred when the trial court gave the jury contradictory instructions on the intent element of the offense of assault with intent to do great bodily harm less than murder.

This Court reviews de novo claims of instructional error. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). Jury instructions must be read as a whole rather than extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Instructions which are somewhat imperfect do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* In the instant case, because defendant did not object to the jury instruction at trial and therefore failed to preserve the issue for appeal, we review this claim under the plain error standard. *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). Under that standard, an unpreserved issue may be considered on appeal if: (1) an error occurred, (2) the error was plain, and (3) the plain error affected substantial rights. "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Carines, supra* at 763. Once a defendant satisfies these three requirements, this Court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when "the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error " 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* at 763, quoting *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

Here, the trial court initially properly instructed the jury, with regard to the offense of assault with intent to do great bodily harm less than murder, that it was required to find "that the defendant intended to cause great bodily harm." See CJI2d 17.7. In subsequent statements to the jury, however, the trial court described only the requisite intent applicable to a simple assault, i.e., an intent to create fear of an immediate battery. See CJI2d 17.1. When the deliberating jury asked for reinstruction on the offense of assault with intent to do great bodily harm, the correct instructions were given to the jury in the form of printed instructions.

Defendant argues that by asking for clarification, the jury indicated it was confused by the contradictory instructions, and the court only compounded the confusion by providing written instructions to the jury that conflicted with its verbal instructions in open court. Defendant, quoting *People v Shipp*, 68 Mich App 452, 456; 243 NW2d 18 (1976), argues that "[i]f a trial court gives a proper instruction, but subsequently gives an improper instruction, we must presume that the jury followed the improper instruction."

However, where the instructional error is corrected or otherwise cured by further specific statements by the court, there is no prejudice. *People v Kanar*, 314 Mich 242, 253; 22 NW2d 359 (1946). In this instance, after the court instructed the jury and it retired for deliberations, the jury then requested reinstruction on assault with intent to do great bodily harm. At that time, the jury was provided with the correct instruction, in written form, thus curing any error caused by the conflicting instructions. *Id.* Consequently, we conclude that defendant has not demonstrated plain error affecting his substantial rights. *Carines, supra*.

In light of our disposition of this issue, defendant's remaining appellate issue is rendered moot.

Affirmed.

/s/ Richard A. Bandstra  
/s/ William B. Murphy  
/s/ Richard Allen Griffin