STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH MCCLENDON,

Defendant-Appellant.

UNPUBLISHED
May 1, 1998

No. 193960
Recorder's Court
LC No. 95-008055

Before: Hood, P.J., and Markman and Talbot, JJ.

PER CURIAM.

Defendant was charged and tried for first degree murder as the result of a stabbing death. He was convicted of voluntary manslaughter, MCL 750.321; MSA 28.553, following a jury trial. He was sentenced as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to a term of 15 to 22-1/2 years' imprisonment, and appeals as of right. We affirm.

I

Defendant argues that the trial court committed numerous errors in instructing the jury. We disagree. Jury instructions are reviewed in their entirety to determine if there was error. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Even if the instructions are imperfect, no error is created if the instructions fairly present the issues to be tried and sufficiently protect the defendant's rights. *Id.* The instructions must include all of the elements of the crime charged and must not exclude any material issues, defenses or theories if there is evidence to support them. *Id.*

Defendant's first claim is that it was error for the trial court to fail to instruct the jury pursuant to CJI2d 4.5, which states that prior inconsistent statements must not be considered when determining if the elements of the crime have been proven, but may be considered in determining credibility[1].

In this case, the jury was instructed that inconsistencies in the testimony of a witness should be considered in determining credibility. It was not instructed, however, that prior inconsistent statements should not be considered as substantive evidence. MRE 105 requires that when evidence which is admissible for one purpose but not for another is admitted, the court, upon request, shall restrict the

evidence to its proper scope and instruct the jury accordingly. In this case, prior inconsistent witness statements were admissible on issues of credibility but not for any other purpose. We therefore agree that the trial court should have given the requested instruction. We disagree, however, that this error automatically requires reversal.

In *People v Durkee,* 369 Mich 618, 627; 120 NW2d 729 (1963), the case upon which defendant relies, the Court determined that it was error requiring reversal for the trial court to omit an instruction that the prior statement of a witness was not substantive evidence. In *Durkee,* however, the prior statement was directly relevant to the elements of the crime. Unlike the case at hand, the prior statement in *Durkee* was essentially the only testimony against the defendant, which could have established the crime. Therefore, it was probable that the jury considered the statement as substantive evidence when it convicted defendant. His rights were directly and irreparably compromised by the lack of an instruction.

Durkee, supra does not require automatic reversal where a trial court omits to instruct the jury that only limited consideration may be given to a prior inconsistent statement. *People v Paul Mathis,* 55 Mich App 694, 697; 223 NW2d 310 (1974):

> Where . . . there is no request for a limiting instruction, where there is no demonstration or likelihood of prejudice and where neither the court nor the prosecutor has suggested to the jury that the prior inconsistent statement could be used as substantive evidence, the trial judge's omission does not require a reversal.

In this case, we find no error requiring reversal. Although the instruction was requested, defendant has failed to make any demonstration of prejudice or likelihood of prejudice stemming from the lack of instruction. Moreover, neither the court nor the prosecutor suggested that the prior inconsistent statement should be used as substance evidence. Our review of the record reveals that the evidence against defendant at trial was overwhelming. Further, we find that the instructions fairly presented the issues and adequately protected defendant's rights.

Defendant's second alleged instructional error is that the trial court invaded the province of the jury by finding that defendant had used a knife to stab the victim and not a broken piece of an aluminum level. In instructing the jury with regard to "state of mind", the trial court gave the following jury instruction:

> You may infer that the defendant, Kenneth McClendon, intended to kill if he used a dangerous weapon - - here a knife - - in a way that was likely to cause death. Likewise, you may infer that the defendant, Kenneth McClendon, intended the usual result that follows from the use of a knife. And here of course under the law, a knife is a dangerous weapon.

The issue presented relating to the above instruction is not preserved because there was no objection to the instruction. Failure to object to a jury instruction waives appellate review unless relief is necessary to avoid manifest injustice. *People v Perry,* 218 Mich App 520, 530; 554 NW2d 362 (1996). "A

miscarriage of justice occurs when an erroneous or omitted instruction pertains to a basic and controlling issue in the case". *Id.* Here, defendant makes no showing that relief is necessary to avoid manifest injustice.

