STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM DALE SNYDER,

Defendant-Appellant.

UNPUBLISHED
March 31, 1998

No. 195666
Montcalm Circuit Court
LC No. 95-000116 FC

Before: Griffin, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to twenty-five to fifty years' imprisonment for the assault conviction and two years' consecutive imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant first alleges that the trial court erred in denying defendant's motion for a mistrial when the complainant made reference to defendant's prior incarceration. The record indicates that prior to trial, there was an in-chambers discussion in which the parties agreed that no mention would be made of the fact that defendant was on parole or that he had served prison time. However, on direct examination, the complainant described how she had convinced defendant to drive her to the hospital after the shooting. Upon their arrival, defendant reached across her, opened the passenger door, and pushed the complainant onto the pavement. In response to the prosecutor's question whether defendant had to reach across her to open the car door, the complainant answered affirmatively and then added, "Before he did this, he said, 'I'm not going back to jail, even though I love you, I'm not going back to jail for you.'" Defendant moved for a mistrial based on this jail reference. The trial court denied the motion, finding that the witness' answer was neither solicited nor responsive to the proffered question. The trial judge then offered the defense a curative instruction to be given at that moment or at the conclusion of the trial, but defense counsel reserved its decision on this issue. Defendant never

resurrected the issue again. Consequently, a curative instruction was never given at the conclusion of the trial.

The trial court's grant or denial of a mistrial will not be reversed on appeal in the absence of an abuse of discretion. *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996); *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *Id.* Generally, unresponsive statements by prosecution witnesses are not grounds for declaring a mistrial. *People v Lumsden*, 168 Mich App 286, 298-299; 423 NW2d 645 (1988); *People v Barker*, 161 Mich App 296, 306; 409 NW2d 813 (1987). As the *Barker* Court, *supra* at 306, explained:

> A witness cannot put error into a case by an unauthorized remark, neither called out by a question nor sanctioned by the jury; and if what he or she says or does improperly is likely to do much mischief, it is presumed that the judge will apply the proper corrective measures in his or her instructions if requested to do so. Unresponsive testimony by a prosecution witness, although error, is not necessarily grounds for reversal. Generally, the failure of defense counsel to request a curative instruction regarding a gratuitous answer will preclude appellate review of the issue in the absence of a showing of manifest injustice. [2 Gillespie, [Michigan Criminal Law & Procedure (2d ed)] supra, § 600, pp 203-204.]

In the instant case, the complainant's solitary reference to defendant's previous incarceration was unsolicited and fleeting. This is not a situation in which multiple references to prior incarcerations were made despite repeated cautioning by the trial court. See, e.g., *People v Spencer*, 130 Mich App 527; 343 NW2d 607 (1983). Although the trial court in this case offered to give a curative instruction, defendant did not accept the offer. The error complained of was not so egregious "that the prejudicial effect [could] be cured in no other way" than to declare a mistrial. *Lumsden*, *supra* at 299. Under these circumstances, we do not find that the trial court abused its discretion in denying a mistrial.

II

Defendant next alleges reversible error in the unpreserved issue of improperly excluded evidence. We disagree.

The complainant testified at trial that defendant intentionally shot her "execution style" at close range with a rifle. The complainant refuted any characterization of the shooting as accidental. On cross-examination, however, defense counsel attempted to demonstrate that the complainant had made prior inconsistent statements regarding the circumstances of the shooting to an insurance company[1] and a personal attorney. Defense counsel asked the complainant if she had ever contacted an attorney or an insurance company about the shooting incident. The prosecutor objected to this line of questioning on the grounds of relevancy and the trial court sustained the objection. Defense counsel then asked the complainant whether she had told others that the shooting was an accident, and she replied, "No, I did not say no such thing."

Defense counsel subsequently called as a witness Daniel Rambadt, the complainant's friend, with the apparent belief that Rambadt would testify that the complainant had told him that the shooting was an accident. However, defense counsel's inquiry ("Did she indicate to you that this had been an accident?") was foreclosed by the prosecutor's objection, sustained by the trial court on hearsay grounds. Defense counsel did not make any record as to the substance of the excluded testimony.

