

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 21, 2000

v

OLIVER U. GANTT,

Defendant-Appellant.

No. 210821
Wayne Circuit Court
Criminal Division
LC No. 97-502846

Before: Wilder, P.J., and Holbrook, Jr. and McDonald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree murder, MCL 750.317; MSA 28.549, and first-degree home invasion, MCL 750.110a; MSA 28.305(a). After vacating one of the second-degree murder convictions,¹ the trial court sentenced defendant to concurrent terms of twenty to thirty years' imprisonment for the murder conviction and ten to twenty years' imprisonment for the home invasion conviction. Defendant appeals as of right. We affirm.

I

Defendant first claims that reversal is warranted based on the trial court's improper jury instructions and "suggestive" verdict form. Because defendant failed to object to the trial court's jury instructions or the verdict form below, appellate relief may be granted only if a miscarriage of justice would otherwise result. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

Defendant contends that the trial court improperly gave CJI2d 7.15, use of deadly force in self-defense, rather than CJI2d 7.22, use of nondeadly force in self-defense or defense of others, despite his testimony that he did not have a weapon. Defendant, however, did not request CJI2d 7.22. "[F]ailure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused." MCL 768.29; MSA 28.1052. See also *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994).

¹ Defendant was charged in the alternative with first-degree premeditated murder and first-degree felony murder.

Moreover, not only did defendant fail to object to the trial court giving CJI2d 7.15, but defense counsel argued vigorously for the instruction when the prosecutor objected and argued against that instruction being given. A party cannot request a certain action of the trial court and then argue on appeal that the resultant action was error. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). Accordingly, defendant has waived this issue for review. See *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987). We nevertheless note that, considering that defendant was originally charged with first-degree premeditated murder and that a deadly weapon was used to kill the victim, the instruction given was not improper. See, e.g., *People Hooper*, 152 Mich App 243, 246-247; 394 NW2d 27 (1986).

Defendant also contends that the verdict form improperly suggested a verdict of guilty of second-degree murder. We disagree. A jury must be instructed on the verdict of not guilty with respect to each offense *charged*, which was what occurred in this case. See *People v Ray*, 119 Mich App 724, 728; 326 NW2d 622 (1982). In particular, with regard to first-degree premeditated murder and first-degree felony murder, the verdict form provided the option of not guilty, guilty, or guilty of second-degree murder. Moreover, defendant did not object to the verdict form. Accordingly, defendant is not entitled to any relief on this basis.²

II

Defendant also argues that the trial court abused its discretion when it admitted into evidence a cane sword that the prosecution offered to demonstrate the kind of weapon it theorized was used in the murder of the victim.³ Because defendant failed to object to the trial court's ruling, our review is limited to whether the evidentiary ruling resulted in manifest injustice. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). We will not reverse on the basis of an evidentiary error unless the court's ruling affected a party's substantial rights. MRE 103(a).

Demonstrative evidence, including physical objects alleged to be similar to those involved in the incident at issue, is admissible where it may assist the trier of fact in reaching a conclusion on a matter material to the case. *People v Castillo*, 230 Mich App 442, 444; 584 NW2d 606 (1998). A weapon similar to one allegedly used in the commission of a crime may be admitted as demonstrative evidence where (1) substantial evidence attests to the similarity of the exhibit offered to the weapon allegedly used, (2) there is no reasonable likelihood that the jury may fail to understand the demonstrative nature of the evidence, and (3) the opposing party has ample opportunity for cross-examination regarding the demonstrative weapon. *Id.* at 445-446.

² We decline to address defendant's claim that defense counsel was ineffective for failing to object to the court's jury instructions because defendant did not raise this claim in his statement of issues presented. *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990). We, however, note that it is unlikely that, but for counsel's failure to object to the instructions, the result of the proceedings would have been different. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

³ The cane sword recovered from the crime scene did not contain the blade because it had been broken off. The blade on the demonstrative cane sword was still in tact.

In addition, the demonstrative evidence offered must satisfy traditional requirements for relevance and probative value in light of policy considerations for advancing the administration of justice pursuant to MRE 401-403. *Id.* at 444-445.

Upon considering these three elements and general principles of admissibility, it is apparent that no error requiring reversal occurred. Concerning the first element, before defendant entered his former girlfriend's home, she observed him holding a long black pole that looked like the shaft portion of a cane sword. Defendant's daughter observed him swinging a cane sword forward and repeatedly towards the victim. Both defendant's former girlfriend and his daughter testified that defendant owned a black cane sword that was similar to the demonstrative evidence. Moreover, the two parts of the cane sword actually used in the incident (the shaft and the cover) were recovered at the crime scene, and a detective indicated that those parts were identical to the demonstrative cane sword. This evidence satisfies the requirement of a substantial evidentiary basis for likening the demonstrative sword in evidence to the alleged instrumentality of the crime.

With regard to the second element, we have reviewed the record and recognize no attempts by the prosecution to deceive the jury regarding the demonstrative nature of the cane sword. The prosecution made plain before the jury that the exhibit was not the weapon used during the incident. In fact, a police detective testified that he purchased the demonstrative cane sword at the Gibraltar Trade Center. Further, the recovered parts of the actual cane sword were discussed and admitted into evidence immediately before the demonstrative cane sword was discussed. With regard to the third element, defendant had ample opportunity and did, in fact, cross-examine the eyewitnesses who likened the demonstration cane sword to the weapon used in the murder. Accordingly, because the prosecutor acknowledged that the subject cane sword was only for demonstration purposes and the defense had every opportunity to highlight for the jury that the exhibit was only for demonstrative purposes, there is no reasonable likelihood that the jury misapprehended the demonstrative nature of that evidence.

