STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS HOLIFIELD,

Defendant-Appellant.

UNPUBLISHED
July 23, 1996

No. 177958
LC No. 93-010497

Before: Reilly, P.J., and Cavanagh and R.C. Anderson,* JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316; MSA 28.548, assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to the mandatory term of life imprisonment for the felony murder conviction, fifteen to twenty-five years' imprisonment for the assault with intent to commit murder conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

I

Defendant argues that the trial court abused its discretion by failing to grant an adjournment so that defendant could obtain new counsel and adequately prepare for trial. This Court reviews the denial of a request for a continuance for an abuse of discretion. Factors to be considered include whether the defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting that right, (3) was negligent, and (4) had requested previous adjournments. A defendant must also demonstrate prejudice. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

After reviewing the record, we conclude that the trial court did not abuse its discretion in denying defendant's request for a continuance so that new counsel could be obtained. As the trial court noted, defense counsel filed motions to suppress the identification testimony and defendant's statement

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

to the police; filed a motion for the appointment of a private investigator at public expense; had written memoranda in support of his arguments, and actively participated as an advocate at the *Wade*[1] and *Walker*[2] hearing. In addition, counsel had corresponded with defendant and provided him with transcripts. Counsel also spoke a number of times with defendant's family for the purpose of locating witnesses. Moreover, defendant has not asserted any prejudice resulting from the trial court's denial of the requested continuance. Under these circumstances, defendant is not entitled to relief.

II

Defendant raises a number of claims of instructional error. However, defendant did not object or request that the instructions at issue be given at trial. Therefore, our review is limited to the issue whether relief is necessary to avoid manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Manifest injustice occurs where the erroneous or omitted instruction pertains to a basic and controlling issue in the case. *People v Johnson*, 187 Mich App 621, 628; 468 NW2d 307 (1991). As a general rule, this Court is hesitant to reverse a lower court because of an error in jury instructions where no objection was raised at trial. *People v Hess*, 214 Mich App 33; 543 NW2d 332 (1995).

A

Defendant argues that the trial court erred in instructing the jury that the prior inconsistent statements of the witness Cynthia Zuccarini were not substantive evidence and could be used only to impeach the witness. We disagree. In general, inconsistent statements of a witness are admissible only for impeachment purposes and cannot be used as substantive evidence of the truth of the matter asserted. When a prior inconsistent statement has been admitted in order to impeach a witness, the trial court should instruct the jury that the prior statement, not made under oath during the trial, cannot be used as substantive evidence of guilt. *People v Kohler*, 113 Mich App 594, 599; 318 NW2d 481 (1982); see also CJI2d 4.5.

Defendant also claims that the trial court instructed the jury that they could not consider inconsistent statements made by Zuccarini at the preliminary examination regarding her identification of defendant as substantive evidence, and that since these statements were made under oath and were subject to cross-examination, they were not hearsay pursuant to MRE 801(d)(1)(A). However, the trial court instructed the jury that it could "consider any time that the witness failed to identify the defendant or made an identification or gave a description that did not agree with the identification of the defendant during the trial." Accordingly, we find no manifest injustice.

B

Defendant next asserts that the trial court erred in failing to sua sponte instruct on unintentional shooting because the evidence supported the instruction. We find no merit to this contention. The proffered defense at trial was not accidental shooting, but rather that defendant was home with his fiancée and children the night of the shootings. Although in a statement to the police defendant claimed

that the gun accidentally went off, at trial defendant took the stand and specifically repudiated that statement. Accordingly, the trial court did not err in failing to instruct the jury on unintentional shooting.

C

Defendant also claims that the trial court improperly instructed the jury on the intent element of assault with intent to commit murder. Defendant argues that the trial court's instruction was "unnecessary and more likely to confuse than enlighten the jury," but provides no support for this assertion.[3] We conclude that the instruction at issue, while somewhat imperfect, fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). Relief is not necessary to avoid manifest injustice to defendant.

D

In his next claim of instructional error, defendant contends that the trial court erred in failing to give CJI2d 16.21, inferring state of mind, along with its instructions on first-degree felony murder. Defendant relies on *People v Aaron*, 409 Mich 672, 733; 299 NW2d 304 (1980), in which the Supreme Court held that in order to convict a defendant of felony murder, it must be shown that he acted with malice. We find no error. The trial court did read CJI2d 16.4, which sets forth the elements of felony murder and accurately reflects the Supreme Court's opinion in *Aaron*. Accordingly, the trial court's instruction fairly presented the issues to be tried and sufficiently protected defendant's rights. *Bell*, *supra*.

