

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEO RANDOLPH,

Defendant-Appellant.

UNPUBLISHED

December 8, 1998

No. 200607

Recorder's Court

LC No. 96-003521

Before: O'Connell, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced as a third-felony habitual-offender, MCL 769.11; MSA 28.1083, to concurrent prison terms of twenty-five to forty-five years for the second-degree murder conviction and seven to ten years for the assault conviction, and a consecutive two year term for the felony-firearm conviction. He appeals as of right. We affirm.

This case arose out of the shooting death of one man and the wounding of another. At trial, defendant claimed that he shot at the decedent only after decedent threatened to kill him and his family, and after decedent aimed a gun at him.

First, defendant raises several claims of instructional error. Because defendant did not object to the trial court's instructions or request special instructions at trial, he failed to preserve these issues for appellate review. *People v Hardin*, 421 Mich 296, 322-323; 365 NW2d 101 (1984); *People v Messenger*, 221 Mich App 171, 177; 561 NW2d 463 (1997). However, we still review defendant's arguments to determine if manifest injustice has been shown. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. Instructions may not be extracted piecemeal to establish error. The trial court must instruct on all elements of the charged offenses and must not exclude material issues, defenses and theories if there

is evidence to support them. Even if the instructions are somewhat imperfect, there is no error if the instructions fairly presented to the jury the issues to be tried and sufficiently protected the defendant's rights. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992).

Defendant first claims that the trial court erroneously instructed the jury in its preliminary instructions that it did not have to apply the law as provided by the trial court. We disagree with defendant's interpretation of the trial court's instructions. Viewed as a whole, it is apparent that the trial court was conveying in its preliminary instructions that it was the jurors' job to decide the facts and that they were to then apply the applicable law to the facts as they found them. The trial court made it clear throughout its instructions that the jury was bound to follow the law as provided in the trial court's instructions. Thus, manifest injustice has not been shown.

Next, defendant argues that the trial court erred in giving instructions indicating both that he had a duty to retreat, CJI2d 7.16, and no duty to retreat from an attack in his own home, CJI2d 7.17. Defendant argues that these instructions were conflicting and he further contends that the trial court erred by not providing the jury with the definition of a "dwelling" for purposes of determining whether he was within the boundaries of his own home when he shot at the victims.

The evidence created a factual dispute as to whether defendant was on his porch at the time he began shooting at the victims. However, the testimony established that defendant had already walked out of his home and began firing the shots while he approached the area where the victims were originally located, which was away from defendant's home. There was no evidence that the victims entered defendant's property.

While there may have been a question of fact regarding defendant's exact position at the time of the shooting, we find no error necessitating reversal with regard to the trial court's instructions. It was clear that defendant was not attacked or assaulted inside his own home. Because defendant started firing from the porch, moved towards the victims, and was not attacked within his own home, the facts of this case did not support application of the no-retreat rule and, consequently, defendant cannot claim error from the trial court's failure to define the term "dwelling" for the jury. See *People v Godsey*, 54 Mich App 316, 319-321; 220 NW2d 801 (1974). Furthermore, although CJI2d 7.16 and 7.17 are generally considered alternative instructions, the trial court's decision to instruct on both did not amount to error requiring reversal. *People v Watts*, 149 Mich App 502, 514-516; 386 NW2d 565 (1986).

Next, the trial court's instruction defining assault with intent to murder was not erroneous. The trial court properly instructed the jury that it was required to find that defendant possessed an actual intent to kill to be guilty of this crime. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). Additionally, it was not error to instruct the jury that it could apply the doctrine of transferred intent in deciding whether defendant possessed an actual intent to kill. See *People v Lovett*, 90 Mich App 169, 171-172, 174-175; 283 NW2d 357 (1979); CJI2d 16.22; CJI2d 17.17. Finally, when instructing the jury that another element of the offense was that defendant tried to physically injure another person, the trial court was addressing the "assault" component of the crime, not the issue of defendant's intent. Viewed as a whole, it is apparent that the trial court properly explained all of the elements of this crime.

We likewise find no error with the trial court's instruction on assault with intent to do great bodily harm less than murder. To prove the crime of assault with intent to do great bodily harm, the prosecution was required to show (1) an assault with (2) a specific intent to do great bodily harm less than murder. *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996), amended on other grounds 453 Mich 1204 (1996). In defining an assault, the trial court stated that defendant must have "tried to physically injure another person" and that "at the time of the assault the defendant had the ability to cause an injury, or at least believed that he had that ability." This definition is consistent with the definition found in CJI2d 17.7 and is in accord with the law. *People v Joeseype Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979).