The issue of exclusion of these purported prior inconsistent statements of the complainant has not been preserved for appellate review. To preserve an evidentiary issue for review, a party seeking admission of excluded evidence is obliged to make an offer of proof to provide the trial court with an adequate basis on which to make its ruling and to provide this Court with the information it needs to evaluate the claim of error. MRE 103(a)(2); *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994); *People v Arenda*, 416 Mich 1, 14; 330 NW2d 814 (1982); *Phinney v Perlmutter*, 222 Mich App 513, 529; 564 NW2d 532 (1997); *People v Stacy*, 193 Mich App 19, 31; 484 NW2d 675 (1992); *People v Emanuel*, 98 Mich App 163, 187-188; 295 NW2d 875 (1980); *Orlich v Buxton*, 22 Mich App 96, 100; 177 NW2d 184 (1970).

The excluded testimony of Daniel Rambadt may have been admissible to impeach the complainant's credibility through her prior inconsistent statements. MRE 801(c). However, defendant did not preserve an objection to the excluded evidence either by arguing the nonhearsay nature of the evidence or by making an offer of proof to the trial court. The substance of the evidence sought to be admitted was not "apparent from the context within which the questions were asked." MRE 103(a)(2). While it is evident from the record what defense counsel hoped the answer to his questions would be, it is by no means certain what the testimony, in actuality, would have been. It would be pure speculation to conclude that Rambadt would have testified that the complainant told him that the shooting was an accident. As the court stated in *People v Wakeford*, 418 Mich 95, 117; 341 NW2d 68 (1983):

> In the absence of some indication as to what the defendant's testimony would have been, we can only speculate as to how the trial would have been different and the "decisional process" affected [*People v*] *Jackson, supra* [391 Mich 323; 217 NW2d 22 (1974)], had the defendant testified. We decline to predicate reversal on such speculation, particularly since it was well within the defendant's ability to preclude such speculation by making an offer of proof and a separate record. See MRE 103.

Under the circumstances of the present case, in which our conjecture regarding the excluded testimony could have been cured by an offer of proof, we are reluctant to find error requiring reversal. *Id.*

A plain, unpreserved error may not be considered by an appellate court for the first time on appeal unless "the error could have been decisive of the outcome or unless it falls under the category of cases, yet to be clearly defined, where prejudice is presumed or reversal is automatic." *Grant, supra* at 553. In the present case, the extent of the complainant's injuries contradicted an accident theory. The evidence indicated that defendant told the victim that if she touched the door knob attempting to leave the apartment, she was dead. The complainant testified that she returned to a couch. Defendant unloaded and then loaded one round into the rifle he was holding, cocked it, pointed it at the victim's

head, and fired a shot at her head. The complainant deflected the shot with her hand. Uncontradicted forensic evidence confirmed that the shot came from a distance of eighteen inches or greater, consistent with the complainant's injuries and her version of events. Being unable, due to the defendant's failure to make an offer of proof, to determine whether the proffered testimony of Daniel Rambadt would indeed have contradicted complainant's previous statements, we are not persuaded that the error alleged here would have been decisive of the outcome of the case. MRE 103(d); *Grant, supra*. Accordingly, the error, if any, was harmless. MCR 2.613(A); MCL 769.26; MSA 28.1096.

III

Defendant next asserts error in certain remarks made by the prosecutor during closing argument. Defendant contends that the prosecutor improperly alluded to defendant's failure to explain or provide testimony relative to his innocence and, therefore, his silence was used against him. Defendant has failed to preserve this issue by objecting at trial. The failure to object during trial precludes appellate review unless the prejudicial effect caused by the remarks would not have been cured by a cautionary instruction and failure to consider the issue would result in a miscarriage of justice. *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995). Viewing the prosecutor's remarks in context, *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995), we find that they do not improperly comment upon defendant's failure to testify. MCL 600.2159; MSA 27A.2159. The prejudicial effect, if any, could have been cured by an instruction to the jury. A miscarriage of justice will not result from our refusal to review this unpreserved issue. *Whitfield, supra*.

