

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

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND LEON CARR,

Defendant-Appellant.

---

UNPUBLISHED

July 9, 1996

No. 168303

LC No. 92-011768

Before: Bandstra, P.J., and Markman and M. D. Schwartz,\* JJ.

PER CURIAM.

Defendant appeals by right his 1993 jury trial conviction for first-degree murder, MCL 750.316; MSA 28.548, and felony firearm, MCL 750.227b; MSA 28.424(2). We affirm.

The victim was found dead at a coin-operated car wash. Part of a bullet and a shell casing were found near his body. The police found a Mac-11 nine millimeter assault rifle at the home where defendant was living. Its bullets matched those found at the crime scene. At trial, an acquaintance of defendant's testified that defendant telephoned him and stated that he had wanted the victim's 1979 white Chevrolet Malibu, that the victim pulled a gun on him when he attempted to steal it, and that defendant then shot the victim seven times with his Mac-11.

On appeal, defendant first argues that comments made by the trial court during voir dire and at trial deprived him of a fair and impartial trial.

A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct. Portions of the record should not be taken out of context in order to show trial court bias against defendant; rather the record should be reviewed as a whole. A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and

---

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

impartial trial. [*People v Pacquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995); citations omitted.]

Comments by the court are subject to a harmless error test. *People v Weathersby*, 204 Mich App 98, 110; 514 NW2d 493 (1994). Here, defendant did not object below to the comments at issue. This Court accordingly will review the matter only if manifest injustice would result from the failure to do so. *People v Weatherford*, 193 Mich App 115, 121; 483 NW2d 924 (1992).

Defendant makes several claims of error relating to comments made by the trial court during voir dire. The court stated, “There’s no real question here that a person . . . was shot and killed in the process of somebody trying to take his car.” Defendant contends that this comment indicated that there was already a prima facie case against defendant that had to be overcome and thereby lessened the prosecution’s burden of proof. This comment was made in the context of a discussion with a prospective juror about a defendant’s right not to testify. It provided background information about the case and did not shift the burden of proof to defendant or convey any belief that defendant had committed the crime. Further, the trial judge gave appropriate preliminary instructions, including the following:

Following the prosecutor’s presentation of evidence the defense attorney may, if he wishes, present evidence, but he is not required to do so. The law does not require the defendant to prove his innocence, or to produce any evidence.”

The present case is distinguishable from *People v Clark*, 340 Mich 411, 417-418; 65 NW2d 717 (1954), cited by defendant, in which a judge stated that “there was bound to be a prima facie case.” Here, unlike in *Clark*, the jury could not have construed the judge’s comment as an inference that defendant was guilty unless evidence overcame that inference.

Defendant’s next claim relates to the following comment by the judge:

This is what is called, in the law, felony murder. It’s first degree murder. It’s a situation where the law says that if one commits a robbery, or some offense, and in the process someone is killed that that raises that to first degree murder.

Defendant argues that this comment, in connection with the first disputed comment, may have erroneously led the jury to believe that if defendant was the perpetrator, their verdict had to be first-degree murder, regardless of defendant’s state of mind. He contends that these comments effectively removed the only disputed issue – defendant’s state of mind – from the jury. He cites *People v Aaron*, 409 Mich 672, 733; 299 NW2d 304 (1980) in which the Michigan Supreme Court clarified the parameters of felony-murder, stating:

We hold that in order to convict a defendant of murder . . . it must be shown that he acted with intent to kill or to inflict great bodily harm or with a wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or

great bodily harm. We further hold that the issue of malice must always be submitted to the jury.

The first-degree murder statute will continue to operate in that all *murder* committed in the perpetration or attempted perpetration of the enumerated offenses will be elevated to first-degree murder.

The trial judge's comment about felony murder during voir dire was not a specific instruction regarding the elements of the offense; it merely provided general background into the offense with which defendant was charged. At the conclusion of the trial, the judge instructed the jury regarding the elements of first-degree felony murder in accordance with *Aaron*. He specifically instructed, "you cannot say that just because there was an attempt to commit a robbery that there was an attempt to murder." In the context of the appropriate instruction just prior to the jury's deliberation, the judge's comment during voir dire could not have misled the jury that they did not have to determine defendant's state of mind at the time of the killing.

Defendant next claims that in the course of discussing a defendant's right to remain silent with a prospective juror, the trial judge gave the extreme example of a matter in which "the prosecution's case didn't show anything." Defendant contends that this left the impression that when the prosecution presents some evidence of guilt, a jury may consider a defendant's silence as evidence of guilt. The judge's example simply demonstrated that there are valid reasons why an innocent defendant might choose not to testify at trial. The comment did not leave any impression that this was the *only* situation in which a defendant's silence is not to be used against him. Both during voir dire and in his instructions, the judge stated that a defendant's decision not to testify cannot be used against him.

Defendant next claims that the trial judge improperly commented about the prevalence of carjackings and his personal experiences as a crime victim. Defendant contends that such remarks were a variant of a "civic duty" argument. "Civic duty arguments are generally condemned because they inject issues into the trial that are broader than a defendant's guilt or innocence and because they encourage the jurors to suspend their own powers of judgment." *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991). Here, these comments were made in the course of questioning prospective jurors regarding whether they had heard about the case at issue or had experienced similar crimes. Throughout the voir dire, the trial judge reminded the jurors that they were to focus solely on the evidence presented at trial in determining defendant's guilt or innocence. Considered in context, the disputed comments did not inject extraneous issues into the trial or encourage the jurors to suspend their powers of judgment.

Defendant next claims that the trial judge undermined the voir dire process by giving negative, hostile responses to prospective jurors who expressed an inability to be fair. "The function of voir dire is to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially." *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996). Here, the trial judge appropriately

explored prospective jurors' claims that they did not think they could be impartial. Such exchanges were not hostile; the judge explained to the jurors that he was simply attempting to understand why they thought that they could not be fair. This questioning was necessary to determine if the prospective jurors should be excused. See *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1995).

Defendant next claims that the trial judge's indication that a witness was an "adverse witness" inappropriately called the witness' credibility into question. The witness at issue was an acquaintance of defendant who testified that defendant told him that he shot the gun only when the victim pulled a gun on him. The judge stated that the witness was an adverse witness in the context of a defense objection to a leading question. In light of the fact that he was a friend of defendant's, the judge appropriately found him a witness hostile to the prosecution, to whom they could pose leading questions. See *People v Walker*, 13 Mich App 113, 115; 163 NW2d 682 (1968), citing *People v Lusk*, 225 Mich 642; 196 NW 403 (1923). This designation of the witness did not express any opinion regarding his credibility or invite the jury to view his testimony with suspicion.

For these reasons, none of these allegedly improper comments denied defendant a fair and impartial trial.

Defendant next claims that he was denied the effective assistance of counsel by his trial counsel's failure to challenge one of the prospective jurors. In order to justify reversal of an otherwise valid conviction on the basis of ineffective assistance of counsel, "a defendant must show that a counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). This Court will not second-guess a defense counsel's strategy. *People v Newton (After Remand)*, 179 Mich App 484, 493; 446 NW2d 487 (1989). Here, defense counsel fully participated in voir dire by asking questions, excusing jurors for cause and excusing jurors peremptorily. The juror at issue stated that her mother had been a victim of an assault with a gun. She later stated that she thought she might have seen defendant before and that it might make her nervous to see him after the trial but that she did not think that it would affect her judgment or decision. She also stated that she had used a gun to protect herself in the past. Here, defendant's theory was that he shot the victim only after the victim pulled a gun on him. In this context, the decision not to challenge this prospective juror, who might be sympathetic to such a self-defense argument, was a reasonable trial strategy. Accordingly, this claimed error does not constitute ineffective assistance of counsel.

In a separate pro per brief, defendant raises a final claim of error: that the trial court improperly instructed the jury regarding first-degree felony murder.

This Court reviews jury instructions in their entirety to determine if there is an error requiring reversal. The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them. Even if the instructions are imperfect, there is no error if they fairly presented the

issues to be tried and sufficiently protected the defendant's rights. [*People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994); citations omitted.]

Defendant contends that the court erroneously instructed the jury that felony murder does not require an intent to kill and is not a specific intent crime. As discussed above, the trial court properly instructed that in order to find defendant guilty of first-degree felony murder, the jury had to find that he acted with one of the three states of mind that constitute malice. See *Aaron, supra*. Defendant also contends that the trial court erroneously instructed that the jury could infer intent from the use of a dangerous weapon. "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Defendant cites *People v Richardson*, 409 Mich 126, 143-144; 293 NW2d 332 (1980), in which the trial court erroneously stated that "the law *implies* malice" under certain circumstances. The present case is readily distinguishable from *Richardson*. Here, the trial court appropriately instructed the jury that "defendant's state of mind *may* be inferred" from the circumstances surrounding the killing. (Emphasis added.) We accordingly find no error in the instructions given on the charge of first-degree felony murder.

For these reasons, we affirm defendant's judgment of sentence.

Affirmed.

/s/ Richard A. Bandstra

/s/ Stephen J. Markman

/s/ Michael D. Schwartz