

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND J. PATTON,

Defendant-Appellant.

UNPUBLISHED

November 25, 1997

No. 197201

Recorder's Court

LC No. 95-013564

Before: Jansen, P.J., and Fitzgerald and Young, JJ.

MEMORANDUM.

Defendant appeals by right his jury conviction of manslaughter, MCL 750.321; MSA 28.553, and felony firearm, MCL 750.227b; MSA 20.424(2), a verdict which represents acquittal of the originally charged offense of second degree murder, MCL 750.317; MSA 28.549.

Defendant first contends that, in instructing the jury on the issue of intent, a burden shifting instruction was used in violation of the principles of *Sandstrom v Montana*, 442 US 510; 99 S Ct 2450; 61 L Ed 2d 39 (1979). Aside from the fact that this issue was unpreserved by timely objection, the instruction in terms simply advised the jury of permissive inferences it could draw from the evidence, and in no way suggested or implied the existence of any kind of presumption, conclusive or otherwise. Such instructions are in no way violative of the principles established in *Sandstrom, supra*. *People v Kelly*, 423 Mich 261, 273-274, n 4; 378 NW2d 365 (1985). If, as defendant now contends, the semantic distinction between a permissive inference and a conclusive presumption was likely to elude the average juror, a timely objection or request for supplemental instruction would have obviated any problem.

Defendant next argues that the trial court erred in precluding defendant from introducing evidence of the victim's reputation for violence. However, the record reflects that no such evidence was ever proffered by defendant or rejected by the trial court. Rather, the transcript reference in defendant's brief reveals an occasion on which there was argument about the use that could be made of the victim's criminal record, involving conviction for a drug offense and resulting incarceration. The trial court cannot be faulted for rejecting evidence it was never called upon to admit. *People v Thompson*,

193 Mich App 58, 62; 483 NW2d 428 (1992); *People v Stacy*, 193 Mich App 19, 31; 484 NW2d 675 (1992).

Finally, defendant claims that his trial counsel was ineffective at sentencing because he failed to correct a claimed inaccuracy in the presentence report. The record before this Court, however, contains no evidence either that the statement is in fact inaccurate, or that defendant apprised counsel of the factual error and demanded its correction. The claim of ineffective assistance of counsel is therefore unsupported by the record, *People v Armendarez*, 188 Mich App 61, 74; 468 NW2d 893 (1991), although in any event the claimed inaccuracy is of such tangential relevance that defendant could not establish the prejudice prerequisite to appellate relief even assuming that counsel was derelict in this respect. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). As to this issue, affidavits defendant included with his brief on appeal but which have never been presented to the trial court in conjunction with a proper motion for post-conviction relief have been disregarded. *People v Taylor*, 383 Mich 338, 362; 175 NW2d 715 (1970).

Affirmed.

/s/ Kathleen Jansen

/s/ E. Thomas Fitzgerald

/s/ Robert P. Young, Jr.