

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN BERNARD CRAWFORD,

Defendant-Appellant.

UNPUBLISHED
November 8, 2002

No. 232962
Saginaw Circuit Court
LC No. 99-016966-FC

ON REHEARING

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of assault with intent to murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b, for which he was sentenced as a third habitual offender, MCL 769.11, to concurrent sentences of 225 months' to 30 years' imprisonment for assault with intent to murder and 2 to 10 years' imprisonment for felon in possession, to be served consecutive to 2 years' imprisonment for felony-firearm. We affirm.

Defendant argues that his assault and felony-firearm convictions were not supported by sufficient evidence and that the prosecution failed to disprove beyond a reasonable doubt that the assault was not excused or mitigated.

This Court reviews de novo a defendant's challenge to the sufficiency of evidence to determine whether the fact finder was justified in concluding that each element of the crime charged was proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 479; 581 NW2d 229 (1998). A defendant's intent to harm may be inferred from the defendant's conduct. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997), and a defendant's intent to kill may be inferred from the type of weapon used and the method of injury. *People v Daniels*, 163 Mich App 703, 706; 415 NW2d 282 (1987). Here, the evidence clearly established that defendant fired a gun several times from close range at the victim's head. Where the jury was instructed on two lesser offenses (felonious assault and assault with intent to do great bodily harm less than murder), its verdict indicates it was convinced beyond a reasonable doubt that defendant was guilty of the most serious offense. Determining the credibility of witnesses and

the weight of the evidence is the exclusive province of the jury and is not subject to appellate review. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992).

Because defendant claimed self-defense, he had to prove that his conduct was in response to an assault directed at the defendant. *Detroit v Smith*, 235 Mich App 235, 238; 597 NW2d 247 (1999); *People v Elkhoja*, ___ Mich App ___; ___ NW2d ___ (Docket No. 224126, issued May 21, 2002). Defendant, failed to present evidence sufficient to convince the trier of fact that the victim initiated an assault. Further, a person generally has a duty to avoid using deadly force when he may safely retreat from the dangerous situation, *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000), and a defendant may not use more force than necessary to defend himself from his aggressor. *People v Oster (On Resubmission)*, 97 Mich App 122, 132; 294 NW2d 253 (1980). Having been clearly instructed on defendant's theory of self-defense, the jury was justified in concluding that the prosecution proved beyond a reasonable doubt that defendant's conduct was not justified as self-defense.

Also, defendant contends he was denied the effective assistance of counsel when his attorney failed to object to the presentence investigation report's offense variable (OV) scoring. Because defendant did not raise this issue as evidence of his counsel's ineffective assistance at any time before the instant appeal, this claim of error is not preserved. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). This Court's review of a defendant's unpreserved claim of ineffective assistance of counsel is limited to the existing record, *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). An unpreserved nonconstitutional error is reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999), reh den 461 Mich 1205 (2000).

After careful review of the record, we find defendant was not denied the effective assistance of counsel. Defendant was properly assessed twenty-five points for OV6 because, as the jury found, he had the "unpremeditated intent to kill". MCL 777.36(1)(b).

Defendant also argues that counsel should have objected to any scoring of OV6 because MCL 777.22 was amended to include assault with intent to murder *after* the date of the instant offense. While the Ex Post Facto Clause, Const 1963, art I, § 10, was intended to prevent the Legislature from enacting remedial and procedural statutes effecting substantive matters, our Supreme Court has decidedly found that the legislative sentencing guidelines do not furnish defendants with any substantive rights and do not violate the prohibition against ex post facto laws. *People v Fisher*, 442 Mich 560, 581-582; 503 NW2d 50 (1993); *People v Potts*, 436 Mich 295, 303; 461 NW2d 647 (1990). Accordingly, any such objection by counsel would have been meritless.

Defendant further asserts that his due process rights were violated when the trial court denied his request for a forensic evaluation to determine whether his mental capacity mitigated his culpability. This Court reviews a trial court's ruling on a defendant's request for expert assistance for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 398; 633 NW2d 376 (2001)

Defendant must first meet three requirements to merit review of this issue: (1) he must have made a timely request to the trial court for expert assistance; (2) the trial court must have improperly denied his request; and (3) lacking expert assistance, defendant must have been forced to proceed to trial at a fundamentally unfair disadvantage. *People v Leonard*, 224 Mich App 569, 581; 569 NW2d 663 (1997). Defendant cannot satisfy these prerequisites. Like the defendant in *Leonard, supra* at 284-285, defendant did not make a timely request; defendant's first request was made post-trial at a scheduled sentencing hearing. Defendant's untimely request – rather than improperly denied – was properly denied by the trial court; any intention to defend on the basis of insanity required filing a thirty-day written pretrial notice. Further, defendant suffered no fundamental unfairness as a result of the court's decision because defendant was not prevented from presenting a defense. *Herndon, supra* at 399.

Defendant finally claims that his convictions for both felony-firearm and felon in possession violate the prohibition against double jeopardy. We disagree.

A double jeopardy issue presents a significant constitutional question which may be considered on appeal regardless whether the defendant raised it before the trial court. *People v Colon*, 250 Mich App 59, 62; ___ NW2d ___ (2002). A double jeopardy claim presents a question of law reviewed de novo on appeal. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

This Court recently upheld a defendant's conviction for felony-firearm where the underlying felony was felon in possession of a firearm. *People v Dillard*, 246 Mich App 163, 169-171; 631 NW2d 775 (2001). In *Dillard, supra* at 168, this Court expressly rejected defendant's argument here on appeal – that because the felon in possession statute was enacted after the effective date of the four exceptions to felony-firearm in MCL 750.227b, there exists no conclusive proof that the Legislature intended multiple punishments for these two specific crimes. Specifically, the *Dillard* Court noted that the fact that the felon in possession statute was enacted after the four exceptions were included in the felony-firearm statute indicated that the Legislature considered the impact of the felony-firearm law on MCL 750.224f (felon in possession statute) and decided against changing MCL 750.227b to except it. *Dillard, supra* at 168.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski