

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KORY SMITH,

Defendant-Appellant.

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UNPUBLISHED

April 17, 2003

No. 238172

Wayne Circuit Court

LC No. 01-000369-01

Before: Meter, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to rob while armed, MCL 750.89, first-degree home invasion, MCL 750.110a(2), attempted carjacking, MCL 750.92; MCL 750.529a, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

On appeal, defendant first argues that he was denied a fair trial because the trial court's erroneous reasonable doubt jury instruction improperly reduced the prosecutor's burden of proof. We disagree. Because defendant failed to object to the jury instruction at trial, our review is for plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

This Court reviews jury instructions as a whole to determine if the trial court made an error requiring reversal. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if somewhat imperfect, jury instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. *Id.* Here, the trial court instructed the jury that the presumption of innocence "continues throughout the trial, entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that he is guilty." Defendant claims that this instruction was deficient because the trial judge substituted "the passive form of the verb 'to satisfy' for the active verb 'to find' and the adverbial modifier 'proven beyond a reasonable doubt.'" However, this jury instruction followed verbatim the instruction provided by CJI2d 3.2, an instruction that has repeatedly been determined to adequately convey the concept of reasonable doubt, the presumption of innocence, and the burden of proof. *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999); *People v Hubbard (After Remand)*, 217 Mich App 459, 487-488; 552 NW2d 493 (1996); *People v Reese*, 126 Mich App 132, 137; 337 NW2d 7 (1983). Consequently, defendant has failed to establish manifest injustice warranting relief. See *Cooper, supra*. Further, defendant's claim that he was

denied the effective assistance of counsel because his attorney failed to object to this jury instruction is, likewise, without merit.

Next, defendant argues that the trial court, in effect, coerced the jury into rendering a verdict by failing to include a “no verdict” option on the jury verdict form. We disagree. Again, because defendant failed to object to the jury instructions or the verdict form at trial, our review is for plain error that affected his substantial rights. See *Carines, supra*. Defendant has failed to establish such error.

Claims of coerced verdicts are reviewed case by case, considering the facts, circumstances, and particular language used by the trial court. See *People v Pollick*, 448 Mich 376, 385-386; 531 NW2d 159 (1995); *People v Pizzino*, 313 Mich 97, 103-104; 20 NW2d 824 (1945). Here, read as a whole, the instructions properly reflected the applicable law, including that the jury’s verdict must be unanimous, that each juror should vote their conscience and should not give up their honest opinions just for the sake of reaching a verdict. See *People v Henry*, 395 Mich 367, 370-374; 236 NW2d 489 (1975); *People v Burden*, 395 Mich 462, 468-469; 236 NW2d 505 (1975). The jury was also properly instructed and given the opportunity to find defendant either guilty or not guilty of the charged offenses. See *People v Ray*, 119 Mich App 724, 728; 326 NW2d 622 (1982); *People v Traylor*, 100 Mich App 248, 251; 298 NW2d 719 (1980). Therefore, defendant has failed to establish error, plain or otherwise, and this issue is forfeited.

Finally, defendant argues that his convictions for assault with intent to rob while armed and felony-firearm violate the double jeopardy clause of the state and federal constitutions. US Const, Am V; Const 1963, art 1, § 15. Defendant failed to raise this claim in the trial court therefore our review is for plain error affecting his substantial rights. See *Carines, supra*. In any event, this Court has already determined that convictions for both felony-firearm and assault with intent to rob while armed do not violate federal and state double jeopardy clauses. See *People v Mitchell*, 85 Mich App 757, 759; 272 NW2d 601 (1978), citing *People v Johnson*, 85 Mich App 654, 669-670; 272 NW2d 605 (1978), modified on other grounds by *People v Johnson*, 411 Mich 50 (1981). As our Supreme Court held in *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998), “[t]he Legislature’s intent in drafting the felony-firearm statute was to provide for an additional felony charge and sentence whenever a person possessing a firearm committed a felony other than those four explicitly enumerated in the felony-firearm statute.” In this case, assault with intent to rob while armed is not one of the four felonies excepted from application of the felony-firearm statute, MCL 750.227b; accordingly, defendant failed to establish plain error warranting relief.

Affirmed.

/s/ Patrick M. Meter  
/s/ Mark J. Cavanagh  
/s/ Jessica R. Cooper