Defendant next claims that the trial court erred by failing to instruct the jury that it was required to give separate consideration to each of the four counts against him. Although the trial court did not initially include such an instruction in its final set of instructions, after the jury posed questions upon commencing deliberations, the trial court provided an additional instruction explaining the jury's duty to consider each charge separately. The trial court's supplemental instruction adequately informed the jury that it was required to decide each charge independent of the other charges.

Finally, although the trial court's instruction on reasonable doubt did not include any "moral certainty" language, the instruction was consistent with CJI2d 3.2(3) and it adequately conveyed the concept of "reasonable doubt" to the jury. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

Next, defendant contends that the medical examiner was improperly allowed to provide testimony on the legal definition of "homicide." Because defendant failed to object to this testimony at trial, appellate review of this issue is precluded absent manifest injustice. *People v Burton*, 219 Mich App 278, 292; 556 NW2d 201 (1996).

The medical examiner was asked about the decedent's manner of death and stated that the decedent died as a result of a homicide, meaning that he died as the result of another person's intent to kill him. The prosecutor's questioning of the medical examiner only provided the jury with the examiner's definition of "homicide," not a legal definition. The testimony did not prejudice defendant, particularly where he admitted to shooting the decedent.

Defendant argues that the evidence was insufficient to support his conviction for second-degree murder because the medical examiner failed to establish which of the six gunshot wounds was fatal to the decedent, and because there was no evidence explicitly linking the gunshot wounds to either of the two guns seized by the police.

Our review of a sufficiency of the evidence claim turns on whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748 (1992), opinion amended on other grounds 441 Mich 1201 (1992). The evidence must be considered in a light most favorable to the prosecution. *Id.* at 514-515.

The medical examiner's testimony established that any of the gunshot wounds could have been fatal, but that the wound to the decedent's back was most likely the fatal shot because it caused the most injury. This testimony was sufficient to link the decedent's cause of death to the gunshots fired by defendant. Furthermore, evidence concerning the specific gun used in the offense was unnecessary to support a conviction. Defendant admitted to shooting a gun and striking the decedent, but claimed he acted in self-defense. The credibility of the self-defense claim was for the jury to resolve. There was no evidence that another weapon was fired. Accordingly, sufficient evidence was presented to support defendant's conviction for second-degree murder.

Defendant's mother, Shirley Oliver, was present at the time of the shooting and was called as a prosecution witness. Defendant contends that his mother should have been advised of her Fifth Amendment privilege against self-incrimination because her testimony implicated her as a possible accessory after the fact to the charged crime.

Defendant lacks standing to raise this issue. The Fifth Amendment privilege is personal; it cannot be asserted on behalf of another individual. *People v Safiedine*, 152 Mich App 208, 212; 394 NW2d 22 (1986); *People v Arthur Jones*, 115 Mich App 543, 547; 321 NW2d 723 (1982), aff'd 419 Mich 577 (1984). Defendant failed to show that any error resulted from the admission of his mother's testimony.

Defendant raises several claims of prosecutorial misconduct, but failed to preserve any of the claims with an appropriate objection at trial. Therefore, appellate review is precluded unless an instruction could not have cured any prejudicial effect, or if failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant first claims that the prosecutor improperly introduced hearsay evidence. Prosecutorial misconduct may be based upon improper questioning of a witness. However, reversal is required only if the alleged misconduct denied the defendant a fair and impartial trial. *People v Harvey*, 167 Mich App 734, 747; 423 NW2d 335 (1988).

Prosecutorial misconduct cannot be based on good faith efforts to admit evidence that turns out to be inadmissible. *People v Missouri*, 100 Mich App 310, 328; 299 NW2d 346 (1980). The prosecutor, as an advocate for the state, is entitled to attempt to introduce evidence which he or she legitimately believes will be accepted by the trial court, so long as that attempt does not actually prejudice the defendant. Absent a showing of bad faith by the prosecutor, this Court will not reverse simply because defense counsel was required to do his job and object. *Id.* at 328-329.

Here, the admission of the testimony in question may have been justified under various exceptions to the hearsay rule. Under the circumstances, defendant has not demonstrated bad faith by the prosecutor in presenting this evidence, or actual prejudice. Thus, a miscarriage of justice has not been shown.

Next, defendant claims that error occurred because, during questioning by the prosecutor, a witness testified that, prior to the charged incident, he had seen defendant go into his house with a gun.

However, the prosecutor's question was not calculated to elicit the response received. A mistrial is generally not warranted where a witness provides an unresponsive answer and there is no evidence that the prosecutor played a role in encouraging the witness to give the response or knew that the witness would provide unresponsive testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990); *People v Taylor*, 159 Mich App 468, 489; 406 NW2d 859 (1987). Here, defendant has not established that the prosecutor's questioning amounted to misconduct, or that the witness' unresponsive answer resulted in a miscarriage of justice.

