STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMONE JONES,

Defendant-Appellant.

UNPUBLISHED
December 30, 1996

No. 163308
LC No. 92-009882

Before: Wahls, P.J., Young and Beach, *JJ.

PER CURIAM.

Defendant was convicted by a jury of felony murder, MCL 750.316; MSA 28.548, assault with a dangerous weapon, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to a term of mandatory life imprisonment without possibility of parole for the murder conviction. Defendant was also sentenced concurrently to six to forty-eight months of imprisonment for the assault conviction and consecutively to two years of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

This case involved the fatal shooting of Tyjuan (a/k/a Tijuan) Hogan on April 21, 1992. The circumstances surrounding the shooting were in dispute. The prosecution theorized that defendant shot the victim because defendant wanted the victim's gun. According to the prosecution's witnesses, while defendant and the victim were shooting dice, defendant shot the victim and took his gun. Defendant admitted to shooting the victim, but maintained that the victim pulled a gun on him first and that defendant only shot the victim because he feared for his life. Defendant denied taking anything from the victim.

I

Defendant maintains that the trial court erred in its jury instructions on self-defense regarding the duty to retreat, the fleeing felon rule, reasonable doubt, and the intent component of felony murder.

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

Defendant did not object to these instructions nor did he request alternative instructions on these issues. Therefore, review of this issue is foreclosed unless manifest injustice would result. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

Our responsibility as a reviewing court is to balance the general correct, clear tenor of the instructions in their entirety against the potentially misleading effect of a single sentence isolated by the defendant. *People v Kelly*, 423 Mich 261, 275; 378 NW2d 365 (1985). Instructions may not be extracted piecemeal to establish error. *People v Harris*, 190 Mich App 652, 664; 476 NW2d 767 (1991). 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. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). Even if the instructions are somewhat imperfect, there is no error if they fairly presented to the jury the issues to be tried and sufficiently protected the rights of the defendant. *Id*.

A

Regarding the duty to retreat, defendant's claim is premised upon the following portion of the instruction. When instructing the jury on self-defense, the court stated that "defendant could have safely retreated, but did not do so, you can consider that fact along with all of the other circumstances when you decide whether he went further in protecting himself than he should have." Defendant argues that the trial court essentially directed a verdict on whether defendant had a duty to retreat. Defendant claims that the court should have instructed that the jury determine whether defendant had a duty to retreat, or alternatively, that defendant did not have a duty to retreat on the facts of this case. The prosecution contends that the quoted portion of the instruction contains a typographical error. Alternatively, the prosecutor suggests that if some words were omitted, the language following this instruction apprised the jury that the court was listing factors for their consideration rather than asking the jury to conclude that defendant had failed to establish self-defense.

As the record on appeal is presumed to be accurate unless a contrary showing is made, we will not assume that the error is typographical. See *People v Abdella*, 200 Mich App 473, 475; 505 NW2d 18 (1993). After reviewing the entire instruction regarding self-defense that was read to the jury, we conclude that there was no manifest injustice. There were questions of fact regarding whether the victim presented a danger to defendant at the time of the shooting. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995). The trial court correctly explained that defendant could justifiably defend himself if he had an honest and reasonable fear that his life was in danger, or if he feared that he was in immediate danger of great bodily harm. *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). Finally, the judge correctly instructed the jury that the law does not require that defendant retreat and that defendant may stand his ground and protect himself. *People v Crow*, 128 Mich App 477, 489; 340 NW2d 838 (1983). Thus, taken in its entirety, the instructions impressed upon the jury that they were to determine whether defendant was justified in acting in self-defense, and as part of that

determination, whether defendant could have safely retreated. As such, we find no manifest injustice resulted from the court's misstatement regarding the defendant's duty to retreat.

B

Defendant also did not request that the court instruct on the fleeing felon rule. Manifest injustice has not been shown because there was no evidence that defendant shot the victim to prevent the victim from escaping with defendant's money or that defendant attempted to arrest the victim. *Mills, supra,* 450 Mich 81. Defendant claimed he shot the victim in self-defense. The court's instructions on self-defense were adequate to guide the jury on the defense's theory.

C

Defendant also failed to object to the reasonable doubt instruction. On appeal, defendant contends that the use of the language "moral certainty" in the instruction constitutes plain error requiring reversal. After reviewing the instruction, we conclude that the jury was properly instructed that they must convict defendant based on the evidence at trial. Thus, this language does not constitute reversible error as the jury was otherwise properly instructed as to reasonable doubt. *People v Swartz*, 118 Mich 292, 300-301; 76 NW 491 (1898); *People v Darwall*, 82 Mich App 652, 667-668; 267 NW2d 472 (1978).

