

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 20, 2012

v

RONALD CALDWELL, JR.,

Defendant-Appellant.

No. 298791
Wayne Circuit Court
LC No. 09-022504-FC

Before: CAVANAGH, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to 17 to 40 years in prison for the murder conviction, and to a consecutive two-year term of imprisonment for the felony-firearm conviction. For the reasons set forth below, we affirm.

Defendant's convictions arise from the August 11, 2009, shooting death of 41-year-old Kevin Swift on a Detroit sidewalk. The prosecution's theory was that defendant approached Swift as Swift was walking his dog and, after a brief exchange between the two men, defendant chased Swift down the street while firing multiple shots at him, ultimately shooting Swift in the back. The defense conceded that defendant fired the shot that killed Swift, but claimed that defendant was aiming only at Swift's dog and that defendant shot Swift accidentally. Defendant testified that after his girlfriend identified Swift as the person who had previously carjacked her, defendant got out of his car and approached Swift to delay him while his girlfriend called the police. According to defendant, he engaged Swift in a conversation about his dog, during which Swift became argumentative and released the dog on him, causing defendant to pull his weapon and fire at the dog in self-defense. Defendant denied that Swift was his intended target.

I. JURY SELECTION

Defendant argues that the trial court erroneously denied his requests to designate the two alternate jurors before trial began, and for "one or two" additional peremptory challenges because of the two extra alternate jurors. We disagree. The trial judge ruled that MCR 6.411 required him to designate the alternate jurors before jury deliberations, and not before the start of trial. Whether the trial court properly interpreted and applied MCR 6.411 is a question of law that we review de novo. *Haliw v City of Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005). We review a trial court's decision regarding a request for additional peremptory

challenges for an abuse of discretion. *People v Howard*, 226 Mich App 528, 536; 575 NW2d 16 (1997).

A. DESIGNATION OF ALTERNATIVE JURORS

MCR 6.411 states, in pertinent part:

The court may impanel more than 12 jurors. If more than the number of jurors required to decide the case are left on the jury *before deliberations are to begin, the names of the jurors must be placed in a container and names drawn from it to reduce the number of jurors to the number required to decide the case.* [Emphasis added.]

Here, as required by the court rule, the trial court selected the alternate jurors before the jurors began deliberations. Defendant's reliance on MCR 6.410(A) is misplaced. Although that rule allows the parties to stipulate to have the case decided by a jury consisting of less than 12 jurors, neither party asked to proceed with less than 12 jurors, so the parties did not stipulate or seek the court's consent to do so. Therefore, defendant's argument fails.

B. ADDITIONAL PEREMPTORY CHALLENGES

Defendant used only 9 of the 12 peremptory challenges to which he was entitled under MCR 6.412(E)(1), and he never expressed that he was dissatisfied with the jury as sworn. Under these circumstances, defendant has forfeited this issue on appeal. See *People v Rose*, 268 Mich 529, 531-532; 256 NW 536 (1934). Furthermore, MCR 6.412(E)(2) allows the trial court to increase the number of peremptory challenges "[o]n a showing of good cause." Defendant has not identified a basis on which defense counsel could have shown good cause for additional peremptory challenges. In addition, he has not identified any juror whom he would have removed. We therefore reject this claim of error.

II. THE PROSECUTOR'S REQUESTED JURY INSTRUCTIONS

The prosecutor charged defendant with first-degree premeditated murder. Defendant argues that the trial court erred by sua sponte instructing the jury on the lesser offenses of second-degree murder and voluntary manslaughter. Contrary to defendant's assertion, the prosecutor requested these lesser offense instructions, so the trial court did not give the instructions on its own motion. Although we review questions of law pertaining to jury instructions de novo, a trial court's decision whether an instruction applies to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

The trial court has a duty to instruct the jury on the applicable law. MCL 768.29. A trial court must instruct the jury with respect to necessarily included lesser offenses upon a request for such instructions so long as "the charged offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Smith*, 478 Mich 64, 69; 731 NW2d 411 (2007). Second-degree murder is a lesser offense of first-degree murder, distinguished by the element of intent. *People v*

Fletcher, 260 Mich App 531, 557; 679 NW2d 127 (2004). While the intent to kill with premeditation and deliberation is required for first-degree murder, a conviction of second-degree murder requires only that the defendant act with malice. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). “Malice is defined as ‘the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.’” *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (citation omitted). Malice may be inferred from facts in evidence, including the use of a dangerous weapon. *People v Bulls*, 262 Mich App 618, 627; 687 NW2d 159 (2004).

