

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWIN DUANE LEWIS,

Defendant-Appellant.

UNPUBLISHED

May 21, 1996

No. 158638

LC No. 92 005943

Before: Wahls, P.J., and Reilly, and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right following a jury conviction of two counts of first-degree premeditated murder, MCL 750.316; MSA 28.548, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(1). Defendant was sentenced to a two-year prison term for the felony firearm conviction, to be served prior to two concurrent terms of life without possibility of parole for the murder convictions. We affirm.

Defendant raises several issues pertaining to the jury instructions. However, because he did not object to the instructions that he now asserts were improper or request the instructions he now contends should have been given, the alleged errors are not preserved for appellate review and relief will be given only in cases of manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Manifest injustice occurs where the erroneous or omitted instructions pertain to a basic and controlling issue in the case. *People v Johnson*, 187 Mich App 621, 628; 468 NW2d 307 (1991).

At trial, defendant testified that the altercation that ended in the deaths of the victims began when one of the victims (Banks) refused to give defendant ten dollars in change when he purchased a rock of cocaine. Although not asserted at trial, defendant now claims that Banks committed armed robbery. Therefore, defendant argues, the “fleeing felon rule” is applicable and defendant did not have the duty to retreat. See *People v Hampton*, 194 Mich App 593; 487 NW2d 843 (1992).

We are not persuaded. If believed, defendant's testimony indicates that he and Banks disagreed about the value of the rock Banks gave defendant. Defendant said that he asked for a ten dollar rock and gave Banks a twenty dollar bill. Banks tried to encourage him to spend twenty dollars, but defendant refused. Defendant testified that Banks got a bag with at least twenty rocks in it.

He reached in and pulled out one. He looked them over, because he had – he said he had all 20s, each one of them cost \$20 apiece, so it was difficult for him to pick out a \$10 one for me, okay? He handed me the \$10 one, and I turned and I asked him for my change.

* * *

[Defense counsel]: All right. And what happened after you asked for the change?

[Defendant]: He said it wasn't no change.

* * *

[Defendant]: He said it wasn't any change. And I said, "Well, you don't have to beat me out of my \$10. I don't come by but every now and then." And he replied that "You can get your every now and then ass out of here."

[Defense counsel]: What did you do next?

[Defendant]: I turned around like that, and the next thing I knew I was hit across the hand.

We are not persuaded that this testimony established that Banks committed an armed robbery. Accordingly, no manifest injustice occurred from the court's failure to instruct the jury on the "fleeing felon rule", or from the court's instructing the jury that defendant had the duty to retreat. We reject defendant's contention that his "primary defense" was that "he shot the victims in defending himself from an armed robbery and as they fled or attempted flight." We also reject defendant's contention that counsel's failure to seek instructions consistent with the fleeing felon rule denied him effective assistance of counsel. Based on the evidence, there is no reasonable probability that, but for counsel's alleged errors, the result would have been different. Therefore, defendant has not shown prejudice. *People v Pickens*, 446 Mich 298, 314-327; 521 NW2d 797 (1994).

Defendant also argues that the court erroneously gave a flight instruction (CJI 2d 4.4) when there was no evidence to support it. A prosecution witness (Scott) testified that he saw "a figure" shoot a woman and then jog away across a field. Defendant argues that merely leaving the scene does not constitute flight. Considering the evidence and the theories presented at trial, we conclude that flight was not a "basic or controlling issue in the case", and no manifest injustice resulted. Furthermore, we

are not persuaded that defense counsel's failure to object to the instruction was prejudicial, and therefore, we do not find that it denied defendant effective assistance of counsel.

We also find no manifest injustice resulting from the omission of the instructions on the burden of proof and the presumption of innocence from the written copy provided to the jury. The jury was told orally to consider all of the instructions, and were orally instructed on the burden of proof and the presumption of innocence. Furthermore, the written copy included the court's explanation of the elements of the charged crime and the lesser included crimes, prefaced by the phrase, "the prosecutor must prove . . ." The written copy also contained the court's instructions on self-defense, including the statements, "The Defendant does not have to prove that he acted in self-defense. Instead, the prosecutor must prove beyond a reasonable doubt that the Defendant did not act in self-defense." We also reject defendant's contention that he was denied effective assistance of counsel by counsel's failure to object to the omission of these instructions. There is no reasonable probability that, but for counsel's error, the result would have been different. Therefore, defendant has not shown prejudice. *Id.*

Defendant also claims that he was denied effective assistance of counsel because counsel did not request an instruction on involuntary manslaughter. Defense counsel's failure to request the instruction could be a matter of trial strategy, e.g. an attempt to force the jury into an "all or nothing" decision. *People v Rone (On Second Remand)*, 109 Mich App 702, 718; 311 NW2d 835 (1981). Similarly, counsel specifically told the court that he did not want the court to instruct on intoxication as a defense. This could also have been a matter of trial strategy, particularly because there was little evidence to support the instruction and it would not have been a defense to second-degree murder. Defendant has not overcome the presumption that counsel's decision might be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant claims that counsel was ineffective for failing to present critical evidence on defendant's behalf. To support this claim, defendant has attached his affidavit, which states that he informed counsel that Scott:

had told police in jail that he had approached the bodies, moved the knife away from the female body and turned over the male body. Counsel did not attempt to find this witness.

Defendant states that he informed counsel that he had character witnesses, but counsel refused to use them. Defendant has also attached evidence indicating that Banks' mother told police her son was selling crack from the apartment. The decision whether to call witnesses is a matter of trial strategy. *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). Ineffective assistance of counsel can take the form of a failure to call witnesses or present other evidence only if the failure deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). Defendant's affidavit does not persuade us that trial counsel's failure to locate an unnamed witness who heard Scott make these statements or failure to call Banks' mother to corroborate his

assertion that Banks sold crack deprived defendant of a substantial defense. Similarly, counsel's failure to present character witnesses did not deprive defendant of a substantial defense.

Defendant also claims that counsel was ineffective because he did not adequately cross-examine the pathologist and did not obtain an independent pathologist to testify for the defense. Although defendant asserts that the pathologist's testimony at the preliminary examination was "confused and contradictory", defendant does not establish that the pathologist's testimony at trial was inaccurate nor does he present an affidavit indicating that an independent pathologist would have provided testimony beneficial to the defense. We are not persuaded that defendant has established ineffective assistance of counsel, nor that defendant has presented sufficient proof to warrant remand for a *Ginther*¹ hearing.

Defendant also argues that he was denied a fair trial by the prosecutor's deliberate distortions of the meanings of "premeditation" and "deliberation". Any error in this regard was cured by the court's instruction to the jury to take the definitions of premeditation and deliberation from the court's instruction and disregard anything that the attorneys said that deviates from that. Accordingly, we are not persuaded that defense counsel's failure to object to each of the claimed instances of misconduct was prejudicial such that defendant was denied effective assistance of counsel.

We also reject defendant's contention that the prosecutor acted improperly by arguing that defendant lied in his testimony. The prosecutor is permitted to comment on the testimony and argue that, upon the facts presented a witness is not worthy of belief or is lying. *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990). That is precisely what the prosecutor did in this case.

Affirmed.

/s/ Myron H. Wahls
/s/ Maureen Pulte Reilly
/s/ Peter J. O'Connell

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).