

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL J. PODOLAK,

Defendant-Appellant.

UNPUBLISHED

August 20, 1996

No. 176509

LC No. 93-7915 FC

Before: Young, P.J., and Holbrook, Jr., and J. Richard Ernst,* JJ.

PER CURIAM.

Defendant was convicted by a jury of felonious assault, MCL 750.82; MSA 28.277, aiming a firearm intentionally but without malice, MCL 750.233; MSA 28.430, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He subsequently pleaded guilty of being an habitual offender, third offense, MCL 769.11; MSA 28.1083. He appeals as of right and we affirm.

Defendant first argues that the trial court erred in refusing to instruct the jury on the misdemeanor offense of reckless or wanton use of a firearm. See MCL 752.a863; MSA 28.436(24). Given that the jury was required to consider the numerous, sometimes overlapping, elements of three felony and two misdemeanor offenses in the context of Count I alone, and that defendant effectively conceded that he had intentionally pointed the gun toward, if not at, the victim, we agree with the trial court that the addition of another misdemeanor instruction would have resulted in juror confusion. We find no error.

Defendant next argues that the trial court erred in refusing to give CJI2d 7.23, "Past Violence by Complainant or Decedent," with respect to Count I. The cited instruction generally is appropriate only where the defendant has claimed self-defense, which was not done in this case. To the extent that defendant did claim that mitigating circumstances surrounded the shooting, his right to a fair trial was protected by the trial court's giving of CJI2d 17.4, "Mitigating Circumstances."

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

Defendant next argues that the trial court erred in denying his motion for a directed verdict on the charge of assault with intent to commit murder. We disagree. Intent and premeditation may be inferred from all the facts and circumstances, *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987), and, because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient, *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). Here, defendant's former girlfriend testified that defendant told her he had bought the gun for the victim. Another witness testified that, just before shooting toward the victim's car, defendant stated that he was aiming for the victim. Accordingly, sufficient evidence was presented to send the assault with intent to commit murder charge to the jury.

Next, we agree with defendant that the prosecutor improperly elicited testimony from her witness that defendant had invoked his right to counsel after being apprised of his *Miranda*¹ rights. *People v McReavy*, 436 Mich 197, 217-218; 462 NW2d 1 (1990). Nonetheless, because the reference to defendant's exercise of his constitutional right was brief and does not appear to have been elicited by the prosecutor in bad faith, we conclude that the error was harmless. See *People v Smith*, 158 Mich App 220, 235-237; 405 NW2d 156 (1987).

Next, defendant argues that the trial court erred in imposing a two-week continuance during trial. Having reviewed the record, we find that defendant expressly consented to the continuance. Moreover, defendant concedes that he suffered no prejudice as a result of the continuance. Accordingly, defendant is not entitled to any appellate relief on this basis.

Defendant's remaining issues are wholly without merit and we decline to address them.

Affirmed.

/s/ Robert P. Young

/s/ Donald E. Holbrook, Jr.

/s/ J. Richard Ernst

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).