

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD L. BROWN,

Defendant-Appellant.

UNPUBLISHED
November 6, 2001

No. 219898
Wayne Circuit Court
Criminal Division
LC No. 98-009284

Before: Holbrook, Jr., P.J., and Cavanagh and R. S. Gribbs*, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a second habitual offender, MCL 769.10, to an enhanced term of twelve to twenty-five years' imprisonment for the second-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant argues that error requiring reversal occurred when the trial court asked defense counsel, in the presence of the jury, whether defendant was aware of his right to remain silent before defendant testified. Because defendant did not preserve this issue with an appropriate objection to the court's inquiry, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999). We agree that it is preferable for a court to question a witness regarding his right to remain silent outside the jury's presence. *People v Dyer*, 425 Mich 572, 578, n 5; 390 NW2d 645 (1986); *People v Clark*, 172 Mich App 407, 416; 432 NW2d 726 (1988). In this case, however, the court's question did not affect defendant's substantial rights because it was not inherently intimidating, it did not dissuade defendant from testifying, and it actually may have enhanced defendant's credibility in the jurors' eyes. See *People v Avant*, 235 Mich App 499, 516-520; 597 NW2d 864 (1999). Accordingly, this issue does not warrant appellate relief.

Next, defendant argues that the trial court erred by failing to sua sponte instruct the jury on the no-duty-to-retreat rule in accordance with CJI2d 7.17. We disagree. Because the facts showed that the victim was shot while defendant was outside his home, on or near his driveway,

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

and there was no evidence that the victim ever entered defendant's home, the no-duty-to-retreat rule did not apply. *People v Kulick*, 209 Mich App 258, 264-265; 530 NW2d 163 (1995), remanded for reconsideration on other grounds 449 Mich 851 (1995); *People v Szymarek*, 57 Mich App 354, 356-357; 225 NW2d 765 (1975); *People v Godsey*, 54 Mich App 316, 319-321; 220 NW2d 801 (1974); *People v Paxton*, 47 Mich App 144, 147-149; 209 NW2d 251 (1973).

Next, defendant argues that the trial court erred in instructing the jury in response to the jury's request to have certain testimony read back. The court informed the jury that the testimony it requested could not be read back because it would take a few days to transcribe the testimony. The court then instructed the jury to resume deliberations. The court never informed the jury that it could have the requested testimony read to it at a later point if necessary.

We find no merit to defendant's claim that the trial court resolved this issue without allowing input from the attorneys. The court discussed the instructions that it planned to give to the jury and asked if there were any objections to the instructions. Defense counsel did not object.

Although the court instructed the jury to resume deliberations because the transcripts were not available, it did not entirely foreclose the possibility of reading back the requested testimony at a later time. See MCR 6.414(H); *People v Davis*, 216 Mich App 47, 57; 549 NW2d 1 (1996). In any event, because defense counsel approved the court's instructions, any error was waived. *People v Carter*, 462 Mich 206, 214-215, 218-219; 612 NW2d 144 (2000).

Defendant also claims that the trial court erred when it refused to instruct the jury on reckless or wanton use of a firearm, consistent with CJI2d 11.26. We disagree.

A court is required to instruct on a lesser included misdemeanor offense where (1) there is a proper request made, (2) there is an "inherent relationship" between the greater and lesser offenses, (3) the requested instruction for the misdemeanor offense is supported by a "rational view" of the evidence, (4) the defendant has adequate notice if he did not make the request, and (5) no undue confusion or other injustice would result. *People v Corbiere*, 220 Mich App 260, 262-263; 559 NW2d 666 (1996); *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993).

A requested instruction on a lesser included misdemeanor offense is supported by a rational view of the evidence when "proof on the element or elements differentiating the two crimes [are] sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense." *People v Stephens*, 416 Mich 252, 262-263; 330 NW2d 675 (1982), quoting *United States v Whitaker*, 144 US App DC 344, 347; 447 F2d 314 (1971).

