

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT FRANKLYN PAYTON,

Defendant-Appellant.

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UNPUBLISHED

August 22, 2006

No. 260302

Lapeer Circuit Court

LC No. 04-008041-FH

Before: Saad, P.J., and Jansen and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of intentionally discharging a firearm in an occupied structure, MCL 750.234b. He was sentenced to 18 months' probation. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in submitting to the jury supplemental written instructions that included a handwritten, rather than typewritten, notation that the lack of self-defense is a necessary element under MCL 750.234b.<sup>1</sup> Defendant contends that when the jury foreperson later read these supplemental instructions to the jurors, he did not mention the self-defense element of the charged offense. Defendant maintains that the foreperson must have omitted mention of the self-defense element *because* it was handwritten rather than typed.

Claims of instructional error are reviewed de novo. *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003). "Jury instructions should be considered as a whole rather than extracted piecemeal to establish error." *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999). Even if the instructions were somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.*

The trial court's handwritten instruction could only have been prejudicial if the foreperson had omitted the self-defense element *because* of the handwriting. However, defendant provides only speculation that this is what occurred. Even assuming the admissibility

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<sup>1</sup> We assume, without deciding, that this issue has been preserved for appellate review.

of the juror's affidavit that was presented by defendant in this case, the affidavit does not confirm that the foreperson in fact omitted the written self-defense element *because* it was handwritten. The affidavit states only that the foreperson read aloud from portions of the written instructions, and that he never read the self-defense element of the charge at issue. According to the juror-affiant, the other jurors did not read the supplemental written instructions at all. Because defendant cannot prove that the *handwriting itself caused* the foreperson to omit mention of the self-defense instruction, defendant has not provided any evidence that the alleged error was prejudicial.<sup>2</sup> Thus, even if the handwritten instruction was somehow technically erroneous, any error was harmless. See *People v Mateo*, 453 Mich 203, 215-216; 551 NW2d 891 (1996) (we will not reverse for harmless error); see also MCR 2.613(A).

With respect to defendant's argument that the handwritten portion of the instructions was illegible or difficult to read, aside from the word "discharge," the handwritten statement appears completely legible.<sup>3</sup> In addition, the word "discharge" is easily understood from context. No error requiring reversal occurred in this regard because the written instructions "fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Henry, supra* at 151.

Defendant also argues that the trial court incorrectly acted sua sponte and ex parte when it gave the supplemental jury instructions, including the handwritten portion. However, because defendant failed to raise this argument below, the issue is not preserved. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). We will not reverse a conviction based on an unpreserved issue absent a showing of plain error that affected a defendant's substantial rights. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003); *People v Carines*, 460 Mich 750, 764-767; 597 NW2d 130 (1999).

With respect to defendant's claim that the trial court improperly provided the written instructions sua sponte, the then-applicable version of MCR 6.414(G) expressly allowed the trial court to provide the instructions "on its own initiative." See former MCR 6.414(G). Thus, there was no error in this regard. Similarly, with respect to defendant's argument that the trial court improperly acted ex parte, the then-applicable version of MCR 6.414(G) did not require the trial court to give the parties prior notice of its decision to give written instructions. We find no outcome-determinative plain error with respect to the trial court's method of providing the supplemental written instructions in this case. *Jones, supra* at 355-356; *Carines, supra* at 764-767.

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<sup>2</sup> Defendant seems to suggest that all written instructions submitted to jurors should be typewritten rather than handwritten. However, defendant cites no authority to support this argument. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Moreover, it appears that neither our Legislature, nor our Supreme Court through court rule, has determined that such instructions must be typed.

<sup>3</sup> We have examined the handwritten statement, which is contained in the lower court file.

Defendant further argues that the trial court violated the then-applicable version of MCR 6.414(G) by providing an incomplete statement of the elements of the charged offense, and by failing to ensure that the instructions were contained in the record. Defendant never argued below that the trial court had failed to provide a full set of instructions to the jury, nor did defendant argue that the trial court had failed to place the instructions in the record. Therefore, these issues are unpreserved. *Grant, supra* at 546. Further, because these alleged errors were not stated in defendant's statement of questions presented, neither argument has been properly presented for our review. *People v Albers*, 258 Mich App 578, 584; 672 NW2d 336 (2003). Nonetheless, the trial court has transmitted to this Court a copy of the supplemental written instructions that it provided to the jury. These written instructions are functionally identical to the instructions that the trial court read to the jury, and which are contained in the record. The evidence demonstrates that the trial court provided the jury with a complete and accurate set of instructions, and that the complete instructions are contained in the lower court record.

Defendant next argues that the jury foreperson engaged in misconduct by failing to allow the other jurors an opportunity to read the supplemental instructions, and by reading portions of the written instructions without mentioning the self-defense element of the charge at issue. After a jury has been polled and discharged, which occurred in this case, the verdict may not be impeached by a juror affidavit or testimony showing juror misconduct unless the affidavit or testimony relates to an outside or extraneous influence. *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997). The alleged misconduct by the jury foreperson cited by defendant obviously did not involve an outside or extraneous influence. Thus, defendant is not entitled to relief on this issue.

Finally, defendant argues that the trial court should have granted his request for a new trial because his conviction under MCL 750.234b was against the great weight of the evidence. "A motion for a new trial based upon the great weight of the evidence should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Akins*, 259 Mich App 545, 556 n 13; 675 NW2d 863 (2003), citing *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). We review a trial court's denial of a motion for a new trial based on the great weight of the evidence to determine whether the trial court abused its discretion. *Akins, supra* at 556 n 13. "In a criminal case an abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made." *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

Defendant claims the verdict was against the great weight of the evidence because he presented evidence of self-defense. Defendant argued before the trial court that his acquittal of felonious assault<sup>4</sup> necessarily established that the jury had found self-defense, which contradicted its finding of guilt under MCL 750.234b. However, there is no indication in the record that the jury actually found that defendant acted in self-defense, and defense counsel's alleged post-verdict discussion with jurors is not a matter of record. Moreover, "a jury may reach inconsistent

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<sup>4</sup> The jury acquitted defendant on charges of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.

verdicts as a result of mistake, compromise, or leniency.” *People v Goss*, 446 Mich 587, 597-598; 521 NW2d 312 (1994).

Additionally, we note that the evidence itself belies defendant’s self-defense argument. The record indicated that Patrick Schueneman had twice attempted to leave defendant’s presence, that defendant had told a witness that he would shoot Schueneman the next time he saw him, and that defendant never asked Schueneman to leave his presence before firing the gun. Moreover, there was no evidence that Schueneman ever moved toward defendant in a threatening manner, particularly at the time immediately leading up to the shooting. Lastly, defendant admitted that he told the 911 operator, “I’ve got to play games so this [person] wouldn’t leave,” and “I’ve got to get my story together.” These statements tend to suggest that defendant did not act in self-defense.

In the end, defendant’s self-defense argument turned largely on his own credibility. It is well settled that “[i]t is the province of the jury to determine questions of fact and assess the credibility of witnesses,” *Lemmon, supra* at 637, and the jury was fully entitled to credit or discredit defendant’s self-defense argument as it related to the charge of intentionally discharging a firearm in an occupied structure. Because the evidence did not clearly preponderate in favor of defendant’s self-defense theory, the trial court did not abuse its discretion in denying defendant’s motion for a new trial. *Akins, supra* at 556 n 13.

Affirmed.

/s/ Henry William Saad

/s/ Kathleen Jansen