STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ISOM HOUSTON,

Defendant-Appellant.

UNPUBLISHED
July 9, 1996

No. 177850
LC No. 93-009157

Before: Bandstra, P.J., and Markman and M. D. Schwartz,* JJ.

PER CURIAM.

Defendant appeals by right his 1994 jury trial convictions for second-degree murder, MCL 750.317; MSA 28.549, assault with intent to commit murder, MCL 750.83; MSA 28.278, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). We affirm.

Decedent and his cousin went to a gathering. The cousin testified that they decided to leave when they saw defendant because he had previously had an altercation with defendant and had heard that defendant wanted to kill him. They returned to their car, but decedent went back into the house to find out what nightclub the group was going to later. The cousin waited outside. He subsequently heard a shot and saw decedent laying on the ground. The cousin went over to decedent. He then heard a clicking sound by his temple. He looked up and saw defendant pointing an AK-47 at him and pulling the trigger but the gun did not fire. Decedent died of a gunshot wound. Evidence indicated that defendant, decedent and the cousin had all been drinking intoxicants on the night in question.

The police found defendant nearly six months later on the basis of an anonymous tip. He gave a statement to the police in which he admitted shooting decedent. In his statement, he stated that he recognized the decedent as one of the people who had previously beat him up, that decedent reached toward his waist, that he thought decedent was reaching for a gun and that he therefore shot him. He also claimed that he knew decedent usually had a gun and that he feared for his life.

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

On appeal, defendant makes three claims relating to jury instructions.

> This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. 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. Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. [*People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994); citations omitted.]

Here, defendant did not preserve his claims with respect to the instructions by objecting on these grounds below. Accordingly, this Court is precluded from reviewing these claimed errors absent manifest injustice. *People v Ferguson*, 208 Mich App 508, 510; 528 NW2d 825 (1995).

First, defendant contends that the trial court erroneously instructed the jury that voluntary intoxication is not a defense to second-degree murder. The defense of intoxication negates the specific intent element of a charged crime if the intoxication rendered the defendant incapable of entertaining the intent. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). Voluntary intoxication is only a defense to specific intent crimes. *Id*. In *People v Langworthy*, 416 Mich 630; 331 NW2d 171 (1982), the Michigan Supreme Court specifically addressed the applicability of an intoxication defense to a second-degree murder charge. It stated at 651:

> Because second-degree murder does not require intent to kill, but rather, only wanton and willful disregard malice need not be shown; and, because we have concluded that voluntary intoxication may not negate this latter category of malice, we believe that voluntary intoxication should not be a defense to a charge of second-degree murder. We are aware that there may be second-degree murder cases which involve only the intent to kill or the intent to do great bodily harm types of malice. We are further aware that these two categories of malice sound suspiciously akin to the traditional language of specific intent. However, we decline to extend the defense of voluntary intoxication to these cases on the grounds of public policy.

Pursuant to *Langworthy*, the trial court properly instructed the jury that voluntary intoxication is not a defense to second-degree murder.

Defendant next claims that the trial court erroneously instructed the jury with respect to an intoxication defense regarding the assault with intent to murder charge. Defendant cites *People v Savoie*, 419 Mich App 118, 134; 349 NW2d 139 (1984), in which the Michigan Supreme Court stated:

> The proper standard is . . . whether the degree of intoxication was so great as to render the accused "incapable of entertaining the intent."

Here, the trial court instructed the jury, "You must decide whether the defendant, Isom Houston's mind as to count three was so overcome by alcohol that he could not have formed the specific intents to commit any of the crimes charged in count three. . . ." While the trial court did not use the exact language from *Savoie*, its instruction correctly informed the jury that intoxication was a defense to this charge if its extent was sufficient to negate the specific intent element of the offense.

Third, defendant claims that the trial court erroneously instructed the jury regarding self-defense because it failed to clarify that the controlling issue was whether defendant honestly feared for his life, not whether decedent was armed. The trial court instructed the jury regarding self-defense as follows:

> You should consider all of the evidence and use the following rules to decide whether the defendant . . . acted in lawful self-defense as to the crimes charged in count one. Remember to judge the defendant's conduct . . . according to how the circumstances appeared to him at the time he acted. First, at the time he acted the defendant . . . must have honestly and reasonably believed that he was in danger of being killed or seriously injured. If his belief was honest and reasonable, he could act immediately to defend himself, even if it turned out later that he was wrong about how much danger he was in. In deciding if the defendant's belief was honest and reasonable, you should consider all the circumstances as they appeared to the defendant at the time. . . .When you decide if the defendant . . . was afraid . . . you should consider all the circumstances. The condition of the people involved, including their relatives and friends. Whether the other person was armed with a dangerous weapon or had some other means of injuring the defendant. The nature of the other person's attack or threat. Whether the defendant knew about any previous violent acts or threats made by the other person. . . .

These instructions appropriately stated the law with respect to self-defense. They did not suggest that this defense turned solely on whether the decedent was armed. They appropriately focused the jury on whether defendant honestly feared for his safety. For these reasons, we find no error requiring reversal in the disputed instructions.

Defendant next claims that the prosecutor engaged in misconduct. When preserved, this Court reviews claims of prosecutorial misconduct by evaluating the prosecutor's comments in context to determine if the defendant was denied a fair and impartial trial. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). Here, defendant failed to preserve these issues by objecting to the prosecutor's comments below. This Court is precluded from review of prosecutorial misconduct allegations that were not objected to at trial unless the prejudicial effect could not have been cured by a jury instruction or failure to consider the issue would result in manifest injustice. *Id*.

Defendant first claims that the prosecutor urged the jury to utilize hearsay evidence. The court allowed the cousin's testimony that he had heard that defendant had threatened to kill him next time he saw him solely to show the cousin's state of mind. The prosecutor argued that this evidence of defendant's desire for revenge provided a motive for defendant to shoot decedent. The prosecutor

raised this argument in response to defense counsel's closing argument that the prosecution had failed to present evidence to support a motive for the shooting. "Where impermissible comments are made by a prosecutor in response to arguments previously raised by defense counsel, reversal is not mandated." *People v Ricky Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). Accordingly, even if there were some impropriety in the prosecutor's comment, because it was made in direct response to defendant's argument, it would not constitute error requiring reversal.

Defendant's second claim of prosecutorial misconduct also relates to the issue of motive. The prosecutor argued, " It doesn't really matter what the dispute was about three years ago, just that it explains why he would decide, "I'm going to kill [the cousin]." Defendant claims that the prosecutor testified regarding his personal knowledge of the case in making this remark. To the contrary, there was evidence from both the cousin's testimony and defendant's statement to the police that defendant had previously been involved in an altercation with the cousin and/or decedent. The prosecutor was free to argue from this evidence that the jury could infer a possible motive for defendant to shoot at decedent and the cousin.

Third, defendant contends that the prosecutor vouched for the credibility of a particular witness. It is improper for a prosecutor to vouch for the credibility of a witness or to indicate that he has special knowledge or facts indicating a witness' truthfulness. *People v Bahoda*, 448 Mich 261, 276-277; 531 NW2d 659 (1995). Here, the comment at issue was simply a response to the defense counsel's argument the prosecution had coached its witnesses. The prosecutor stated that he could talk to witnesses before trial but agreed with defense counsel that it would be wrong to coach a witness. He also properly argued from the evidence that the substance of the witness' testimony was substantiated by other witnesses. Accordingly, the prosecutor did not vouch for the witness' truthfulness.

Fourth, the defendant claims that the prosecution improperly urged the jury to reward it for failing to produce two witnesses. The comment at issue is:

> There were two witnesses who the . . . police did not find. The Judge will tell you that you may infer if you wish, but you don't have to, that their testimony would have been – may have been favorable for the defendant. You don't have to do that. You may infer as we've been saying that they would have said as the others, "I didn't see anything. I didn't hear anything. I don't know anything."

The court instructed the jury that it was the prosecutor's responsibility to locate the two witnesses and that the jury could infer that the testimony would have been unfavorable to the prosecution's case. The prosecutor's comment merely emphasized the permissive nature of this inference and appropriately argued on the basis of the evidence that several other witnesses testified that they did not see or hear anything regarding the shootings. For these reasons, we find that the alleged instances of prosecutorial misconduct did not deprive defendant of a fair and impartial trial.

Finally, defendant claims that he was denied effective assistance of counsel by his trial counsel's failure to object to the claimed errors addressed above. In order to justify reversal of an otherwise valid conviction on the basis of ineffective assistance of counsel, "a defendant must show that a counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303: 521 NW2d 797 (1994). As discussed above, none of defendant's claims of error constitute error requiring reversal. Accordingly, the failure to object to these claimed errors did not prejudice defendant as to deprive him of a fair trial.

For these reasons, we affirm defendant's judgment of sentence.

Affirmed.

/s/ Richard A. Bandstra
/s/ Stephen J. Markman
/s/ Michael D. Schwartz