Defendant next argues that the prosecutor improperly commented on his presumption of innocence when she told the jury during closing argument that there were many facts and elements of this case that were not in dispute. We disagree. A prosecutor is afforded great latitude in closing argument and is permitted to argue the evidence and make reasonable inferences in order to support her theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Viewed in context, it is apparent that the prosecutor was attempting to identify which particular facts were in dispute and which were not, as determined by the evidence presented at trial. The prosecutor's remarks did not implicate defendant's presumption of innocence. Accordingly, defendant has not shown that the remarks were improper.

Defendant also argues that counsel was ineffective. In order for this Court to reverse because of ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

Defendant failed to properly raise this issue in the trial court. *People v Hughey*, 186 Mich App 585, 594; 464 NW2d 914 (1990); *People v Douglas*, 122 Mich App 526, 529-530; 332 NW2d 521 (1983). However, we may review the issue on appeal to the extent that any alleged deficiencies are apparent from the record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

Having considered defendant's several assignments of error with regard to counsel's performance, we find that he failed to overcome the presumption that counsel's decisions constituted sound trial strategy. With matters of trial strategy, this Court will not substitute its judgment for that of trial counsel. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). Furthermore, defendant failed to show that any of the alleged errors prejudiced his right to a fair trial. Therefore, ineffective assistance of counsel has not been established.

There is no merit to defendant's claim that he was denied a fair trial because of cumulative error. *People v Morris*, 139 Mich App 550, 563; 362 NW2d 830 (1984).

Defendant also challenges his sentence. The trial court originally sentenced defendant on the underlying crimes, but then vacated those sentences and imposed enhanced sentences pursuant to the habitual-offender statute, MCL 769.11; MSA 28.1083. Defendant now argues that the trial court lacked the authority to change the original sentences, because they were valid sentences. See MCR

6.429(A). We disagree. The prohibition against changing a valid sentence does not apply until after the court has finally imposed its sentence and the court has lost its ability to modify the sentence. This occurs when the court enters the judgment of sentence or the defendant is remanded to the jail to await execution of the sentence. *People v Barfield*, 411 Mich 700, 702-703; 311 NW2d 724 (1981). A trial court's mere oral pronouncement of its sentencing decision does not terminate the court's ability to modify the sentence. *People v Bingaman*, 144 Mich App 152, 157-159; 375 NW2d 370 (1984). In this case, the trial court modified the sentences on the record before the sentences were actually imposed by court order and while defendant was still present. Under these circumstances, the trial court had the authority to modify the sentences.

Defendant next contends that the trial court erroneously believed that it was required to enhance his sentences because he was an habitual offender. Simply because the trial court imposed the maximum sentence possible does not mean that it was unaware of its discretion to set the maximum sentence. *People v Gomer*, 206 Mich App 55, 59; 520 NW2d 360 (1994). Here, the trial court's comments at sentencing do not support defendant's claim that the court was unaware of its discretion. *People v Beneson*, 192 Mich App 469, 471; 481 NW2d 799 (1992).

Defendant also contends that he was penalized for asserting his right to trial where he received a minimum sentence of twenty-five years' imprisonment for second-degree murder and where the prosecutor had previously offered a plea agreement providing for a minimum term of twenty years' imprisonment. We disagree. The trial court was not bound by the prosecution's offer when deciding on an appropriate sentence. The prosecution's plea agreement does not establish that defendant's sentence for second-degree murder was either improper or disproportionate when the trial court based its sentencing decision on the evidence presented at trial. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Next, defendant argues that the trial court relied upon inaccurate information because the presentence investigation report (PSIR) omitted information about a closed head injury he suffered in 1993. However, defendant has failed to show that the PSIR was inaccurate when he specifically denied having any prior health problems, either physical or mental. Moreover, simply because defendant suffered a head injury prior to this incident does not prove that he suffered from mental health problems as a result of that injury.

Defendant's final argument on appeal is that he is entitled to sentence credit for 198 days rather than 187 days. MCL 769.11b; MSA 28.1083(2); *People v Givans*, 227 Mich App 113, 125-126; 575 NW2d 84 (1997). The prosecutor concedes that defendant is entitled to at least 197 days credit. Accordingly, we direct the trial court, on remand, to amend the judgment of sentence to reflect 198 days of sentence credit. A copy of the amended judgment of sentence shall be forwarded to the Department of Corrections. Resentencing is not required.

Defendant's convictions and sentences are affirmed. Remanded for modification of the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Roman S. Gibbs

/s/ Michael J. Talbot