CJI2d 11.26 provides as follows:

[The defendant is charged with the crime of/You may also consider the lesser charge of*] reckless [use/handling] of a firearm. To prove this charge, the prosecutor must prove beyond a reasonable doubt that the defendant

[recklessly/heedlessly/wilfully/(or) wantonly] [used/carried/handled/(or) fired] a gun without reasonable caution for the rights, safety, or property of others.

CJI2d 11.26 is based on MCL 752.863a,¹ which is a misdemeanor. The instruction applies where a gun is negligently or accidentally discharged, not where it is intentionally fired. Here, defendant admitted intentionally firing the gun, although he claimed that he was only intending to scare the victim. On these facts, the instruction was not applicable.

Defendant argues that his attorney was ineffective for not moving to suppress two statements that he gave to the police. In order for this Court to reverse due to ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced him that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996). The burden is on defendant to produce factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Because defendant did not raise this issue in the trial court, our review is limited to the record. A review of the record fails to reveal any support for defendant's claim that his statements should have been suppressed. Defendant has not met his burden of showing that defense counsel was ineffective.

Defendant further claims that counsel was ineffective for not properly preserving the matters previously discussed in this opinion. We disagree. While counsel could or should have objected to some of the matters, defendant was not prejudiced by counsel's failure to do so. Defendant has not met his burden on this issue.

Defendant next argues that the trial court abused its discretion when it permitted the prosecutor to question him about how he was shot and lost the use of his legs. We find no abuse of discretion in admitting this testimony. Defendant opened the door to the line of questioning when he testified that he had never felt as helpless in his life as when he was attacked by the victim. In response, the prosecutor questioned defendant about how he was previously shot, which left him paralyzed. Contrary to what defendant argues, the prosecutor's question did not involve the injection of improper evidence of prior bad acts under MRE 404(b). Moreover, because the trial court did not allow any reference to the reason why defendant was shot or by

¹ Formerly known as MCL 752.a863, which provides:

Any person who shall recklessly or heedlessly or wilfully or wantonly use, carry, handle or discharge any firearm without due caution and circumspection for the rights, safety or property of others shall be guilty of a misdemeanor.

whom, the question was not unfairly prejudicial under MRE 403. See *People v Sabin (After Remand)*, 463 Mich 43, 57-58; 614 NW2d 888 (2000).

Next, defendant argues that the prosecutor improperly appealed to the jurors' civic duty during closing argument. Because defendant did not object to the challenged remarks, we limit our review to plain error affecting defendant's substantial rights. *Carines, supra; People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Considered in context, the prosecutor's remarks did not involve a blatant attempt to urge the jurors to decide the case based upon a civic duty to convict. Plain error has not been shown.

Defendant argues that his sentence of twelve to twenty-five years' imprisonment for second-degree murder violates the principle of proportionality. We disagree. Defendant was sentenced as an habitual offender. This Court's inquiry when reviewing sentencing decisions in the case of habitual offenders is limited to determining if the trial court abused its discretion. *People v Alexander*, 234 Mich App 665, 679; 599 NW2d 749 (1999). This Court reviews sentencing decisions for an abuse of discretion by applying the principle of proportionality and determining if the sentence imposed is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Here, defendant's sentence, even as enhanced, was still within the recommendation of the sentencing guidelines. Contrary to what defendant argues, there is no indication that the court gave undue weight to his prior conviction. Defendant has not shown that his sentence amounted to an abuse of discretion.

Finally, defendant argues that the court's comments during voir dire, that the jury should not consider his handicap, were inconsistent with the court's final instructions on self-defense, wherein the court told the jury that it should take into account the relative strength of defendant and the victim when deciding if self-defense applied. During voir dire, the court emphasized several times and questioned the jurors about whether they could decide this case without prejudice or sympathy for defendant because of his handicap. We do not believe that the court's instructions were inconsistent. The court's earlier comments were aimed at determining whether the jurors could decide this case without prejudice or sympathy because defendant was handicapped. The court also instructed the jury to decide the case on the evidence and law as instructed. The court did not tell the jury that defendant's handicap could not be considered for any purposes. Accordingly, this issue does not warrant relief.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh
/s/ Roman S. Gribbs