Here, the prosecution presented testimony that defendant and Swift were briefly engaged in conversation before defendant chased down and fired multiple shots at Swift while Swift fled down the street. Testimony also established that defendant pulled his weapon and shot at Swift’s dog. Defendant claimed that he pulled his weapon and shot at the dog in self-defense. Although testimony supported an inference of premeditation and deliberation, the jury also could have rationally discounted defendant’s claim that he fired toward Swift’s dog in self-defense and concluded that defendant shot at Swift with malice, but did not do so with a premeditated and deliberate plan to kill him. Because the intent element differentiating first-degree premeditated murder from second-degree murder was in substantial dispute, the trial court did not err in instructing the jury on second-degree murder.

Like second-degree murder, voluntary manslaughter is also a necessarily included lesser offense of murder, distinguished by the element of malice. *People v Mendoza*, 468 Mich 527, 533-534, 536, 540-541; 664 NW2d 685 (2003). Consequently, when a defendant is charged with murder, an instruction for voluntary manslaughter must be given upon request if supported by a rational view of the evidence. *Id.* at 541. “Voluntary manslaughter requires a showing that (1) defendant killed in the heat of passion, (2) this passion was caused by an adequate provocation, and (3) there was no lapse of time during which a reasonable person could have controlled his passions.” *People v Roper*, 286 Mich App 77, 87; 777 NW2d 483 (2009). To mitigate a killing from murder to voluntary manslaughter, the necessary degree of provocation required “‘is that which causes the defendant to act out of passion rather than reason’; that is, adequate provocation is ‘that which would cause the reasonable person to lose control.’” *Id.* (citation omitted).

Defendant testified that his confrontation with Swift was prompted by his girlfriend’s identification of Swift as the person who carjacked her five days earlier. Defendant also testified that Swift became argumentative during the confrontation, and that Swift caused or allowed his dog to react threateningly or aggressively toward defendant. A jury could have concluded that this combination of events caused defendant to act in the heat of passion, rather than reason, when he pulled his weapon and fired the gun. Therefore, the trial court’s decision to instruct on voluntary manslaughter was not outside the range of reasonable and principled outcomes.

III. DEFENDANT’S REQUESTED JURY INSTRUCTION

Defendant claims that the trial court abused its discretion by refusing to instruct the jury on involuntary manslaughter. Involuntary manslaughter is a necessarily included lesser included offense of first-degree murder. *Mendoza*, 468 Mich at 533. As it relates to this case, if a

homicide “was committed with a lesser mens rea of gross negligence or an intent to injure, and not malice, it is not murder, but only involuntary manslaughter.” *People v Holtschlag*, 471 Mich 1, 21; 684 NW2d 730 (2004) (emphasis added). Thus, defendant was entitled to an involuntary manslaughter instruction only if a rational view of the evidence would have supported a finding that Swift’s death was caused by an act of gross negligence, and not malice.

A rational view of the evidence does not support a finding of gross negligence, without malice. Defendant testified that after his girlfriend identified Swift as the man who carjacked her, defendant made a U-turn, parked his SUV, exited his vehicle with his loaded firearm, and waited for Swift (and his dog) to approach. Defendant engaged Swift in conversation as Swift was holding his dog’s leash. Defendant testified at trial that, in self defense, he intentionally pulled the trigger of his loaded firearm three to four times while the gun was pointed toward Swift’s dog. Thus, this is not a circumstance in which a defendant, through an act of gross negligence, accidentally discharged a weapon. Defendant further testified that at the time he intentionally fired his weapon three to four times, he did not know Swift’s whereabouts, although Swift was initially standing near him with the dog. As a result of defendant’s acts, Swift was shot in the back and died. Defendant admittedly left the scene immediately afterward. Given this evidence, no rational juror could conclude that defendant’s act of intentionally shooting a firearm at least three times on a neighborhood sidewalk in mid afternoon, and in close proximity to a human being, could be characterized as only an act of gross negligence, without malice, i.e., an act that, at a minimum, was done with “wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *Werner*, 254 Mich App at 531.

