STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OTIS V. FRAZIER,

Defendant-Appellant.

UNPUBLISHED
November 17, 1998

No. 203797
Recorder's Court
LC No. 96-007674

Before: Whitbeck, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to two years' imprisonment for the felony-firearm conviction and mandatory life imprisonment for the first-degree murder conviction, the murder sentence to run consecutively to the felony-firearm sentence. We affirm.

I. Basic Facts

The offenses in this case arise out of a gathering in September of 1996 at a house located in the City of Detroit. The house was rented by one Ramont Tillery. In addition to Tillery and a number of other persons, defendant, one Bobbie Jessie Blanding and the victim, Tracy Turner, were present at this gathering. Since the persons present were drinking malt liquor and smoking "blunts,"[1] it is not surprising—indeed it was perhaps inevitable—that violence ensued. Apparently, one of the women present accused the victim of stealing cocaine and these two individuals fought for several minutes. The victim then left the house, bleeding from the head.

According to Blanding's testimony at trial, there were two guns located in the house, a Chinese assault rifle and a .380 handgun; the handgun was normally kept on the television stand. Blanding testified that defendant stated that he was "going to do her," meaning that defendant intended to kill the victim. Blanding believed that defendant had the handgun, as it was no longer on the television stand and defendant had his hand in his pocket. Blanding stated that he told defendant to "chill" and grabbed his arm but that defendant pulled away. Defendant then left for approximately five or ten minutes, with

another individual. When defendant returned to the house, he stated that he had killed the victim. According to Blanding, defendant told him that defendant caught up to the victim in the park and walked up to her. She said "Hey O" to defendant, as "O" was his nickname. Defendant then shot the victim. Tillery also testified at the trial that, after the victim left the house, defendant stated that he was "gon' do that bitch" and that when defendant returned he stated, "I got that bitch."

After his arrest, the police advised defendant of his constitutional rights. Defendant waived his rights and gave a statement. Defendant stated that he was smoking marijuana and drinking forty ounce bottles of malt liquor at the house but that he proceeded to a gas station to get himself a blunt after the fight occurred and that, when he returned, the victim was gone. Defendant stated that Tillery then told him that the victim had to go and handed defendant a gun. Defendant understood this to mean that the victim had to die or be shot. Defendant stated that he "didn't want nothing to happen to my boy's crib over no dope" and that he shot the victim once and then ran. Defendant also stated that he shot the victim because Tillery wanted it done, but that he was not paid to shoot her.

The assistant medical examiner for Wayne County who examined the victim testified that she suffered blows to her head prior to her death, as there were bruises present in her head area. He also testified that the cause of death was a gun shot at close range to the right side of the victim's forehead.

II. Standard of Review

A. Cautionary Instructions

"A trial court is only required to give instructions that are supported by the evidence or the facts of the case." The application of the facts of the case to the jury instruction lies within the sound discretion of the trial court. *People v Ho*, ___Mich App ___; ___ NW2d___ (Docket No. 188274, issued 8/14/98, pp 5-6).

B. Ineffective Assistance of Counsel

Review of a claim of ineffective assistance of counsel is limited to the existing record where defendant did not preserve this issue. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

C. Civic Duty Arguments

We review civic duty arguments during closing argument in context to determine whether the statements constitute error requiring reversal. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995).

III. Cautionary Instructions

Defendant contends that the trial court erred in failing to sua sponte provide a cautionary instruction on accomplice testimony. We disagree.

Our analysis begins with *People v McCoy*, 392 Mich 231; 220 NW2d 456 (1974). There, the only evidence, other than the testimony of an alleged accomplice, linking the defendant to the crime was an eyewitness who could not make a positive identification of the defendant. *Id.* at 238. Thus, the prosecutor presented uncorroborated testimony of the defendant's alleged accomplice while the defendant presented an alibi witness. *Id.* The guilt of the defendant was contingent upon the credibility contest between the defendant and his witness or the accomplice. While the trial court gave a cautionary instruction regarding the alibi witness, there was no cautionary instruction as to the testimony of the accomplice. Accordingly, the Supreme Court held:

> For cases tried after the publication of this opinion, it will be deemed reversible error . . . to fail upon request to give a cautionary instruction concerning accomplice testimony and, if the issue is closely drawn, it may be reversible error to fail to give such a cautionary instruction even in the absence of a request to charge. [*Id.* at 240.]

In *People v Reed*, 453 Mich 685, 691-692; 556 NW2d 858 (1996), the Supreme Court set forth the basis for the need for the accomplice cautionary instruction rule:

> This rule is motivated by the inherent weakness of accomplice testimony that is presented by the prosecution. The problem with such testimony is two fold. First, actual or implied threats or promises of leniency by the prosecutor will often induce an accomplice to fabricate testimony. Second, a jury may rely on otherwise incredible accomplice testimony simply because it is presented by the prosecutor.

However, the *Reed* Court noted that automatic reversal occurs when the case is "closely drawn" and the trial court fails to give an instruction sua sponte where the motivation of the accomplice has not been explored, stating:

> Certainly, it would make little sense to require a judge to caution a jury sua sponte on a witness' motivation to lie when defense counsel has thoroughly explored the witness' motivations. Rather, *McCoy* stands for the proposition that a judge should give a cautionary instruction on accomplice testimony sua sponte when potential problems with an accomplice's credibility have not been plainly presented to the jury. [*Id.* at 692-693.]