IV

Defendant also alleges that the trial court erred in denying his request to sequester the investigating officer during opening argument. The sequestration of witnesses is a matter for the discretion of the trial court. *People v Houston*, 179 Mich App 753, 759; 446 NW2d 543 (1989); *People v Hayden*, 125 Mich App 650, 659; 337 NW2d 258 (1983). Defendant offered no reasons to the trial court for this request. On appeal, defendant likewise does not specify how his right to effective confrontation of witnesses was affected, other than to argue that the prosecution witness was given the unfair advantage of critiquing defense strategy before the start of trial. We find no merit in defendant's argument. On this record, it cannot be said that the trial court abused its discretion. *People v Buero*, 59 Mich App 670; 229 NW2d 880 (1975).

V

Defendant raises two issues relating to the selection of the jury. First, he contends that the trial court abused its discretion by refusing additional *voir dire* of a juror. The juror stated that a family member had been the victim of an assault three years before this case was tried. The trial court refused further voir dire concerning the details of the assault. The trial judge did inquire as to whether the juror would be able to reach a fair and impartial verdict. The juror assured the court that he had no opinion regarding defendant's guilt or innocence and that he would weigh the evidence to reach a fair conclusion. It is presumed that the juror was being truthful in this regard. *People v King*, 215 Mich App 301; 544 NW2d 765 (1996). The trial judge observed the demeanor of the juror when he

answered the question and reached a conclusion regarding that juror's objectivity. We find no abuse of discretion in the trial court's decision not to conduct further voir dire. *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996).

Similarly, the trial court did not abuse its discretion in denying defendant's request for additional peremptory challenges. *King, supra*. Defendant alleged good cause for additional challenges pursuant to MCR 6.412(E)(2) on the grounds that a number of the panel members were acquainted with the investigating officers. Some of the jurors defendant complains of on appeal were seated on the jury at a time when defendant still had remaining peremptory challenges. None of these jurors was challenged for cause. Moreover, the record indicates that the trial court ascertained that the jurors' acquaintance with the officers would not affect their ability to render a fair verdict based on the evidence in the case. See *King, supra*. The trial court was clearly concerned with discerning bias and not merely with qualifying jurors. *People v Tyburski*, 445 Mich 606, 627; 518 NW2d 441 (1994). The fact that defendant's strategy in jury selection proved unsatisfactory to him does not compel the trial court to grant additional peremptory challenges.

VI

Defendant next argues that the trial court should have allowed him to inquire into certain conduct or propensities of the complainant. Absent the requisite offer of proof pursuant to MRE 103(a)(2), defendant has not preserved this issue for appellate review. *Grant, supra*. The purpose of the inquiry was not apparent from the context of the record. *People v Morton*, 213 Mich App 331; 539 NW2d 771 (1995). Even assuming that this issue had been properly preserved, we agree with the trial court that it was appropriate to exclude such evidence as irrelevant to the circumstances of the case. MRE 404(a)(2).

VII

Next, defendant complains that error requiring reversal occurred when the complainant was allowed to testify in detail concerning the extent and continuing consequences of her injuries. Defendant asserts that this testimony served no probative purpose other than to inflame the jury. Defendant did not object to the admission of the testimony and therefore has not preserved the issue for appellate review. *Id.* A thorough review of the record indicates, at any rate, that evidence as to the complainant's injuries was relevant to matters at issue, particularly the question of intentional as opposed to accidental conduct. The complainant's testimony that her hand "exploded" from the impact of the bullet added credence to her testimony that defendant leveled his rifle and fired as she shielded herself with her hand. The nature and extent of complainant's injuries added credence to the prosecution theory of an intentional assault. We therefore find no manifest injustice in the admission of this relevant evidence. *People v Stimage*, 202 Mich App 28, 29; 507 NW2d 778 (1993).

VIII

We disagree with defendant that the trial court improperly denied his motion for a directed verdict. In reviewing a trial court's decision on a motion for directed verdict, this Court views the

evidence presented up to the time the motion was made in the light most favorable to the prosecution to determine if a rational factfinder could find the essential elements of the crime proven beyond a reasonable doubt. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996). To prove the charge of assault with intent to commit murder, the prosecution must show (1) that there was an assault, (2) that there was an actual intent to kill, and (3) that the assault, if successful, would make the killing murder. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). The intent to kill may be proven by inference from any facts in evidence. *Id*.; *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).

