

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ISMAEL MARRERO,

Defendant-Appellant.

UNPUBLISHED

March 20, 1998

No. 194925

Oakland Circuit Court

LC No. 94-135840-FC

Before: Young, P.J., and Wahls and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1), MCL 750.529; MSA 28.797, assault with intent to rob while armed, MCL 750.89; MSA 28.284, involuntary manslaughter, MCL 750.321; MSA 28.553, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to two years' imprisonment for the convictions of felony-firearm, to be served consecutively with two ten- to thirty-year terms for the conspiracy to commit armed robbery and assault with intent to rob while armed convictions and a ten- to fifteen-year term for the manslaughter conviction. Defendant appeals as of right. We affirm.

I

Defendant argues that the jury's verdict was against the great weight of the evidence. Specifically, defendant maintains that the evidence did not support his convictions of assault with intent to rob while armed and involuntary manslaughter as an aider and abettor. We disagree. We review for an abuse of discretion a trial court's denial of a motion for a new trial based on a claim that the verdict was against the great weight of the evidence. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). A jury's verdict may be vacated only when it finds no reasonable support in the evidence. *Id.*

The elements of assault with intent to rob while armed are: "(1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed." *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). Conviction of involuntary manslaughter requires proof

that the defendant caused a death without legal excuse or justification while the defendant was acting in a grossly negligent manner or while committing an unlawful act which was inherently dangerous to human life. *People v Maghzal*, 170 Mich App 340, 344; 427 NW2d 552 (1988). In order to convict a defendant on an aiding and abetting theory, the prosecution must prove that the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid or encouragement. *People v King*, 210 Mich App 425, 430-431; 534 NW2d 534 (1995).

In this case, the prosecution presented more than enough evidence from which the jury could convict defendant of both assault with intent to rob while armed and involuntary manslaughter under an aiding and abetting theory. The evidence showed that while defendant waited in the car and acted as a lookout, his cohorts forcibly entered the home of the victim, Rosendo Guerrero, wearing masks and armed with sawed-off shotguns, a rifle, and a handgun. One of the men shot and killed Guerrero, and Guerrero's son, Rene, was ordered at gunpoint to open a locked chest. In the face of this evidence, the jury was not obliged to credit defendant's contention that he thought no one was home and believed he was participating in a breaking and entering, not a robbery. We find no abuse of discretion in the trial court's denial of defendant's motion for a new trial.

II

Defendant argues that he was denied due process of law because Detective Kouri, one of the detectives in charge of the case and who testified as a prosecution witness, was not sequestered. However, defendant did not object to Detective Kouri's presence during trial and so may not now assert on appeal that it was somehow improper. *People v Hughes*, 217 Mich App 242, 247-248; 550 NW2d 871 (1996).

III

Defendant argues that the trial court erred in allowing into evidence an allegedly hearsay statement which resulted in a violation of *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968). The disputed statement arose when Detective Kouri testified that some of defendant's accomplices "had named another responsible as Junior or Junjie. I believe Mr. Perez had referred to him by the name of Ismael." We find no error because the disputed statement was not offered as substantive evidence of defendant's guilt. Therefore, this case does not present the concerns faced by the Supreme Court in *Bruton*. Further, defendant was not prejudiced by Detective Kouri's testimony because defendant's own confession was properly admitted against him. See *People v Harris*, 201 Mich App 147, 150; 505 NW2d 889 (1993). Finally, it was defendant who elicited the testimony to which he now objects. See *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 360 (1996).

IV

Defendant argues that testimony regarding defendant's membership in a street gang (1) constituted improper character evidence, and (2) was unduly prejudicial. While defendant did object to the admission of this testimony on the basis of relevance, defendant did not raise the objections he now

asserts on appeal. Therefore, this issue is not preserved for appellate review and we decline to address it. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). Even if the issue had been preserved, we would find no error.

V

Defendant argues that the prosecutor, during closing argument, made a statement which shifted the burden of proof to defendant. Defendant's argument lacks record support, and we therefore reject it as unfounded.

VI

Defendant argues that he was deprived of his Fifth Amendment right to remain silent in the face of accusation when the trial court allowed the prosecution to introduce a portion of defendant's second, taped interview with the police in which Detective Serna asked defendant the following questions:

Do you understand the problem that you're facing, apparently by making the statement, is that you went over there to commit a felony and somebody ended up getting killed?
Do you understand that?

In light of the fact that defendant had already incriminated himself at the time the second interview was conducted, this argument is meritless and does not warrant further discussion. We also reject as unfounded defendant's assertion that the questions improperly shifted the burden of proof from the prosecution.

VII

Defendant argues that his convictions should be reversed because the trial court failed to instruct the jury that its verdict had to be "unanimous as to each charged and included offense." Because defendant did not object to the instructions given or request different instructions, he has waived review of this issue absent manifest injustice. *People v Johnson*, 187 Mich App 621, 627-628; 468 NW2d 307 (1991). We find no manifest injustice because the trial court's unanimity instruction as given was adequate.

VIII

Defendant argues that he was denied due process of law because the trial court ordered that he pay restitution as part of his sentence without holding an evidentiary hearing regarding his ability to pay. Defendant did not request an evidentiary hearing on this issue at or before sentencing, so the issue is not properly before this Court and will not be considered. *People v Griffis*, 218 Mich App 95, 103; 553 NW2d 642 (1996).

IX

Defendant argues that his trial counsel was ineffective for failing to raise all of the objections defendant now raises in his brief on appeal. We disagree. Defendant has not shown that his counsel committed errors so serious that he was not functioning as counsel guaranteed by the Sixth Amendment or that any such errors resulted in prejudice to the defense. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Reed*, 453 Mich 685, 694-695; 556 NW2d 858 (1996).

X

Defendant asserts that he was wrongfully bound over for trial following his preliminary examination. We find no error in defendant's bindover.

XI

Defendant argues that the trial court erred in failing, sua sponte, to instruct the jury on all of the lesser included offenses of armed robbery. We disagree. Except in first-degree murder prosecutions, a trial court is not required to instruct on lesser included offenses absent a request made before the jury retires to deliberate. See *People v Beach*, 429 Mich 450, 482; 418 NW2d 861 (1988); *People v Herbert Smith*, 396 Mich 362; 240 NW2d 245 (1976); *People v Henry*, 395 Mich 367, 374; 236 NW2d 489 (1975).

XII

Finally, defendant asserts that the trial court erred in ruling defendant's allegedly involuntary statement admissible. Defendant has abandoned this issue by failing to argue it on appeal. *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992).

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Myron H. Wahls
/s/ Helene N. White