STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

TROY SNIDER,

Defendant-Appellant.

UNPUBLISHED
January 25, 2002

No. 222606
Wayne Circuit Court
LC No. 99-004374

Before: Owens, P.J., and Holbrook, Jr. and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent terms of two years in prison for the felony-firearm charge and five years' probation on the other charges. We affirm.

Defendant first contends that the trial court deprived him of a fair trial when it admitted evidence regarding his prior conviction for attempted larceny in a building. We review for a clear abuse of discretion a trial court's decision to allow impeachment by evidence of a prior conviction. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995).

Evidence of a prior conviction involving an element of theft may be used to impeach a testifying defendant if the crime was punishable by imprisonment for more than one year and the probative value of the evidence outweighs its prejudicial effect. MRE 609(a)(2). Defendant's prior attempted larceny in a building conviction was punishable by up to two years' imprisonment, MCL 750.92, 750.360, 750.503, thus satisfying MRE 609(a)(2)(A). The prior conviction also had significant probative value because it contained an element of theft, *People v Frey*, 168 Mich App 310, 319; 424 NW2d 43 (1988) (noting that a conviction for attempted larceny in a building was moderately probative of veracity), and occurred approximately eight years before the instant charge, within the ten-year cutoff imposed by MRE 609(c). Furthermore, the admission of the evidence appeared to result in no unfair prejudice to defendant in light of the vast dissimilarity between the prior theft offense and the instant assault and weapons charges. Additionally, the admission of the prior conviction did not prevent defendant from testifying in his own defense. MRE 609(b). Under these circumstances, we cannot conclude that the trial court abused its discretion in admitting the evidence.

Defendant next argues that the trial court erred in failing to provide instructions regarding the lesser misdemeanor offense of intentionally aiming a firearm without malice, the shooting range exception to the CCW statute, and the dwelling house or place of business exception to the CCW statute.

When properly requested, a trial court should instruct a jury on appropriate lesser included misdemeanors if a rational view of the evidence could support a verdict of guilty of the misdemeanor and not guilty on the felony, provided that the defendant has proper notice or has made the request and the instruction would not result in confusion or injustice. This Court reviews for an abuse of discretion a trial court's denial of a requested lesser included misdemeanor instruction. *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993).

In this case, no appropriate relationship existed between intentionally aiming a firearm without malice and felonious assault because proof of the misdemeanor generally is not necessarily presented as part of the charged offense. *People v Steele*, 429 Mich 13, 19; 412 NW2d 206 (1987); *People v Corbiere*, 220 Mich App 260, 263; 559 NW2d 666 (1996). Furthermore, a rational view of the evidence did not support an instruction on the misdemeanor because defendant insisted that he did not aim the gun at the security guards and conceded that he intended to scare them by displaying the gun. Accordingly, we conclude that the trial court did not abuse its discretion in rejecting defendant's request for an instruction on the lesser offense.

The trial court also properly declined to provide an instruction on the shooting range exception to the CCW statute, MCL 750.321a(d), because defendant had not shown that he had a valid Michigan hunting license or that he had a valid membership in an organization with shooting range facilities. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997).

Because defendant did not request at trial an instruction on the dwelling house and place of business exceptions to the CCW statute, our review of this claim is limited to plain error that affected substantial rights. *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001). We find no plain error arising from the absence of this instruction because the truck in which defendant had his gun does not qualify as a "place of business" within MCL 750.227(1), *People v Wallin*, 172 Mich App 748, 751; 432 NW2d 427 (1988), and defendant provided no authority demonstrating that his truck qualified as a "dwelling house" within MCL 750.227(1) on the basis that defendant lived inside it while performing his job as a truck driver.

Defendant lastly alleges that his counsel provided ineffective assistance by failing to communicate to him a plea bargain offer. Because defendant did not move for an evidentiary hearing or a new trial before the trial court, our review of this claim is limited to mistakes apparent on the existing record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that a reasonable probability exists that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). While a defense counsel's failure to convey a plea bargain offer can constitute ineffective assistance of counsel, the defendant bears the burden of proving by a preponderance

of the evidence that a plea offer was made and that counsel failed to communicate it to him. *People v Williams*, 171 Mich App 234, 241-242; 429 NW2d 649 (1988).

The record indicates that before trial defense counsel negotiated with the prosecutor and thought "for a while" that the case would settle. Not until the sentencing hearing when the trial court expressed astonishment that defendant had not agreed to the terms of the proposed plea bargain did defendant indicate through his substitute counsel that he had never heard of the plea offer. The prosecutor and court both responded that defense counsel had worked hard to secure the plea offer, and the court disbelieved that defense counsel never conveyed the offer to defendant. Defendant did not then or otherwise request that the trial court grant an evidentiary hearing or new trial on the basis of defense counsel's alleged failure.[1] We conclude that defendant's bare assertion that he had no knowledge of the offer, which constitutes the only record support for his claim of ineffective assistance, is insufficient to satisfy his burden of establishing that his counsel failed to communicate the plea offer. *Williams, supra* at 242; *Johnson, supra*.

Affirmed.

/s/ Donald S. Owens
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage

[1] We note that in June 2000 defendant moved this Court to remand for an evidentiary hearing regarding defense counsel's alleged failure to inform him of any proposed plea offer, but the Court denied the motion.