The only evidence suggesting that defendant did not commit this homicide with malice is defendant’s own testimony that he did not aim at or intend to kill Swift, and the defense claim, which lacked any supporting evidence, that the fatal bullet may have ricocheted and accidentally struck Swift. This does not constitute the kind of substantial evidence necessary to support a lesser offense instruction, and the facts do not rationally fit within the legal purview of involuntary manslaughter. Defendant claims that eyewitnesses corroborated his testimony that he aimed and shot at the dog. But one witness who testified that he observed defendant shoot at the dog clarified that defendant shot at *both* Swift and the dog, and the other witness testified that after defendant pulled his gun and shot at the dog, defendant began chasing Swift, who was running away from defendant. Each of the prosecution’s five eyewitnesses testified that they observed defendant chasing Swift at some point, and several of those witnesses stated that the dog had already run away or was running in front of Swift as Swift was fleeing defendant’s gunfire. With regard to defendant’s claim that the fatal bullet, which was intended for the dog, must have ricocheted, the police evidence technician testified that no evidence of ricocheting was detected at the scene. In addition, the medical examiner testified that Swift’s entry wound was not characteristic of a bullet that struck the ground before entering Swift’s back. The trial court did not err by failing to instruct the jury on involuntary manslaughter.

IV. REINSTRUCTION ON SECOND-DEGREE MURDER

Defendant incorrectly contends that the trial court denied him a fair trial by shifting the burden of proof when it reinstructed the jury on second-degree murder during jury deliberations. During deliberations, the jury asked for clarification of the third element of second-degree

murder. The trial judge told the parties how he planned to respond. In turn, defense counsel stated, “That sounds right,” and requested that the court remind the jury that the prosecutor had the burden of proof with regard to all of the elements. The trial court thereafter instructed the jury as follows:

The court: [J]ust so I’m clear, make sure that what I’m trying to clarify for you is the paragraph that says, “third, that the killing was not justified or excused or done under circumstances that reduce it to a lesser crime.”

That’s the one?

Juror 13: Yes.

The court: And as you know, when its referred to, the third—this is the third element, and *the prosecutor has to prove all three of these elements beyond a reasonable doubt.*

You understand that?

The jury: Yes.

The court: What this third element refers to when it says “that the killing was not justified or excused,” what that deals with is the defense’[s] contention in this case, the defense claims that the defendant, Mr. Caldwell, shot at the dog in self-defense and that the firing at the dog resulted in the accidental death of Mr. Swift.

Okay. Everybody clear on that?

That’s what that element is in reference to.

The second part of that particular sentence where it says “or done under circumstances that reduce it to a lesser crime” means that you find that *what the prosecutor has proven beyond a reasonable doubt is not voluntary manslaughter but second degree murder.*

Does that make sense that you don’t find that it is the lesser offense of manslaughter but the higher offense?

I hope that—if that’s not clear, write me another note because as I told you with regard to Count One, there are four options.

You can find defendant not guilty, or you can find the defendant guilty of first degree premeditated murder or guilty of second degree murder or guilty of voluntary manslaughter.

So in terms of that third element when it talks about its done under circumstances that don’t reduce it to the lesser crime there, they’re saying what

the law says in that instruction is that you find beyond a reasonable doubt that it wasn't the lesser of the three charges of manslaughter but the higher one of second degree murder. [Emphasis added.]

After the court instructed the jury, defense counsel stated, "I haven't any objection to what the Court provided as relates to the first question clarification on element three." Because defense counsel assented to the trial court's instruction as given, appellate review of this claim is waived. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Defense counsel's waiver extinguishes any error. *Id.* at 216.

Regardless, defendant's failure to object limits this Court's review to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). Examined in their entirety, *People v Martin*, 271 Mich App 280, 337; 721 NW2d 815 (2006), the jury instructions clearly indicated that the prosecution was required to prove the elements of the crimes beyond a reasonable doubt, and did not convey, expressly or implicitly, that defendant must disprove any element, including malice. On this record, defendant's unpreserved challenge to the jury instructions does not warrant relief.

