

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMONT SMITH,

Defendant-Appellant.

UNPUBLISHED
September 16, 2003

No. 240365
Wayne Circuit Court
LC No. 01-007998

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

PER CURIAM.

Defendant Lamont Smith appeals as of right his conviction of second-degree murder, MCL 750.317, and his sentence of 60 to 90 years. Defendant was also convicted of possession of a firearm by a convicted felon, MCL 750.224(f), and felony firearm, MCL 750.227(b). We affirm.

Defendant Smith's convictions arise from the April 4, 2001 killing of Detroit Police Officer Neil Wells. Defendant admitted to shooting an assault rifle that killed Officer Wells but claimed that he only intended to secure a getaway. Officer Wells suffered two gunshot wounds, one of which pierced his heart, killing him within minutes. During jury deliberations, the jury asked several questions about being deadlocked and consistently displayed confusion over the charges they were instructed to consider. The judge gave them several supplemental instructions and on the fourth day the jury returned their verdict.

Defendant makes two claims on appeal arising from his conviction of second-degree murder. First, defendant claims that the trial judge's instructions to the jury were unduly coercive and substantially departed from the approved standard instructions. We disagree. Defendant claims that at least a portion of the instructions were objected to at trial, and therefore the issue is preserved for appeal. Error is waived for any instructions not objected to, and there will be no reversal, absent manifest injustice requiring relief. *People v Swint*, 225 Mich App 353, 376; 572 NW2d 666 (1997). A preserved issue of instructional error is reviewed de novo. *People v Hubbard* (After Remand), 217 Mich App 459, 487; 552 NW2d 493 (1996). This Court reviews jury instructions in their entirety to determine if there is an error requiring reversal. *People v Whitney*, 228 Mich App 230, 252; 578 NW2d 329 (1998). "Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected

the defendant's rights." *People v McFall*, 224 Mich App 403, 412-13; 529 NW2d 868 (1997). A review of the record demonstrates that the failure of the trial court to use the standard criminal jury instructions verbatim does not warrant reversal. The instructions utilized were not coercive and the language protected the defendant's rights and fairly presented the issues to the jury.

Defendant objected to the instructions given on the fourth day of deliberations. After reading the last note from the jury, the trial court concluded that they still did not understand the charges or the possible verdicts under consideration. He attempted to clarify the charges and reiterated the unanimity requirement. Defendant objected at trial and argues here that the trial court should have only given the deadlocked jury instruction, CJI2d 3.12. A judge may instruct a jury after deliberation begins on any instructions that are appropriate. MCR 6.414(F). The extent to which a court instructs a jury lies within the sound discretion of the trial court. *People v Perry*, 114 Mich App 462, 467; 319 NW2d 559 (1982). The trial court is not required to use the standard instructions at all and therefore is not required to use quoted language from CJI2d 3.11 or CJI2d 3.12 to instruct the jury. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). Coercion, and not the specific language of an instruction, lies at the heart of our inquiry. *Hardin* at 314, quoting *People v Holmes*, 132 Mich App 730, 749 349 NW2d 230. The trial court specifically instructed the jury members that they were not to abandon their own convictions unless they were convinced that they had previously been wrong. There is no record evidence of any coercion by the trial court, nor did the court substantially depart from the standard language in his attempt to clarify the charges to the jury. No reversal is warranted.

Next, defendant claims that the trial court erred by departing from the statutory sentencing guidelines for his second-degree murder conviction. We disagree. Because the sentence is a departure from the guidelines, no preservation of the issue at trial is required for review. This Court reviews the existence of objective and verifiable factors for clear error. *People v Fields*, 448 Mich. 58, 77; 528 NW2d 176 (1995). We review for an abuse of discretion whether the objective and verifiable factors stated by the court constitute substantial and compelling reasons for departure for an abuse of discretion. *People v Babcock*, ___ Mich ___; ___ NW2d ___ (Docket. No. 120310 decided July 31, 2003), slip op at 12. A trial court may depart from the sentencing guidelines if it has a substantial and compelling reason and states on the record the reason for that departure. MCL 769.34(3). The court shall not use a factor already considered in the offense variables or prior record variables unless the court finds that the characteristic has been given inadequate or disproportionate weight based on the facts of record. MCL 769.34(3)(b).

Considering defendant's OV and PRV scores, his conviction for second-degree murder required a minimum sentence of 270 to 450 months under the statutory guidelines. MCL 777.61. The trial court departed from the guidelines and sentenced defendant to a minimum of 720 months. The court cited the defendant's extensive contact with the criminal justice system coupled with his young age as his reason for departure. Defendant's contacts with the criminal justice system are indeed extensive. As a juvenile, defendant was charged with carjacking, armed robbery, assault with intent to murder, felonious assault and felony firearm and was ultimately convicted of armed robbery, felonious assault and felony firearm. Defendant was confined as a juvenile offender and, while under supervision, was arrested for home invasion, carrying a concealed weapon and felony firearm. Following his release from the juvenile facility, he was placed in supervised independent living; however, he later absconded from this

program. Defendant also had two outstanding warrants under a false name at the time he murdered Officer Wells. All of this occurred before defendant reached 22 years of age. The total of these objective and verifiable factors show that the defendant, despite being given several chances at reform, was unable or unwilling to rehabilitate himself. Such an extensive and increasingly violent record involving an individual as young as defendant, culminating in the wanton shooting of a police officer, should “keenly” and “irresistibly” grab the trial court as it did in this case. *Fields, supra* at 67-68. It arrests this Court’s attention as well. The fact that this defendant had such a record is not adequately accounted for in the guidelines and is objective and verifiable. Therefore, there was no clear error or abuse of discretion in the trial court’s decision to depart upward in the sentence. No reversal is warranted.

Affirmed.

/s/ Donald S. Owens

/s/ Michael J. Cavanagh

/s/ Patrick M. Meter