Defendant also claims that after the jury requested clarification of the definitions of felony murder and second-degree murder, the trial court gave a confusing instruction. The trial court instructed the jury that for the crime of second-degree murder, the prosecution had to prove that "the killing was not justified, excused or done under circumstances that reduce it to a lesser crime." Defendant claims that because there was no lesser crime at issue, the instruction was unnecessary and distracting.

There is no evidence that the instruction "distracted" the jury. The instruction was sufficient to elucidate the distinction between felony murder and second-degree murder, as the jury had requested. We find no manifest injustice.

E

In his final claim of instructional error, defendant argues that the trial court's instructions on the order of deliberations were flawed and require reversal of his convictions. We agree that the trial court erred in telling the jury that it could "bing, bang over this thing any way you want to." A trial court should instruct a jury to consider the principal charge first, and if it acquits the defendant or fails to agree, it may then turn to lesser offenses. *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982).

However, this error does not require reversal of defendant's convictions. The purpose of the holding in *Handley* was to avoid a situation where the jury believed that it was required to unanimously find the defendant not guilty of the principal charge before it could consider the lesser charge. *Id*. at 358-360. The trial court's statements did not convey to the jury that they had to acquit defendant of first-degree felony murder before they could consider second-degree murder. Hence, manifest injustice did not result.

III

Defendant next argues that he was denied a fair trial by the appearance of impropriety created by the trial court's camaraderie with the jury. The sole "impropriety" cited by defendant is the fact that the trial court brought fresh bagels and orange juice for the jurors on the morning of deliberation. However, defendant failed to object when the trial court inquired whether the jurors would like bagels and orange juice in the morning, and hence has waived appellate review of this issue. See *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). In any case, defendant has failed to set forth a clear argument as to how the provision of bagels and orange juice to the jurors prejudiced him.

IV

Defendant next argues that his felony murder conviction must be vacated because the evidence was insufficient to support a conviction of larceny, the underlying felony. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

The elements of larceny are (1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with felonious intent, (4) the subject matter must be the goods or personal property of another, (5) and the taking must be without the consent of and against the will of the owner. *People v Ainsworth*, 197 Mich App 321, 324; 495 NW2d 177 (1992).

Defendant argues that the evidence was insufficient to prove that he possessed the requisite intent to commit the underlying larceny. In support, defendant cites *People v David Wells*, 102 Mich App 122; 302 NW2d 196 (1980). In *Wells*, this Court held that a conviction of felony murder is improper where the determination to steal property from the victim is not formed until after the homicide. *Id*. at 133-135.

We conclude that, under the facts of the present case, the evidence was sufficient to establish that defendant murdered the decedent and attempted to murder Zuccarini after he formed the intent to steal the car and possibly the radio. The evidence showed that defendant begged the decedent to give

him a ride home. Defendant then directed the decedent through a circuitous route to a dark and secluded area. There was evidence from which a reasonable factfinder could conclude that during the ride, defendant held a gun between his knees. Defendant instructed the decedent to pull over and then shot the decedent and Zuccarini, pushed both bodies out into the street, and drove away.

Defendant also contends that the proofs were insufficient to establish the crime of larceny because the decedent may have been dead before the car was taken. Thus, defendant reasons, the decedent was no longer a "person" who could have possession of the car at the time that it was taken. We first note that defendant's argument is based on an assumption which cannot be proved, i.e., that the decedent was dead before defendant drove off in his car, and that we are required to review a claim of insufficient evidence in the light most favorable to the prosecution. *Wolfe, supra*. In any case, where the predicate crime underlying a charge of felony murder is part of a continuous transaction or is otherwise immediately connected with the killing, it is immaterial whether the underlying felony occurs before or after the killing. *People v Hutner*, 209 Mich App 280, 284; 530 NW2d 174 (1995).

Defendant further contends that there is no proof that he intended to permanently deprive the decedent of his vehicle or the radio within it. However, the law does not require, in a literal sense, that a thief have an intent to permanently deprive the owner of the property. Rather, the intent required is a lack of purpose to return the property with reasonable promptitude and in substantially unimpaired condition. *People v Jones*, 98 Mich App 421, 425-426, 296 NW2d 268 (1980). Under the facts of this case, a rational trier of fact could conclude that defendant possessed the requisite intent.

