STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN DAVID BENSON, JR.,

Defendant-Appellant.

UNPUBLISHED
March 18, 1997

No. 184542
Recorder's Court
LC No. 94-009522

Before: Bandstra, P.J., and Neff and M.E. Dodge,* JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial conviction of first-degree felony murder, MCL 750.316; MSA 28.548, second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life without parole on the first-degree murder conviction and to a consecutive two-year term on the felony-firearm conviction. Defendant's conviction for second-degree murder was vacated. We affirm.

Defendant first argues that the trial court improperly denied his motion to suppress the statement he made while in police custody. He contends that his confession was not voluntary because he was intoxicated. This matter was subject to a *Walker*[1] hearing at which the trial court heard testimony and evidence. In reviewing the trial Court's findings, this court examines the entire record and makes an independent determination of voluntariness. *People v Bender*, 208 Mich App 221, 227; 527 NW2d 66 (1994), aff'd 452 Mich 594; 551 NW2d 71 (1996). However, we give deference to the trial court's ability to judge the credibility of witnesses and will not reverse unless the trial court's factual determinations are clearly erroneous. *Id*. Officer Clark testified that, although he was aware that defendant had been drinking, he did not appear intoxicated or otherwise unable to knowingly waive his rights. See *People v Beebe*, 70 Mich App 154, 160-161; 245 NW2d 547 (1976). The trial court chose to accept this version of the events, there is evidence to support the court's finding, and we do not conclude that this was clear error. *Id.*

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

Defendant argues that he took the victim's car after the shooting as an afterthought, meaning that felony-murder was an inappropriate charge because defendant did not have the requisite intent. However, notwithstanding defendant's contention, there was evidence contradicting his version of events that could reasonably be construed to suggest that defendant's intent was to steal the car when he shot the victim. When the evidence conflicts or raises a reasonable doubt concerning guilt, the defendant should be bound over and the questions resolved by the trier of fact, and we do not conclude that the information should have been quashed in this case. *People v Cotton*, 191 Mich App 377, 383-384; 478 NW2d 681 (1991).

Defendant also argues, in a similar vein, that there was insufficient evidence to support a felony-murder conviction, contending that the killing was not committed during the perpetration of the larceny. In viewing the evidence in a light most favorable to the prosecution, we conclude that there was ample evidence presented at trial, especially from eyewitnesses, upon which a rational factfinder could conclude that the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Defendant claims certain jury instructions were erroneous but failed to object to them at trial. Absent an objection, our review is precluded absent manifest injustice. *People v Ferguson*, 208 Mich App 508, 510; 528 NW2d 825 (1995). There is no error, and certainly no manifest injustice, if instructions fairly present to the jury the issues to be tried, even if they are somewhat imperfect. *People v Harris*, 190 Mich App 652, 664; 476 NW2d 767 (1991). Further, manifest injustice occurs where a jury is misinstructed on "a basic and controlling issue in the case." *People v Baker*, 207 Mich App 224, 225; 523 NW2d 882 (1994). Having fully reviewed the jury instructions given in this case, we do not conclude that there was any manifest injustice.

Defendant argues that the trial court erred requiring reversal by making comments at trial regarding the conduct of defense counsel. We have reviewed the record fully and do not conclude that any of the complained-of instances unduly influenced the jury by calling into question defense counsel's skills and abilities. Compare *People v Cole*, 349 Mich 175, 199; 84 NW2d 711 (1957); *People v Wigfall*, 160 Mich App 765, 775; 408 NW2d 551 (1987). The trial court did not act in an excessive, intimidating, argumentative, or prejudicial way. Compare *People v Conyers*, 194 Mich App 395, 405-406; 487 NW2d 787 (1992). The trial judge's comments did not deny defendant a fair trial, and defense counsel was not prevented from functioning effectively on behalf of defendant. See *Wigfall*, *supra* at 774.

Defendant argues that the trial court abused its discretion by failing to order that the prosecutor assist in locating a potential defense witness. However, defendant did not comply with the requirements of the applicable statute, MCL 767.40a(5); MSA 28.980(1)(5), having produced nothing to indicate that a request in writing was made not less than ten days before trial. Accordingly, there was no abuse of discretion.

