

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CURTIS CLINTON HOWARD,

Defendant-Appellant.

UNPUBLISHED

July 29, 1997

No. 180226

Recorder's Court

LC No. 94-002375

Before: Doctoroff, P.J., and MacKenzie and Griffin, JJ.

PER CURIAM.

Defendant was convicted by a jury of 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). He was sentenced to fifteen to forty years' imprisonment for the murder conviction and two years' consecutive imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant was originally charged with first-degree murder, MCL 750.316; MSA 28.548, and felony-firearm for the shooting death of Jennita Fields. At trial, defendant admitted to shooting the victim, but there were conflicting accounts of the circumstances of the shooting. Defendant testified that he shot the victim accidentally during a physical confrontation with the victim and others when his gun fell and discharged after he was pushed by the victim. The prosecution's witnesses, however, testified that only defendant and the victim were arguing and that defendant shot the victim after she would not move away from him.

I

Defendant first cites error with the prosecution's rebuttal argument. Because this issue was not raised below, it may be reviewed on appeal only if a curative instruction could not have remedied any prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

The prosecutor stated in his rebuttal argument that the victim was once a live human being and that even if she was "fouled up" at the time of her death due to drugs and alcohol, the jury should not

forget that she was a loving human being. The prosecutor also argued to the jury that the witnesses to the shooting did not have a motive to lie.

While a prosecutor may not appeal to the jury's sympathy, the prosecutor's arguments here were primarily responsive to the defense's closing argument. For this reason, we do not find error with the prosecutor's closing argument. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997); *People v Modelski*, 164 Mich App 337, 348; 416 NW2d 708 (1988). If there was error, it was not egregious and it could have been cured with a cautionary instruction. Thus, reversal is not required. *Stanaway, supra*.

Furthermore, the prosecutor did not personally vouch for his witnesses or place the prestige of his office behind the witnesses. *People v Stacy*, 193 Mich App 19, 36-37; 484 NW2d 675 (1992). Although defendant argues that the prosecutor improperly commented on defendant's guilt, argued facts that were not in evidence, and improperly raised new issues in his rebuttal argument, he has not provided citations to the transcript where the above claimed errors occurred or explained the factual basis for his arguments. The arguments are therefore abandoned on appeal. *People v Sean Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).

II

Defendant next claims that his trial counsel was ineffective, although he failed to raise this issue in the trial court. Moreover, this Court previously denied defendant's motion to remand for an evidentiary hearing. Our review is therefore limited to the current trial record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992). On the record available, we hold that defendant was not denied the effective assistance of counsel.

To obtain relief due to the ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced him that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

Defendant cites error with his trial counsel's failure to object to the prosecutor's closing argument. While counsel may have had grounds for objecting to the prosecutor's rebuttal comments, at most the trial court would have only given a cautionary instruction to the jury. Because the prosecutor's remarks were generally responsive to defendant's closing argument, the remarks were not prejudicial to defendant and he has not shown that his counsel's error prejudiced his right to a fair trial.

Defendant also argues that his counsel coerced him into testifying at trial against his will. The record does not support defendant's claim. The record reveals that defendant and his attorney disagreed on whether defendant should testify, but it is unclear what was defendant's desire. Despite the disagreement on strategy, defendant was fully advised that it was his decision to make regarding his right to testify. Nothing in the record suggests that defendant was pressured to testify or that he was reluctant to testify. There is no evidence that defendant abandoned a more viable defense in favor of personally testifying. The record also does not support defendant's claim that his trial attorney was

ineffective for not objecting to the placement of a partition between defendant and the witnesses throughout the trial. Rather, it appears that the diagram that blocked one witness' view of defendant was moved. Accordingly, defendant's argument on these points is not supported by the record and must fail.

Defendant further argues that his counsel did not adequately prepare for defendant to testify, should not have continued to represent defendant due to illness, did not impeach a witness, abandoned defendant's motion for a directed verdict, and conceded defendant's guilt. After reviewing the record, we find no merit to these claims of error.

III

Defendant claims that the prosecutor placed a diagram in such a position that it served as a partition between defendant and the testifying witnesses, thereby violating his right of confrontation. US Const, Am VI; Const 1963, art 1, § 20. We disagree.

The only reference to a partition in the record was a brief comment by one witness who was asked to identify defendant in the courtroom. The witness could not see defendant due to the placement of a diagram. It appears that the diagram was moved during a recess. When the witness resumed testifying, he was able to identify defendant in the courtroom and describe what defendant was wearing. The record does not support defendant's claim that he was denied his right to confront the witnesses against him due to the presence of the partition. *People v Burton*, 219 Mich App 278, 287; 556 NW2d 201 (1996). Even if there was error here, it was harmless. *People v Mack*, 218 Mich App 359, 360, 364; 554 NW2d 324 (1996).

IV

Defendant next argues that he was coerced into testifying by his trial counsel in violation of his constitutional rights. As discussed in Section II of this opinion, the record does not support defendant's claim that his counsel forced him to testify. Furthermore, there is nothing in the record to support defendant's claim that his counsel had not prepared for defendant to testify.

V

Defendant argues that there was insufficient evidence to support the jury's verdict of second-degree murder or to submit the charge of first-degree murder to the jury. We disagree.

This Court reviews the sufficiency of the evidence to sustain a conviction not based on whether there was any evidence to support the conviction, but whether the evidence was sufficient, when viewed in a light most favorable to the prosecution, to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Viewed most favorably to the prosecution, the evidence presented at trial established that defendant retrieved a gun from a car trunk before he followed the victim inside the house. While inside

the house, defendant argued with the victim over money for a period of time and when the victim would not move away from him, he shot her. There was no evidence from the prosecutor's witnesses that the victim physically threatened defendant. Defendant was near a door which he could have used to leave the house. Further, enough time elapsed for defendant to have taken a second look before he pulled out his gun and shot the victim. Thus, the charge of first-degree murder was proper since it was for the jury to decide defendant's state of mind. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

The jury's verdict of second-degree murder was also supported by sufficient evidence. The evidence showed that defendant intentionally shot the victim when she would not get away from him and that she did not pose a threat of physical harm to defendant. *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996), amended on other grounds 453 Mich 1204 (1996).

VI

Next, defendant argues that the prosecutor abused his discretion in charging defendant with first-degree murder because, at most, the facts only supported a charge of manslaughter. We find no merit to defendant's argument. The facts supported charging defendant with first-degree murder and there was no abuse of the prosecutor's charging discretion. *People v Yeoman*, 218 Mich App 406, 413; 554 NW2d 577 (1996).

VII

Defendant next contends that the trial court, the prosecutor, and his attorney all conspired to convict him. This argument lacks merit. Nothing in the record suggests that the court and the attorneys conspired against defendant.

VIII

Next, defendant cites error with the trial court's failure to rule on his motion to reduce the charges. Defendant also argues that the trial court did not follow the rule of stare decisis when ruling on the motion. Defendant only requested a reduction in the charges as part of his motion for a directed verdict. The trial court addressed the merits of the request to reduce the charge of first-degree murder when ruling on defendant's motion for a directed verdict. The trial court also properly denied the motion on the law and facts of this case. Thus, the trial court did not err.

IX

Finally, defendant contends that the trial court did not instruct the jury on malice for the crimes of first-degree and second-degree murder. We find no merit to defendant's argument. A review of the court's instructions reveals that the court instructed the jury on the necessary intent to convict defendant of either first-degree or second-degree murder. The jury was properly

instructed on the intent elements of the charged offenses. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Barbara B. MacKenzie
/s/ Richard Allen Griffin