In sum, we conclude that, viewing the evidence in a light most favorable to the prosecution, a reasonable factfinder could conclude that the essential elements of felony murder were proved beyond a reasonable doubt.

V

Next, defendant contends that because the police did not have probable cause to arrest him, the identification evidence and incriminating statements resulting therefrom should have been suppressed. This Court will not disturb a trial court's ruling at a suppression hearing unless that ruling is found to be clearly erroneous. *People v Bordeau*, 206 Mich App 89, 92; 520 NW2d 374 (1994). A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995).

Probable cause to arrest exists if the facts available to the officer at the moment of arrest would justify a fair-minded person of average intelligence to believe that the suspected person has committed a felony. *People v Richardson*, 204 Mich App 71, 79; 514 NW2d 503 (1994). Probable cause is a lesser standard than preponderance of the evidence. *In re Fultz*, 211 Mich App 299, 306; 535 NW2d 590 (1995), lv gtd 450 Mich 989 (1996).

Zuccarini told the police that the person who had shot her and the decedent had been to the Coney Island at Seven Mile and Hayes with the decedent on the day of the shooting. When Officer

Carlisle was in the Coney Island, two waitresses indicated that defendant, who was sitting at the counter, was the man who had come in with the decedent the previous weekend. Defendant fit the description of the shooter given by Zuccarini. When Carlisle approached defendant, he gave a name which did not match the name on his driver's license. We conclude that the trial court did not clearly err in ruling that the police had probable cause to arrest defendant.

VI

Defendant next asserts that the trial court erred in failing to suppress Zuccarini's identification testimony. The trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. *Barclay*, *supra*. The relevant inquiry is not whether a lineup was suggestive, but whether it was unduly suggestive in light of all the circumstances surrounding the identification. *People v Kurylczyk*, 443 Mich 289, 306; 505 NW2d 528 (1993).

Because defense counsel was present at the lineup, defendant bears the burden of showing any impropriety. *People v Barnes*, 107 Mich App 386, 389; 310 NW2d 5 (1981). Here, defendant points to the fact that he may have been the only person in the lineup wearing shorts, and when Zuccarini identified him, she stated that he was wearing the same shorts that he had worn the night of the shooting. However, a lineup is not impermissibly suggestive because the accused appeared in the same clothes he wore when he committed the crime. This is particularly so where the victim was able to identify the accused by his facial features and had a substantial independent basis for the in-court identification. *People v Johnson*, 202 Mich App 281, 286; 508 NW2d 509 (1994). In the present case, Zuccarini had spent enough time with defendant to provide an independent basis for her in-court identification.

Defendant also argues that the lineup was prejudicial because it followed a photo display where Zuccarini indicated that the shooter resembled the person in one of the pictures. However, because defendant was not depicted in the photo display, we fail to see how the lineup was impermissibly tainted.

VII

Defendant next argues that the trial court erred in refusing to suppress the statements defendant gave to the police because they were not voluntarily made. When reviewing a trial court's determination of the voluntariness of a statement, this Court examines the entire record and makes an independent determination. Nevertheless, the trial court's findings will not be reversed unless they are clearly erroneous. *Haywood*, *supra* at 225-226.

The trial court did not actually rule on the question of the voluntariness of defendant's statements. However, the issue of the voluntariness of a statement is a question of law. *People v Jobson*, 205 Mich App 708, 710; 518 NW2d 526 (1994). The transcript of the *Walker* hearing provides an adequate record for our review. After carefully reviewing the record, we conclude that the trial court did not clearly err in refusing to suppress defendant's statements. Defendant's statements to

the police were freely and voluntarily made in light of the factors provided by the Supreme Court in *People v Cipriano*, 431 Mich 315, 334-335; 429 NW2d 781 (1988).

VIII

Defendant claims that he was denied a fair trial by the comments of the prosecutor. Defendant did not object to many of the comments which he now claims constituted misconduct. To preserve for appeal an argument that the prosecutor committed misconduct during trial, a defendant must object to the conduct at trial on the same ground as he asserts on appeal. In the absence of a proper objection, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996). With regard to the comments which were properly preserved, the propriety of a prosecutor's conduct depends on all the facts and circumstances of a case and must be evaluated in context. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Minor*, 213 Mich App 682, 689; 541 NW2d 576 (1995).