The complainant's testimony established that defendant first threatened her, then loaded a rifle, pointed it at her head, and fired. She deflected the shot, which came from a distance of approximately eighteen inches, with her hand. The injuries which the complainant sustained were consistent with her version of events. No other evidence was presented that contradicted this body of evidence. Accordingly, a rational factfinder, reviewing the testimony and exhibits, could have found that the essential elements of the charged crime were proven beyond a reasonable doubt. The trial court did not err when it denied defendant's motion for a directed verdict.

IX

Defendant asserts additional error in the trial court's refusal to instruct the jury on the misdemeanor lesser offense of reckless use of a firearm resulting in injury, MCL 752.861; MSA 28.436(21). When properly requested, a trial court should instruct a jury on appropriate lesser included misdemeanors if a rational view of the evidence could support a verdict of guilty of the misdemeanor and not guilty of the felony, the defendant has proper notice or has made the request, and the instruction would not result in confusion or injustice. *People v Stephens*, 416 Mich 252, 261-265; 330 NW2d 675 (1982); *People v Corbiere*, 220 Mich App 260, 262-263; 559 NW2d 666 (1996); *People v Taylor*, 195 Mich App 57, 62; 489 NW2d 99 (1992).

In this case, the evidence supported a conviction for the felony but not the misdemeanor. If believed by the jury, the complainant's testimony clearly showed that defendant had the intent necessary for the felony conviction. As noted previously, the evidence indicated that the shot fired at the complainant's head occurred after defendant had unloaded and then reloaded the rifle before cocking it, pointing it at the complainant's head, and firing it. No evidence was presented in the case showing that defendant's conduct was reckless or that the weapon had been accidentally discharged. Accordingly, the trial court did not abuse its discretion in denying defendant's requested misdemeanor instruction. A rational view of the evidence could not support a verdict of guilty on the misdemeanor and not guilty of the felony. *Taylor, supra*.

In a related argument, defendant contends that it was error for the trial court to deny his request to have his theory of the case presented to the jury. When a jury instruction is requested on any theories or defenses and is supported by evidence, it must be given to the jury by the trial judge. MCR 2.516(A)(2); *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995), mod on other grounds, 450 Mich 1212 (1995). A trial court is required to give a requested instruction, except where the theory is not supported by evidence. *Id.*

In the instant case, the trial court reviewed defendant's theory and declined to read it, finding it to be unsupported by the facts in evidence. We agree. Defendant's proposed theory was that the complainant grabbed the loaded rifle and struggled with defendant, causing the rifle to accidentally discharge. That theory was not consistent with either the evidence presented at trial or the complainant's injuries. The facts set forth in defendant's proffered theory were argumentative, derived solely from defendant's opening and closing statements to the jury, and were not based on properly introduced evidence. We therefore find no error in this issue.

X

Finally, we find no merit in defendant argument that his sentence of twenty-five to fifty years for the assault conviction was disproportionate and in disregard of the *Coles'* factors. *People v Coles*, 417 Mich 523; 339 NW2d 440 (1983). As an habitual offender, defendant's sentence is reviewed under the proportionality standard. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). The sentencing guidelines (fifteen to twenty-five years in this instance) do not apply to habitual offender convictions. *People v McFall*, 224 Mich App 403, 415; 569 NW2d 828 (1997).

We reject defendant's claim that his sentence violates the principle of proportionality. The trial court properly stated on the record the criteria it considered in imposing the enhanced sentence, including the significant danger of death to the victim and defendant's extensive criminal history dating back to l966. *People v Hunter*, 176 Mich App 319, 321; 439 NW2d 334 (1989); *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985). Defendant, an habitual offender, fourth offense, was on parole when the present offenses occurred. Under these circumstances, we find the sentence imposed to be proportionate to the seriousness of the crime.

Having found no error on the individual issues raised by defendant, we conclude that the cumulative effect of any alleged errors did not prejudice defendant.

Affirmed.

/s/ Richard Allen Griffin
/s/ Roman S. Gribbs

[1] Defendant was attempting to show that the victim may have filed an application for insurance benefits. Under the policy, intentional acts are excluded while accidental conduct is covered.