

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO DUANE PAYNE,

Defendant-Appellant.

UNPUBLISHED

February 14, 1997

No. 189735

Macomb Circuit Court

LC No. 93-2682 FC

Before: O’Connell, P.J., and Markman and M.J. Talbot,* JJ.

PER CURIAM.

Following a jury trial, defendant, who was 15 years old at the time of the offense, was convicted 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 as an adult to a term of mandatory life imprisonment for the first-degree felony murder conviction and to 2 years’ imprisonment for the felony-firearm conviction. Defendant now appeals as of right. We affirm.

On the night of June 13, 1993, defendant shot and killed Emil Mazurek at an Amoco gas station in the city of Warren. Mazurek and four passengers were seated in his vehicle when defendant and Donald Williams approached. Defendant walked to the driver’s side of the vehicle and pulled out a gun. He pointed the gun at Mazurek, announced that a “stick-up” was taking place, and demanded that the occupants exit the vehicle. When Mazurek attempted to drive away, Payne shot twice. Mazurek lost consciousness while driving, and died a short time later of massive internal bleeding caused by a gunshot wound.

Defendant argues that his convictions should be vacated because the trial court erroneously ruled that the prosecution could introduce evidence that he had participated in a carjacking the night before the shooting. Defendant failed to preserve this issue for review because he did not testify at trial. See *People v Finley*, 431 Mich 506, 521; 431 NW2d 19 (1988). Further, in light of defense counsel’s offer of proof regarding defendant’s anticipated testimony, evidence of defendant’s prior criminal behavior would have been admissible had defendant testified. Defense counsel stated that

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

defendant would testify that the present offense was “essentially a spontaneous act . . . that had no prior scheme or format in mind in the commission of the underlying felony” Because evidence of defendant’s prior carjacking would have rebutted the suggestion that his “scheme” or motive in the present case was not carjacking, this evidence would have been admissible. MRE 404(b)(1).

Defendant also argues that the trial court erred in refusing his request for a jury instruction on the offense of statutory involuntary manslaughter. MCL 750.329; MSA 28.561. However, the evidence at trial would not have supported a conviction of statutory involuntary manslaughter because there was neither evidence nor an argument raised by defendant at trial that the gun was fired by accident. *People v Heflin*, 434 Mich 482, 502, 516-517; 456 NW2d 10 (1990). In fact, at trial defendant argued that the gun he shot was a starter pistol and the shots that killed Mazurek were fired by a distant shooter. Therefore, the court did not err in declining to instruct the jury concerning involuntary manslaughter.

Affirmed.

/s/ Peter D. O’Connell
/s/ Stephen J. Markman
/s/ Michael J. Talbot