

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD D. BRAXTON,

Defendant-Appellant.

UNPUBLISHED

July 26, 1996

No. 174581

LC No. 93-002454

Before: Murphy, P.J., and Reilly and C.W. Simon, Jr.,* JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced him to imprisonment for twenty-five to fifty years for the second-degree murder conviction and two years for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant first argues that the trial court erred in refusing to instruct the jury on the lesser included misdemeanor offenses of reckless or wanton use or discharge of a firearm, MCL 752.a863; MSA 28.436(24), discharge of a firearm intentionally but without malice aimed at another, MCL 750.234; MSA 28.431, and intentionally aiming a firearm without malice, MCL 750.233; MSA 28.430. To merit an instruction on a lesser included misdemeanor, there must be an inherent relationship between the misdemeanor and the charged offense. *People v Hendricks*, 446 Mich 435, 445; 521 NW2d 546 (1994). Generally, the offenses must be so related that proof of the lesser offense is necessarily presented as part of proof of the greater offense. *Id.*

The trial court did not err in refusing to give instructions on the misdemeanor offenses of intentionally aiming a firearm without malice and discharge of a firearm intentionally but without malice aimed at another because there is not an inherent relationship between the misdemeanor offenses and the charged offense, second-degree murder. Both misdemeanor offenses require the defendant to have

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

intentionally pointed a gun at another person without malice. MCL 750.233; MSA 28.430; MCL 750.234; MSA 28.431. In contrast, second-degree murder does not require the defendant to have intentionally pointed a gun at another person. To establish the elements of second-degree murder, the prosecution must show that the defendant acted with malice, a mental state consisting of the intent to kill, to cause great bodily harm, or to do an act in wanton and willful disregard of the likelihood that the natural tendency of the behavior is to cause death or great bodily harm. *People v Miller*, 198 Mich App 494, 497; 499 NW2d 373 (1993). Accordingly, proof of the misdemeanor offenses is not necessarily presented as proof of the charged offense, and there is not an inherent relationship between the misdemeanor offenses and the charged offense. *Hendricks, supra*, 445. The trial court therefore did not err in refusing to give the requested misdemeanor instructions on the offenses of intentionally aiming a firearm without malice and discharge of a firearm intentionally but without malice aimed at another. In addition, the trial court did not err in not instructing the jury on the misdemeanor offense of reckless or wanton use or discharge of a firearm because reckless use of a firearm is not a lesser included offense of murder. *People v Warren*, 65 Mich App 197, 201; 237 NW2d 247 (1975).

Defendant next argues that the trial court abused its discretion in denying his request to substitute appointed counsel and in so doing, deprived defendant of his Sixth Amendment right to counsel. We disagree. An indigent defendant is guaranteed the right to counsel. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). However, an indigent defendant is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. *Id.* Appointment of substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. *Id.* The decision regarding substitution of counsel is within the sound discretion of the trial court and will not be upset on appeal absent a showing of an abuse of that discretion. *Id.* After carefully reviewing the record, we find that defendant's request for substitute counsel was not supported by a showing of good cause. Thus, the trial court did not abuse its discretion in denying defendant's request to substitute counsel.

Defendant further argues that the prosecutor made numerous improper comments during closing argument that deprived him of a fair trial. Defendant did not object to all the comments which he contends were improper. To the extent that defendant failed to object to the prosecutor's comments, appellate review is precluded because a curative instruction could have eliminated any possible prejudicial effect of the comments, and our failure to consider the issue will not result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We have reviewed the objected-to remarks in context and conclude that no prosecutorial misconduct occurred.

Defendant finally argues that his twenty-five- to fifty-year sentence for second-degree murder is disproportionate. Defendant's sentence is within the guidelines range of ten to twenty-five years and is therefore presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). After reviewing the record, we conclude that defendant's sentence is proportionate in light of the seriousness of the circumstances surrounding the offense and

offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Therefore, the trial court did not abuse its discretion in imposing defendant's sentence.

Affirmed.

/s/ William B. Murphy

/s/ Maureen Pulte Reilly

/s/ Charles W. Simon, Jr.