Finally, the demonstrative evidence was not irrelevant, as defendant claims. Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401. The demonstrative cane sword, which had the blade in tact, illustrated the prosecution's theory regarding the instrumentality of the crime, as well as the congruence between the prosecution's theory of how the crime was committed and the evidence concerning the extent and nature of the victim's injuries. Further, the only unfair prejudice that defendant alleges is that the presence of the demonstrative sword as an exhibit likely caused confusion and misled the jurors and witnesses. However, as previously discussed, it was made clear that the exhibit was not the weapon allegedly used. Accordingly, any unfair prejudice defendant may have suffered from admission of the demonstrative evidence was not sufficient to outweigh substantially the probative value of the evidence. MRE 403. For these reasons, the evidence in question satisfied the general requirements for relevance and probative value as balanced against prejudicial effect. Accordingly, defendant is not entitled to any relief on this basis.

III

Defendant also argues that he entitled to a new trial because the admission of the demonstrative cane sword caused the verdict to be against the great weight of the evidence. Because defendant did not move for a new trial below, this issue is not preserved for appellate review and we need not review this issue. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). As discussed previously, the demonstrative evidence was properly admitted. Moreover, as discussed *infra*, the evidence in this case did not clearly weigh in defendant's favor. Because the evidence reasonably supports the verdict in this case, no miscarriage of justice will result from our failure to consider this issue. See *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1994).

IV

Defendant claims that insufficient evidence was presented to allow a rational trier of fact to conclude that the essential elements of second-degree murder and first-degree home invasion were proved beyond a reasonable doubt. We disagree. When reviewing the sufficiency of the evidence in a criminal case, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. *People v Vronko*, 228 Mich App 649, 654; 579 NW2d 138 (1998). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Questions of credibility are left to the trier of fact. *People v Givans*, 227 Mich App 113, 123-124; 575 NW2d 84 (1997). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The offense of second-degree murder consists of the following elements: “(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.” *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Defendant essentially challenges the element of malice, which is defined as “the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *Id.* at 464. Intent may be inferred from all the facts and circumstances and, because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v Daniels*, 163 Mich App 703, 706; 415 NW2d 282 (1987).

The testimony, if believed, was sufficient for a rational trier of fact to find the necessary elements, including malice, beyond a reasonable doubt. The evidence showed that, on the day of the incident, defendant was observed beating on his former girlfriend's door, while holding something in his hand that resembled a cane sword. Defendant yelled that he was going to kill her and that he knew that she had someone in her room. Defendant then kicked-in his former girlfriend's locked door and, ultimately, a struggle ensued between defendant and his former girlfriend's boyfriend--the victim. Defendant was observed standing on the bed, swinging a cane sword forward towards the victim repeatedly, while the victim was standing beside the bed holding a pillow with both hands in front of the chest area of his body. The victim died as a result of multiple stab wounds made by a double-edged blade. This evidence, viewed in a light most favorable to the prosecution, was sufficient for a rational trier of fact to find that the essential elements of second-degree murder were proved beyond a reasonable doubt.

With regard to defendant's claim that insufficient evidence was presented to sustain his conviction for first-degree home invasion, he failed to offer any argument to support this claim. A defendant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997). We, nevertheless, briefly note that sufficient evidence was presented to sustain defendant's conviction. See MCL 750.110a; MSA 28.305(1). Defendant does not dispute that he entered his former girlfriend's house without permission. Immediately before he kicked-in the front door, defendant yelled that he was going to kill his former girlfriend, which infers that he intended to commit a felony while in the house. Finally, the evidence, if believed, showed that defendant was armed with a weapon. This evidence, viewed in a light most favorable to the prosecution, was sufficient for a rational trier of fact to find that the essential elements of first-degree home invasion were proved beyond a reasonable doubt.⁴

V

Defendant argues that numerous instances of prosecutorial misconduct denied him a fair trial. Defendant objected to only one of the several claims alleged. With regard to the remaining claims, appellate review is precluded unless a curative instruction could not have eliminated any possible prejudice or failure to consider the issue would result in a miscarriage of justice. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). Issues of prosecutorial misconduct are decided on a case-by-case basis, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995). The test is whether defendant was denied a fair trial. *Id.*

Our review of the record reveals that the challenged remarks and conduct by the prosecutor were either proper responses to defense counsel's arguments or reasonable inferences from the evidence produced at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Although a prosecutor may not use a defendant's failure to present evidence as substantive evidence of guilt, she may contest evidence presented by a defendant. *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999). Moreover, with regard to all of the remarks, any prejudice that did arise from the prosecutor's remarks could have been cured by a timely objection and a request for a curative instruction. Therefore, defendant is not entitled to any relief on this basis.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald

⁴ We decline to address defendant's claim presented in his statement of the issue that the court erred in instructing the jury on CJI2d 3.9, because he failed to object to the instructions below and fails to argue this issue in the body of his brief.