

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAURICE MONTRELL SANDERS,

Defendant-Appellant.

UNPUBLISHED

May 24, 1996

No. 179681

LC No. 94-000402-FC

Before: Sawyer, P.J., and Griffin and M.G. Harrison,* JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for first-degree felony 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). A two-year sentence was imposed for the felony-firearm conviction, to be served prior to and consecutively to the life sentence for the first-degree felony-murder conviction. We affirm.

Defendant first argues that the trial court erred in failing to instruct the jury on defendant's theory of defense that the shooting of the victim was accidental. We disagree. Defendant was not entitled to an accidental death jury instruction because accident is not a defense to first-degree felony murder. First-degree felony murder is a second-degree murder, which does not require premeditation or deliberation, committed during the course of one of the enumerated felonies. *People v Hughey*, 186 Mich App 585, 591; 464 NW2d 914 (1990). Felony murder is not a specific intent crime and merely requires the general malice element of second-degree murder. *People v Langworthy*, 416 Mich 630, 650-651; 331 NW2d 171 (1982) Thus, the only mens rea required for felony murder, in addition to the mens rea required for the underlying felony, is that required for second-degree murder, namely, malice, which is defined as the intent to kill, the intent to inflict great bodily harm, or acting with wanton and willful disregard of the likelihood that the natural tendency of the defendant's behavior is to cause death or great bodily harm. *Hughey, supra* at 590-591.

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

Here, the record shows, at a minimum, that defendant caused the victim's death by knowingly creating a high risk of death. That is, defendant admitted pointing a loaded gun at the victim's head during the course of an armed robbery. Thus, we find that defendant's contention that the gun accidentally went off is not a defense to the fact that he knowingly created a high risk of death when he pointed the gun at the victim's head in the first place. Therefore, we find that the trial court did not err in refusing to issue the requested accident instruction.

In addition, the instructions, when read as a whole, fairly presented the issues to be tried and sufficiently protected defendant's rights. The trial court informed the jury that defendant's theory of defense was that defendant "did not mean to pull the trigger" and the victim's death "was an accident." The trial court also informed the jury that it could consider whether "defendant intended to pull the trigger" in considering whether the prosecution had proven beyond a reasonable doubt that defendant had committed second-degree murder. The court also repeatedly informed the jury that to convict defendant of the crimes charged, the prosecution had to prove that defendant "intended" to cause a particular result. Therefore, because the issued instruction fairly presented the issues to be tried and sufficiently protected defendant's rights, we find that no error requiring reversal of defendant's conviction occurred. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992).

Defendant next contends that the trial court erred in refusing to allow defendant to cross-examine a codefendant about the lenient treatment the codefendant received in exchange for his testimony against defendant. Specifically, defendant argues that he should have been permitted to question the witness regarding whether the codefendant could have been charged as an adult with felony murder and that in exchange for his testimony the prosecution only charged him as a minor. The trial court agreed with defendant that if the codefendant had been given some consideration for his testimony, the jury was entitled to hear that evidence. To that end, the trial court offered defendant the opportunity to call the codefendant out of the presence of the jury to develop the issue. Defendant declined this invitation. The only evidence adduced regarding this issue showed that the prosecutor never intended to charge the codefendant as an adult. Therefore, because defendant failed to provide a record supporting his contention of error, we decline to address the issue. *People v Thompson*, 193 Mich App 58, 61; 483 NW2d 428 (1992).

The sixteen-year-old defendant next contends that the trial court erred in sentencing him as an adult. This Court's review of a trial court's decision to sentence a minor as a juvenile or as an adult is a bifurcated one. First, the trial court's factual findings supporting its determination regarding each factor enumerated in MCL 769.1(3); MSA 28.1072(3) are reviewed under the clearly erroneous standard. *People v Lyons (On Remand)*, 203 Mich App 465; 513 NW2d 170 (1994). Second, the ultimate decision whether to sentence a minor as a juvenile or as an adult is reviewed for an abuse of discretion. *Id.*

Our review of the record shows that the trial court made factual findings with respect to each of the factors set forth in MCL 769.1(3); MSA 28.1072(3). In sentencing defendant as an adult, the trial court took into consideration defendant's mental and physical maturity, defendant's past assaultive

conduct, the seriousness of the offense, the unlikelihood that defendant would be rehabilitated within three to four years, and the likelihood that defendant would remain a danger to society if released at the age of twenty-one. The trial court's findings are supported by the record and, therefore, are not clearly erroneous. Thus, we find that the court did not abuse its discretion in sentencing defendant as an adult. *Id.*

Defendant's final contention of error is that he was denied a fair trial when the prosecutor improperly appealed to the jury's sense of civic duty to convict defendant. In some cases, a prosecutor's appeal to the civic duty or social fears of the jurors can be held to be error warranting reversal. *People v Curry*, 175 Mich App 33, 45; 437 NW2d 310 (1989). However, such arguments can be cured by cautionary instructions, including an instruction which informs the jury that "arguments of counsel are not evidence." *Id.* at 45; See also *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

After defendant objected to the prosecutor's civic duty remark, the trial court immediately informed the jury that "sympathy or prejudice are [sic] not to influence them." Thereafter, the trial court also instructed the jury that "the lawyers' statements and argument are not evidence." Therefore, because any prejudice defendant may have suffered was cured by the trial court's instruction, we find that no error requiring reversal occurred. *Curry, supra* at 45.

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Michael G. Harrison