

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

CLEOTIS L. JOHNSON,

Defendant-Appellant.

UNPUBLISHED

November 16, 2001

No. 223460

Wayne Circuit Court

LC No. 99-001860

Before: Holbrook, Jr., P.J., and Cavanagh and Gribbs,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second-degree murder, MCL 750.317, assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to a term of thirty-five to eighty-five years' imprisonment for the second-degree murder conviction, five to ten years' imprisonment for the assault with intent to do great bodily harm conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first claims that the trial court erred when it failed to instruct the jury on the lesser included misdemeanor of careless, reckless, or negligent use of a firearm, MCL 752.861. We disagree. Defendant did not request such an instruction, nor did he object to the absence of the complained of offense in the jury instructions given by the trial court; thus, defendant failed to preserve this issue for our review. MCR 2.516(C); *People v Mass*, 464 Mich 615, 640-641; 628 NW2d 540 (2001); *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000). We review unpreserved claims for plain error. *People v Carines*, 460 Mich 750, 763-768; 597 NW2d 130 (1999); *Snider*, *supra* at 420. To avoid forfeiture, defendant must show that the error was plain, i.e., clear or obvious, and affected his substantial rights by prejudicing the outcome of the trial. *Mass*, *supra* at 640; *Carines*, *supra* at 763-764, 774.

The Michigan Supreme Court has set forth five conditions that must be satisfied before a trial court should consider granting a request for instruction on a lesser included misdemeanor. A court must instruct concerning a lesser included misdemeanor where (1) there is a proper request, (2) there is an "inherent relationship" between the greater and lesser offense, (3) the requested misdemeanor is supported by a "rational view" of the evidence, (4) the defendant has adequate notice, and (5) no undue confusion or other injustice would result. *People v Corbiere*,

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

220 Mich App 260, 262-263; 559 NW2d 666 (1996). The first condition is that the party must make a proper request. *People v Stephens*, 416 Mich 252, 261; 330 NW2d 675 (1982). In other words, “the party must inform the court of exactly what lesser offenses are being requested.” *People v Steele*, 429 Mich 13, 19; 412 NW2d 206 (1987). Even where these conditions are met, the trial court still retains “substantial discretion” to accept or deny a request for instruction on a misdemeanor. *Id.*

In this case, defendant failed to meet the first condition of *Steele* as he never requested an instruction on the lesser included misdemeanor of careless or reckless use of a firearm.¹ Further, defendant did not provide an objection to the absence of the desired instruction after the court instructed the jury. At the conclusion of the instructions, defense counsel expressed satisfaction with the instructions as given. Accordingly, we need not address the remaining conditions. *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987); *People v Gregg*, 206 Mich App 208, 211; 520 NW2d 690 (1994). Contrary to defendant’s argument, the trial court did not err as it was not obligated to instruct on a lesser included misdemeanor sua sponte. *People v Ramsdell*, 230 Mich App 386, 403; 585 NW2d 1 (1998). This issue is forfeited as defendant has failed to show plain error affecting his substantial rights. *Carines, supra* at 763-768.

Defendant next claims that the instructions given by the trial court did not adequately present his theory to the jury. We disagree. We review jury instructions in their entirety to determine if error requiring reversal occurred. *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000). We do not find error where the instructions as given fairly presented the issues to be tried and adequately protected defendant’s rights. *Brown, supra* at 746-747. Defendant failed to object to the instructions as given, and therefore, this issue is not preserved for our review beyond plain error. MCR 2.516(C); *Mass, supra* at 640-641; *Snider, supra* at 420; *Carines, supra* at 763-768. We review claims of instructional error de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

Defendant assigns error to the court’s accident instruction by claiming that it did not adequately address his theory that the gun discharged accidentally. As developed through trial testimony and argument, defendant’s theory was that he did not intend to shoot the victim and that the gun discharged accidentally. In an instruction modeled after CJI2d 7.3a, the trial court properly instructed that “defendant’s defense is that he is not guilty because he did not intend to kill or harm” the victim because his “conduct was accidental,” and if defendant did not possess the requisite intent, he was not guilty. The trial court properly instructed the jury on all elements of the charged offenses and the prosecution carried the burden of proof on all elements. Therefore, defendant’s rights were adequately protected as the instruction substantially covered the material substance of defendant’s theory and fairly presented the issue of accidental discharge to the jury. MCR 2.516(A)(5); *Brown, supra* at 746; *People v Crawford*, 232 Mich App 608, 620; 591 NW2d 669 (1998). Moreover, we find no error where, as here, the trial court

¹ Defendant notes that “instructional discussions between Counsel and the Trial court and/or instruction requests are not part of the transcript record.” This was defense counsel’s choice. Issues for appeal must be preserved in the record by notation of objection; counsel may not harbor error as an appellate parachute. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

gave an instruction that was virtually identical to the standard jury instruction. MCR 2.516(D)(2); *Snider, supra* at 420-421; *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991).

