

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYWAN LENNELL IVERSON,

Defendant-Appellant.

UNPUBLISHED
October 27, 1998

No. 200971
Genesee Circuit Court
LC No. 96-054223 FC

Before: Bandstra, P.J., and Griffin and Young, Jr., JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83; MSA 28.278, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b(1); MSA 28.424(2)(1). Defendant was sentenced to twenty-five to forty years' imprisonment for the conviction of assault with intent to commit murder, six to ten years' imprisonment for the conviction of assault with intent to do great bodily harm less than murder, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

First, defendant argues that the trial court's instructions on intoxication misled the jury. Defendant takes issue with the following paragraph of the intoxication instructions, which immediately followed the instructions given on intoxication as it related to specific intent:

But you should know that voluntarily [sic] intoxication, in itself, is not a defense in itself. It doesn't excuse the Defendant if he commits the crime. But the reason that we talk about the use of alcohol only relates to specific intent. And it's not proper to say well, I'm going to go on and drink as much as I can and then I won't be responsible for anything I do. The law doesn't allow that.¹

Defendant contends that the inclusion of the instruction regarding intoxication and general intent crimes negated the instructions concerning intoxication and specific intent crimes because the trial court failed to limit the general intent instruction to the crime of felony-firearm.

Defendant failed to preserve this issue by objecting to the jury instructions. Therefore, the issue is not preserved for appeal, and this Court may review the issue only if defendant was caused manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). This Court reviews jury instructions in their entirety to determine whether there is an error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). “The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them.” *Id.* If the instructions presented the issues fairly and sufficiently protected defendant’s rights, there is no error even if the instructions are imperfect. *Id.*

We conclude that when the instructions are considered in their entirety, defendant was not caused manifest injustice by the instruction. The trial court instructed the jury on the crimes of assault with intent to commit murder, assault with intent to do great bodily harm less than murder, assault with a dangerous weapon, and intentionally pointing a firearm without malice. The instructions for each crime included an explanation of the requisite intent. The trial court also instructed the jury on specific intent. The instruction with which defendant takes issue explains that intoxication relates only to specific intent. Therefore, the instruction did not negate the preceding instructions that were given on intoxication as a defense to the specific intent crimes.

Defendant also argues that he was caused manifest injustice by the trial court’s instruction regarding his testimony. After instructing the jury on witness and police credibility, the trial court stated:

Now, let’s talk about the position of the Defendant. The Defendant has testified in this case, as you do know. He had [sic] an absolute right to testify if he wants to.

Now, when he takes the stand, he takes the stand under the same rules as does anybody else. He’s sworn to tell the truth. You subject his testimony to the same review as you would that of any other witness, including the fact that he does, obviously, have a direct interest in the outcome of this litigation or this lawsuit.

And that’s a factor you may want to take into consideration in determining his testimony. You have an absolute right to do that.

Defendant argues that giving this instruction constitutes error requiring reversal because it led the jury to consider defendant’s testimony differently from that of other witnesses. Defendant failed to object to the instruction.

In *People v Nash*, 61 Mich App 708, 715; 233 NW2d 153 (1975), the trial court instructed the jury in part:

Where, as in this case, the defendant takes the witness stand, it is your duty to treat his testimony fairly and weigh it carefully just as you do the testimony of other witnesses in the case, remembering, however, that he is the defendant in the case and that he has an interest in the outcome of the case.

This Court concluded that the instruction was proper. *Id.* However, in *People v Beck*, 96 Mich App 633, 637; 293 NW2d 657 (1980), this Court criticized the *Nash* decision and disapproved of the following instruction, noting that it did not fairly instruct the jury to weigh the defendant's testimony in light of all other facts and circumstances:

The defendant took the stand and testified. The defendant has a right to take the stand and become a witness in his own behalf and it is your duty to consider his testimony by the same standards as you would that of any other witness who has appeared on the stand; however, you must take into account the fact that he is the defendant and has an interest in the outcome of the case.

The Court in *Beck* concluded that this instruction could lead the jury to consider the defendant's testimony differently from that of any other witnesses. *Id.*

Subsequently, in *People v Seabrooks*, 135 Mich App 442, 453; 354 NW2d 374 (1984), this Court distinguished *Beck* and held that it was not improper to instruct the jury "that they could consider defendant's interest in the outcome of the case and *the reasonableness of his testimony in light of all the evidence*" (emphasis added). This Court noted that the trial court had instructed the jury that it was to consider all the evidence and the testimony from all witnesses, that the jury should consider the defendant's testimony in the same manner that it considered the testimony of other witnesses, and that it could consider factors that could affect the witnesses' observations. *Id.* Thus, this Court concluded that when viewed in their entirety, the instructions, "did not create a danger that the jury would view defendant's testimony differently from the testimony of the police." *Id.*²

We conclude that the present case is analogous to *Seabrooks* and that defendant was not caused manifest injustice by the complained-of instruction because, when the instructions are viewed in their entirety, the instruction did not create a danger that the jury would view defendant's testimony differently from the testimony of other witnesses. First, we note that unlike the trial court in *Beck*, the trial court in the present case did not instruct the jury that it *must* consider defendant's interest in the case, but that it *may* consider defendant's interest in evaluating his testimony. Further, similar to *Seabrooks*, the instructions given by the trial court in the present case included instructions that the jury was to evaluate testimony in light of all the evidence. The court instructed the jury that it was the jury's job to decide the facts by analyzing and weighing all the evidence or testimony and that reasonable doubt was "a doubt that is reasonable after a fair and a careful and a considered examination of all the facts in the case." Moreover, in giving the witness credibility instruction, the trial court informed the jury that it "should think about all the other evidence when you review the testimony of witnesses." Therefore, we conclude that the instructions sufficiently protected defendant's rights, and he was not caused manifest injustice.

