

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRANDON JOURDON LIVINGSTON, a/k/a
EDDIE SPRAGGINS, a/k/a CURTIS HURTON,

Defendant-Appellant.

UNPUBLISHED

April 17, 2007

No. 267575

Wayne Circuit Court

LC No. 05-003509-01

Before: Donofrio, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317, felony murder, MCL 750.316, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court vacated the second-degree murder conviction and sentenced defendant to prison terms of life without parole for the felony murder conviction, 40 to 60 months for the possession of a firearm by a felon conviction, and two years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred when it reinstructed the jury on the offense of felony murder without also reinstructing the jury on the predicate felony of first-degree home invasion. Defendant failed to object when the trial court reinstructed the jury and, therefore, this issue is not preserved for appellate review. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000); MCL 768.29.

Unpreserved issues are reviewed for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. *Carines, supra* at 763. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. The defendant bears the burden of persuasion with respect to prejudice. *Carines, supra* at 763. Once a defendant satisfies the three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763-764.

Jury instructions are read as a whole rather than extracted piecemeal to determine whether error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Jury instructions must clearly present the case and the applicable law to the jury. *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003). The instructions must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence. *McKinney*, *supra* at 162-163.

Defendant concedes that the trial court initially instructed the jury correctly. Defendant argues, however, that the trial court created a situation of conflicting instructions when it failed to reinstruct the jury on the elements of first-degree home invasion when reinstructing it on the elements of felony murder where first-degree home invasion was the underlying felony. But the jury did not ask that those elements be clarified, and the only confusion was over the different types of murder. Moreover, when reinstructing on the elements of felony murder, the trial court twice listed first-degree home invasion as an element. The trial court also distinguished second-degree murder and felony murder by the presence of first-degree home invasion. The instructions did not conflict, and defendant has failed to establish plain error with regard to the reinstruction. Further, defense counsel was not ineffective for failing to object to the reinstruction. Defense counsel is not required to make a futile objection. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Defendant also argues that prosecutorial misconduct denied him a fair trial. To properly preserve a claim of prosecutorial misconduct, a defendant must promptly and specifically object to the offensive conduct. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Defendant failed to object to the alleged offensive conduct below and this issue is therefore unpreserved for appeal. “Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial right.” *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

Defendant first argues that the prosecutor committed misconduct by denigrating defense counsel. A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). However, the prosecutor's comments must be considered in light of defense counsel's comments and “an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument.” *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

In this case, the prosecutor argued that defense counsel made inaccurate statements and that defense counsel's arguments were “smoke and mirrors and red herrings.” Viewed in context, however, it is clear that the prosecutor was responding to specific comments and arguments made by defense counsel and that, in each instance of alleged misconduct, the prosecutor was urging the jury to focus on the evidence that the prosecutor found most relevant instead of the irrelevant arguments made by defense counsel. We find no plain error because the prosecutor was merely responding to defense counsel's arguments.

Defendant also argues that the prosecutor committed misconduct by appealing to the jury's sympathy for the victims. “A prosecutor may not appeal to the jury to sympathize with the deceased and his family.” *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). Here, the prosecutor commented that defendant did not deserve a break because the victim and

the victim's family never got a break. The prosecutor also noted the effect the shooting had on the children who witnessed it. However, even assuming clear error in those comments, the comments did not prejudice defendant. The comments were isolated, did not blatantly appeal to the jury's sympathy, and they were not inflammatory. Further, the trial court instructed the jury that the attorneys' arguments were not evidence and that the jurors must not let sympathy or prejudice influence their decision. Additionally the evidence against defendant was substantial and included the testimony of numerous eyewitnesses. Under these circumstances, we conclude that defendant was not prejudiced by any appeal to sympathy by the prosecutor.

Defendant also argues that defense counsel was ineffective for failing to object to the alleged instances of prosecutorial misconduct discussed above. We disagree. Defense counsel is not required to make a meritless motion or a futile objection. *Goodin, supra* at 433.

Affirmed.

/s/ Pat M. Donofrio
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey