

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DELPHON LOUIS CALHOUN,

Defendant-Appellant.

UNPUBLISHED
February 19, 2002

No. 227622
Oakland Circuit Court
LC No. 99-166893-FC

Before: Neff, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for assault with intent to murder, MCL 750.83, assault with intent to do great bodily harm less than murder, MCL 750.84, two counts of felony-firearm, MCL 750.227b, and felon-in-possession, MCL 750.84. We affirm.

Defendant claims that the burden of proof was impermissibly shifted to him when the trial court failed to explicitly instruct the jury that the prosecution was required to prove the absence of mitigating circumstances beyond a reasonable doubt. We disagree.

Defendant failed to object at trial to the jury instructions as given. Therefore, this issue was not preserved for appellate review. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). We review defendant's claim of unpreserved instructional error for manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). We are convinced that the jury instructions adequately and accurately apprised the jury of the applicable law and properly allocated – to the prosecution – the burden of proof with regard to each element of the crimes with which defendant was charged. *Mullaney v Wilbur*, 421 US 684, 702; 95 S Ct 1881; 44 L Ed 2d 508 (1975); *Patterson v New York*, 432 US 197, 207, 210; 97 S Ct 2319; 53 L Ed 2d 281 (1977).

Defendant also asserts that he was prejudiced by the court's failure to repeat the mitigation instruction as it applied to each count of assault with intent to murder. We do not agree.

Defendant was not denied a fair trial by the trial court's delivery of a single "umbrella" instruction on mitigating circumstances following the comprehensive manner in which the court delivered identical instructions on the elements of the assault charges for both victims. Where a

trial court correctly recited a mitigation instruction for the two most serious charges against a defendant but failed to repeat the same instruction – the theory on which defendant relied to defend against *all* charges against him – this Court found no error. *People v Bonham*, 182 Mich App 130, 134; 451 NW2d 530 (1989). Though a trial court omits a proper instruction, no error results when the jury instructions, in their entirety, adequately cover the substance of the omitted instruction. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997).

Defendant further says that he was denied a fair trial by the prosecutor's allegedly and highly prejudicial misconduct at trial.

This Court's review of improper prosecutorial remarks is generally precluded in the absence of objection because the trial court was deprived of the opportunity to cure the alleged error. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Defendant's unpreserved claim of prosecutorial misconduct may be reviewed for plain error, but a jury's verdict will not be disturbed unless the error could not have been cured by a timely instruction at trial or this Court's failure to address the error would result in manifest injustice. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999).

Our review of the prosecutor's conduct at trial reveals no misconduct. However, were we to view the prosecutor's conduct as improper, any error resulting from the misconduct was cured when the trial court instructed the jury that statements of the attorneys were not evidence. *People v Curry*, 175 Mich App 33, 45; 437 NW2d 310 (1989).

Additionally, defendant claims that the trial court mishandled and erred regarding the parties' stipulation to defendant's previous felony conviction for purposes of the felon-in-possession charge.

The record reveals that defense counsel stipulated to defendant's ineligibility to possess a firearm because of a previous felony conviction. However, the record is unclear whether defense counsel intended that reference be made to defendant's actual status as a convicted felon or simply that reference be made to his ineligibility to possess a firearm. Defendant failed to object to subsequent – and numerous – direct references to his felony conviction; in fact, defense counsel stipulated on the record (outside of the jury's presence) to defendant's status as a convicted felon, and during cross-examination, defendant himself (*in the jury's presence*) admitted he was a convicted felon prohibited from possessing a firearm.

Because of counsel's record stipulation, defendant's own testimonial admission, and counsel's failure to object at trial to other direct references to defendant's felony conviction, defendant has waived this issue for appellate review. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Defendant may not assign error on appeal to his apparent approval of the court's treatment of the stipulation to a prior felony conviction. *Green, supra* at 691. A contrary result would permit defendant to harbor error as an appellate parachute. *Id.* Moreover, even if defendant's felony conviction was mishandled, the error was harmless in light of the weight and strength of the untainted evidence presented at trial. *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).

Finally, defendant says that the court abused its discretion when it allowed the prosecutor to question him about a statement introduced at trial by a witness whose entire testimony was struck when the witness failed to appear for defense counsel's cross-examination. We disagree.

The trial court did not abuse its discretion by permitting the prosecutor's question about defendant's alleged threat. As noted by plaintiff, MRE 801(d)(2)(A) permits the admission of statements by party-opponents and does not implicate a defendant's constitutional right of confrontation. Even if the court did abuse its discretion, any error was harmless in light of the untainted evidence admitted at trial and was not likely to have undermined the reliability of the jury's verdict. *Mateo, supra* at 215. Because defendant cannot show that the error affected the outcome, reversal is not warranted. MCR 2.613(A); MCL 769.26; *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Nor did the court abuse its discretion by refusing to give CJI2d 5.12 – the missing witness instruction – requested by defense counsel. The prosecution has no duty to produce a witness it cannot locate through the exercise of due diligence. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Affirmed.

/s/ Janet T. Neff
/s/ Mark J. Cavanagh
/s/ Henry William Saad