

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KYMON BUTLER,

Defendant-Appellant.

UNPUBLISHED

July 9, 1996

No. 174912

LC No. 93-006798

Before: Wahls, P.J., and Murphy and C.D. Corwin,* JJ.

PER CURIAM.

Following a consolidated jury trial in which defendant was tried along with co-defendants Shavante Johnson and Roderick Morris, defendant was convicted of first-degree premeditated murder, MCL 750.316; MSA 28.548, first-degree felony murder, MCL 750.316; MSA 28.548, assault with intent to murder, MCL 750.83; MSA 28.278, armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two years in prison for felony-firearm, to be followed by concurrent sentences of natural life for first-degree premeditated murder, natural life for first-degree felony murder, life for assault with intent to murder and life for armed robbery. We affirm in part and reverse in part.

Defendant argues that the trial court erred in denying his motion to suppress and allowing into evidence a statement which he made to police shortly after his arrest. We disagree. To determine whether a statement was freely and voluntarily made, this Court reviews the totality of the circumstances surrounding the making of the statement. *People v Haywood*, 209 Mich App 217, 226; 530 NW2d 497 (1995). In the instant case, the admissibility of defendant's confession essentially involved a credibility contest between defendant and Sergeant Ronald Gale, the officer to whom the statement was made. In denying defendant's motion to suppress, the trial court concluded that Sergeant Gale's testimony was reliable. On appeal from a *Walker*¹ hearing, we defer to the trial court's superior ability to view the evidence and the demeanor of the witnesses. *People v Marshall*, 204 Mich App 584, 587; 517 NW2d 554 (1994). Accordingly, defendant is not entitled to reversal on this basis.

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

Next, defendant contends that he was denied a fair trial as a result of improper questioning and argument by the prosecutor. Although he refers to case law addressing, in general terms, the issue of prosecutorial misconduct, defendant failed to cite the precise instances of misconduct which form the basis of this challenge. A defendant may not leave it to this Court to search for a factual basis to sustain or reject his position. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). See also *People v Kean*, 204 Mich App 533, 536; 516 NW2d 128 (1994). Thus, appellate review of this issue has been waived.

Defendant next argues that the trial court erred in instructing the jury regarding the inferences which may be drawn from the use of a dangerous weapon. Because defendant failed to object to the jury instructions, appellate review of this issue is waived absent manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Jury instructions are reviewed as a whole rather than extracted piecemeal to establish error. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Even if the instructions are somewhat imperfect, there is no error if they fairly presented the issues to be tried and sufficiently safeguarded the defendant's rights. *Id.* Viewed in context, the state of mind instruction did not shift the burden to defendant. Accordingly, we find that manifest injustice has not been shown.

Finally, defendant contends that his convictions for both first-degree premeditated murder and first-degree felony murder constitute multiple punishment for the same offense in violation of the federal and state Double Jeopardy Clauses. We agree. The Double Jeopardy Clauses of the Michigan and United States Constitutions provide protection against multiple punishments for the same offense. *People v White*, 212 Mich App 298, 305; 536 NW2d 876 (1995). Where a defendant has been convicted of both first-degree premeditated murder and first-degree felony murder based on a single killing, the defendant's right against double jeopardy is violated. See e.g. *People v Passeno*, 195 Mich App 91, 95-96; 489 NW2d 152 (1992); *People v Zeitler*, 183 Mich App 68, 71; 454 NW2d 192 (1990). Accordingly, we vacate defendant's felony murder conviction.

Affirmed in part and reversed in part.

/s/ Myron H. Wahls
/s/ William B. Murphy
/s/ Charles D. Corwin

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).