

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT PERRY,

Defendant-Appellant.

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UNPUBLISHED

May 21, 1996

No. 166307

LC No. 92-012323

Before: Griffin, P.J. and Smolenski and L. P. Borrello,\* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316; MSA 28.548, and the possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life imprisonment for the felony-murder conviction, consecutive to a two-year sentence for the felony-firearm conviction. We affirm.

I

On appeal, defendant first contends that the trial court abused its discretion in denying his motion for new counsel. However, the record reflects that the trial court did not rule on defendant's request. Instead, after conferring with counsel, defendant withdrew his request for new counsel by stating on the record that he and his attorney had resolved their differences and that defendant wished to be represented by his current attorney. Accordingly, defendant's claim has no merit. To the extent that the trial court's demeanor before sending defendant to confer with counsel could, somehow, be construed as a denial of defendant's request for new counsel, we conclude that the denial of defendant's eleventh hour request was not an abuse of discretion. See *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Moreover, defendant has not suggested that he was prejudiced by the trial court's purported ruling. See *People v Cumbus*, 143 Mich App 115, 121; 371 NW2d 493 (1985).

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

## II

Next, defendant contends that he was denied a fair trial because the prosecutor failed to secure a number of res gestae witnesses. However, defendant failed to raise this issue below. See *People v Robinson*, 390 Mich 629, 634; 213 NW2d 106 (1973). Therefore, the issue has been waived. *People v Jackson*, 178 Mich App 62, 66; 443 NW2d 423 (1989). Had the issue been preserved, a prosecutor's duty to discover, endorse, and produce res gestae witnesses has been replaced with an obligation to notify defendant of known witnesses and provide reasonable assistance in locating witnesses upon defendant's request. MCR 767.40a; MSA 28.980(1); *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995); *People v Paquette*, 214 Mich App 336, 343; 543 NW2d 342 (1995). Here, defendant never requested the prosecutor's assistance in locating the witnesses. Accordingly, defendant failed to invoke the prosecutor's responsibility under MCL 767.40a(5); MSA 28.980(1)(5) and, thus, has no basis for relief.

## III

Defendant further contends that he was denied his right to confront the witnesses against him because the trial court ordered him to face away from witnesses and the jury. However, the record does not support defendant's claim that the trial court imposed any such requirement. Therefore, because this Court's review is limited to the lower court record, appellate review of this issue is foreclosed. See MCR 7.212(C)(7); *People v Canter*, 197 Mich App 550, 556-557; 496 NW2d 336 (1992) (ex parte affidavits and other documentary evidence not presented to the trial court will not be considered); *In re Norris Estate*, 151 Mich App 502, 507; 391 NW2d 391 (1986) (same); see also *Harkins v Dep't of Natural Resources*, 206 Mich App 317, 323; 520 NW2d 653 (1994) (issues not developed below cannot be considered on appeal).

## IV

Defendant's fourth argument is that the trial court abused its discretion in admitting evidence that defendant "may" be sentenced to life imprisonment. However, defendant failed to object to the admission of this evidence. Therefore, the issue is unpreserved. MRE 103; *People v Grant*, 445 Mich 535, 546-547; 520 NW2d 123 (1994); *People v Dowdy*, 211 Mich App 562, 570; 536 NW2d 794 (1995). Because we are not persuaded that the involved error, if any, was decisive to the outcome of the case, we conclude that defendant has not established the prejudice necessary to avoid forfeiture of this unpreserved issue. *Grant, supra* at 551, 553.

## V

Next, defendant contends that the trial court abused its discretion in admitting defendant's incriminating statement. We disagree. A confession may not be introduced into evidence unless the prosecution proves by a preponderance of the evidence that defendant's statements were voluntary. *People v Bender*, 208 Mich App 221, 226-227; 527 NW2d 66 (1994); *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992). The determination whether a confession was voluntary is a

question of law for the trial court. *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965); *Mack, supra* at 17. In reviewing the trial court's findings, this Court examines the entire record to make an independent determination of voluntariness. *Bender, supra* at 227. However, we accord deference to the trial court's superior ability to assess the credibility of the witnesses and will reverse the trial court's factual findings only if clearly erroneous. *Id.*

In determining voluntariness, the court should consider, inter alia, defendant's age, education, intelligence, and experience; the duration of the preconfession detention and questioning; any unnecessary delay in arraignment; defendant's physical and mental state; whether defendant was threatened or abused; and whether defendant was advised of his constitutional rights. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).

After a thorough review, we conclude that the trial court did not clearly err in determining that defendant's confession was voluntary. At the lengthy *Walker* hearing, defendant portrayed a grievous situation where, prior to his confession, officers rebuked his repeated requests for an attorney, conditioned needed medical treatment upon his willingness to confess, promised leniency, and forced him to sign a confession that was partially untrue. However, in stark contrast to defendant's version, the officer who took defendant's statement, Isaiah Smith, testified that defendant appeared neither distressed, intoxicated, nor wanting of medical care prior to or during his confession. Smith testified that defendant was promised nothing, confessed voluntarily, and was not coerced or threatened. Smith testified that defendant never requested an attorney and, instead, signed a waiver form after his *Miranda*<sup>1</sup> rights were read to him. Further, Smith testified that defendant reviewed a typewritten account of his statement and attested to its accuracy with his signature. In short, the determination of the voluntariness and admissibility of defendant's confession depends on an evaluation of the credibility of two witnesses who gave drastically different accounts of the same scene. It is in this exact scenario that deference to the trial court's superior ability to assess witness credibility is most appropriate. *Mack, supra* at 17-18. Hence, because defendant points to no evidence that persuades this Court that the trial court clearly erred in disbelieving defendant's testimony and finding his confession voluntary, we hold that defendant's confession was properly admitted into evidence.

## VI

Defendant also argues that the trial court abused its discretion in admitting a police officer's written account of defendant's confession as a past recollection recorded. We disagree. Defendant's statement was admissible as an admission of a party opponent. MRE 801(d)(2). Therefore, regardless of the trial court's rationale for admitting the document into evidence (something which is not apparent from the record), admission of defendant's statement is the correct result. See *People v Lucas*, 188 Mich App 554, 577; 470 NW2d 460 (1991); *People v Beckley*, 161 Mich App 120, 131; 409 NW2d 759 (1987), *aff'd* 434 Mich 691 (1990).

## VII

Next, defendant contends that there was insufficient evidence to support his conviction for felony murder. We disagree. In reviewing the sufficiency of the evidence in a criminal case, we 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), amended 441 Mich 1201 (1992).

Defendant's sole argument pertaining to the sufficiency of the evidence is that the prosecution failed to prove the underlying felony of attempted armed robbery independent of defendant's confession. However, in *People v Cotton*, 191 Mich App 377, 384-389; 478 NW2d 681 (1991), lv den 439 Mich 932 (1992), this Court held:

After review of [the Supreme Court's opinion in *People v Williams*, 422 Mich 381; 373 NW2d 567 (1985)] and of this Court's decision in [*People v*] *Hughey* [186 Mich App 585; 464 NW2d 914 (1990), lv den 438 Mich 873 (1991)], we conclude that the corpus delicti rule is satisfied in any criminal case if the prosecution shows that the specific injury or loss has occurred and that some person's criminality was the source or cause of the injury. A defendant's confession then may be used to elevate the crime to one of a higher degree or to establish aggravating circumstances.

Accord *People v Hutner*, 209 Mich App 280, 286; 530 NW2d 174 (1995); *People v Hayden*, 205 Mich App 412, 414; 522 NW2d 336, lv den 447 Mich 1048 (1994); *People v Metzler*, 193 Mich App 541; 484 NW2d 695 (1992). Here, the prosecution offered evidence from which a rational trier of fact could conclude that the victim's death resulted from a criminal agency (death by multiple gunshot wounds). Therefore, defendant's confession was admissible to establish (and could lead a rational trier of fact to conclude) that the shooting was committed with the intent to commit a robbery, the underlying felony from which the jury found evidence to convict defendant of felony murder. *Hughey, supra* at 589.

## VIII

Next, defendant contends that he was denied a fair trial when the prosecutor used facts not in evidence to argue that defendant committed uncharged criminal acts. However, defendant failed to object to the allegedly improper comments. Therefore, appellate review of this unpreserved issue is foreclosed unless the failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994); *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994); *People v Vaughn*, 186 Mich App 376, 384; 465 NW2d 365 (1990); *People v Gonzalez*, 178 Mich App 526, 534-535; 444 NW2d 228 (1989). After reviewing the prosecutor's comments in context, we find no miscarriage of justice. *Gonzalez, supra* at 535. The prosecutor's comments were based upon reasonable inferences drawn from record evidence. See generally *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995); *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989); *People v Caldwell*, 78 Mich App 690, 692-693; 261 NW2d 1 (1977).

## IX

Defendant's ninth through eleventh arguments contest the propriety of the jury instructions. However, defendant failed to object to the jury instructions at trial. Therefore, this issue is unpreserved and will be reviewed only for the existence of manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). We find no manifest injustice. Taken as a whole, the jury instructions fairly presented the jury with the requisite issues to be tried and sufficiently protected defendant's rights. See, e.g., *People v Holt*, 207 Mich App 113, 116; 523 NW2d 856 (1994); *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994); *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992).

With regard to defendant's twelfth argument pertaining to the trial court's order of deliberation instruction, we find no error. The instruction conformed with CJI2d 3.11(5) and was approved by our Supreme Court in *People v Handley*, 415 Mich 356; 329 NW2d 710 (1982). See *People v Mays*, 407 Mich 619; 288 NW2d 207 (1980); compare *People v Sullivan*, 392 Mich 324; 220 NW2d 441 (1974).

## X

Defendant further claims that he was denied the effective assistance of counsel. However, there was no evidentiary hearing on this issue below. Therefore, appellate review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). After a thorough review of the record, we conclude that defendant has neither sustained his burden of proving that counsel made a serious error that affected the result of trial nor overcome the presumption that counsel's actions were strategic. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Stanaway*, 446 Mich 643, 666, 687-688; 521 NW2d 557 (1994).

## XI

Finally, defendant asserts that the cumulative effect of the errors at trial resulted in an unfair trial. In view of our resolution of the preceding issues, this claim is without merit.

Affirmed.

/s/ Richard Allen Griffin  
/s/ Michael R. Smolenski  
/s/ Leopold P. Borrello

<sup>1</sup> *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966).