STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON CYARS,

Defendant-Appellant.

UNPUBLISHED
February 28, 1997

No. 176536
Recorder's Court
LC No. 93-010155

Before: Marilyn Kelly, P.J., and Jansen and M. Warshawsky,* JJ.

PER CURIAM.

Following a jury trial, defendant was found guilty of two counts of first-degree murder, MCL 750.316; MSA 28.548, one count of assault with intent to commit murder, MCL 750.83; MSA 28.278, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was subsequently sentenced to life imprisonment without the possibility of parole for each of the murder convictions, eight to fifteen years for the assault conviction, and two years for the felony-firearm conviction. Defendant appeals as of right and we affirm.

This case arises out of a shooting, resulting in the deaths of Veronica Taylor and Thomas Lewis, that occurred on August 29, 1993, in the City of Detroit. Nimrod Lumpkin was also shot, but his injuries were relatively minor. Lewis died as a result of a bullet wound to the back of his head and Taylor died as a result of a bullet wound to the right side of the back of her head. It is undisputed that defendant shot at these three people, but he claimed self-defense.

I

Defendant first contends that there was insufficient evidence to sustain his convictions for first-degree murder. When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in the 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

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

beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201.

Here, a careful review of the record establishes that there was sufficient evidence presented that defendant premeditated and deliberated before he shot and killed the decedents. There was evidence that before the shooting, defendant told two of the prosecution's witnesses that he intended to take drugs from one of the decedents' home in order to repay a debt owed to drug dealers for whom defendant worked. There was also evidence that sometime after the shooting, defendant told those same witnesses that he had completed what he earlier planned to do. Further, by his own admission, defendant waited until the male decedent fell asleep before shooting him. Additionally, there was testimony from the assault victim that the female decedent pleaded with defendant not to shoot her just before defendant fired the gun. Moreover, there was evidence that the fatal wounds to each of the decedents was made to the back of their heads.

Thus, there was sufficient evidence from which the jury could have reasonably inferred that defendant had time for a "second look" before he proceeded to shoot the decedents. *People v Coddington*, 188 Mich App 584, 599-600; 470 NW2d 478 (1991). The evidence, and all reasonable inferences drawn from it, is sufficient to establish the elements of first-degree murder. *People v Anderson*, 209 Mich App 527, 537-538; 531 NW2d 780 (1995).

II

Defendant next argues that the trial court erred when it excluded testimony which would have tended to establish that defendant had reason to fear for his life. That evidence, defendant contends, was crucial to his defense of self-defense.

We review a trial court's decision whether to admit or exclude evidence for an abuse of discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). After reviewing the witness' proffered testimony that defendant claims should not have been excluded, we conclude that although the trial court did not specifically state the grounds for exclusion, it could have properly excluded the testimony as being irrelevant. MRE 401; *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996); *People v Vandelinder*, 192 Mich App 447, 454; 481 NW2d 787 (1992). Whether the two drug dealers for whom defendant worked actually stabbed the witness *after* the shooting simply would not have tended to make defendant's self-defense theory more or less probable. MRE 401. Additionally, because there was ample relevant evidence which tended to show that defendant may have had reason to fear a reprisal from the two drug dealers, the evidence could have properly been excluded as a needless presentation of cumulative evidence because there was testimony from other witnesses concerning defendant's fear of the drug dealers in question. MRE 403. Furthermore, we do not believe it would have been proper for the jury to have considered the activities of third parties, not involving defendant, which occurred *after* the shooting incident. *People v Green*, 113 Mich App 699, 704; 318 NW2d 547 (1982); *People v Perez*, 66 Mich App 685, 692; 239 NW2d 432 (1976).

III

Defendant next contends that the trial court failed to correctly instruct the jury on the law of self-defense, particularly that a person who is forcibly confined has a right to use deadly force to escape his captors.

Because defendant failed to request this instruction in the trial court and did not object to the court's instruction on this basis, we will review this issue only for manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). There is no manifest injustice in this case. A review of the trial court's instructions reveals that the instruction on self-defense was proper. That instruction appropriately instructed the jury that it was to "consider all of the evidence" that might support or refute defendant's defense "whether the other person was armed with a dangerous weapon or had some other means of injuring defendant" and that the evidence was to be judged "according to how the circumstances appeared to [defendant] at the time he acted." See CJI2d 7.15.

IV

Defendant next argues that the trial court erred when it refused to instruct the jury on his requested voluntary intoxication instruction. The trial court's refusal to so instruct, defendant contends, unfairly denied him a defense to the first-degree murder charges.

When a jury instruction is requested on any theories or defenses and is supported by the evidence, the instruction must be given to the jury by the trial court. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995). In this case, we find that there was no evidence which would have supported a voluntary intoxication instruction. Defendant was the only witness to testify that he had consumed drugs -- marijuana mixed with crack cocaine -- approximately three hours before the shooting took place. However, by his own admission, defendant was able to keep track of the drugs he sold later that morning and the money he took in for those drugs. Additionally, defendant conceded that, at the time of the shooting, he had not "smoked [any] [drugs] for all kinds of hours." Furthermore, defendant admitted that he was able to formulate a plan of escape and, if his testimony is to be credited, defendant had the presence of mind to try to leave the drug house through the only window in the house that had no bars on it when the refrigerator blocking the doorway got stuck in the carpet. Therefore, we cannot conclude that defendant was intoxicated at the time of the shooting, or even if he was, that defendant was intoxicated to the point at which he was incapable of entertaining the intent to commit the specific intent crimes for which he was convicted. *Id.*, p 82; *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995).

