STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT E. GARDNER,

Defendant-Appellant.

UNPUBLISHED
June 4, 1996

No. 173910
LC No. 93-008207

Before: Murphy, P.J., and Griffin and E.R. Post,* JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317; MSA 28.549, assault with intent to commit murder, MCL 750.83; MSA 28.278, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to imprisonment for twenty-five to forty years for the second-degree murder conviction, twenty to forty years for the assault with intent to murder conviction, and two years for each of the felony-firearm convictions. The felony-firearm sentences were to be served concurrently with each other, but consecutive to the second-degree murder and assault with intent to murder sentences. Defendant appeals as of right. We affirm.

Defendant argues that the trial court abused its discretion in allowing the prosecutor to call Shawn Harris as a rebuttal witness. We disagree. Defendant testified that he shot Raed Essa out of fear because Essa intentionally tried to hit him with a car. Defendant stated that he told Harris about the incident and that he did not tell Harris anything different from his testimony. Over defendant's objection, the trial court permitted the prosecutor to call Harris as a rebuttal witness. Harris testified that defendant told him that he shot Essa to eliminate any witnesses. Rebuttal evidence is limited to refuting, contradicting, or explaining evidence presented by the other party. *People v King*, 210 Mich App 425, 433; 534 NW2d 534 (1995). Harris' testimony was proper rebuttal testimony because it refuted or contradicted defendant's testimony regarding why he shot Essa. Accordingly, we conclude that the trial court did not abuse its discretion in admitting the rebuttal testimony of Harris.

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

Defendant also argues that his second-degree murder conviction must be reversed because the trial court failed to instruct the jury on the defense of accident. Defendant failed to request an accident instruction and did not object to the instructions on the basis that they did not contain such an instruction. Generally, when a defendant fails to request a particular instruction and fails to object to the instructions as given, the instruction issue is not preserved for review. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). However, in *People v Ora Jones*, 395 Mich 379; 236 NW2d 461 (1975), the Supreme Court held that although the defendant did not request an accident instruction, the trial court erred in failing to *sua sponte* instruct the jury on the defense of accident when the issue whether the shooting was intentional or accidental was the central issue in the case. Here, whether the shooting was intentional or accidental was not the central issue in the case. The central issue was whether the shooting was in self-defense, and the trial court gave a self-defense instruction. Thus, the trial court did not err in failing to *sua sponte* instruct the jury on the defense of accident.

Defendant finally argues that his twenty-five to forty-year sentence for second-degree murder is disproportionate. Defendant's sentence is presumptively proportionate because it is within the minimum guidelines range of eight to twenty-five years. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). We have reviewed the record and conclude that the trial court did not abuse its discretion in sentencing defendant because defendant's sentence is proportionate in light of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Edward R. Post