

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEONARD GREGORY WALKER,

Defendant-Appellant.

UNPUBLISHED
February 19, 2009

No. 279500
Wayne Circuit Court
LC No. 07-006407-01

Before: Gleicher, P.J., and K.F. Kelly and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to 25 to 50 years' imprisonment for the second-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. We affirm.

The charges in this case stem from a fight between defendant and the victim outside a local bar. Defendant knew the victim before this incident, and they exchanged words on the night of the murder. The victim's friend testified that he saw defendant pull a gun from his hood and shoot the victim while the two argued outside the bar. The bar's bouncer testified that he heard several gunshots while defendant and the victim were engaged in a fistfight. According to the bouncer, when the victim tried to reenter the bar, defendant stood behind him and fired additional shots at him. The victim then ran toward the road and fell to the ground. Defendant repeatedly punched the victim in the face as he lay on the curb. The autopsy revealed five gunshot wounds on the victim's body, including three consistent with close-range shots. Police officers found blood in various locations near the bar.

Defendant acknowledged that he had engaged in a physical altercation with the victim. However, defendant contends that the victim pulled the weapon, and when they struggled for control of the gun the weapon discharged, wounding the victim. Defendant conceded that he walked away from the scene after the shooting, did not call authorities, and left the state two days later.

At trial, defendant did not raise a challenge to the first-degree murder charge or request a directed verdict. The trial court granted defendant's request for the inclusion of jury instructions on second-degree murder, voluntary manslaughter, and self-defense. When queried by the trial

court regarding approval of the instructions provided to the jury, defense counsel specifically stated, “Satisfied, Your Honor,” and declined the opportunity to place any additional information or objection on the record.

Defendant first argues that the trial court erred by instructing the jury on first-degree murder because insufficient evidence supported the charge. Defendant further contends that this erroneous instruction likely resulted in the jury reaching a compromise verdict and improperly convicting him of second-degree murder. To preserve a challenge to a charge submitted to the jury, a defendant must seek a directed verdict on the proper grounds in the trial court. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). Because defendant failed to preserve this challenge, this Court will review the unpreserved issue only for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

In accordance with our Supreme Court’s ruling in *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000), we find that the actions of defense counsel in expressly approving the trial court’s instructions to the jury constitutes a waiver of the issue on appeal. *Id.* at 214-215. Waiver means “the intentional relinquishment or abandonment of a known right,” which serves to “extinguish[] any error” and precludes appellate review. *Id.* at 215-216.

In this case, the trial court instructed the jury on first-degree murder as charged and, in accordance with defendant’s own request, second-degree murder, voluntary manslaughter and self-defense. Once the trial court had read the instructions to the jury, defense counsel had two separate opportunities to object to the instructions or make a record of any concerns. In response to the trial court’s inquiry, defense counsel specifically indicated satisfaction with the instructions and declined to add or delineate any concerns for the record. As a result, defendant has waived the issue and appellate review is precluded.¹

Further, defendant cannot now complain of his conviction on the charge of second-degree murder when he requested instruction of the jury on this offense. A defendant may not assert that an error requires reversal if the error arose from actions to which he “contributed by plan or negligence,” *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003), disapproved in part on other grounds 469 Mich 967 (2003), nor may a defendant advocate a position before the trial court and argue on appeal that the decision in his favor resulted in error. *Aldrich*, *supra* at 111.

Defendant lastly contends that he is entitled to resentencing because the trial court erroneously scored offense variable (OV) 7 at 50 points for “excessive brutality.” This Court must affirm a sentence falling within the proper sentencing guidelines range “unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the

¹ We note, based on our review of the lower court record, that even had defendant not waived this issue, his claim would fail. Viewing the evidence presented in the light most favorable to the prosecution, sufficient evidence existed for a rational trier of fact to have found defendant guilty of first-degree murder beyond a reasonable doubt. *People v Marsack*, 231 Mich App 364, 370; 586 NW2d 234 (1998). Hence, the instruction on first-degree murder was proper.

defendant's sentence.” *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). The trial court has discretion to score a certain number of points, as long as evidence on the record supports that particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Defendant's conviction of second-degree murder required the scoring of OV 7. *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005); MCL 777.22(1). Pursuant to MCL 777.37(1)(a), the trial court may score 50 points for OV 7 if the “victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.”

The trial court found that after defendant initially shot the victim, the victim attempted to walk away. Defendant stood behind the victim and fired several additional shots. While the victim lay on the ground, defendant sat on top of him and repeatedly punched him in the face. The court determined that this conduct constituted excessive brutality. Notably, defendant does not deny that he sat on top of the victim and punched him. Rather, he argues that he only did this because he believed that he and victim were still actively engaged in their fistfight. However, no evidence exists, aside from defendant's own testimony, supporting that the victim continued fighting or struggling with defendant as he lay on the ground. The evidence indicates to the contrary, and defendant concedes that he did not stop hitting the victim until other patrons of the bar intervened.

This Court will affirm a trial court's scoring decision if the evidence of record supports it. *Hornsby*, *supra* at 468. Because the trial court sufficiently delineated its reasoning on the record and the evidence presented at trial supports the scoring determination, we find no error.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray