

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDRICK BROWN III,

Defendant-Appellant.

UNPUBLISHED

May 11, 2010

No. 289348

Genesee Circuit Court

LC No. 07-021944-FC

Before: TALBOT, P.J., and FITZGERALD and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree felony murder, MCL 750.316, assault with intent to commit armed robbery, MCL 750.89, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a second offense habitual offender, MCL 769.10, to life in prison for the first-degree murder conviction, to 25 to 45 years in prison for the assault with intent to commit armed robbery conviction, to three to seven and one half years in prison for the felon in possession of a firearm conviction, and to two years in prison for the felony-firearm conviction. Because we conclude that there were no errors warranting relief, we affirm.

I. PROSECUTORIAL MISCONDUCT

Defendant first argues that the prosecutor improperly shifted the burden of proof to defendant by commenting on defendant's failure to produce an alibi witness. Because defendant's trial counsel did not preserve this claim of error by objection before the trial court, our review is for plain error affecting the defendant's substantial rights. In order to show plain error warranting relief, defendant must show that: (1) an error occurred, (2) the error was plain, meaning clear or obvious, and (3) the plain error affected the defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). For claims of prosecutorial misconduct, this Court examines the pertinent portion of the record and evaluates the prosecution's remarks in context. *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). The propriety of the prosecution's comments depends on the specific facts of each case because "a prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Id.*

In this case, defendant's trial counsel told the jury in his opening statement that he would be producing an alibi witness. However, defendant did not present the witness at trial. In her closing, the prosecutor commented on the missing alibi witness:

[y]ou heard, in opening statements, that you would hear from Sherry Blasengame [sic]. You didn't, Ladies and Gentlemen. You did not hear any evidence that [defendant] was anywhere other than at 2205 Howard Avenue on November 14th. No other evidence and that that man went into the home of Nicole Jones, Ashley Hill, [the victim], where Dedric Sharp was staying, without permission, with a gun; that he tried to rob [the victim], and did, of what he had in his possession. (sic) And that's the evidence that's before you, Ladies and Gentlemen.

Defense counsel did not object to this statement; instead, he elected to respond to the prosecutor's remarks in his closing argument by noting that he did not have to present the witness because the prosecutor failed to meet her burden of proof.

Generally, a prosecutor may not comment on a defendant's failure to produce an alibi witness on the basis of the defendant's earlier notice of intent to present an alibi defense where the defendant "effectively withdraws his notice of alibi by failing to present any evidence on the defense" *People v Holland*, 179 Mich App 184, 190; 445 NW2d 206 (1989). However, once a defendant actually presents an alibi defense, the prosecution may comment on the weakness of the defense and the defendant's failure to produce corroborating witnesses. *Id.* at 191.

In his opening statement, defendant's trial counsel told the jury that defendant's significant other would testify that she was with defendant at the time of the offense. This statement was sufficient to place alibi at issue and, therefore, the prosecution could properly note that defendant did not support his alibi defense. *Id.* Therefore, there was no error.

In any event, even if we were to conclude that the prosecutor's comments were improper, we note that the trial court properly instructed the jury that defendant was innocent until proven guilty, that the prosecution bears the burden of proving each element of each charged crime beyond a reasonable doubt, that defendant had an absolute right not to testify, and that the attorneys' statements and arguments were not evidence. These instructions dispelled any minimal prejudice arising from the prosecution's comment. See *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Therefore, the comments do not warrant appellate relief.

II. INSTRUCTIONAL ERROR

A. Standard of Review

Defendant next argues that the trial court erred when it read an incorrect felony murder instruction to the jury and that this instructional error was so prejudicial that it warrants a new trial. This Court reviews de novo claims of instructional error. *People v Martin*, 271 Mich App 280, 337; 721 NW2d 815 (2006). Even though there may be some imperfections in the

instructions given to the jury, there will be no basis for reversal if, when read as a whole, the instructions adequately protected the defendant's rights by fairly presenting the issues to be tried. *Id.* at 337-338.¹

B. Analysis

In addition to the weapons charges, the prosecution charged defendant with one count of felony murder and one count of assault with intent to rob while armed. In order to prove felony murder, the prosecution had to show that defendant committed second-degree murder while also committing an enumerated felony. See MCL 750.316(1)(b). In the information, the prosecutor alleged two alternate enumerated felonies to support the felony murder charge: "the perpetration or attempted perpetration of a robbery or Home Invasion in the 1st degree."

After the close of proofs, the trial court properly instructed the jury on the causation and malice elements of felony murder. However, when it came time to instruct the jury on the predicate felonies, the trial court apparently inadvertently read the instruction for assault with intent to rob while armed in the place of an instruction on robbery or attempted robbery.

Defendant's trial counsel did not object to this error either at the time of the instruction or after the trial court concluded its instructions. Indeed, after the trial court finished its instructions it noted that it had discussed the instructions with the parties off the record and that the parties agreed that there were no additions or deletions or objections to the instructions as given:

THE COURT: Okay. The record should show we had a sidebar conference at the conclusion of the Court's instructions. And I was told there were no additions or deletions or objections. Is that accurate Ms. McKellar?

MS. MCKELLAR: Yes, your Honor.

THE COURT: Mr. Latchana?

MR. LATCHANA: Yes, Judge.

As the record clearly demonstrates, defendant's trial counsel did not merely fail to object to the apparently erroneous instruction; he affirmatively agreed that the instructions were not objectionable, did not require additions, and did not require deletions. Thus, defendant's trial counsel waived any claim of error with regard to the felony murder instruction. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). And his waiver extinguished any error. *Id.*

¹ To the extent that defendant's argument on appeal can be read as a claim that the trial court erred when it failed to give a heightened unanimity instruction, we conclude that defendant has abandoned that claim of error by failing to properly brief it on appeal. See *People v Martin*, 271 Mich App 280, 315; 721NW2d 815 (2006). In any event, we have examined the instructions and conclude that the general unanimity instruction adequately protected defendant's rights because there were not materially distinct proofs or a risk that the jurors would be confused or disagree about the factual basis of defendant's guilt. See *id.* at 338-339.

Even if we were to conclude that defendant's trial counsel had not waived this issue, we would nevertheless conclude that the instructions as a whole adequately protected defendant's rights. *Martin*, 271 Mich App at 337.

Defendant argues that the trial court's instruction was inherently prejudicial because it allowed the jury to convict defendant on the basis of a predicate felony—assault with intent to rob while armed—that is not one of the enumerated felonies listed under MCL 750.316(1)(b). Defendant is correct to the extent that he notes that the statute does not *specifically* refer to assault with intent to rob while armed. See MCL 750.316(1)(b) (stating that felony murder is murder “committed in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, kidnapping, or vulnerable adult abuse in the first and second degree . . . torture . . . or aggravated stalking . . .”). However, this Court has examined this very issue and determined that assault with intent to rob while armed is a species of robbery within the meaning of MCL 750.316(1)(b). See *People v Akins*, 259 Mich App 545, 552-553; 675 NW2d 863 (2003). Therefore, although assault with intent to rob while armed was not listed as a predicate on defendant's information, it could serve as an underlying predicate felony.

Moreover, although the trial court should have instructed the jury on robbery or attempted robbery as one of the predicate felonies for felony murder rather than assault with intent to rob while armed, that error did not prejudice defendant. Our Supreme Court examined the relationship between assault with intent to rob while armed and attempted robbery and concluded that the intent element within the assault with intent to rob while armed felony necessarily incorporated attempted robbery:

The distinction between the element of intent and attempt is, under the circumstances of this case, a matter of semantics. Intent alone is not enough to convict a person of a crime. There must be an act taken in conjunction with the intent and, once that is done, there is, therefore, an attempt. Thus, attempted robbery armed is a lesser included offense of assault with intent to rob being armed. [*People v Patskan*, 387 Mich 701, 714; 199 NW2d 458 (1972).]

Indeed, our Supreme Court stated that the elements of assault with intent to rob while armed are: “(1) an assault; (2) an attempt to rob; (3) being armed.” *Id.*; see also *Akins*, 259 Mich App at 552-553 (“But assault with intent to rob while armed is a necessarily lesser included offense of armed robbery, and attempted armed robbery is a lesser included offense of assault with intent to rob while armed. Thus, attempted robbery is established every time assault with intent to rob while armed is established.” [citations omitted]). Accordingly, when the trial court instructed the jury on assault with intent to rob while armed in lieu of an instruction on robbery, it in effect instructed the jury that it had to find defendant guilty of attempted robbery—which was listed as one of the predicates on defendant's information—and two additional elements that it otherwise would not have had to find. Therefore, to the extent that the instruction properly stated the elements of assault with intent to rob while armed—a matter that defendant has not challenged on appeal—that instructional error actually benefited defendant. For this reason, even if defendant's trial counsel had not waived any error with regard to this instruction, we would nevertheless conclude that there was no error warranting relief.

