

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALLEN CARTER,

Defendant-Appellant.

UNPUBLISHED

June 12, 1998

No. 200304

Recorder's Court

LC No. 96-005318

Before: Wahls, P.J., and Jansen and Gage, JJ.

MEMORANDUM.

Defendant appeals as of right his conviction for second-degree murder, MCL 750.317; MSA 28.549 and felony-firearm, MCL 750.227b; MSA 28.424(2). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Leonard Burrage died after being shot by defendant in an altercation outside defendant's house. Defendant did not dispute that he shot Burrage, but he claimed that he acted in self-defense. Defendant was on the porch of his house at the time of the shooting, while Burrage was on a neighbor's driveway.

Defendant asserts that the trial court erred in giving instructions on duty to retreat, CJI2d 7.16, and the inapplicability of the duty to retreat from one's own home, CJI2d 7.17. These instructions are to be used in the alternative, and are not to be given together. *People v Watts*, 149 Mich App 502; 386 NW2d 565 (1986). Defendant failed to object to these instructions, waiving error unless relief is necessary to avoid manifest injustice. *People v Turner*, 213 Mich App 558, 573; 540 NW2d 728 (1995). There was no manifest injustice here. Defendant was not entitled to an instruction that he did not have a duty to retreat where decedent did not make an assault on his home. *People v Godsey*, 54 Mich App 316; 220 NW2d 801 (1974). Any error in the instructions inured to defendant's benefit, and did not result in manifest injustice.

Defendant also argues that he was deprived of the effective assistance of counsel where his trial counsel stipulated to the admission of a statement made by a witness who was too ill to be present at trial. To establish an ineffective assistance of counsel claim, defendant must show that counsel's performance was deficient and that under an objective standard of reasonableness, counsel made an

error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. Defendant must overcome the presumption that the challenged action was sound legal strategy, and must establish that the deficiency was prejudicial. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994); *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). Where the statement of the witness was cumulative to other testimony at trial, there is no showing that the stipulation was a serious error that was prejudicial to defendant.

Affirmed.

/s/ Myron H. Wahls

/s/ Kathleen Jansen

/s/ Hilda R. Gage