STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRONE DUVAUL FORD,

Defendant-Appellant.

UNPUBLISHED
June 24, 1997

No. 189631
Detroit Recorder's Court
LC No. 95-000472

Before: Reilly, P.J., and Wahls and N.O. Holowka,* JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of one count of first-degree premeditated 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). He appeals as of right. We affirm.

First, defendant claims error in the trial court's denial of his motion for adjournment to seek an additional psychiatric evaluation. However, defendant has failed to provide a transcript of the hearing on that motion. Failure to provide a record of the proceedings constitutes a waiver of this issue because we are unable to review the nature of the motion and the lower court's decision in denying that motion. *People* v *Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995).

Next, defendant asserts that the trial court erred by failing to include instructions on several lesser included assault offenses. We disagree. Defendant did not request the instructions and did not object to the instructions as given. Therefore, this issue has not been preserved for review. MCL 768.29; MSA 28.1052; *People* v *Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). However, relief will be granted absent an objection to an instruction or a request for an instruction where it is necessary to avoid manifest injustice. *Van Dorsten, supra*, 441 Mich 545.

In the present case, the jury was instructed on several lesser included offenses, some of which were intermediate between first-degree murder and the assault offenses defendant now asserts should have been given. We conclude that the jury's decision not to convict on one of these intermediate

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

charges indicates their unwillingness to convict on the lesser assault charges that they were not instructed on. Consequently, any error was harmless. *People* v *Mosko*, 441 Mich 496, 512; 495 NW2d 534 (1992); *People* v *Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990). Therefore, there is no manifest injustice requiring relief.

Defendant also claims that the trial court failed to properly instruct the jury that their verdict must be unanimous. We disagree. Again, defendant failed to object at trial to the trial court's instructions and, therefore, review of this issue is waived unless review is necessary to avoid manifest injustice. *People* v *Turner*, 213 Mich App 558, 576; 540 NW2d 728 (1995). During its instructions to the jury, the trial court specifically instructed the jury that their verdict must be unanimous. On appeal, defendant cites cases from this Court which hold that where a defendant has committed more than one act which might provide the basis for a conviction on a single criminal charge, the trial court must instruct the jury that it must be unanimous with respect to which act constitutes the basis for the guilty verdict. *People* v *Yarger*, 193 Mich App 532, 537; 485 NW2d 119 (1992). This rule is inapplicable in the present case as there was only the singular act of defendant which caused the death of the victim which could have been the basis for the jury's verdict. Since the trial court gave the appropriate instruction on unanimity of verdict, we find defendant's claim of error to be without merit.

Next, defendant contends that the trial court erred by admitting evidence of threats defendant made to the two eyewitnesses in an attempt to keep them from going to the police. We disagree. Since defendant failed to object to the introduction of this evidence, the issue is not preserved and relief is only appropriate to avoid manifest injustice. *People* v *King*, 210 Mich App 425, 433; 534 NW2d 534 (1995). A trial court's determination whether to admit certain evidence is reviewed for an abuse of discretion. *People* v *Watkins*, 176 Mich App 428, 430; 440 NW2d 36 (1989).

Generally, all relevant evidence is admissible and evidence that is irrelevant is not. MRE 402; *People* v *VanderVliet*, 444 Mich 52, 60-61; 508 NW2d 114 (1993), modified on other gds 445 Mich 1205; 520 NW2d 338 (1994). Relevant evidence is that which has any tendency to make the existence of a fact which is in issue more or less probable than it would be without the evidence. MRE 401; *VanderVliet*, *supra*, 444 Mich 60. However, even if relevant, evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, undue delay, waste of time, or by needless presentation of cumulative evidence. MRE 403; *People* v *Mills*, 450 Mich 61, 74-75; 537 NW2d 909 (1995). Unfair prejudice does not simply mean damaging, since any relevant evidence will be damaging to some extent. *Mills*, *supra*, 450 Mich 75-76. Rather, unfair prejudice exists where there is a tendency that the jury will give undue or preemptive weight to the evidence, or when it would be inequitable to allow the evidence to be used. *Id*.

In the present case, the evidence of defendant's threats was highly probative in addressing the defense theory that the shooting was accidental. The evidence was not unfairly prejudicial. Defendant presents no applicable authority for a conclusion otherwise. Therefore, defendant's claim that the evidence was unduly prejudicial is without merit.

Defendant also argues that his constitutional privilege to remain silent[1] was violated when testimony was admitted concerning his refusal to tape record the statement he had made to police. We

disagree. The record shows that defendant never exercised his right to remain silent. Rather, the evidence shows that defendant specifically waived this right and never revoked that waiver. Therefore, we conclude that this evidence does not implicate the exercise of defendant's right to remain silent.

Additionally, defendant contends that the prosecutor's closing argument violated his right to due process by shifting the burden of proof to defendant. We disagree. Defendant did not object to the prosecutor's argument. Therefore, review of this issue is precluded unless manifest injustice would result or if a curative instruction would not have eliminated the prejudice. *People* v *Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Specifically, defendant objects to portions of the prosecutor's closing argument which indicate a lack of surprise after the shooting occurred. This argument was based on evidence of defendant's actions following the killing and was focused on rebutting the defense theory that the killing was an accident. A prosecutor is free to argue the evidence adduced at trial and all reasonable inferences drawn therefrom as it relates to her theory of the case. *People* v *Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The prosecutor's argument merely analyzed the evidence and asserted that it was not consistent with an explanation of accident. We conclude that there was no error in this line of argument.

Defendant's final two issues on appeal concern the signed police statement made by one of the eyewitnesses prior to defendant's arrest. The statement was used for impeachment purposes when the witness testified. On appeal, defendant first contends that the trial court abused its discretion in denying defendant's motion to reopen the proofs to have a copy of the police statement entered into evidence. We disagree. A written memorandum of a prior statement is itself hearsay. *People* v *Jenkins*, 450 Mich 249, 256-258; 537 NW2d 828 (1995). While the statement may be used to impeach the testifying witness, MRE 613, the written memorandum cannot be admitted as substantive evidence unless it fits within an exception to the hearsay rule. *Jenkins*, *supra*, 450 Mich 257. Defendant has failed to identify any exception under which the police statement would be admissible. Therefore, we conclude that the statement was inadmissible and, hence, the trial court did not abuse its discretion in denying the motion to reopen the proofs.

In addition, defendant claims that he was denied the effective assistance of counsel due to his attorney's failure to move for admission of the statement prior to the close of proofs. We disagree. As previously stated, the witness' police statement was inadmissible. Consequently, defense counsel's failure to move for its admission was not error, and the failure did not affect the outcome of the trial. *Stanaway*, *supra*, 446 Mich 687. Hence, this was not ineffective assistance of counsel.

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Myron H. Wahls
/s/ Nick O. Holowka

[1] US Const, Am V; Const 1963, art 1, § 17.