Finally, even if this instructional error could be said to have occasioned some prejudice, given the eyewitness testimony by the victims who survived the ordeal at issue and the testimony by defendant's accomplice, we would still conclude that the error was harmless—indeed, we would conclude that any error was harmless beyond a reasonable doubt. As such, it would still not warrant any relief. See *People v Carines*, 460 Mich 750, 770-771; 597 NW2d 130 (1999) (noting that the trial court gave an erroneously incomplete aiding and abetting instruction, but concluding that the error did not warrant relief because the jury had to have found that defendant engaged in the conduct under the instructions actually given).

For similar reasons, we must reject defendant's claim that his trial counsel was ineffective for failing to object to this instruction at trial. There was no evidentiary hearing held to take evidence concerning defendant's claim that he received ineffective assistance of counsel in this regard, so our review is limited to errors that are apparent on the record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). To establish a claim for ineffective assistance of counsel, a defendant must show (1) that counsel's assistance fell below an objective standard of professional reasonableness, and (2) that but for counsel's ineffective assistance, the result of the proceeding would have been different. *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008). Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

As noted, the instructions actually given to the jury imposed a higher burden on the prosecution than it would have had with a robbery instruction alone. On this record, defendant's trial counsel might very well have recognized this fact and elected—as a matter of trial strategy—to refrain from objecting in the hopes that the jury be unable to come to a consensus on the assault with intent to rob while armed charge. Accordingly, defendant has not overcome the presumption that counsel's actions constituted sound trial strategy. *LeBlanc*, 465 Mich at 578. Furthermore, given the evidence against defendant, including numerous witnesses who all testified that they either heard or saw defendant repeatedly demand money from the victim before shooting him, any deficiency in counsel's performance did not prejudice defendant. Therefore, no relief is warranted. *Yost*, 278 Mich App at 387.

III. ADMISSION OF PHOTOS

Defendant also argues that the trial court erred when it permitted the admission of highly prejudicial autopsy photographs of the victim. We review a trial court's evidentiary rulings for an abuse of discretion. *Id.* at 353. An abuse of discretion occurs when the trial court selects an outcome that does not fall within the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

Photographic evidence is generally admissible if it is relevant and not unduly prejudicial. *People v Gayheart*, 285 Mich App 202, 227; 776 NW2d 330 (2009). This means demonstrative evidence offered must satisfy the traditional requirements for relevance and probative value in light of policy considerations for advancing the administration of justice. *People v Unger*, 278 Mich App 210, 247; 749 NW2d 272 (2008). If photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they vividly portray the details of a gruesome or shocking accident or crime. *People v Ho*, 231 Mich App 178, 188; 585 NW2d 357 (1998); *Gayheart*, 285 Mich App at 228.

Defendant argues that the photographs were prejudicial and irrelevant because he did not dispute the victim died a violent death. However, the prosecution is required to prove each element of a charged offense regardless of whether the defendant specifically disputes or offers to stipulate any of the elements. *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). Defendant was charged with felony murder, which required the prosecution to prove the killing of a human being, with 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 during the commission of a felony. *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007). The photographs assisted the jury in determining whether the elements of felony murder were satisfied because the photographs depicted the nature and the extent of the injuries. Although the medical expert testified to the injuries, the jury is not required to depend solely on the testimony of experts, but is entitled to view the severity of the injuries for itself. *People v Mills*, 450 Mich 61, 72-73; 537 NW2d 909 (1995). Additionally, after reviewing the autopsy photos, we do not agree that the photographs were unfairly prejudicial. The trial court did not abuse its discretion in allowing the jury to view the autopsy photos. Even assuming that the trial court should not have permitted the jury to see the photos, given the evidence against defendant, we conclude that any error was harmless. See *People v Whittaker*, 465 Mich 422, 426-427; 635 NW2d 687 (2001).

Defendant also argues that it was error for the trial court to permit the jury to see the autopsy photos because they were not properly marked and admitted. The trial court determined that the photographs were admissible as demonstrative evidence to assist the jury and that they were more probative than prejudicial. MRE 401; MRE 403. Before showing the autopsy photographs to the jury, the prosecution laid a proper foundation by having the expert testify that the photographs accurately represented the injuries to the victim's body. Thereafter, it appears that the prosecutor neglected to formally mark and move for the admission of the autopsy photographs into evidence before showing the photographs to the jury. Generally, a properly authenticated photograph is admissible if relevant to the action and its probative value is not substantially outweighed by the danger of unfair prejudice. See *People v Sharbnaw*, 174 Mich App 94, 102-103; 435 NW2d 772 (1989). The autopsy photographs of the victim's body were admissible and defendant has not shown that the failure to formally mark and admit the photographs resulted in unfair prejudice.

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Michael J. Kelly