STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERTO ANTONIO CASANOVA,

Defendant-Appellant.

UNPUBLISHED
May 13, 1997

No. 183532
Muskegon Circuit Court
LC No. 94037204

Before: Taylor, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Defendant was charged and convicted, following a jury trial, of two counts of first-degree murder, MCL 750.316(1)(a); MSA 28.548(1)(a), two counts of felony murder, MCL 750.316(1)(a); MSA 28.548(1)(a), and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life imprisonment without parole for each of the first-degree murder convictions and the felony murder convictions and to a term of two years' imprisonment for each of the felony-firearm convictions. We vacate defendant's felony murder convictions and sentences, but affirm defendant's remaining convictions and sentences.

This case arises out of the May 26, 1993, slayings of James and Linda Crews. Linda Crews was the parent of Cheryl Sladovnik, defendant's girlfriend and mother of his child. There was evidence that defendant killed the Crews because he was angry that they would not tell him the location of Sladovnik.

Defendant first argues that the trial court abused its discretion in admitting the testimony of an investigating police officer who investigated the alibis of the people whom defendant contended had committed the murders of the victims in this case. We agree, but find the error harmless. The decision whether to admit evidence rests within the sound discretion of the trial court and will not be set aside on appeal absent an abuse of discretion trial. *People v Price*, 214 Mich App 538, 546; 543 NW2d 49 (1995). Error requiring reversal may not be predicated upon a ruling that admits evidence unless a substantial right was affected and resulted in a miscarriage of justice. MRE 103(a); MCL. 769.26; MSA 28.1096.

In this case, an officer testified that he had conducted an investigation and had drawn a conclusion from his investigation that four particular people were not suspects. During voir dire, outside the presence of the jury, it was revealed that the officer based his conclusion on his interviews with the four people and the bus tickets that all of them showed him, even though these bus tickets did not state the passengers' names and the officer conducted no further investigation. The trial court ruled that the bus tickets and the statements of the four people were inadmissible hearsay, but allowed the officer's testimony under MRE 701.

We agree with defendant's assertion that admission of the officer's testimony was an abuse of discretion. See *People v Lucas*, 138 Mich App 212; 360 NW2d 162 (1984). We, however, find this error harmless. An error in the admission of evidence may require reversal of a conviction where, after considering the nature of the error and assessing its effect in light of the weight and strength of the properly admitted evidence, refusal to vacate the judgment would be inconsistent with substantial justice. *People v Huyser*, ___ Mich App ___; ____ NW2d ___ (Docket No. 184611, issued 1/28/97) slip op p 3.

Here, the case does not entirely depend on whether the jury believed the officer's conclusion because there was sufficient corroborating evidence of defendant's culpability. The physical evidence in this case that pointed to defendant's guilt included footwear impressions, handwriting samples and personal items of the victims in his possession. Furthermore, the trial testimony consistently established defendant's motive and opportunity to murder the victims. In addition, defendant's own testimony was problematic because he gave the investigating officers no aid in locating his own alibi witness. Given the overwhelming evidence against defendant, raising doubts about another person's alibi would not have exculpated defendant. Therefore, any error is deemed harmless. Compare *Huyser*, *supra* and *Lucas*, *supra* (erroneous admission of evidence not harmless where there was little or no corroborating evidence).

Defendant next argues that the trial court abused its discretion in admitting testimony regarding evidence that was missing because of the police officers' gross negligence. We disagree. Again, we review this issue for an abuse of discretion. *Price*, *supra*.

The missing evidence included the shotgun wadding and pellets that were removed from the victims' bodies during their autopsies and from the victims' home. Absent the intentional suppression of evidence or a showing of bad faith, the loss of evidence which occurs before a defense request for its production does not require reversal. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Defendant has the burden of showing that the evidence was exculpatory or that the police acted in bad faith. *Id*.

Having reviewed the pertinent testimony, we find that there is no support for defendant's assertion that the police deliberately destroyed the evidence. There was no testimony at trial or the evidentiary hearing indicating that the suppression was deliberate or in bad faith. Indeed, the testimony of the officers who searched the police department's evidence room several times indicated the opposite. In addition, both the coroner and the firearms expert testified from a report or notes made

during their examinations. Moreover, based on the evidence in this case, there is no indication that the shotgun wadding or pellets would have provided defendant with exculpatory evidence. We therefore conclude that the trial court did not abuse its discretion.

Defendant also argues that he was denied a fair trial because the prosecutor improperly injected testimony that there were outstanding warrants against him and the trial court's cautionary instruction did not cure the error. We disagree. We initially note that defendant failed to challenge the sufficiency of the trial court's instruction below. In fact, defense counsel approved the curative instruction before it was given to the jury. We therefore review this issue only for manifest injustice. *People v Maleski*, 220 Mich App 518, 521; ___ NW2d ___ (1996).

Defendant concedes that the testimony complained of was unresponsive to the prosecutor's question. Generally, unresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990).

In any event, defendant's claim is without merit. Both the prosecutor and defense counsel requested a curative instruction following the unresponsive testimony. Defense counsel failed to object to the trial court's instruction. In fact, defense counsel indicated to the court that the instruction was "excellent" before it was given to the jury. A defendant may not choose a course of action and then "sit back and harbor error to be used as an appellate parachute." *People v Pollick*, 448 Mich 376, 387; 531 NW2d 159 (1995). Furthermore, the court properly and clearly instructed the jury that outstanding warrants are "totally irrelevant to the defendant's guilt or innocence" and it "must disregard the statement by the witness regarding the alleged warrants." Jurors are presumed to have followed a court's instructions until the contrary is clearly shown. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). We therefore find no manifest injustice.

Defendant also argues this Court's holding in *People v Passeno*, 195 Mich App 91; 489 NW2d 152 (1992), mandates that his felony murder convictions be vacated. We agree, and note that in its late filed brief, the prosecution also agrees that defendant's felony murder convictions must be vacated. This Court reviews double jeopardy issues de novo. *Price*, *supra* at 542; *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995).

The United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15; *People v Torres*, 452 Mich 43, 63; 549 NW2d 540 (1996), cert den ___ US ___; ___ S Ct ___; 136 L Ed 2d 867 (1997). Multiple convictions and sentences for counts of both first-degree murder and felony murder arising from the death of a single individual violate the constitutional guarantees against double jeopardy. *Passeno*, *supra* at 95. Where a defendant is convicted of both first-degree and felony murder for the murder of a single individual, the conviction of first-degree murder must be affirmed, and the conviction for felony murder vacated. *Id.* We therefore affirm defendant's convictions for first-degree murder and vacate his convictions for felony murder. The mandatory life sentences for those affirmed convictions are affirmed.

Defendant's felony murder convictions and sentences are vacated. Defendant's convictions and sentences for first-degree murder and felony-firearm are affirmed.

/s/ Clifford W. Taylor
/s/ Harold Hood
/s/ Roman S. Gribbs