The trial court did not instruct the jury that defendant used a knife during the fight. Instead, the instruction allowed the jury to infer that defendant intended to kill *if* he used a knife in a way likely to cause death. The instruction simply reflected the allegations made by the prosecutor that the weapon used was a knife. The jury could have believed that defendant did not use a dangerous weapon, here the knife, in a way likely to cause death. It could have believed that he used the broken level. More importantly, the difference between the use of the level or the use of a knife in this case is without distinction. The essential question was whether defendant's state of mind could be inferred from the manner in which the object was used, along with other factors contained in the jury instructions. Even if the broken level had been used instead of a knife or if the knife at issue was not a dangerous weapon, objects, which are not inherently dangerous weapons, become dangerous weapons for criminal law purposes when they are used to inflict serious injury. *People v Goolsby*, 284 Mich 375, 378; 279 NW 867 (1938); *People v Vaines*, 310 Mich 500, 505; 17 NW2d 729 (1945). Thus, if the broken level was used to kill the victim, the jury would have reached the same result. Further, the trial court did not erroneously instruct that the knife was a dangerous weapon. A knife is a dangerous weapon. See MCL 750.82; MSA 28.277. The instruction did not affect a basic and controlling issue in the case[2].

Defendant next claims that the trial court improperly instructed the jury with regard to his self-defense claim and improperly shifted the burden of proof. We find no error. Our review of the instruction leads to the conclusion that the instruction did not shift the burden to defendant to prove that he acted in self-defense. The instruction clearly states that the defendant did not have to prove that he acted in self-defense and that the prosecutor had to prove beyond a reasonable doubt that defendant committed the offenses that were charged. *People v Watts*, 61 Mich App 309, 311; 232 NW2d 396 (1975).

Finally, defendant claims that the trial court erred by failing to instruct on police credibility. We decline to review this issue because defendant fails to identify the issue in his statement of questions. *People v Yarger*, 193 Mich App 532, 540 n. 3; 485 NW2d 119 (1992). Moreover, where defendant has cited no authority for his position that the instruction should have been given, the issue is deemed abandoned. *Magee v Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996).

II

Defendant next assigns several errors relating to the effective assistance of trial counsel. We review defendant's claims of ineffective assistance of counsel to the extent permitted by the record. *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991). To find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

We find no merit to defendant's claim that defense counsel was ineffective by failing to move to reduce the first-degree murder charge after the preliminary examination. Error in the bindover is harmless if sufficient evidence is produced at trial to sustain the charge. *People v Dunham*, 220 Mich App 268, 276-277; 559 NW2d 360 (1996). Moreover, it was not ineffective assistance for counsel to fail to move to reduce the first-degree murder charge after the prosecution rested. Viewed in a light most favorable to the prosecution, the trial evidence was sufficient to enable a rational trier of fact to find that premeditation and deliberation and thus first degree murder were proven beyond a reasonable doubt. *People v Herbert*, 444 Mich 466, 473; 511 NW2d 654 (1993); *People v Vail*, 393 Mich 460, 468-469; 227 NW2d 535 (1975); *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992).

We are also unpersuaded that defense counsel's failure to object to the jury instructions or the prosecutor's conduct establishes the requisite deficient performance and prejudice to warrant reversal on the basis of ineffective assistance of counsel. This is especially so given that after thorough review, we find no errors requiring reversal with regard to the jury instructions or the prosecutor's conduct (See Issue III below).

Finally, because sentencing guidelines do not apply to the sentencing of habitual offenders, *People v Edgett*, 220 Mich App 686, 691-694; 560 NW2d 360 (1996), defendant's claim of ineffective assistance of counsel premised on counsel's failure to object to the scoring of the guidelines likewise fails.

III

Defendant next contends that the prosecutor's conduct deprived him of a fair trial. Because there was no objection to the prosecutor's remarks, review is precluded unless the prejudicial effect could not have been cured by a cautionary instruction, or where failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We examine the prosecutor's remarks in context to determine if they denied defendant a fair trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995).

Viewed in context, we reject defendant's claim that the prosecutor improperly made a burden-shifting argument when discussing self-defense. Although a defendant has no burden to produce any evidence, once the defendant advances a theory to exonerate himself, argument on the inferences created does not shift the burden of proof. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). The comments cited to by defendant were appropriate argument based on the evidence presented at trial and the inferences drawn from the evidence that defendant's theory of self-defense was improbable.