The defendant in *Reed* was convicted of first-degree murder. The defendant's accomplice was also placed on trial for first-degree murder and testified on his own behalf at trial. The trial court did not give a cautionary instruction regarding accomplice testimony. The Supreme Court held that the problems with the accomplice's testimony were plainly apparent to the jury. The accomplice testified that he participated in the robbery and shot the victim, but that the defendant was the instigator. However, the accomplice had also told police that a man not on trial for the offense was the shooter. The prosecutor and the defendant's counsel extensively cross-examined the accomplice about the inconsistencies when he was testifying. Furthermore, as the accomplice was also a codefendant who voluntarily testified at trial, the cautionary instruction that accomplice testimony is suspicious would have prejudiced the

accomplice's trial. Therefore, reversal was not required where the cautionary instruction regarding accomplice testimony was not given. *Id.* at 693-694.

In *People v Buck*, 197 Mich App 404, 415; 496 NW2d 321 (1992), reversed in part on other grounds 444 Mich 853 (1993), the defendant contended that the trial court erred in failing to sua sponte give a cautionary instruction regarding accomplice testimony. This Court assumed for the sake of argument that witness Cameron was an accomplice who testified at trial, although such a fact was not conclusively established and was not submitted to the jury for consideration. This Court also noted that the issue is "closely drawn" where the issue at trial is the credibility contest between the defendant and the accomplice. Review of the trial revealed that proofs were not limited to the credibility contest between the defendant and Cameron. Another witness corroborated Cameron's testimony. This Court concluded that the defendant's conviction was the result of substantial physical and testimonial evidence independent of the credibility of Cameron's testimony. *Id.* at 415-416.

Here, defendant contends that both Tillery and Blanding were accomplices to the crime as both men owned the gun used in the killing, both men allowed defendant to have the gun, both men had a grudge against the victim, both men had beaten the victim before the killing and both men knew defendant was induced to kill the victim. Furthermore, defendant contends that the police conceded Tillery and Blanding were accomplices to the crime.

In order to be an accomplice to a crime, the person must have "'knowingly and willingly helped or cooperated'" in the killing. *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993). Assuming defendant's implication of Tillery in his confession was truthful, Tillery satisfies the definition of an accomplice, as Tillery handed defendant the gun and told him the victim had to die. However, defendant's contention that Blanding is also an accomplice is not substantiated by the record. There is no indication that Blanding had any ownership interest in the gun. Furthermore, Blanding testified that he attempted to stop defendant by grabbing his arm after defendant expressed his intention to kill the victim, but defendant pulled away. Blanding was never characterized by the police as an accomplice.[2] As there is no indication in the record that Blanding knowingly and willingly helped in the killing of the victim, he cannot be deemed an accomplice. *Id.*

Blanding was questioned regarding any bias against defendant and his relationship with Tillery. During closing argument, defense counsel attacked the credibility of Blanding's testimony based upon his friendship with Tillery. Where the defense attorney thoroughly explores the witness' motivations to lie, the trial court is not required to sua sponte provide the cautionary accomplice instruction. *Reed, supra* at 692-693. Accordingly, the trial court did not err in failing to sua sponte provide the cautionary accomplice instruction.

IV. Ineffective Assistance of Counsel

Defendant contends that his trial counsel was ineffective as the failure to request the cautionary instruction constituted ineffective assistance of counsel. "Trial counsel's failure to request an instruction inapplicable to the facts at bar does not constitute ineffective assistance of counsel." *People v Truong (After Remand)*, 218 Mich App 325, 341; 553 NW2d 692 (1996). As the issue was not closely

drawn, the failure to request the cautionary instruction at trial does not constitute ineffective assistance of counsel.

V. Civic Duty Arguments

Defendant contends that the prosecutor made an improper civic duty argument in his closing statement when the prosecutor thanked the jury on behalf of the family of the victim, investigating officers, and the People of the State of Michigan. We disagree.

This issue was not preserved below as defendant failed to object to the statement made in closing argument. Accordingly, this issue need not be addressed unless failure to do so would result in manifest injustice. *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995). Here, the comments made by the prosecutor merely expressed gratitude for the jurors' service. In *Truong*, *supra* at 339-340, the prosecutor, in his closing comment, stated, "'on behalf of the Wyoming Police Department and on behalf of the State of Michigan, I am asking you to convict Tai Van Nguyen.'" This Court held that the argument was not a civic duty argument as it did not inject issues broader than the defendant's guilt or innocence of the charges. Furthermore, the statement did not encourage the jurors to suspend their powers of judgment. Therefore, the disputed comments did not deprive the defendant of a fair trial. *Id.* at 340. Likewise, the prosecutor's comments here did not deprive defendant of a fair trial as they did not inject issues beyond defendant's guilt or innocence.

Further, in *People v Eaton*, 114 Mich App 330, 332; 319 NW2d 344 (1982), the victim was robbed and sexually assaulted by the defendant. In closing argument, the prosecutor asked that, on behalf of the victim and all of the people of Wayne County, the defendant be found guilty. *Id.* at 334-335. On appeal, the defendant contended that the prosecutor's argument including that statement was an impermissible civic duty argument. *Id.* at 335. This Court denied that contention, stating:

> However, absent objection – and in light of the overwhelming evidence of defendant's guilt – we are unwilling to conclude that these remarks were so prejudicial as to deprive defendant of a fair trial. [*Id.*]

Here, there was no objection to the statement and defendant confessed to shooting the victim. Lastly, a civic duty argument may be cured by the cautionary instruction that arguments of counsel are not evidence. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Our review of the jury instructions reveals that the trial judge instructed the jury that the lawyers' statements and arguments were not evidence. In the circumstances of this case, defendant was not denied his right to a fair trial as the trial court provided the appropriate curative instruction to the jurors. *Id.*

Affirmed.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Janet T. Neff

[1] "Blunts" are cigars stuffed with marijuana.

[2] The police did indicate that another man who could not be located was considered to be an aider and abettor.