STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BAKARI KOYA TURNER,

Defendant-Appellant.

UNPUBLISHED
December 20, 1996

No. 190647
Saginaw County
LC No. 94-009821-FC

Before: MacKenzie, P.J., and Wahls and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316; MSA 28.548, kidnapping, MCL 750.349; MSA 28.581, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent terms of life imprisonment without parole on the murder conviction and twenty to fifty years for kidnapping. He also received a two-year sentence for felony-firearm consecutive to and preceding the concurrent terms. The convictions arose from an incident in which defendant shot and killed Arthur Ray Turner while they were riding in a car after defendant and others forced the victim into the back of the car. We vacate defendant's kidnapping conviction because it was the predicate felony underlying his first-degree felony murder conviction, but affirm his murder and felony-firearm convictions.

Defendant first contends that his convictions should be reversed based on certain comments made by the prosecutor during his closing argument. We disagree. Because defendant did not object to those remarks in the trial court, appellate review is precluded unless a curative instruction could not have eliminated any prejudicial effect, or failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996); see also *People v Warren (After Remand)*, 200 Mich App 586, 589; 504 NW2d 907 (1993). We conclude that the prosecutor's remark about the deceased "lying on a stainless steel slab, ready for his autopsy" was unnecessary and improper because this rather gruesome image of the deceased awaiting an autopsy was irrelevant. While we recognize that "[e]motional language may be used during closing argument and is 'an important weapon in counsel's forensic arsenal,'" *People v Ullah*, 216 Mich App 669, 679; 550

NW2d 568 (1996) (citation omitted), a prosecutor may not intentionally inject inflammatory arguments with no apparent justification except to arouse prejudice. *People v Lee*, 212 Mich App 228, 247; 537 NW2d 233 (1995). We perceive no proper purpose for this remark. However, we also conclude that this remark, although improper, does not rise to the level of error requiring reversal. See *People v Bahoda*, 448 Mich 261, 287; 531 NW2d 659 (1995). Inasmuch as a forensic pathologist testified at length about the autopsy, this remark added little in terms of improper emotional considerations.

Defendant also argues that the prosecutor acted improperly by saying, "How cheap can a life be? $20 for the life of another human being." However, this comment was relevant to defendant's motive because it referenced the $20 that the deceased apparently owed defendant's mother. We conclude that this remark was proper. Although it was not strictly necessary for the prosecutor to comment on how "cheap" a life could be, we conclude that this was within the bounds of the permissible use of emotional language.

Defendant next contends that it was improper for the prosecutor to have stated that it was completely uncontradicted that defendant caused the death of the deceased. Prosecutorial remarks are improper where the language used was manifestly intended or would naturally and necessarily be taken by the jury as comment on the failure of the accused to testify. *People v Guenther*, 188 Mich App 174, 177-178; 469 NW2d 59 (1991); *Raper v Mintzes*, 706 F2d 161, 164-165 (CA 6, 1983). However, in this case, three prosecution witnesses provided testimony that was consistent in implicating defendant as having killed the deceased. Accordingly, we conclude that the prosecutor's remark was proper because it referenced the agreement between these witnesses who could have contradicted each other regarding defendant's actions, although their actual testimony was substantially consistent, and, thus, the remark would not necessarily be taken as a comment on defendant's failure to testify.

Defendant also claims that his trial counsel was ineffective for failing to object to the above prosecutorial remarks. However, only one of those remarks was improper and that remark did not constitute manifest injustice. To obtain reversal based on ineffective assistance, a defendant must show that counsel's representation deprived the defendant of a fair trial. *People v Pickens*, 446 Mich 298, 302-303, 314; 521 NW2d 797 (1994). Accordingly, counsel's failure to object to the prosecutorial remarks does not warrant reversal based on ineffective assistance.

Next, defendant apparently argues that the manner in which the jury venire from which his trial jury was selected violated the Sixth Amendment right to a jury drawn from a fair cross-section of the community, *People v Hubbard*, 217 Mich App 459, 465; 552 NW2d 593 (1996), and/or the Equal Protection Clause of the Fourteenth Amendment, *Taylor v Louisiana*, 419 US 522, 527; 95 S Ct 692; 42 L Ed 2d 690 (1975). This issue was not preserved for appeal because defendant made no challenge to the jury venire before his jury was impaneled and sworn. *Hubbard*, *supra* at 465. Defendant contends that blacks and City of Saginaw residents have been underrepresented on jury venires in Saginaw County. However, defendant has failed to provide any evidence regarding the manner in which jury venires are selected in Saginaw County or any specific allegation regarding any part of this process that systematically excludes any distinctive group in the county. Thus, he has not established error requiring reversal based on this issue. Accordingly, defendant has also not shown that

trial counsel denied him effective assistance by failing to raise this issue in the trial court. *Pickens, supra*, 446 Mich 302-303, 314.

Although defendant did not preserve the propriety of his being sentenced for kidnapping by objecting to that sentence at the sentencing hearing, we will review this matter because it involves an important and decisive constitutional issue. *People v Johnson*, 215 Mich App 658, 669; 547 NW2d 65 (1996), lv granted on other grounds 453 Mich 900 (1996); see also *People v Heim*, 206 Mich App 439, 441; 522 NW2d 675 (1994). Defendant is correct that his convictions and sentences for both first-degree felony murder and the predicate felony of kidnapping violate his right against double jeopardy. *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996). We vacate his conviction and sentence for kidnapping. *Id.* at 259-260.

Defendant's convictions and sentences for first-degree felony murder and felony-firearm are affirmed. However, his conviction and sentence for kidnapping are vacated.

/s/ Barbara B. MacKenzie
/s/ Myron H. Wahls
/s/ Jane E. Markey