We also find no support in the record for defendant's claim that the prosecutor improperly commented on his credibility. Viewed in context, the challenged remarks were a proper comment on the evidence that defendant admitted stabbing the victim at the time of the incident and again three months later when he gave a statement to the police. A prosecutor may comment about and suggest

reasonable inferences from the trial evidence. *People v Ricky Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993).

Defendant's remaining claims of prosecutorial misconduct include that the prosecutor argued facts not in evidence, misstated the law, and referred to irrelevant and prejudicial matters. We disagree. First, these claims are not preserved because defendant failed to object at trial, and defendant has failed to establish that a miscarriage of justice will result if we do not review these issues. *Stanaway*, *supra*. Second, if there was any prejudice stemming from the prosecutor's remarks, it was sufficiently dispelled by the trial court's instructions that lawyer's statements are not evidence and that the jury was to base its verdict on the law provided by the court. *Bahoda*, *supra* at 281. Further, we do not find that the prosecutor improperly argued that the jury could convict solely based on defendant's confession. Viewed in context, the prosecutor was merely commenting on the weight of defendant's statement to support a finding of guilt, rather than to support a finding that he killed in self-defense. The argument assumed that the corpus delicti existed. The prosecutor then focused on the essential question of whether defendant's statement established a killing in self-defense. The prosecutor's argument did not deprive defendant of a fair trial.

IV

Defendant next raises three claims of alleged constitutional error arising out of the trial court's rulings with regard to cross-examination. We find no merit to defendant's contentions.

First, defendant contends that he was deprived of his constitutional right to present a defense because the trial court refused to allow his counsel to ask a prosecution witness if she heard anyone "ask Mr. McClendon to go outside". The trial court sustained a hearsay objection on the question. We disagree that defendant's constitutional right to present a defense was implicated where the trial court refused to allow the question. Our review of the record reveals that immediately following the hearsay objection, defense counsel asked "Was Mr. - - did you hear [the victim] standing outside calling for [the defendant] to come out?" No objection was made, and an answer was given. Therefore, the testimony sought was admitted through the use of a non-objectionable question. Moreover, where the jury convicted defendant only of voluntary manslaughter and not murder, it obviously heard and gave credence to the testimony that the victim called defendant outside, thus provoking him. No constitutional error was committed. Further, even if there was a constitutional error, it was harmless beyond a reasonable doubt based on the record. *People v Mateo*, 453 Mich 203, 206; 551 NW2d 891 (1996).

Defendant next claims that the trial court's refusal to allow defense counsel to recross-examine a prosecution witness was constitutional error. The right of confrontation protected by the Sixth Amendment protects the right to cross-examine a witness on evidence that is relevant to the matter being tried. *People v Jackson*, 108 Mich App 346, 349; 310 NW2d 238 (1981). The scope of cross-examination is within the sound discretion of the trial court. *Id.* at 348; MRE 611. A limitation on cross-examination, which prevents a defendant from placing into evidence facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred, constitutes denial of the constitutional right of confrontation. *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d

715 (1996). However, absent introduction of a new matter on re-direct examination, the general rule is that recross-examination is not required. *United States v Fleschner*, 98 F3d 155, 158 (CA 4, 1996). "Without something new, a party has the last word with his own witness." *Id.*

During cross-examination defense counsel tried to establish that the prosecution witness' prior testimony and statements differed from her trial testimony with regard to where the knife allegedly used to stab defendant came from during the fight. On redirect-examination, the prosecutor attempted to clarify the prior testimony and rehabilitate the witness on some of the issues covered in cross-examination, including the issue regarding the knife. When defense counsel asked for recross-examination, he specifically informed the trial judge that he had "a few [questions] on the same basis. Nothing new, just what he went over." Where defense counsel had already questioned the witness on the differences in her testimony and went over her preliminary examination testimony, the record does not support a finding that defendant was prejudiced by the trial court's limitation or was denied his right to confront the witness by the trial court's decision to refuse recross-examination. Even if there was a constitutional error, it was harmless beyond a reasonable doubt based on the facts of this case. *Mateo, supra.*

Defendant's third claim of error involves the trial court's imposition of a thirty-minute time limit for closing argument. Although defendant claims that he was deprived of a constitutional right, he fails to articulate what specific right was violated. Under MCL 768.29; MSA 28.1052, the trial court has a duty to control the trial proceedings. The trial court has discretionary authority to place time limits on closing arguments, *People v Hence*, 110 Mich App 154, 172; 312 NW2d 191 (1981); however, the time limits should be "reasonable" limits. MCR 6.414(E).