Next, defendant argues that the trial court abused its discretion by admitting evidence that he had "whooped" his girlfriend with a belt. Defendant contends that the evidence was irrelevant, and trial counsel objected to the prosecutor's question regarding earlier disputes between defendant and his girlfriend on this ground. The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). The trial

court abuses its discretion only “when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made.” *Id.*

We conclude that the trial court did not abuse its discretion by admitting the evidence because the evidence was relevant. As defined by MRE 401, relevant evidence is evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Stated another way, the evidence must be material and probative. *People v Mills*, 450 Mich 61, 66-67; 537 NW2d 909, modified 450 Mich 1212 (1995). According to Atkinson, defendant “whooped” Trice with a belt earlier in the day when she tried to go to the grocery store with Atkinson and Keaton, the two victims in this case. Thus, the evidence was relevant to defendant’s motive, intent, and state of mind at the time of the shooting because it helped to explain the events leading to the shooting. Therefore, the trial court did not abuse its discretion by admitting the evidence.

Finally, defendant contends that his sentence is disproportionate and that the trial court abused its discretion by exceeding the guidelines because it primarily relied on the injury to defendant’s brother as a reason for enhancing the sentence for the crime committed against Keaton,³ thus circumventing the ten-year maximum punishment set by the Legislature for defendant’s conviction of assault with intent to do great bodily harm.

This Court reviews a sentence imposed by the trial court for an abuse of discretion. The sentence must be proportionate to the seriousness of the crime and defendant’s background. *People v Phillips (On Rehearing)*, 203 Mich App 287, 290; 512 NW2d 62 (1994). The sentencing court may depart from the sentencing guidelines where the guidelines are not proportionate to the seriousness of the crime or the defendant’s criminal background. *People v Milbourn*, 435 Mich 630, 656-657; 461 NW2d 1 (1990). Departures may be appropriate if the guidelines do not adequately reflect important facts that may legitimately be considered. *Phillips, supra* at 291.

In the present case, the guidelines’ range for defendant’s minimum sentence for his conviction of assault with intent to commit murder was eight to fifteen years. Pursuant to statute, the maximum sentence for defendant’s conviction of assault with intent to do great bodily harm less than murder was ten years. MCL 750.84; MSA 28.279. Defendant received sentences of twenty-five to forty years’ imprisonment and six to ten years’ imprisonment for his respective convictions. The sentencing court stated that it departed from the guidelines because defendant senselessly shot his brother in the back, resulting in lifetime paralysis, and because defendant attempted to shoot Keaton in the head and continued to shoot at her after she entered the bathroom.

Assuming without deciding that the trial court improperly emphasized the injury to defendant’s brother when it sentenced defendant on the assault with intent to commit murder conviction, we nevertheless conclude that the sentencing court did not abuse its discretion by imposing a twenty-five to forty-year sentence for this conviction. The trial court had sufficient reasons to sentence outside of the guidelines’ range based on the nature and the severity of the crime against Keaton. See *People v Hunter*, 176 Mich App 319, 321; 439 NW2d 334 (1989). As stated by the sentencing court, defendant aimed and shot Keaton in the head and continued to fire shots at her through the door after

she fled to the bathroom. After hearing no shots or noise for several minutes, Keaton opened the door in an attempt to seek help for herself and, upon seeing her, defendant again fired another shot at Keaton's head, striking her again in the head. The court did not abuse its discretion in exceeding the guidelines because the standard scoring failed to appropriately weigh the severity of defendant's actions. See *People v Granderson*, 212 Mich App 673, 680-681; 538 NW2d 471 (1995).

We affirm.

/s/ Richard A. Bandstra

/s/ Richard Allen Griffin

/s/ Robert A. Young, Jr.

¹ Defendant acknowledges that this instruction was based on CJI2d 6.1, General Intent—Intoxication Is Not a Defense, which states:

There has been some evidence that the defendant was voluntarily intoxicated with alcohol or drugs when the alleged crime was committed. Voluntary intoxication is not a defense to [the crime charged here / the crime of ____]. So it does not excuse the defendant if [he/she] committed this crime.

² The defendant in *Seabrooks* was contesting the omission of a requested instruction on the credibility of police witnesses.

³ The jury convicted defendant of assault with intent to murder Keaton and of assault with intent to do great bodily harm to Atkinson.