Defendant argues that he was entitled to jury instructions on intoxication and manslaughter. Although first-degree felony murder is a general intent crime for which the defense of intoxication may not be asserted, the underlying felony here, larceny, is a specific intent crime with respect to which intoxication may be asserted. *People v Hughey*, 186 Mich App 585, 590; 464 NW2d 914 (1990). However, a defense of intoxication is proper only if the facts of the case could allow the jury to conclude that the defendant's intoxication was so great that the defendant was unable to form the necessary intent. *People v Mills*, 450 Mich 61, 82; 537 NW2d 909 (1995), modified and remanded 450 Mich 1212 (1995). The eyewitnesses testified that, immediately after the shooting, defendant got into the victim's car and drove it away. No reasonable jury could find that defendant was "intoxicated to the point at which he was incapable of forming the intent to commit the charged crime." *Id.* at 82-83. The jury instruction on intoxication was properly denied.

With respect to the requested manslaughter instruction, the trial court properly ruled that there was insufficient evidence to conclude that the victim did anything that would constitute adequate and reasonable provocation for the killing, thereby reducing the crime to manslaughter. *People v Etheridge*, 196 Mich App 43, 55; 492 NW2d 490 (1992). Defendant was not entitled to a manslaughter instruction.

Defendant argues that although no objection was made at trial, reversal is required because the prosecutor improperly personally vouched for the veracity of the evidence that had been presented against defendant. We agree with defendant that the prosecutor's closing argument statement was improper. While a prosecutor may argue that the evidence shows a defendant is guilty, the prosecutor may not attempt to place the prestige of the prosecutor's office or that of the police behind that evidence. *People v Bahoda*, 448 Mich 261, 282, 286; 531 NW2d 659 (1995). This rule was clearly violated when the prosecutor in this case told the jury that "it would not be right and it would not be my duty to put on evidence that was not true in the case." It is especially unfortunate that the prosecutor made this statement in a case where such an improper argument was unnecessary to bolster the chance of a conviction. The prosecutor had plenty of evidence to support the charges against defendant and the complained-of statement was not only improper but unnecessary.

No objection was raised at trial regarding the prosecutor's statement; therefore, a curative instruction was not given. Defendant argues that, nonetheless, his conviction should be automatically reversed under *People v Erb*, 48 Mich App 622, 631-633; 211 NW2d 51 (1973). *Erb* is not a binding precedent under Supreme Court Administrative Order No. 1996-4. 451 Mich xxxii (1996). Further, we do not conclude that *Erb* can properly be understood as saying that reversal is required in every case where a prosecutor improperly places the weight of the prosecutor's office behind evidence, even if no objection is raised at trial. *Erb* itself reiterated the rule that "the failure to object is and should be a bar to review only where the goal of objection--a cautionary instruction--in all likelihood would have eliminated the prejudice arising from the prosecutor's remark." *Id.* at 633, quoting *People v Humphreys*, 24 Mich App 411, 416; 180 NW2d 328 (1970); see, also, *People v Fuqua*, 146 Mich App 250, 254; 379 NW2d 442 (1985). In *Erb*, it is clear that the defendant's main defense theory was that he was not the person who had committed the attempted armed robbery, having presented two defense witnesses to show that a misidentification had been made. *Id.* at 628-629. That alibi

testimony was "given significant attention in the closing argument of defense counsel," *id.*, and, in rebuttal, the prosecutor placed the prestige of his office specifically behind the testimony of one witness who identified the defendant as the person who committed the crime, *id.* at 631 ("I expect the witnesses that I call to present the truth, and his testimony is that there is no question that the defendant is the man."). In that context, the *Erb* panel concluded that no cautionary instruction could remove the damage that had been done by the prosecutor's improper statement, specifically reasoning that "[s]tatements made by a prosecutor which attest to or vouch for the credibility of certain witnesses are very cautiously reviewed." *Id.* at 632. It appears that the *Erb* panel was not adopting an automatic reversal rule but, instead, was examining the facts of the case before it to see whether a cautionary instruction might have eliminated the prejudice that had been done.

Taking that same approach in this case, we conclude that a cautionary instruction would have eliminated the prejudice and that, in the absence of the cautionary instruction, defendant's conviction should not be reversed. In contrast to *Erb*, the prosecutor's improper statement in this case did not single out and bolster the credibility of key testimony against defendant. Instead, the challenged statement was more in the nature of a general description of why the prosecutor had asked redirect questions of a youthful eyewitness to clear up confusion in his testimony. Further, in the present case, there was ample evidence to show that defendant was guilty of the crimes charged, beyond the testimony of this witness. Compare *People v Smith*, 158 Mich App 220, 232; 405 NW2d 156 (1987). The testimony of another disinterested eyewitness that defendant had killed the motorist was corroborated when defendant was found with the stolen car and the murder weapon. In light of all that evidence, it seems highly improbable that the improper statement by the prosecutor made any difference to the jury. Certainly, any slight difference that might have resulted from that improper statement could have been addressed with a curative instruction had defendant raised an objection at trial.

We affirm.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Michael E. Dodge

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).