STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLTON WEST,

Defendant-Appellant.

UNPUBLISHED
September 17, 1996

No. 175678
LC No. 93-049579

Before: Marilyn Kelly, P.J., and Wahls and M.R. Knoblock,* JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of 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). The trial court sentenced defendant to terms of life imprisonment without parole and two years' imprisonment for his respective convictions. We affirm.

Defendant argues that the prosecutor shifted the burden of proof in his opening statement. We disagree. Because defendant failed to object, we review this issue only to prevent manifest injustice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). When evaluated in context, the prosecutor's remarks were made to explain what prompted defendant's friend to testify. An opening statement is the appropriate time to state facts which will be proven at trial. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). Even where a prosecutor promises that evidence will be submitted to the jury and it is not, no reversal is warranted if the prosecution acted in good faith. *Id.* In addition, even assuming arguendo that error occurred, such error was harmless given that the trial court twice instructed the jurors that the burden of proof remains on the prosecution at all times and that defendant was not required to prove anything.

Defendant argues that the trial court erroneously introduced evidence of defendant's gang participation. We disagree. A trial court's decision to admit bad acts evidence is reviewed for an abuse of discretion. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995). Bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose; (2) it must be

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

relevant to an issue of fact of consequence at trial; and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993); *Catanzarite, supra*, p 579.

The prosecution introduced evidence of photographs taken inside defendant's apartment after the murder. One of the photographs depicted a gang symbol. A police witness testified that the message in this photograph stated, "you can always find me on the 9 block putting shells in your homey till my 5-7 stop," and that "5-7" is a street term for "357." A second photograph showed a gang sign reading, "folks down." Finally, a third photograph read, "me Glock bust nonstop for ghetto red, peace out, sincerely, son of drid."

Here, the graffiti evidence was not introduced to show defendant's character, but rather as substantive, albeit circumstantial, evidence that defendant shot the decedent. In addition, the evidence was relevant to the crime, and more probative than prejudicial. The message in the first photograph referred to the manner in which the murder was conducted, that is, the perpetrator fired at least six times before the shooting stopped. Defendant's friend testified to defendant's desire for decedent's gun, which was a Glock. An acquaintance of defendant testified that he stole a .357 from defendant's apartment prior to the murder. Defendant's rap group was named "Ghetto Red Enterprise." Accordingly, the trial court did not abuse its discretion in admitting the photographs into evidence. *VanderVliet*, *supra*, pp 74-75; *Catanzarite, supra*, p 579. In any case, given defendant's admission that he belonged to a gang, and the fact that other photographs depicting similar graffiti were admitted without objection, any possible error should be regarded as harmless. MCL 769.26; MSA 28.1096; *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995).

Defendant argues that it was ineffective assistance counsel to fail to object to the above alleged errors. We disagree. Because no evidentiary hearing was held, our review is limited to errors apparent on the record. *People v Moseler*, 202 Mich App 296, 299; 508 NW2d 192 (1993). The record shows that defense counsel objected vigorously to the admission of the graffiti during the prosecutor's case. Defendant has not overcome the presumption in favor of effective assistance of counsel. *Id.*; *People v Wilson*, 180 Mich App 12, 17; 446 NW2d 571 (1989).

Defendant argues that it was error to sentence defendant to first-degree murder rather than felony-murder. First-degree murder and first-degree felony-murder appear in the identical statute, MCL 750.316; MSA 28.548. The statute provides for mandatory life sentences for each crime. *Id.* In view of this, a remand to correct any alleged clerical error is unnecessary. See *People v Beneson*, 192 Mich App 469, 471; 481 NW2d 799 (1992).

Finally, defendant argues that the trial court erred in failing to instruct the jury with two lesser included offenses of felony murder. Because defendant failed to object to the instructions, this issue will only be reviewed to avoid manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). The trial court instructed the jury as to first-degree murder, first-degree felony-murder, armed robbery, and second-degree murder. An instruction for voluntary manslaughter was neither requested nor supported by the evidence. Accordingly, that instruction was not required.

People v Etheridge, 196 Mich App 43, 55; 492 NW2d 490 (1992); *People v Coddington*, 188 Mich App 584, 605; 470 NW2d 478 (1991). In any case, any error was harmless given the fact that the jurors rejected the charge of second-degree murder. *People v Mosko*, 441 Mich 496, 502, 504-505; 495 NW2d 534 (1992).

Similarly, defendant failed to request and the evidence did not support an instruction for assault with intent to murder. See *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). In any case, given the jurors' rejection of the second-degree murder instruction, any error was harmless. *Mosko*, *supra*, pp 504-505. Defendant's ancillary effective assistance of counsel claim was not properly preserved as it was not contained in the statement of questions presented. *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990).

Affirmed.

/s/ Marilyn Kelly
/s/ Myron H. Wahls
/s/ M. Richard Knoblock