In this case, defense counsel did not object to the imposition of the time limit or indicate to the trial court that her argument could not effectively be made in the allotted time. Defendant also has not established that any error resulted from the time limit. Although the charges were indeed grave, this case was not complex and required only 1-1/2 days of testimony. More importantly, the record does not indicate that the trial court stopped defense counsel's argument before she was finished. Defendant's claim that the "trial court indicated to counsel that she had talked long enough" is a complete distortion of the record in this case. From the record, it appears that defense counsel stopped her argument without prompting from the trial court.

V

Defendant next contends that the trial court abused its discretion in admitting a photograph of the victim taken when he was alive and healthy. We disagree that the photograph was only admitted in order to call upon the sympathy of the jury. Defendant claimed self-defense and the trial court did not abuse its discretion in admitting the photograph for the proffered purpose of showing the victim's size. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995). The photograph was not prejudicial and would not have lead the jury to convict on passion alone. We also note that a photographs is not excludable simply because a witness can orally testify about the information in the photograph. *Mills, supra*.

VI

Defendant next argues that the evidence was insufficient to support his conviction for voluntary manslaughter. We disagree. Viewed most favorably to the prosecution, the evidence that defendant stabbed and beat the victim during a heated argument, and that the victim was too drunk to defend himself, was sufficient to establish voluntary manslaughter. *People v Fortson*, 202 Mich App 13, 19-20; 507 NW2d 763 (1993). In fact, the evidence against defendant was overwhelming. We also note that lawful self-defense does not entitle a defendant to use more force than is necessary to defend himself, *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993), and there was ample evidence that defendant used more force than necessary to defend himself against a victim who was basically helpless.

VII

Finally, we have considered the sentencing issues raised by defendant in his original brief on appeal, and we find no basis to grant a resentencing. Defendant was not deprived of his right of allocution. MCR 6.425(D)(2)(c); *People v Lugo*, 214 Mich App 699, 711-712; 542 NW2d 921 (1985). Prior to being sentenced on the underlying conviction of involuntary manslaughter, defendant was afforded his right to allocution. Thereafter, defendant was not "resentenced" when the trial court merely enhanced the sentence for the underlying conviction as authorized by the habitual offender statute, MCL 769.10; MSA 28.1082. Thus, defendant was not deprived of his right. Further, although the trial court's articulation was brief, it was sufficient to reflect consideration of defendant's prior criminal record and the facts of the crime as the basis for the sentence imposed. A remand for further articulation would not serve the purposes of the articulation requirement. *People v Brown*, 186 Mich App 350, 358-359; 463 NW2d 491 (1990).

Because we find no error requiring resentencing, there is no need to address defendant's argument that he should be sentenced before a different judge to preserve the appearance of justice.

Affirmed.

/s/ Harold Hood
/s/ Stephen J. Markman
/s/ Michael J. Talbot

[1] At the outset, we note that defendant's request for the instruction was not necessarily timely. Defendant did not request the instruction at issue until after the jury was charged. The trial court specifically noted, when defense counsel made her objections on the record, that it had not received any request for the instruction prior to that time. Later, during jury deliberations, after the jury requested the statement of one of the witnesses, defendant again requested the instruction. We assume, however, for purposes of our review that defense counsel's requests were timely, and we conclude that the trial court's refusal to read CJI2d 4.5 was not error requiring reversal.

[2] We are mindful of defendant's argument that his self-defense defense was more probable if the broken level was used. However, we find that there was ample evidence presented at trial that defendant did not act in self-defense when stabbing the victim. As indicated in issue VI above, defendant clearly used more force than necessary to defend himself against a basically helpless victim.