STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL JARRETT,

Defendant-Appellant.

UNPUBLISHED
August 9, 1996

No. 173921
LC No. 93-008770

Before: Griffin, P.J., and Bandstra and M. Warshawsky,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree 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, a juvenile, was sentenced as an adult to life in prison without the possibility of parole on the first-degree murder conviction, consecutive to a two-year sentence for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

On appeal, defendant first contends that there was insufficient evidence of premeditation and deliberation to support his conviction for first-degree 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). In order to prove first-degree murder, the prosecutor must show that defendant intentionally killed the victim and that the killing was premeditated and deliberate. MCL 750.316; MSA 28.548; *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995); *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995). Premeditation and deliberation require sufficient time to allow the defendant to take a "second look." *Anderson*, *supra*.

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

"The elements of premeditation and deliberation may be inferred from all the facts and circumstances surrounding the incident . . . including the parties' prior relationship, the actions of the accused both before and after the crime, and the circumstances of the killing itself." *Haywood, supra* at 229; see also *Anderson, supra* at 537.

In the present case, after a witness observed defendant circling the area where the victim was talking among friends, several witnesses observed defendant approach the victim from across the street while carrying a gun in his hand, get the victim's attention, aim the gun at the victim, and shoot the victim in the face from close range. As the victim slumped to the ground, defendant shot the victim once again. The second bullet entered through the victim's back and lodged in his chest. Defendant then approached the fallen victim, observed his status, and fled the scene. The victim died of multiple gunshot wounds. There is no evidence that defendant and the victim engaged in any argument or struggle prior to the shooting. Moreover, contrary to defendant's claim that his actions were inspired by "hot blood," defendant had time to contemplate his actions as he circled the area in his car and approached the victim from across the street with a loaded gun in his hand. Viewed in a light most favorable to the prosecution, we conclude that this presents sufficient evidence to justify the submission of the first-degree murder charge to the jury.

II

Next, defendant claims that he was denied a fair trial because the prosecutor vouched for the credibility of a witness. However, defendant failed to object to the conduct that he now claims to have been improper. Accordingly, 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. Even assuming arguendo that the prosecutor's comments were improper, but see *People v Bahoda,* 448 Mich 261, 276-277; 531 NW2d 659 (1995) (no error if prosecutor does not insinuate possession of some special knowledge not heard by the jury), the evidence against defendant was so overwhelming that the error, if any, is harmless. MCR 2.613; MCL 769.26; MSA 28.1096; *People v Mosko,* 441 Mich 496, 502-503; 495 NW2d 534 (1992); *People v Hubbard,* 209 Mich App 234, 243; 530 NW2d 130 (1995).

III

Defendant further contends that his conviction should be reversed because a juror that had previously been dismissed was allowed to replace a juror who became ill. We disagree. The day after jury deliberation commenced, one of the jurors became ill and was taken to the hospital. When the trial court learned that the ill juror could not continue deliberating, it recalled a juror who sat through the

entire trial, but was dismissed after jury instructions to attend a funeral. Each party questioned the recalled juror, who said that he could deliberate impartially and that he had not spoken with anyone about the case. Defense counsel indicated that he did not want to proceed with only eleven jurors and stated that defendant had no objection to replacing the excused juror with the recalled juror. The trial court instructed the jury to begin their deliberations anew.

Defendant makes no claim that this procedure prejudiced him in any way. Therefore, in accordance with this Court's holding in *People v Dry Land Marina*, 175 Mich App 322; 437 NW2d 391 (1975), we conclude that defendant is not entitled a new trial. See also *United States v Hillard*, 701 F2d 1052 (CA 2, 1983). Although defendant suggests that we reject the holding in *Dry Land Marina* in light of the Ninth Circuit's holding in *People v Lamb*, 529 F2d 1153 (CA 9, 1975), this Court rejected *Lamb* in *Dry Land Marina* and we are not persuaded that that *Dry Land Marina* was wrongly decided. Furthermore, defendant agreed to the trial court's method of handling the problem created by the sick juror and we will not allow a party to harbor error to use as an appellate parachute. *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991).

IV

Finally, defendant claims that sentencing a minor to life without parole constitutes cruel or unusual punishment. We disagree. After the jury convicted defendant of first-degree murder, the trial court conducted a dispositional hearing pursuant to MCL 769.1(3); MSA 28.1072(3) and MCR 6.931(A) determined that the best interests of defendant and the public would be better served by sentencing defendant as an adult. After making this determination, the trial court was bound by MCL 750.316(1); MSA 28.548(1) to sentence defendant to life imprisonment without the possibility of parole.

Defendant does not contend that the sentencing court abused its discretion in deciding to sentence defendant as an adult. Nor does defendant claim that MCL 750.316(1); MSA 28.548(1) is unconstitutional as it applies to adults. Instead, defendant advances the limited proposition that applying MCL 750.316(1); MSA 28.548(1) to a minor who is sentenced as an adult constitutes cruel or unusual punishment. However, in *People v Launsburry*, ___ Mich App ___; ___ NW2d ___ (Docket No. 178536, issued 6/25/96, slip op at 3-4), this Court held that it is not cruel or unusual punishment to sentence a juvenile to mandatory life imprisonment. In fact, defendant cites no authority for the proposition that minors, or minors sentenced as adults, enjoy some special constitutional status that would make MCL 750.316(1); MSA 28.548(1) unconstitutional when applied to a minor where it is not unconstitutional when applied to adults. See *People v Hall*, 396 Mich 650; 242 NW2d 377 (1976); *People v Saxton*, 118 Mich App 681; 325 NW2d 795 (1982). Nor does any such authority exist. See *Washington v Massey*, 803 P2d 340, 348 (Wash App, 1990). Indeed, "there is no constitutional right to be treated as a juvenile," *Launsburry*, *supra* at 4, citing *People v Hanna*, 443 Mich 202; 504 NW2d 166 (1994), and defendant was clearly afforded the protections for juveniles the Legislature has chosen to provide. See *Woodard v Wainwright*, 556 F2d 781, 785 (CA 5, 1977) ("treatment as a juvenile is not an inherent right but one granted by the state legislature . . .").

Furthermore, contrary to defendant's position that his sentence is cruel or unusual because the sentencing court was unable to look at mitigating factors before applying MCL 750.316(1); MSA 28.548(1), the trial court held a thorough dispositional hearing before determining that defendant should be sentenced as an adult. Indeed, this dispositional hearing provided the sentencing court the ability to consider mitigating factors and defendant's potential for rehabilitation. In this respect, a juvenile first-degree murderer is better situated than an adult first-degree murderer because, unlike the adult, the sentencing court must consider several factors before sentencing a juvenile as an adult and, hence, imposing the life sentence required by MCL 750.316(1); MSA 28.548(1). Accordingly, we reject defendant's claim that MCL 750.316(1); MSA 28.548(1) is per se unconstitutional when applied to a minor sentenced as an adult. *Launsburry, supra* at 3.

We proceed, however, to determine whether the sentence is "cruel or unusual" as it applies to defendant. In determining whether a sentence violates the "cruel or unusual" clause of the Michigan Constitution, we must consider (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, (3) the sentences imposed for the commission of the same crime in other jurisdictions, and (4) the goal of rehabilitation. *People v Bullock*, 440 Mich 15, 33-34; 485 NW2d 866 (1992), citing *People v Lorentzen*, 387 Mich 167; 194 NW2d 827 (1972); *People v Loy-Rafuls*, 198 Mich App 594, 604; 500 NW2d 480 (1993), rev'd on other grounds 442 Mich 915; 503 NW2d 453 (1993).

Here, while he was an escaped fugitive from a juvenile detention facility, defendant gratuitously shot a man – ambush style – on a public street corner, in broad daylight, in front of several witnesses and a young child. Defendant's grave, predatory crime warrants the severest penalty constitutionally permitted in Michigan. See MCL 750.316(1); MSA 28.548(1); *Hall, supra*; *Launsburry, supra* at 3; *People v Hamp*, 110 Mich App 92; 312 NW2d 175 (1981). Moreover, even when focusing our attention on juveniles who are sentenced as adults, we find that defendant's sentence is neither unusual in this state, see, e.g., *People v Lyons*, 203 Mich App 465; 513 NW2d 170 (1994) (remanding for resentencing when a juvenile convicted of first-degree murder was not sentenced as an adult); *People v Black*, 203 Mich App 428; 513 NW2d 152 (1994) (same); *People v Miller*, 199 Mich App 609; 503 NW2d 89 (1993); *People v Haynes*, 199 Mich App 593; 502 NW2d 758 (1993) (same), nor unique to this state. See, e.g., *Massey, supra* (holding that sentencing a minor to mandatory life imprisonment is not cruel and unusual punishment); *Illinios v Clark*, 544 NE2d 100 (Ill App, 1989) (same); *Illinios v Rodriguez*, 480 NE2d 1147 (Ill App, 1985) (same); *Eddings v State*, 688 P2d 342 (Okla Crim App, 1984); see also *Stanford v Kentucky*, 492 US 361; 109 S Ct 2969; 106 L Ed 2d 306 (1989) (holding that imposing capital punishment on persons who murder at age sixteen or seventeen does not constitute cruel and unusual punishment). Further, with regard to the goal of rehabilitation, we note that several efforts have been made to rehabilitate defendant and that those efforts have proven futile. Indeed, defendant has rebuked past rehabilitative efforts with two escapes from juvenile detention facilities, an escalating pattern of predatory criminal behavior, repeated fighting while in jail on the present charges, and defendant's professed pride with his criminal lifestyle. Under these circumstances, defendant's sentence of life in prison is proportionate to the offense and the offender, see *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), neither cruel nor unusual, see *People v Williams*

(After Remand), 198 Mich App 537, 543; 499 NW2d 404 (1993),

and necessary to accomplish the objective of protecting society and to achieve the related goals of deterrence, rehabilitation, and restitution.

Affirmed.

/s/ Richard Allen Griffin
/s/ Meyer Warshawsky