

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN HUNTER,

Defendant-Appellant.

UNPUBLISHED

March 2, 2001

No. 218212

Recorder's Court

LC No. 98-006444

Before: Saad, P.J. and Griffin and R. B. Burns*, JJ.

PER CURIAM.

Defendant was convicted after a jury trial of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to twenty to forty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant argues that the jury instructions were erroneous and incomplete. However, defendant did not raise a timely objection to the instructions and therefore this issue is unpreserved. In order to avoid forfeiture of this issue, defendant must demonstrate plain error that affected his substantial rights. *People v McCrady*, ___ Mich App ___, ___ NW2d ___ (Docket No. 215180, issued 12/19/00), slip op at 2; *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000).

A trial court is required to instruct the jury concerning the applicable law, and fully and fairly present the case to the jury in an understandable manner. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). On review, we read the jury instructions as a whole, comparing the general tenor of the instructions in their entirety against the potentially misleading effect of a single isolated sentence. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995); *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989).

Defendant first contends that the court erred in instructing on first-degree murder. We disagree. Here, the jury was instructed on the two charged offenses: second-degree murder and felony-firearm. The trial court briefly defined first-degree murder to help the jury distinguish it from the charged crime, but emphasized at all times that defendant was charged only with

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

second-degree murder. Under the circumstances, we reject defendant's contention that the instructions were confusing and may have led to a "compromise" verdict. *See People v Hall*, 56 Mich App 10, 16-17; 223 NW2d 340 (1974). We also reject defendant's contention that the jury should have been instructed on intervening causes of death. While there was evidence that the victim had been hit by a vehicle, there was no dispute at trial that the cause of death was three gunshot wounds.

Accordingly, we conclude that the instructions fairly presented the issues and sufficiently protected defendant's rights. *People v Mass*, 238 Mich App 333, 341; 605 NW2d 322 (1999). Therefore, the trial court did not commit plain error that affected defendant's substantial rights. *McCrary, supra*.

Defendant also contends that defense counsel was ineffective because he did not object to the above instructions and failed to request instruction on lesser offenses. We disagree. There was no error in the instructions given by the trial court, so any objections made would properly have been overruled. There was no reason for defense counsel to request an instruction on intervening causes of death because there was no evidence to support any cause of death other than the gunshot wounds. A request for that instruction would have been denied. Counsel was not required to advocate a meritless position. *Snider, supra* at 425. Defense counsel's failure to request instructions on lesser offenses was a legitimate trial strategy, an attempt to force the jury into an "all or nothing" decision. *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982). Defendant here presents no reasons why defense counsel's actions were not sound trial strategy, except that they were unsuccessful.

Finally, defendant argues that his sentence of twenty to forty years' imprisonment was disproportionate because he had only one prior contact with the criminal justice system and was an employed, family man. This Court reviews a trial court's sentence imposed on an habitual offender for an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997); *People v Reynolds*, 240 Mich App 250, 252; 611 NW2d 316 (2000). A trial court does not abuse its discretion in sentencing an habitual offender within the statutory limits established by the Legislature when the offender's underlying felony, in the context of previous felonies, evinces the defendant's inability to conform his conduct to the laws of society. *Hansford, supra* at 326; *Reynolds, supra* at 252. Defendant's crime, second-degree murder, is punishable by life or any term of years, at the trial court's discretion. The trial court briefly explained its reasoning on the record, noting that defendant's violent tendencies made him a danger to the community. Defendant's employment and limited criminal history are not unusual circumstances that overcome the presumption that his sentence is proportionate. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Defendant has not carried his burden of showing any unusual circumstances that requires a deviation from his sentence, and his sentence is proportionate because it falls within the statutory limits.

Affirmed.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Robert B. Burns