STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOMA SHERMAN LIGHTFOOT,

Defendant-Appellant.

UNPUBLISHED
June 18, 1996

No. 178601
LC No. 94-007149-FH

Before: O'Connell, P.J., and Sawyer and G.R. Corsiglia,* JJ.

PER CURIAM.

Defendant was convicted by a jury of five counts of assault with a dangerous weapon, MCL 750.82; MSA 28.277, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent terms of eighteen to forty-eight months' imprisonment on the assault convictions, consecutive to the mandatory two-year sentence for felony-firearm. Defendant appeals as of right. We affirm.

The convictions arose from a shooting incident in which defendant fired several shots. One person was hit in the face. This transpired while defendant and some others were being chased by another group. Defendant asserted that he acted in self-defense by firing shots to ward off his pursuers.

Contrary to defendant's assertion that his self-defense claim was established as a matter of law, viewing the evidence in the light most favorable to the prosecution, *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified on other grounds 441 Mich 1201 (1992), there was sufficient evidence for the jury to reject this defense. "Self-defense requires both an honest and reasonable belief that the defendant's life was in imminent danger or that there was a threat of serious bodily harm." *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995). From the testimony that those pursuing defendant veered off to the side after he fired his first shot, a reasonable factfinder could conclude that defendant did not have a reasonable belief that he was in further danger when he fired two additional shots. Moreover, there was testimony indicating that defendant and his companions were

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

increasing the distance between them and their pursuers when he fired. Accordingly, a reasonable jury could have found that defendant was not entitled to resort to self-defense because he had a way open for retreat. *People v Bright*, 50 Mich App 401, 406; 213 NW2d 279 (1973).

The trial court did not abuse its discretion by declining defendant's request for instructions on the lesser misdemeanors of discharge of a firearm intentionally aimed without malice, MCL 750.234; MSA 28.431, and discharge of a firearm intentionally aimed without malice resulting in injury, MCL 750.235; MSA 28.432. In this case, the jury was instructed on the felony of assault with a dangerous weapon. A rational view of the evidence supports the trial court's decision because the evidence would not have supported conviction of the lesser misdemeanors, but acquittal of that felony. *People v Steele*, 429 Mich 13, 21; 412 NW2d 206 (1987). Defendant testified that he fired the gun intending to frighten the asserted victims. The asserted victims were placed in reasonable apprehension. If defendant was justified based on self-defense, then he committed no crime. However, if the shooting was unjustified, then it constituted assault with a dangerous weapon because it (1) was an assault, an unlawful act placing another in reasonable apprehension of an immediate battery; (2) was conducted with a dangerous weapon; and (3) was done with the intent to place the victims in reasonable apprehension of an immediate battery. *People v Malkowski*, 198 Mich App 610, 614; 499 NW2d 450 (1993); see *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). Because defendant was not entitled to instruction on these misdemeanors, prosecutorial argument concerning the instructional request did not deny defendant a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

The prosecutor did not commit misconduct by cross-examining defendant regarding the purpose of the pistol that he was carrying in connection with his state of mind at the time of the incident. Prosecutors are generally accorded great latitude regarding their conduct. *Bahoda*, *supra* at 282. Defendant's state of mind was crucial as he was charged with assault with intent to do great bodily harm. By taking the witness stand, defendant waived his constitutional right to refuse to answer any question that might have been material to the case and that would, in the case of any other witness, have been legitimate cross-examination. *People v Johnson*, 382 Mich 632, 640; 172 NW2d 369 (1969).

Defendant has not established that he received ineffective assistance of counsel. He was not entitled to a directed verdict on the charged offenses of assault with intent to do great bodily harm. Accordingly, there was no prejudice warranting reversal from trial counsel's failure to move for such a directed verdict. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Neither could trial counsel's failure to move for an instruction on the lesser offense of reckless discharge of a firearm, MCL 752.861; MSA 28.436(21), have constituted ineffective assistance. As with the other misdemeanor offenses, a rational view of the evidence would not have supported defendant's conviction of reckless discharge, but acquittal of assault with a dangerous weapon inasmuch as he testified that he fired intending to frighten the asserted victims.

Finally, review of the proportionality of criminal sentences is for abuse of discretion, see, e.g., *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), not de novo. The instant eighteen-

month minimum sentences, at the midpoint of the guidelines' recommended range, are presumptively proportionate. *People v McCray*, 210 Mich App 9, 13; 533 NW2d 359 (1995). Like the trial judge, we recognize significant positive factors in defendant's background. However, he also brought a gun, which he was not licensed to carry, to a party on a college campus. As this case illustrates, this action could reasonably be viewed as greatly escalating the degree of violence in the event of a conflict. We do not conclude that the trial court abused its discretion by imposing a disproportionately severe sentence. We further conclude that the trial court did not penalize defendant for exercising the right to trial, *People v Mosko*, 190 Mich App 204; 475 NW2d 866 (1991), aff'd on other grounds 441 Mich 496; 495 NW2d 534 (1992). In context, the trial court's comments were essentially a mere observation that more aggravating information was produced at trial than might have been produced in a plea proceeding.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ George R. Corsiglia