D

Defendant next argues that the court should have instructed the jury that he may have formed the intent to commit the larceny for felony murder after shooting the victim. This would have foreclosed finding defendant guilty of felony murder. See *People v Brannon*, 194 Mich App 121, 125; 486 NW2d 83 (1992). Defendant did not request this instruction. Yet, if the court had instructed the jury as defendant suggests, this would have contradicted defendant's testimony and claim that he took nothing from the victim. The instruction was not supported by the evidence in the case and did not reflect defendant's testimony or theory of the case. Thus, the trial court did not err by not instructing the jury to consider when defendant formed the intent for larceny. See *Mills, supra,* 450 Mich 80-81.

Defendant also contends that his counsel was ineffective for not raising the above argument as an alternative defense. Because the facts did not support defendant's theory, it may have actually weakened the defense's claim of self-defense if counsel had argued that defendant formed the intent to steal after the killing. It was a legitimate trial strategy decision for defense counsel not to raise this argument at trial. See *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). We find no error.

III

Defendant next argues that the trial court erred in its instructions on imperfect self-defense and contends that the court should have instructed the jury that defendant was entitled to a conviction of manslaughter if the jury found any fault with his claim of self-defense. Defendant urges that the court

instructed the jury that it "may," but was not required to, consider the offense of manslaughter. Defendant has not shown error requiring reversal.

Imperfect self-defense is only available where the defendant would have been entitled to claim self-defense had he not been the initial aggressor. *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). The theory was unavailable to defendant because he was not the initial aggressor. *Butler*, *supra*. Despite the limited nature of this defense, the trial court gave a more expansive instruction of this theory than this Court has recognized by extending application of the doctrine to two new situations, i.e., if defendant used excessive force or if his fear of danger was not justified. *People v Deason*, 148 Mich App 27, 31-32; 384 NW2d 72 (1985) ("The doctrine has been applied only where the defendant would have had a right to self-defense but for his actions as the initial aggressor.").

In light of the court's expansive instruction and the jury's verdict, any error was harmless. The court's instruction, as given, did not foreclose the jury from considering voluntary manslaughter as a lesser offense. As the jury rejected the intermediate offense of second-degree murder and convicted defendant of the highest charge of felony murder. Defendant has therefore not shown that he was prejudiced by error in this instruction. *People v Beach*, 429 Mich 450, 491-493; 418 NW2d 861 (1988)

IV

Next, defendant argues that the prosecutor engaged in misconduct in his opening statement and closing argument. Because defendant did not object, the issue may only be reviewed on appeal if a special instruction could not have cured the prejudicial effect or if the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We decline to further review this issue because any errors with the prosecutor's statements could have been cured with a cautionary instruction and a miscarriage of justice has not been shown.

Defendant also contends that the prosecutor engaged in misconduct in his cross-examination of defendant. Again, no objections were made. We also decline to further address the merits of this argument when any error could have been cured by a proper objection and a miscarriage of justice has not been shown. *Stanaway*, *supra*.

V

Defendant next cites error with the court's instruction regarding evidence of his flight. There was no objection made below to this instruction. Because defendant did not object and because the facts show that defendant ran from the scene of the crime (thereby supporting the instruction), manifest injustice has not been shown. *Van Dorsten*, *supra*, 441 Mich 544-545; *People v Cutchall*, 200 Mich App 396, 398; 504 NW2d 666 (1993).

VI

Defendant next argues that there was insufficient evidence to support a conviction for felony murder because there was no evidence presented that he committed the larceny before the victim died. We believe there was sufficient evidence to support the jury's verdict.

In reviewing the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 748, modified 441 Mich 1201 (1992).

In order to prove felony murder, the underlying felony need not be committed contemporaneously with the murder. *Brannon, supra,* 194 Mich App 125. The intent to commit the underlying felony need only be formed before the homicide occurs. *Id*.

There was testimony presented that defendant formed the intent to take the victim's gun before they went outside to shoot dice. This was sufficient evidence to support the necessary intent for felony murder even if the larceny was not completed until after the victim was shot.

VII

Finally, defendant argues that his trial counsel was ineffective for multiple reasons. Defendant failed to raise this issue below or in a motion to remand. Therefore, our review is limited to errors apparent on the current record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

In order for this Court to reverse due to the ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

Having reviewed defendant's claimed errors in the record, we do not find that defendant's counsel committed any serious errors or that any errors prejudiced him. Accordingly, defendant has not established ineffective assistance of counsel, *Pickens, supra*, and we decline to remand this matter for further proceedings pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), based upon the current record.

Affirmed.

/s/ Myron H. Wahls
/s/ Robert P. Young, Jr.
/s/ Harry A. Beach