

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LLOYD OWEN GRESEHOVER,

Defendant-Appellant.

UNPUBLISHED

February 24, 2005

No. 251457

Washtenaw Circuit Court

LC No. 02-001075-FC

Before: Fort Hood, P.J., and Griffin and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions and sentences for assault with intent to murder, MCL 750.83, carrying a dangerous weapon with unlawful intent, MCL 750.226, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. His convictions were entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first points to several excerpts from the prosecutor's closing argument and argues that the prosecutor engaged in misconduct denying him a fair trial. However, defendant failed to object at trial. "Absent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996), see also *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (unpreserved issues are reviewed for plain error affecting substantial rights).

In general, the prosecutor's statements consisted of fair comments on the testimony presented by the witnesses. To the extent it can be argued that the prosecutor misrepresented the import of the witnesses' statements, any prejudicial effect could have been cured by a timely objection and curative instruction. In addition, the trial court instructed the jury that the attorney's arguments were not evidence. The jury is presumed to follow the court's instructions. *People v Lueth*, 253 Mich App 670, 687; 660 NW2d 322 (2002). Therefore, we find that defendant has failed to demonstrate that he is entitled to relief on this issue.

Defendant next argues that the trial court failed to give adequate jury instructions on specific intent. Defendant failed to object to the instructions as given, and, thus, this Court reviews his claim for plain error that affected his substantial rights. *Carines, supra* at 761-764,

774. This Court reviews jury instructions in their entirety to determine if error requiring reversal occurred. Even if somewhat imperfect, jury instructions do not create error if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

Defendant argues that the trial court was required to follow model jury instruction CJI2d 3.9 when providing the jurors with a discussion of the intent necessary to support the charges of assault with intent to commit murder and carrying a dangerous weapon with unlawful intent. Defendant is correct that his intent was a central element here and, thus, CJI2d 3.9 is applicable. Although the trial court did not use the precise words "specific intent," the instructions clearly provided that the jury was required to find that defendant specifically intended to kill and/or to use a weapon against the complainant in order to convict him of the respective counts. Likewise, the trial court provided the further instruction on the claim of accident, based on CJI2d 7.3a, after it instructed the jury on the elements for the crime of assault with intent to murder. Moreover, the trial court provided instructions on the lesser included offenses of assault with intent to cause great bodily harm less than murder, felonious assault, discharging a firearm intentionally pointed at a person, and reckless use of a firearm. Each of these lesser included offense instructions contained their own intent elements that delineated them from the crime of assault with intent to murder. The substance of the instructions as a whole adequately conveyed the idea that an accidental discharge of the firearm would not render defendant guilty of intent to murder. We thus find that defendant is not entitled to relief on this issue.

Defendant lastly argues that trial counsel was ineffective for failing to object to the instances of prosecutor misconduct set forth above and for failing to request a further specific intent instruction. Because defendant did not raise this issue below, review is limited to errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish a claim of ineffective assistance of counsel, defendant must show both that counsel's performance was deficient, and the existence of a reasonable probability that the result of the proceeding would have been different but for counsel's error. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Here, defendant cannot show that counsel's decision not to request a separate specific intent instruction was outcome determinative. As discussed above, the trial court's instructions adequately conveyed the idea that defendant could not be found guilty if the discharge was accidental, and the trial court provided a number of other optional charges for the jury to consider. Under the circumstances, even had counsel requested a more extensive specific intent instruction, it is unlikely that the jury would have reached a different conclusion. As to the alleged prosecutor misconduct, defendant has also failed to show that counsel's alleged ineffectiveness was outcome determinative. A request for a curative instruction during the prosecutor's closing arguments might have resulted in the grant of such an instruction. But given the other evidence presented, any curative instruction would likely have made no difference in the outcome. We conclude that defendant has not met his burden of showing that he is entitled to a new trial based on ineffective assistance of counsel.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Richard Allen Griffin
/s/ Pat M. Donofrio