

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM L. DOUGLAS,

Defendant-Appellant.

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UNPUBLISHED

December 11, 2001

No. 225214

Wayne Circuit Court

Criminal Division

LC No. 99-002640

Before: Cavanagh, P.J., and Doctoroff and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b(1). He was thereafter sentenced to the mandatory terms of life imprisonment without parole for the conviction of felony murder and two years for the felony-firearm conviction.<sup>1</sup> Defendant appeals as of right. We vacate defendant's conviction of armed robbery, but affirm his convictions of felony murder and felony-firearm.

Defendant first argues that the trial court erred by not instructing the jury on his theory of the case—that the gun discharged accidentally. A trial court is required to give requested instructions on a defense theory only if it is supported by the evidence. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). The trial court's determination whether an instruction is supported by the evidence is reviewed for an abuse of discretion. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

In this case, the trial court did not abuse its discretion by declining to give the requested instruction. There was no evidentiary support for defendant's accidental-discharge theory. The evidence showed that defendant told the victim to get on his knees, pointed a gun at him, and demanded all of his money. When the victim begged for his life, defendant responded that he "didn't give a f\_\_\_." When the victim stood up and lunged forward in an attempt to grab the gun, defendant said either, "I'll shoot you," or "I'll kill you," then shot the victim once in the chest. This evidence demonstrates clearly that defendant intentionally shot the victim.

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<sup>1</sup> Although the trial court did not impose a sentence for the conviction of armed robbery, it did not formally vacate this conviction.

Defendant claims that the gun discharged during a struggle for the gun, but there was no evidence that the victim touched either the gun or defendant. Indeed, even after the victim began to lunge toward defendant, defendant stated his intention to shoot the victim. Thus, defendant's accident instruction was not supported by the evidence. Although the trial court relied on alternative reasoning, we will affirm the right result even where it is reached for the wrong reasons. *People v Lyon*, 227 Mich App 599, 612-613; 577 NW2d 124 (1998).

We likewise reject defendant's claim that the trial court erred by failing to instruct the jury on the lesser cognate offense of statutory involuntary manslaughter, MCL 750.329. A trial court is required to instruct on a lesser cognate offense only where it is supported by the evidence. *People v Bailey*, 451 Mich 657, 668; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996). Again, we review the trial court's decision for an abuse of discretion. *Ho, supra* at 189. Defendant's requested instruction relied on his theory that the gun discharged accidentally. As noted above, that theory lacked evidentiary support. Therefore, the trial court did not abuse its discretion by declining to give the requested instruction.

Defendant also challenges the evidentiary support for the trial court's jury instruction on flight. This issue is unpreserved, because defendant failed to object to the flight instruction. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Defendant has forfeited this issue, having failed to show plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The evidence showed that when defendant was arrested, he broke free from officers and fled. The trial court's flight instruction was supported by the evidence.

Defendant also argues that he was denied his rights to due process and a fair trial by a police officer's testimony regarding his post-arrest, post-*Miranda*<sup>2</sup> silence. Defendant failed to raise this specific objection during trial;<sup>3</sup> thus, this issue is unpreserved. *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Defendant has not shown plain error affecting his substantial rights. *Carines, supra* at 763. A police officer testified that, after being advised of his rights, defendant made a partial statement, in which he claimed that he was at his sister's house on the date of the shooting. When defendant was asked whether he knew the victim, he responded, "Yes. I don't want to talk anymore." Although this was a reference to defendant's post-*Miranda* silence, the prosecutor did not intentionally elicit this reference in order to use it against defendant. The prosecutor never directly asked the officer whether defendant had invoked his right to remain silent; rather, the prosecutor simply asked the officer about the content of the statement that defendant made. Also, the prosecutor did not encourage the jury to draw any negative inference from defendant's silence. This isolated, unsolicited reference to defendant's post-*Miranda* silence—which was never used against defendant by the prosecutor—did not constitute a due-process violation. See *People v Dennis*, 464 Mich 567, 575-583; 628 NW2d 502 (2001). Defendant was not denied a fair trial.

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<sup>2</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

<sup>3</sup> Defendant's objection to the police officer's testimony was that it was not relevant. Defendant did not challenge the testimony on the basis that the prosecutor impermissibly used his post-*Miranda* silence against him.

Although not raised by defendant, we note that his conviction of armed robbery violates the prohibition against double jeopardy, because it was the predicate felony for his conviction of felony murder. *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996). Although the trial court declined to impose a sentence, the proper remedy is to vacate the conviction of the predicate felony entirely. *Id.* Therefore, we vacate defendant's armed robbery conviction.

Defendant's conviction of armed robbery is vacated, and we affirm in all other respects.

/s/ Mark J. Cavanagh

/s/ Martin M. Doctoroff

/s/ Kathleen Jansen