V. THE DEFENSE OF ACCIDENT

Defendant asserts that the trial court erred when it failed to sua sponte instruct the jury on the defense of accident in accordance with CJI2d 7.2, and then compounded this error by mischaracterizing the defense theory of the case. We disagree. Defendant acknowledges that he did not request a jury instruction on accident as a defense to murder. Therefore, that portion of this claim is not preserved. During deliberations, defendant requested that the court provide further instructions regarding his theory of the case, thereby preserving the latter portion of this claim. This Court reviews claims of instructional error de novo. *Martin*, 271 Mich App at 337. This Court "examines the instructions as a whole, and, even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried." *Id.* at 337-338 (citation omitted). Defendant's unpreserved claim is reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

Contrary to what defendant argues, the record discloses that immediately before instructing the jury on self-defense, the trial court instructed the jury in accordance with CJI2d 7.2 as follows:

Now the defendant says he is not guilty of first degree premeditated murder or second degree murder or voluntary manslaughter because he did not intend to kill Kevin Lamont Swift. The defendant says that his conduct was accidental.

If the defendant did not intend to murder or kill Kevin Lamont Swift, he is not guilty. The prosecutor must prove beyond a reasonable doubt that the defendant intended the crime of premeditated murder in the first degree, second degree murder of voluntary manslaughter.

After the trial court completed its final instructions, it asked the attorneys if there were “any additions, corrections or objections to the jury instructions?” Defense counsel responded, “No, Your Honor.” Thus, not only did the trial court instruct the jury in accordance with CJI2d 7.2, defendant waived any claim challenging the instruction by expressing his approval of the instruction as given. See *Carter*, 462 Mich 215-216.

Within this issue, defendant also argues that when responding to the jury’s question regarding the third element of second-degree murder, the trial court mischaracterized his defense theory as self-defense *and* accident when it stated:

What this third element refers to when it says “that the killing was not justified or excused,” what that deals with his the defense’[s] contention in this case, the defense claims that the defendant, Mr. Caldwell, *shot at the dog in self-defense and that the firing at the dog resulted in the accidental death of Mr. Swift.* [Emphasis added.]

The trial court’s instructions clearly reflected the defense theory of the case. Throughout trial, the defense claimed that defendant deliberately shot his gun toward the ground, aiming for the dog in self-defense, and never aimed at Swift, but that a bullet must have ricocheted from the ground and accidentally struck Swift. The defense of accident was never a sole defense theory, but, as the trial court aptly noted, was directly tied to defendant’s claim of self-defense. The trial court instructed the jury accordingly on the defenses of self-defense and accidental death, and the instructions, as given, fairly presented the issues to be tried and sufficiently protected defendant’s rights.

VI. REINSTRUCTION ON FELONY-FIREARM

Defendant avers that he is entitled to a new trial because, when reinstructing the jury on the offense of felony-firearm during deliberations, the trial court omitted a portion of the instruction, which defendant maintains may have confused the jury. Because there was no objection to the challenged instruction, we review this unpreserved claim for plain error affecting defendant’s substantial rights. *Carines*, 460 Mich at 763-764.

In its final instructions, the trial court instructed the jury in accordance with CJI2d 11.34, the standard jury instruction for felony-firearm. During deliberations, in responding to the jury’s request for clarification of that charge, the court again provided an accurate recitation of the instruction, but omitted the sentence that states that it is not necessary for a defendant to be actually convicted of the underlying crime in order to be guilty of felony-firearm. This omission during reinstruction did not affect defendant’s substantial rights. If anything, the omission would have been more harmful to the prosecution. The omitted instruction does not involve any of the elements of felony-firearm, but merely conveys that a jury may convict a defendant of felony-firearm even if it does not convict the defendant of an underlying crime. That is, it advises the

jury of a circumstance in which a felony-firearm conviction is *permitted*, not *precluded*. There is no basis to conclude that defendant was prejudiced by the absence of this instruction.¹

VII. SENTENCE

We disagree with defendant's claim that he is entitled to resentencing because the trial court failed to specifically address his motion for a downward departure from the sentencing guidelines range. Defendant was sentenced within the sentencing guidelines range of 144 to 240 months. This Court must affirm a sentence within the guidelines range absent an error in the scoring of the guidelines or reliance on inaccurate information in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). On appeal, defendant has not demonstrated that the guidelines were erroneously scored or that the trial court relied on inaccurate information. Therefore, this Court must affirm defendant's sentences.

Further, the record does not support defendant's claim that the trial court failed to address his request for a downward departure from the guidelines range. Though the trial court did not expressly state that it was denying defendant's request for a downward departure, it clearly rejected the request while thoroughly addressing its reasons for sentencing defendant within the guidelines range. Defendant is not entitled to resentencing.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Pat M. Donofrio

¹ Because we find no error by the trial court, we reject defendant's argument that the cumulative effect of several "errors" denied him a fair trial. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).