

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES GILBERT,

Defendant-Appellant.

UNPUBLISHED

March 24, 1998

No. 197257

Recorder's Court

LC No. 95-003359

Before: Holbrook, Jr., P.J., and Young and J.M. Batzer*, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree felony-murder, MCL 750.316; MSA 28.548, assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to concurrent terms of life imprisonment without parole for the felony-murder conviction and fifty to eighty years for the assault with intent to commit murder conviction, to be served consecutively to a two-year term for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred in admitting into evidence a Smith and Wesson .38 caliber revolver recovered after the shooting in an unrelated traffic stop, as well as defendant's use of various aliases. We disagree. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

Regarding his use of aliases, defendant did not object at trial to the introduction of this evidence. Therefore, the issue is not properly preserved for appeal. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). In addition, we note that defense counsel used the evidence of defendant's aliases in his closing argument in an attempt to persuade the jury that defendant did not always tell the truth and that his confession could therefore be disbelieved. Defendant cannot now be heard to complain that the prosecution's reference to defendant's aliases was error. *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991).

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

With respect to the Smith and Wesson revolver, we agree with defendant that it was irrelevant to a determination of defendant's guilt of the charged offense because there was no evidence connecting that particular revolver to the crime scene. However, we conclude that any resulting error in its admission was harmless because the evidence of defendant's guilt was overwhelming. See *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). Defendant admitted to being at the club, robbing it, shooting Willie Daniels in the face, and watching his cohort Darrin McNeely shoot and kill Claxton Joyce. Evidence corroborating defendant's statement was also presented, including Daniels' testimony and the testimony of defendant's girlfriend that defendant admitted to her robbing the club and being involved in a shooting. Finally, we note that defense counsel cross-examined the prosecution's firearms expert and elicited testimony from him that the revolver was not involved in the commission of the charged crimes. These circumstances, particularly when considered in light of defendant's failure to object in a timely manner below, lead us to conclude that there was no error requiring reversal.

Defendant next argues that the prosecutor committed reversible error when he appealed during closing argument to the jurors' sense of civic duty. Defendant did not object to the prosecutor's remarks, so appellate review is precluded unless the prejudicial effect was so great that it could not have been cured by a cautionary instruction and failure to consider the issue would result in a miscarriage of justice. *People v Sharbnow*, 174 Mich App 94, 100; 435 NW2d 772 (1989). We conclude that any potential prejudice to defendant resulting from the prosecutor's fleeting remarks about doing justice was cured by the trial court's instruction that the attorneys' statements were not evidence, and that no miscarriage of justice would result from our failure to consider this issue. See *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991).

Defendant next argues that trial counsel's belated objection to the introduction of the revolver, as well as counsel's failure to object either to evidence regarding defendant's use of aliases or to the prosecutor's appeal to the jurors' sense of civic duty, constituted ineffective assistance of counsel. We disagree.

"To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment." *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). The defendant must also show that there is a reasonable probability that, but for the deficient performance, the result of the proceeding would have been different and the result of the proceeding was fundamentally unfair or unreliable. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996); *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Because we have already concluded that none of the claimed errors prejudiced defendant's right to a fair trial, defendant has failed to establish that he did not receive the effective assistance of counsel.

Defendant argues that insufficient evidence was presented at trial to convict him. We disagree. When reviewing a claim of insufficient 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, 515; 489 NW2d 748 (1992). Circumstantial evidence, and reasonable inferences arising from the evidence, may constitute satisfactory proof of the elements of the offense. *Id.*

The elements of felony murder are (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548. *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995). Robbery is a felony specifically enumerated in MCL 750.316; MSA 28.548. The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a dangerous weapon. *Turner, supra* at 570. The elements of assault with intent to murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempted commission of a felony. *People v Davis*, 216 Mich App 47; 53 NW2d 1 (1996).

In the present case, evidence was presented in the form of witness testimony and defendant's confession to establish that defendant and Darrin McNeely went to the after-hours club. The victim, Willie Daniels, saw defendant approach him with a gun just before the shooting; defendant admitted to participating in the armed robbery. Defendant confessed that he shot Daniels, who miraculously survived, and that he watched McNeely shoot Claxton Joyce, killing him. The evidence also established that money was taken from the cash register as well as from both victims. Viewed in a light most favorable to the prosecution, the evidence was more than sufficient to allow a rational jury to convict defendant of felony-murder, assault with intent to commit murder, and felony-firearm. We also reject defendant's claim that the verdict was against the great weight of the evidence.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Robert P. Young, Jr.

/s/ James M. Batzer