

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES SMITH,

Defendant-Appellant.

UNPUBLISHED
February 10, 2004

No. 243633
Wayne Circuit Court
LC No. 01-012977-01

Before: Cooper, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of felonious assault, MCL 750.82; carrying a concealed weapon, MCL 750.227; and possession of a firearm during the commission of a felony, MCL 750.227b; entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainant testified that the day after he rebuffed defendant's sexual advances by pushing defendant away, defendant came to his apartment door and fired a single shot at him. Complainant admitted that he and defendant had had words on a previous occasion, but denied that he harassed defendant. Defendant testified that he was nearly seventy years old, was in poor health, and that complainant continually harassed him. Defendant admitted that he fired a shot in complainant's direction, but stated he did so in order to show complainant he was not intimidated. He denied he intended to harm complainant. Defendant denied that he made advances toward complainant, and maintained that the day before the shooting complainant struck him repeatedly for no reason.

We review jury instructions in their entirety to determine whether the trial court committed error requiring reversal. As stated in *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000)(internal citations omitted):

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. Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. Error does not result from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction.

We review a claim of instructional error de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002).

First, defendant argues that the trial court denied him due process by failing to read CJI2d 4.5, impeachment by prior inconsistent statement, as it is written rather than giving the trial court's own version.¹ We disagree. The Michigan Criminal Jury Instructions are not officially sanctioned, and courts are not required to use them. *People v McFall*, 224 Mich App 403, 414; 569 NW2d 828 (1997). The trial court's version of the instruction was not perfect; however, it advised the jury as to how impeachment evidence should be evaluated. The instructions as a whole advised the jury that it was the sole judge of the credibility of the witnesses. The instruction adequately protected defendant's rights by fairly presenting the issue to the jury. *Canales, supra* at 574.

Next, defendant argues that the trial court erred by failing to instruct the jury on discharge of a firearm at an occupied dwelling, CJI2d 11.26a. We disagree. Defendant did not request that the trial court read this instruction, and did not object to the trial court's failure to sua sponte read the instruction. Defendant's failure to request the instruction or to object to the trial court's failure to sua sponte read the instruction precludes appellate relief. MCL 768.29. The evidence did not support the giving of the instruction. Defendant admitted that when he fired the gun he aimed at complainant's side because, while he did not intend to harm complainant, he intended to establish that he was not intimidated. Because defendant failed to show error, he cannot demonstrate plain error that affected his substantial rights. *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994); *People v Gonzalez*, 468 Mich 636, 643-644; 664 NW2d 159 (2003).

Defendant requested an instruction on reckless or careless use of a firearm, CJI2d 11.26, but the trial court did not err by declining to give the instruction. The instruction was not required as a necessarily included lesser offense of carrying a concealed weapon. *People v Reese*, 242 Mich App 626, 629; 619 NW2d 708 (2000); *People v Pritchett*, 62 Mich App 570, 573; 233 NW2d 655 (1975). Moreover, the instruction was not supported by the evidence. Defendant carried the gun in a box as he went to complainant's apartment, and upon his arrival, deliberately fired the gun in complainant's direction. No error occurred. See *Canales, supra* at 574.

Finally, defendant argues that the trial court erred by instructing the jury on use of deadly force in self-defense, CJI2d 7.15, rather than on use of nondeadly force in self-defense, CJI2d 7.22, as requested. We disagree. Defendant was not entitled to an instruction on nondeadly force in self-defense because he was originally charged with assault with intent to commit murder based on the firing of a gun. *People v Hooper*, 152 Mich App 243, 246-247; 394 NW2d 27 (1986). To be lawful self-defense, the evidence must show that: (1) the defendant honestly believed that he was in danger; (2) the danger feared was death or serious bodily harm; (3) the action taken appeared at the time to be immediately necessary; and (4) the defendant was not the initial aggressor. *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995). The

¹ Complainant was impeached with a prior inconsistent statement regarding previous dealings with defendant.

threatened harm must be imminent. *People v Riddle*, 467 Mich 116, 129 n 21; 649 NW2d 30 (2002). Defendant testified that he feared complainant; however, the undisputed evidence showed that defendant did not fire the gun at complainant until the day after the confrontation in the elevator. No evidence showed that defendant faced the threat of imminent harm. The trial court would not have erred had it declined to give any instruction on self-defense. See *Canales*, *supra* at 574.

Affirmed.

/s/ Jessica R. Cooper
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood