STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONTA YEARGIN,

Defendant-Appellant.

UNPUBLISHED
June 8, 1999

No. 201650
Oakland Circuit Court
LC No. 96-149005 FC

Before: White, P.J., and Markman and Young, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted 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 subsequently pleaded guilty to being an habitual offender, third offense, MCL 769.11; MSA 28.1083. Defendant was sentenced to ten to twenty years' imprisonment for the assault conviction, consecutive to two years' imprisonment for the felony-firearm conviction. This Court granted defendant's motion to remand, and defendant filed a motion for resentencing, which was denied in part.[1] Defendant appeals as of right. We affirm, but remand for correction of the judgment of sentence.

Defendant's convictions arose from a gunfire exchange between defendant and the complainant, who were in separate vehicles in a convenience store parking lot. The complainant was shot and injured during the incident. The complainant testified that defendant, who dated a woman with whom the complainant had had a child, got in the passenger side of a car immediately after seeing the complainant. The car defendant entered then pulled next to the drivers' side of the van the complainant was driving. The complainant testified that instead of accepting defendant's request to "come here," he tried to avoid a confrontation and began backing the van out of his parking space. The complainant testified that he then saw defendant make a motion like he was "racking" a pistol, point a gun at him, and begin shooting. At this time, the complainant "floored" the van backward. As he did so, defendant shot the complainant in the arm. The complainant testified that he then crashed into the car defendant was riding in, which had backed up to block the path of the van while the complainant was backing out of the

parking space. The complainant testified that he was afraid for his life, so he got down in the seat and started shooting his gun as a means to protect himself and his passengers.

The defense's theory was that the complainant crashed his van into the car defendant was riding in, and shot at defendant, before defendant had done anything to provoke the complainant. Defendant claimed that the complainant was the initial aggressor, shot first and that he had shot at the complainant in self-defense.

On appeal, defendant first argues that the trial court erred by failing to explain to the jury that the complainant may have been the initial aggressor when he rammed his van into the vehicle defendant was driving in. Because defendant did not object to the self-defense instructions given or request an additional instruction, our review is for manifest injustice. *People v Kuchar*, 225 Mich App 74, 78; 569 NW2d 920 (1997). Even if jury instructions are imperfect, there is no error if the instructions, as a whole, fairly represented the issues to be tried and sufficiently protected the defendant's rights. *People v McFall*, 224 Mich App 403, 412-413; 569 NW2d 828 (1997).

We conclude that the standard self-defense jury instructions the trial court read[2] fairly presented the self-defense issue to the jury and sufficiently protected defendant's rights. *Id.*; *People v Curry*, 175 Mich App 33, 41; 437 NW2d 310 (1989). Accordingly, manifest injustice will not result in our failure to review this issue on appeal.

We reject defendant's alternative argument that the trial court erred in failing to sua sponte instruct the jury on imperfect self-defense. In jurisdictions where it is recognized, the doctrine of imperfect self-defense is a qualified defense which can mitigate second-degree murder to voluntary manslaughter. *People v Heflin*, 434 Mich 482, 507; 456 NW2d 10 (1990). The Michigan Supreme Court has not adopted the doctrine,[3] but panels of this Court have applied it in cases involving deadly force, where the defendant would have had a right to self-defense but for his actions as the initial aggressor. *People v Amos*, 163 Mich App 50, 57; 414 NW2d 147 (1987).

Assuming, arguendo, that an instruction on imperfect self-defense is appropriate where there was no murder, defendant was not entitled to the instruction because he failed to request it, and he maintained that the complainant, and not he, was the initial aggressor. *People v Wytcherly*, 172 Mich App 213, 221; 431 NW2d 463 (1988); *People v Vicuna*, 141 Mich App 486, 493; 367 NW2d 887 (1985). Gillespie states:

> The doctrine of imperfect self-defense is a qualified defense which can mitigate an act of second-degree murder to voluntary manslaughter. The doctrine applies only where the defendant would have had a right to self-defense but for his or her actions as the initial aggressor. [citing *People v Amos*, 163 Mich App 50; 414 NW2d 147 (1987), app den (1988).]

CJI2d 7.15, Commentary, states:

> In cases involving the use of deadly force, Michigan recognizes the doctrine of imperfect self-defense. Imperfect self-defense is a qualified defense that can mitigate second-degree murder to voluntary manslaughter. Although in some other jurisdictions the defense applies where the defendant reacted with unreasonable force or had an unreasonable belief about the danger at hand, in Michigan the doctrine only applies where the defendant would have had a right to self-defense but for the defendant's actions as the initial aggressor. *Deason*, 148 Mich App at 32.
>
> The defendant must request an instruction on imperfect self-defense . . . and is not entitled to the instruction where his or her position at trial is that the victims were the initial aggressors . . .
>
> . . . *People v Curry* [] held that the trial court's failure to instruct on imperfect self-defense was not reversible error where testimony was conflicting on whether the defendant was the aggressor in the fight, and general self-defense instructions were otherwise adequate.]

Next, defendant claims that the trial court erred in directing a verdict against him on the issue of venue. As defendant did not object to the venue instruction given below, or to the comments made by the court that he now challenges, our review is for manifest injustice. *Kuchar, supra* at 78.

The record does not support that the trial court directed a verdict on the issue of venue. The trial court read CJI2d 3.10, the standard jury instruction on venue:

> [Now this] evidence must convince you beyond a reasonable doubt that the crime occurred on or about May 18, 1996, within Oakland County in the city of Pontiac.

The challenged comments were to the effect that the jury should not visit the crime scene,[4] and were not made by the court during final jury instructions. These comments were not tantamount to directing a verdict on venue. Further, several police officers testified that the incident occurred in Oakland County.

Defendant further contends that he was denied a fair trial because the prosecutor improperly attacked defense counsel and her credibility during closing arguments. Because defendant failed to object to the alleged prosecutorial misconduct or request a curative instruction, we need not address the alleged misconduct unless the misconduct was so egregious that no curative instruction could have removed the prejudice to defendant or if manifest injustice would result from our failure to review the alleged misconduct. *People v Messenger,* 221 Mich App 171, 177; 561 NW2d 463 (1997). On review of the record, we conclude that the comments were permissible and responsive to defense counsel's closing argument, and that any resulting prejudice could have been cured had defendant timely requested a curative instruction. See *People v Kennebrew,* 220 Mich App 601, 607; 560 NW2d 354 (1996); *People v Simon,* 174 Mich App 649, 655; 436 NW2d 695 (1989). Manifest injustice will not result in our failure to review the alleged misconduct

Defendant also argues that he was denied effective assistance of counsel by his trial counsel's failure to request factually accurate self-defense instructions and an instruction on imperfect self-defense, and in failing to object to the trial court's directing a verdict on venue. We disagree. Defendant has neither sustained his burden of proving that counsel made a serious error that affected the result of trial nor overcome the presumption that counsel's actions were strategic. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Defendant cannot base a claim of ineffective assistance of counsel on his attorney's failure to advance meritless objections at trial. *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986).

Defendant contends that he is entitled to resentencing because the trial court considered two constitutionally invalid prior convictions in imposing sentence. Defendant argues that he did not waive counsel in connection with these convictions. The record does not support defendant's argument. Transcripts of the hearings of the contested plea-based convictions indicate that defendant validly waived his right to counsel regarding one conviction, and was fined and not imprisoned as a result of the second conviction. Thus, the court could properly consider both convictions. *People v Justice*, 216 Mich App 633; 550 NW2d 562 (1996); *People v Reichenbach*, 224 Mich App 186, 192-193; 568 NW2d 383 (1997), aff'd 459 Mich 109 (1998). In any event, the trial court expressly stated on remand that it did not consider the contested misdemeanors in imposing sentence. We find no error.

Second, defendant contends that the trial court improperly decided the sentence before listening to defendant's allocution. Again, we disagree. The trial court stated on the record that it considered what defendant had to say before imposing sentence.

Third, defendant argues that he is entitled to resentencing because the trial court did not realize that it could sentence below the guidelines' range. The trial judge stated in response to this argument that he had been on the bench for twenty years and "Obviously, I know that I can go below the guidelines. I know all the criteria. I have sentenced enough people below guidelines and have had them come back for more articulation." We conclude that the trial court was aware of its authority to sentence defendant below the guidelines' range.

Fourth, defendant essentially asserts that he is entitled to resentencing because the judgment of sentence indicates a separate conviction and sentence for the habitual offense. While this technical mistake is not grounds for resentencing, we remand to the trial court to correct the judgment of sentence to reflect one conviction and one sentence.[5]

Affirmed, but remanded to correct the judgment of sentence. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Stephen J. Markman

Judge Robert P. Young, Jr. not participating.

[1] The trial court agreed with defendant that the judgment of sentence should be amended because it indicated a separate conviction for habitual offender, but rejected defendant's other claims, which are discussed *infra*.

[2] The trial court read CJI2d 7.20 (Burden of Proof--Self-Defense), 7.15 (Use of Deadly Force in Self-Defense), 7.16 (Duty to Retreat to Avoid Using Deadly Force), and 7.18 (Deadly Aggressor—Withdrawal).

[3] In *Heflin*, *supra* at 508 n 20, the Supreme Court noted that its order granting leave to appeal excluded argument regarding the doctrine of imperfect self-defense, further stating:

> However, in light of statements made at oral argument, in addressing the first issue that we granted leave to appeal to consider, "whether the trial court erred in not giving, sua sponte, an instruction on the offense of involuntary manslaughter," we must briefly address the doctrine of imperfect self-defense insofar as it applies to the facts of the instant case.

[4] Defendant challenges the statements in bold type. In its initial instructions to the jury, the court stated:

> I'm not going to allow—and it goes right with what I just told you—you to ask questions. I don't know whether I've got a Perry Mason here or an Arnie Becker or what have you . . . We just don't have the time for that . . . .
>
> But as a practical matter, I really don't want you playing attorney. I don't want you playing detective. . . . You concern yourself only with what happened in this courtroom and the testimony of these witnesses. And it's up to the prosecution to provide you all those elements, and the defense has the opportunity to offer anything that they want to that they feel will be help in connection with this particular matter. So it's not your job to be the lawyer, it's not your job to be the detective. **As was mentioned by Ms. Bare [defense counsel] in the voir dire—excuse me. I'm sorry—Ms. Madzia [assistant prosecuting attorney], we know where this occurred. You're going to hear that. I don't want you running over there and looking around and trying to figure things out for yourself.** If I thought it was necessary, we'd all do it together. . . .

Defendant also challenges a statement the court made on the second day of trial:

> All right. Okay. It's 3:25 now and we're going to have to go over our instructions
>
> . . .

* * *

> So I'm not going to keep you. I don't think it's proper to give you at the last minute in a day, so what we'll do is just tomorrow morning at nine o'clock we'll come back . . . I'll instruct you and then you can take your time in your deliberations and not feel pressured, okay?
>
> **Again you've heard where these things occurred.** Thank you so much for being so prompt and good.

We believe the second remark related back to the first, and was not a comment regarding the element of venue.

[5] Although the court stated at the motion for resentencing that it had no objection to amending the judgment of sentence, the record does not reflect that an amended judgment was entered.