A

Defendant argues that the prosecutor acted improperly in stating that defense counsel was "deliberately misleading" the jury, calling defense counsel's conduct "reprehensible," and calling a defense witness "absolutely worthless." The first statement was not objected to at trial and did not result in a miscarriage of justice. The second statement was a direct response to defense counsel's improper references to the consequences for defendant if he were convicted. See *People v Szczytko*, 390 Mich 278, 285; 212 NW2d 211 (1973). While the prosecutor may have overstated defense counsel's culpability, in heat of a trial it is humanly impossible to obtain absolute perfection, and some allowance must be made in determining whether impromptu remarks are to be held prejudicial. *Lawton*, *supra* at 354. We find no error in the third comment. Arguments regarding the weight and credibility of the witnesses and evidence presented by the defendant are permissible because they question the reliability of the testimony and evidence presented. *People v Fields*, 450 Mich 94, 107; 538 NW2d 356 (1995). The statement was not disparaging of defendant, defense counsel, or an asserted defense.

B

Defendant claims that the prosecutor shifted the burden of proof by asking why the defense did not call Raymond Holifield to testify. However, commenting on a defendant's failure to call or ask particular questions of a witness does not have the effect of shifting the burden of proof unless it taxes the exercise of defendant's right not to testify. *Fields*, *supra* at 111 n 21. Because defendant testified at trial, his Fifth Amendment rights were not affected by the prosecutor's comments. *Id*. at 109.

C

Defendant next claims that the prosecutor argued facts not in the record when he stated that defendant might have erased fingerprints or traded the car for cocaine. Defendant objected to these comments, and thus they are preserved for appellate review. However, we find that defendant was not denied a fair and impartial trial by the remarks. It is clear that the prosecutor was not presenting these theories as fact. Moreover, the comments were made in response to defense counsel's argument that defendant's fingerprints were not found in the car and defendant would not have left the car so far from his home.

D

Defendant argues that the prosecutor improperly vouched for the testimony of Sergeant Gerds. After reviewing the passage, we conclude that the prosecutor did not improperly vouch for Gerds' credibility. The prosecutor did not suggest that he had some special knowledge that Gerds was telling the truth; rather, he was merely asking the jury to use its common sense. In any case, defendant did not object to the remarks at trial, and no miscarriage of justice resulted from them.

E

Defendant argues that the prosecutor impermissibly appealed to the jury to sympathize with the decedent and his family. In addition, the prosecutor stated that it was "impossible to predict" whether defendant would spend the rest of his life in prison if he were convicted. We find no error requiring reversal. Defense counsel first acted improperly when he twice told the jury that its decision would affect defendant for the rest of his life. Where impermissible arguments are made by a prosecutor in response to arguments previously made by defense counsel, reversal is not mandated. *People v Ricky Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993).

F

In his final claim of prosecutorial misconduct, defendant claims that the prosecutor argued facts not of record. While the prosecutor's comment regarding the procedural hurdles which must be surmounted before a search warrant can be obtained was improper, it was made in response to defendant's argument that the gun had not been recovered because the police had made no effort to do so. Accordingly, reversal is not mandated. *Id*.

With regard to the prosecutor's comment that he was surprised that defense counsel did not "start to mention the race of certain witnesses," we first note that defendant did not object to this comment at trial. Because, considering the prosecutor's remark in context, it does not appear that the statement was intended to arouse racial prejudice, but was instead a plea to not let prejudice affect the case, we find that the remark did not lead to a miscarriage of justice. Moreover, any prejudice to defendant could have been alleviated by a curative instruction, had one been requested. See *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993).

IX

Defendant next asserts that he was denied the effective assistance of counsel at trial. Because defendant failed to move in the trial court for a *Ginther*[4] hearing or a new trial based on ineffective assistance of counsel, this Court's review is limited to errors apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id*. When considering a claim of ineffective assistance of counsel, counsel's performance must be considered without benefit of hindsight. Moreover, a defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel. *People v Murph*, 185 Mich App 476, 479; 463 NW2d 156 (1990), modified with respect to sentencing 190 Mich App 707; 476 NW2d 500 (1991).