V

Defendant next contends that the trial court committed reversible error when it failed to instruct the jury on the limited use of prior inconsistent statements.

Prior inconsistent statements not "given under oath subject to the penalty of perjury" are hearsay and would only be admissible for impeachment purposes, not as substantive evidence. MRE

801; *People v Durkee*, 369 Mich 618, 627; 120 NW2d 729 (1963); *People v Kohler*, 113 Mich App 594, 599; 318 NW2d 481 (1982). However, where there is no request for a limiting instruction, where there is no demonstration or likelihood of prejudice, and where neither the court nor the prosecutor has suggested to the jury that the prior inconsistent statements could be used as substantive evidence, the trial court's omission does not require reversal. *People v Bonner*, 116 Mich App 41, 47; 321 NW2d 835 (1982); *People v Mathis*, 55 Mich App 694, 697; 223 NW2d 310 (1974), remanded on other grounds 395 Mich 788 (1975).

In this case, defense counsel first requested that the trial court give a limiting instruction regarding prior inconsistent statements before cross-examining James Morrison, who had known defendant from high school and from their neighborhood. The trial court responded:

> Well, I have never been asked to give that instruction. So I do not have it articulated too well. If you want to write it out for me and pass it to the Prosecutor, we will give it at an appropriate time. Because I don't want to just give it from the hips. If both Counsels would sit down and draft an instruction for me, I would be glad to look at it.

Defense counsel never drafted a proposed instruction and did not renew a request during the trial court's final instructions to the jury that it give the instruction concerning prior inconsistent statements. Because defendant did not request an instruction regarding prior inconsistent statements with respect to the trial court's final instructions to the jury, MCL 768.29; MSA 28.1052 mandates that the verdict shall not be set aside.

Moreover, even if we were to consider that this was properly preserved, we find that the failure of the trial court to instruct the jury regarding prior inconsistent statements did not prejudice defendant. See *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). In other words, even if the instruction was appropriately requested, preserved, nonconstitutional error is reviewed for a miscarriage of justice. *Id.*, p 221. There is no miscarriage of justice in this case.

The trial court instructed the jury:

> Evidence includes only the sworn testimony of witnesses and any exhibits that have been admitted into evidence and anything else I told you you may consider as evidence.

Further, neither the trial court nor the prosecutor had suggested at trial that the prior inconsistent statements of the witnesses could be used as substantive evidence. Moreover, defendant has not demonstrated a likelihood of prejudice. *Bonner, supra*, p 47. In this case, the issue was that of defendant's intent. It was undisputed at trial that defendant shot three people, two of whom were killed. However, defendant claimed self-defense. Defendant has not shown that the prior inconsistent statements of the witnesses, properly limited with an instruction, could have proved his theory of self-defense or disproved the elements of the offenses. Because the weight and strength of the untainted evidence presented in this case overwhelmingly supports defendant's convictions, and because the error

is relatively innocuous (indeed, it was not error for the prior inconsistent statements to be put before the jury, only that the jury could not consider those statements as substantive evidence), we conclude that defendant was not prejudiced in this regard. *Mateo, supra,* p 215.

Accordingly, the failure of the trial court to instruct the jury regarding prior inconsistent statements did not result in a miscarriage of justice. The trial court correctly instructed the jury that evidence included only the *sworn* testimony of witnesses and other exhibits admitted by the court. Defendant has not demonstrated any resulting prejudice as a result of the failure to instruct the jury on impeachment by prior inconsistent statements.

Because defendant has failed to show that he was prejudiced by the failure of the trial court to instruct the jury on the use of prior inconsistent statements, he likewise cannot show that he was denied the effective assistance of counsel for counsel's failure to properly request such an instruction. *People v Pickens,* 446 Mich 298, 314; 521 NW2d 797 (1994).

VI

Lastly, defendant claims that the prosecutor impermissibly urged the jury to convict him based on the prestige of the prosecutor and as part of their civic duty.

Because defendant failed to object to the challenged comments at trial, our review of this issue is limited to whether a curative instruction could not have eliminated any prejudicial effect of where failure to consider the issue would result in a miscarriage of justice. *People v Stanaway,* 446 Mich 643, 687; 521 NW2d 557 (1994).

A careful review of the prosecutor's opening statement, closing and rebuttal arguments reveals that the prosecutor did not engage in any prohibited "prestige" or "civic duty" arguments. Rather, in his opening statement, the prosecutor was merely stating the obvious -- that the prosecutor's office represents all of the citizens of Michigan, including defendant. Additionally, the challenged closing and rebuttal arguments were very much related to defendant's guilt or innocence of the charges. *People v Bahoda,* 448 Mich 261, 276-277, 284-285; 531 NW2d 659 (1995); *People v Crawford,* 187 Mich App 344, 353-354; 467 NW2d 818 (1991). Moreover, the trial court's subsequent instructions that arguments of attorneys are not evidence adequately cured any prejudice that may have resulted from the challenged remarks. *Bahoda, supra,* p 281.

Defendant's contention that he was denied the effective assistance of counsel by defense counsel's failure to object to the challenged remarks of the prosecutor must be rejected because defendant cannot show that he was prejudiced by counsel's failure to object to the prosecutor's remarks. *Pickens, supra,* p 314.

Affirmed.

/s/ Marilyn Kelly
/s/ Kathleen Jansen
/s/ Meyer Warshawsky