STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 14, 1997
v	No. 199653 LC No. 93-049629-FH
KHALID JINNAH, Defendant-Appellant.	ON REMAND

Before: Wahls, P.J., and Hood and O'Connell, JJ.

PER CURIAM.

A jury convicted defendant of carrying a concealed weapon (CCW), MCL 750.227; MSA 28.424. Subsequently, defendant pleaded guilty to being a third habitual offender, MCL 769.11; MSA 28,1083. The trial court sentenced defendant to a term of three to ten years' imprisonment. Defendant appeals as of right. We affirm.

Initially, this Court reversed defendant's conviction, holding that the trial court committed reversible error by allowing defendant to represent himself at trial before establishing an intelligent waiver of counsel on the record. *People v Jinnah*, unpublished per curiam of the Court of Appeals, issued 5/7/96 (Docket No. 173096). However, the Michigan Supreme Court disagreed, and reversed this Court's decision. *People v Jinnah*, 453 Mich 945; ___ NW2d ___ (1996). The Supreme Court remanded to this Court for consideration of "whether the other two errors found by that Court [Court of Appeals] to have occurred constitute reversible error." *Id.*

In this Court's initial opinion, we advised the prosecution to avoid arguing that the jury should disbelieve defendant's testimony because a previous jury did not believe defendant. *People v Jinnah*, unpublished opinion per curiam of the Michigan Court of Appeals, issued 5/7/96 (Docket No. 173096). This error does not require reversal. First, any error that occurred was in the prosecutor's use of the prior convictions for an improper purpose. However, defendant failed to object to the prosecutor's allegedly improper use of these convictions. Accordingly, our review of this issue is precluded absent manifest injustice. *People v Wilson*, 196 Mich App 604, 609; 493 NW2d 471 (1992). Second, the admission of evidence of defendant's previous convictions was harmless because defendant introduced the convictions himself during the course of the trial. Finally, a curative instruction

could have eliminated the prejudicial effect of the prosecutor's line of questioning. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

In our initial opinion, we also stated that the evidence supported an instruction that defendant handled a firearm without due caution and circumspection. *People v Jinnah*, unpublished opinion per curiam of the Court of Appeals, issued 5/7/96 (Docket No. 173096). This error also was harmless. The trial court refused defendant's request that the trial court instruct the jury on MCL 752.a863; MSA 28.436(24) (hereinafter reckless use of a firearm). Before we address whether this error was harmless, we wish to emphasize that the trial court did not err in refusing defendant's request for an instruction on attempted CCW. Here, there was no evidence that only an attempt was committed. *People v Adams*, 416 Mich 53, 57; 330 NW2d 634 (1982). Similarly, there was not sufficient evidence to support an instruction that defendant violated MCL 752.861; MSA 28.436(21), which prohibits a person from discharging a firearm "so as to kill or injure another person." See *People v Bailey*, 451 Mich 657, 680; 549 NW2d 325 (1996).

In *People v Beach*, 429 Mich 450, 491; 418 NW2d 861 (1988), the Court held that the refusal to give a requested instruction on a cognate lesser included offense can be harmless error where an intermediate charge was rejected by the jury. The Court held that, for this doctrine to apply, the intermediate charge rejected by the jury necessarily must have indicated a lack of likelihood that the jury would have adopted the lesser requested charge. *Id.* However, the Court explicitly limited application of the doctrine to situations where the jury had the choice of a lesser offense and rejected it in favor of conviction of a higher offense. *Id.*, p 493. Here, because the jury did not have the choice of a lesser offense to reject, *Beach* does not apply. *Id.*

In *People v Mosko*, 441 Mich 496, 505-506; 495 NW2d 534 (1992), the Court held that, even in the absence of an intermediate charge that was rejected, the failure to give a requested instruction on a necessarily included lesser offense can be harmless error where the defendant did not dispute the element which distinguished the principal offense from the lesser offense. A similar doctrine operates in the case of a refused instruction on a cognate lesser included offense. See *Bailey*, *supra*, p 680. Here, the element which is not found in the lesser included offense but is found in the principal offense is the element of concealment.[1] At trial, defendant's main defenses were temporary possession, see *People v Coffey*, 153 Mich App 311, 315; 395 NW2d 250 (1986), and duress. Neither affirmative defense disputes the element of concealment. Accordingly, any error in refusing to give the requested instruction was harmless. See *Mosko, supra*, pp 505-506.

Affirmed.

/s/ Myron H. Wahls
/s/ Harold Hood
/s/ Peter D. O'Connell

[1] Although the element of a "weapon" is broader in CCW than the element of a "firearm" in reckless use of a firearm, and the element of "using, carrying, handling or discharging" in reckless use of a firearm is broader than the element of "carrying" in CCW, both crimes can be satisfied, in part, by the carrying of a firearm. See MCL 750.227(1); MSA 28.424(1), MCL 752.a863; MSA 28.436(24). The

offenses differ in that CCW is satisfied by the carrying of a *concealed* firearm whereas reckless use of a firearm is satisfied by the *reckless* carrying of a firearm. See MCL 750.227(1); MSA 28.424(1), MCL 752.a863; MSA 28.436(24).