A

Defendant was not denied effective assistance of counsel by counsel's failure to review Zuccarini's medical records, history of substance abuse, and prior record. The nature and extent of Zuccarini's injuries were described to the jury. The jury was aware of Zuccarini's alcohol and drug abuse and the amount of illegal substances that she took on the day of the shooting. Defense counsel's failure to analyze these factors did not deprive defendant of a substantial defense which might have made a difference in the outcome of the trial. *Stanaway*, *supra*.

B

Defendant nest argues that he was denied effective assistance of counsel because counsel failed to properly prepare Demond Terry to testify, exposed him to impeachment which damaged defendant's case, and elicited the fact that Terry was in jail when counsel spoke with him. We agree that Terry's testimony did not aid defendant's case. However, while it may not have been sound trial strategy to call Terry as a witness, we do not believe that a reasonable probability exists that, in the absence of Terry's testimony, the outcome of the proceedings would have been different. *Pickens*, *supra*.

C

Defendant also asserts that his counsel egregiously erred by relying on Camile Bresses's statement to the police, rather than talking to her himself. However, as defendant has failed to explain how Breese's testimony prejudiced him, we find no error requiring reversal.

D

Defendant contends that his trial counsel failed to object to an improper instruction that prior witness statements could not be considered as substantive evidence. However, defendant was not precluded from using testimony at the preliminary hearing to impeach a witness' credibility, pursuant to MRE 801(d)(1)(A). Defendant fails to explain what "proper instruction" defense counsel should have requested. We find no error requiring reversal.

E

Defendant also claims ineffective assistance of counsel because counsel failed to object to redirect examination which went beyond the scope of cross-examination. Defendant claims that until evidence of the missing car radio was placed before the jury during redirect examination, the fact that the car was abandoned shortly after the crime cast doubt on the prosecution's theory that the killing was done in the course of a larceny. However, the fact that defendant murdered the owner of the car and attempted to murder the passenger is sufficient evidence of an intent to commit larceny as to the vehicle. Accordingly, defense counsel's failure to object did not so prejudice defendant as to derive him of a fair trial.

F

Defendant claims that he was denied effective assistance of counsel because defense counsel did not have him testify at the *Walker* hearing. Whether defendant should have testified at the hearing is a matter of trial strategy which we will not second guess. *Murph*, *supra*. Moreover, defendant has failed to support this claim with evidence as to what he would have said that would have produced a different outcome.

G

Finally, defendant contends that he was denied the effective assistance of counsel because defense counsel failed to argue that the two waitresses at the Coney Island were not even on duty at the time Zuccarini claimed that defendant and the decedent went there. However, our review of the record indicates that defendant is mistaken. Defense counsel addressed the time discrepancy in his closing argument. Accordingly, this claim is without merit.

X

Defendant next argues that the cumulative effect of the above errors deprived him of a fair trial. We disagree. We find no evidence of an accumulation of errors, and defendant is accordingly not entitled to reversal of his convictions. Cf. *People v Taylor*, 185 Mich App 1, 10; 460 NW2d 582 (1990).

XI

Defendant also claims that he is entitled to remand for a *Ginther* hearing on his claim of ineffective assistance of counsel. This Court has previously denied defendant's motion for remand and his motion for rehearing of the denial of his motion to remand. We see no purpose in remanding for a *Ginther* hearing at this time.

XII

In his final issue, defendant claims that the trial court erred in failing to investigate whether members of the jury had improper contacts with relatives of both defendant and the decedent. A new trial will not be granted for juror misconduct unless it affects the impartiality of the jury. *People v Strand*, 213 Mich App 100, 103-104; 539 NW2d 739 (1995).

After trial, defendant sent letters to the trial court alleging that jurors had spoken to his fiancée and to the family of the decedent. However, although the improper contacts were allegedly made prior to or during trial, no motion for a hearing was brought before the trial court. Defendant's allegations thus do not require that a new trial be granted. To hold otherwise would allow defendant to harbor error as an appellate parachute. *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991).

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Mark J. Cavanagh
/s/ Robert C. Anderson

[1] *United States v Wade*, 388 US 218, 87 S Ct 1926, 18 LEd2d 1149 (1967).

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[3] Defendant cites *People v Beard*, 171 Mich App 538, 541; 431 NW2d 232 (1988), in support of this issue, but that case merely sets forth the elements of assault with intent to commit murder.

[4] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).