

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS CHRISTOPHER SWANIGAN,

Defendant-Appellant.

UNPUBLISHED

December 27, 2007

No. 273671

Wayne Circuit Court

LC No. 06-006398-01

Before: Murray, P.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the first-degree murder conviction and 40 to 60 months' imprisonment for the felon-in-possession conviction, those sentences to be served concurrently, but consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant was charged in connection with the shooting death of Shannon Kenney on May 6, 2006. A majority of the witnesses identified defendant as a passenger in a green Cougar being operated by a man known to most of the witnesses as "E" or Eric. Several witnesses further testified that defendant fired an AK-47 assault rifle towards an alley down which the victim was seen running shortly after the Cougar turned onto the block. In a written statement given after his arrest, defendant admitted being in the vehicle and shooting an AK-47 in the neighborhood; he claimed that he did not know who he was shooting at, and that the shooting was done in self-defense because their car had been shot at and he was in fear for his life.

Defendant argues that the trial court erred by failing to adequately instruct the jury in two instances. Defendant concedes that no objections to the jury instructions were made at the time of trial. Defendant's conduct must be evaluated to determine whether there occurred a waiver or a forfeiture of the claimed error. Waiver constitutes the intentional abandonment of a known right while forfeiture constitutes the failure to timely assert a right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). A defendant who waives a known right cannot seek appellate review of a claimed error, while forfeiture will permit this Court to review the claim for plain error. *Id.* A defendant that expresses approval of the jury instructions as given waives the right to contest the instructions on appeal. See *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Here, defense counsel not only failed to object to the instructions, but when asked,

she was unable to suggest any additions or corrections to the instructions as given. In essence, counsel approved of the instruction. Thus, defendant affirmatively waived his claims of instructional error.

Even if the matter is reviewed as an unpreserved issue subject to forfeiture, appellate relief is not warranted because defendant has failed to show plain error. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). This Court reviews jury instructions in their entirety to determine if the trial court committed error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Jury instructions must include all elements of the charged offense and must not exclude material issues, defenses and theories if the evidence supports them. *Id.* Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. *Id.*

First, defendant argues that the trial court erred in instructing the jury that it could infer an intent to kill by the use of a dangerous weapon in a way that was likely to cause death. Defendant contends that this instruction was erroneous because it gave rise to a conclusive presumption of the intent necessary to commit first-degree murder and thereby, improperly shifted the burden to defendant. We disagree.

The instruction did not direct the jury that defendant was presumed to have possessed the intent to kill or that it must infer such intent from the fact that defendant used a dangerous weapon. Rather, consistent with CJI2d 16.21, the instruction merely informed the jury that it "may" infer that defendant acted with an intent to kill from his use of a deadly weapon. The instruction was consistent with the law in this state. *People v Dumas*, 454 Mich 390, 403; 563 NW2d 31 (1997); *People v Fields*, 450 Mich 94, 113; 538 NW2d 356 (1995).

Further, the challenged instruction did not shift the burden of proof to defendant. Indeed, the trial court instructed the jury several times that the burden of proof with regard to both the principal charges and defendant's claim of self-defense was with the prosecution. Because the instruction was consistent with the law, defendant has failed to show plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 765; 597 NW2d 130 (1999).

Defendant also claims that the language of the aiding and abetting instruction failed to instruct the jury on the specific intent element required to convict a defendant of aiding and abetting. Again, we disagree. To convict a defendant as an aider and abettor, MCL 767.39 requires the prosecution to show that the crime was committed by the defendant or another, that the defendant performed acts or gave encouragement that aided or assisted the commission of the crime, and that the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time the defendant gave the aid or assistance. *People v Jones*, 201 Mich App 449, 451; 506 NW2d 542 (1993). Examining the jury instructions in their entirety, *Aldrich*, *supra* at 124, it is clear that the court properly instructed the jury on the intent element required to convict a defendant of aiding and abetting.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder