

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LORENZO J. HARRELL,

Defendant-Appellant.

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UNPUBLISHED

August 16, 1996

No. 171615

LC No. 93-007172

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JENARD SHARP,

Defendant-Appellant.

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No. 172276

LC No. 93-007172

Before: Taylor, P.J., and Murphy and E.J. Grant,\* JJ.

PER CURIAM.

Defendants Lorenzo J. Harrell and Jenard Sharp appeal as of right from their jury convictions for first-degree felony murder, MCL 750.316; MSA 28.548; two counts each of assault with intent to murder, MCL 750.83; MSA 28.278; armed robbery, MCL 750.529; MSA 28.797; and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Harrell and Sharp were each sentenced to two years' imprisonment on the felony-firearm convictions, life in prison without parole on the felony murder conviction, and parolable life on the other convictions. The sentences on

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

the armed robbery convictions were suspended. We vacate Harrell's and Sharp's armed robbery convictions, but affirm their remaining convictions and sentences.

Harrell and Sharp both argue that the trial court erred in denying their motions for a mistrial or to strike testimony because the prosecutor violated a discovery order by failing to provide them with notice of a witness' statement in advance of trial and failing to timely endorse the witness. We disagree.

The record indicates that defendants were made aware of the witness, heard her testimony, and were allowed to cross-examine her at the preliminary examination. The record further indicates that the counsel asked the court to allow them five minutes to review the witness' statement so that the case could proceed. Therefore, we conclude that the trial court did not abuse its discretion in denying defendants' motions. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

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Harrell next argues that he was denied his right to a fair trial due to the prosecutor's repeated appeals to the jurors to sympathize with the victim. We disagree.

Defendant failed to preserve this issue for appellate review by not objecting below. We find that failing to review this issue would not result in manifest injustice where the prosecutor's comments to the jury during closing argument were not inflammatory, and where any possible prejudicial effect could have been cured with a cautionary instruction. *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993).

Next, Harrell argues that his convictions for felony murder and armed robbery should be reversed where there was insufficient evidence to support a finding beyond a reasonable doubt of armed robbery. Harrell claims that because the testimony indicated that he took the victim's money *after* the victim was fatally shot, it therefore would have been impossible for the victim to have had knowledge of the robbery. We disagree.

Here, the testimony indicated that, at the moment of the assault, Harrell knew that the victim was carrying a large sum of money, and that the victim attempted to flee when assaulted. Accordingly, a rational trier of fact could reasonably conclude that the victim had knowledge of the need to protect his money and was in a position to do so when he was overcome by force or violence. *People v Clark*, 113 Mich App 477, 479-481; 317 NW2d 664 (1982). Therefore, viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found Harrell guilty of armed robbery beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992); *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

Finally, in a supplemental brief, Harrell raises six additional issues. None of these issues were preserved for appellate review. After careful consideration of the record, we find that manifest injustice will not result from our failure to review these issues. See e.g., *People v Wofford*, 196 Mich App 275, 282; 492 NW 2d 747 (1992).

Sharp argues that he was denied the effective assistance of counsel when his attorney failed to provide the trial court with authority to support the motion for a mistrial because of the prosecutor's late endorsement of a witness. We disagree.

Because Sharp failed to preserve his claim of ineffective assistance of counsel by making a testimonial record in the trial court in connection with a motion for a new trial or for an evidentiary hearing, we will limit our review of Sharp's claim for errors apparent on the record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992). We find that Sharp was not denied the effective assistance of counsel because of his attorney's decision to familiarize himself with the witness' statement, rather than pursuing the motion for a mistrial, was a trial strategy decision which this Court will not second-guess on appeal. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Sharp next argues that he was denied his right to a fair trial when the prosecutor improperly argued facts not in evidence in order to rehabilitate the credibility of her witnesses. We disagree.

Because Sharp failed to preserve this issue, appellate review is precluded unless a failure to do so would result in manifest injustice. *Cross, supra*, p 143. We do not find that manifest injustice will result from our failure to review this issue because the prejudicial effect of the prosecutor's comment could have been cured by a timely instruction. *Id.*

Finally, Sharp argues that his dual convictions for armed robbery and felony murder violate the state and federal constitutional prohibitions against double jeopardy. We agree. In addition, although Harrell does not raise this issue on appeal, because this claim has a significant constitutional dimension, we conclude that his armed robbery conviction should also be vacated.

Because Sharp and Harrell were convicted of both first-degree felony murder and the underlying felony of armed robbery, their right against double jeopardy was violated, despite the sentencing court's decision to suspend their sentences for their armed robbery convictions. *People v Allen*, 201 Mich App 98, 105-106; 505 NW2d 869 (1993). The appropriate remedy is to vacate their armed robbery convictions. *Id.*

Because we do not find that Sharp's conviction for felony murder should be reversed, we need not consider his argument that he should be resentenced on the remaining counts.

Affirmed in part and vacated in part.

/s/ Clifford W. Taylor  
/s/ William B. Murphy  
/s/ Edward J. Grant