We likewise reject defendant's claim that the accident instruction, coupled with the state of mind instruction, which was virtually identical to CJI2d 16.21, precluded the jury from considering his theory of accidental discharge. Defendant claims that, because he possessed a gun that discharged during the incident, the instruction as given required the jury to conclude that he had the requisite intent. However, defendant reads the instruction too narrowly. The state of mind instruction did not require the jury to find intent if the assault involved a gun; rather, it simply instructed that the jury *may* infer intent based upon the circumstances of the assault. The facts underlying defendant's accidental discharge theory factored into the jury's determination of intent and a finding that the gun discharged accidentally would have wholly negated the requisite intent element, resulting in a not guilty verdict. Nothing whatsoever precluded the jury from reaching such a decision, or from considering defendant's theory of accidental discharge.

In conclusion, we have reviewed the instructions in their entirety and find no error. The material substance of defendant's theory of accidental discharge was conveyed to the jury and any failure to give a more specific instruction did not impair his ability to effectively present his defense. *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995). Furthermore, viewing the instructions, together with the evidence, defendant has also failed to show that he was prejudiced by the court's instruction in a way that affected the outcome of the trial. *Carines, supra* at 763-764, 774. Based on the instructions, the jury could have reached a guilty verdict only where the prosecution proved that defendant possessed the requisite intent. If the jury believed defendant's theory that the gun accidentally discharged, then it could not have found that he had the requisite intent and the jury, according to the instructions, would have been required to acquit defendant. Accordingly, the claim of instructional error is forfeited as defendant has failed to show plain error affecting his substantial rights. *Carines, supra* at 763-764.

Finally, defendant claims that the prosecutor improperly denigrated defense counsel. We disagree. Defendant takes issue with several comments made by the prosecutor during her rebuttal argument. Defendant preserved for our review some, but not all, of the allegedly offending comments by making a timely objection. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Concerning preserved claims of prosecutorial misconduct, we evaluate the challenged conduct in context to determine if defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). In the absence of a miscarriage of justice, reversal of a preserved claim of error is not warranted. *Carines, supra* at 774; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). With regard to the unpreserved issues, we review for plain error. *Carines, supra* at 761-764; *Aldrich, supra* at 110. To avoid forfeiture of the issue, defendant must demonstrate plain error that affected his substantial rights by prejudicing the outcome of the proceedings. *Carines, supra* at 763-764; *Aldrich, supra* at 110.

Defendant's first claim of improper prosecutorial comment, to which defendant properly objected, concerns the following remarks made during her rebuttal argument:

The Defense's job is a little different from the Prosecutor's job. I have to prove the elements of the crimes beyond a reasonable doubt. The Defense only has to blow smoke.

Although, when arguing to the jury, the prosecutor has wide latitude and may argue the evidence and reasonable inferences from it, prosecutorial comment is not completely without limits. *Bahoda, supra* at 282; *Aldrich, supra* at 112. A prosecutor cannot personally attack defense counsel because it may infringe upon defendant's presumption of innocence. *People v Kennebrew*, 220 Mich App 601, 607; 506 NW2d 354 (1996). We find the prosecution's comment that defense counsel "only has to blow smoke" improper. The comment improperly attacked the veracity of defense counsel and undermined defendant's presumption of innocence by, in effect, stating that defense counsel does not believe his own client. *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984); *People v Bairefoot*, 117 Mich App 225, 230; 323 NW2d 302 (1982).

Although we find the prosecution's comments to be improper, any error was cured when the court, immediately following proper objection by defendant, provided an adequate curative instruction. The court adequately cured any error by giving an instruction to clarify the respective burdens of the prosecution and defendant as well as instructing the jury that the prosecution's comment was not correct. Defendant was therefore not prejudiced by the prosecutor's comments to the extent of being denied a fair and impartial trial. Moreover, we cannot say that, in light of the overwhelming evidence against defendant, the remarks undermined the reliability of the verdict such that a miscarriage of justice occurred. *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000); *Carines, supra*, 460 Mich 774.

We likewise reject defendant's claims that several remarks made during the prosecution's rebuttal argument, which were not objected to during trial, improperly denigrated defense counsel. Because defendant failed to object to these remarks, we review this claim for plain error that affected his substantial rights. *Carines, supra* at 763-764; *Aldrich, supra* at 101. Reviewing the remarks in context, we find that the prosecution's comments were nothing more than a response to defense argument, and consequently, we find that the comments did not deny defendant of a fair trial. *Kennebrew, supra* at 608. Moreover, the outcome of the trial was not prejudiced by the prosecution's comments regarding premeditation and deliberation as the jury acquitted defendant of first-degree murder. Because the prosecution's comments did not constitute plain error, nor did they affect defendant's substantial rights by prejudicing the outcome of the trial, this claim of error is forfeited. *Carines, supra* at 764-764, 774.

Affirmed.

/s/ Donald E Holbrook, Jr.
/s/ Mark J. Cavanagh
/s/ Roman S. Gribbs