

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEON HARDWAY,

Defendant-Appellant.

UNPUBLISHED

August 26, 1997

No. 187847

Recorder's Court

LC No. 93-008506 FC

Before: Wahls, P.J., and Taylor and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions 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). Defendant was sentenced to two years in prison for the felony-firearm conviction and a consecutive term of twenty to forty years in prison for the second-degree murder conviction. We affirm.

Defendant first argues that the prosecutor's questions asking him why he read police reports and witnesses' statements violated his right to effective assistance of counsel and his attorney-client privilege. We disagree.

Appellate review of improper prosecutor remarks or questions is generally precluded absent an objection because the trial court is deprived of an opportunity to cure the error. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). In this case, the prosecutor asked defendant why he read the police reports and witnesses' statements three times without objection. The fourth time, defense counsel objected on the ground that the question had been asked and answered. Generally, "an objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground." *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Appellate review is not precluded, however, if an objection on such grounds could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996); MCL 769.26; MSA 28.1096. We find no miscarriage of justice in the prosecutor's questions.

The record indicates that the prosecutor was trying to establish that defendant did not actually see the victim's gun on the night of the shooting and that defendant fabricated a self-defense theory only after reading about the presence of the gun in the police reports and witnesses' statements. The opportunity and motive to fabricate testimony were permissible areas of inquiry by the prosecutor because of the inference that defendant fabricated his testimony. *People v Buckey*, 424 Mich 1, 15; 378 NW2d 432 (1985); *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993); *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Defendant testified that he shot the victim only because the victim, who was sitting in the driver's seat of a car, had turned around toward defendant with a gun in his hand. Two other witnesses in the car, however, testified that the gun was on the seat near the victim's thigh. The shooting occurred while it was dark outside. It could be inferred that defendant fabricated his testimony about the victim and gun only after reading police reports and witness statements. The questions did not violate defendant's attorney-client privilege or his right to assistance of counsel. *Buckey, supra*; *Allen, supra*.

Defendant next argues that the trial court erred in its instruction on second-degree murder and in its instruction regarding the order of deliberation. The trial court did not err in its instruction on second-degree murder, but it did err in its instructions regarding the order of deliberation.

We first note that a defendant must object to jury instructions in order to preserve the issue for appellate review. *Paquette, supra*; MCL 768.29; MSA 28.1052. Defendant did not object to the jury instructions at trial. Failure to object waives appellate review absent manifest injustice *Id.* To establish second-degree murder, the prosecution must show that defendant caused the death of another and that the killing was done with malice and without legal justification. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). The trial court instructed the jury that the prosecutor must prove only the first two elements for a finding of second-degree murder. Later, when the trial court read the jury an instruction on self-defense, the trial court stated that if the jury found defendant acted in self-defense, then defendant was not guilty of any crime. We find that the trial court's instructions, when read as a whole, sufficiently set forth the law of the case. The trial court erred, however, by instructing the jury that, if it found defendant not guilty of first-degree murder, then it could consider second-degree murder, and if it found defendant was not guilty of first or second-degree murder, then it could consider the crime of voluntary manslaughter. The trial court should have instructed the jury that it could consider second-degree murder if it was unable to agree whether to convict or acquit regarding the first-degree murder charge and then that they could consider voluntary manslaughter if they were unable to agree whether to convict or acquit regarding the second-degree murder charge. *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982). Despite the error, however, we will not reverse the conviction on the basis of instructional error because defendant did not object to the instructions given. *Id.* at 360; MCL 769.26; MSA 28.1096.

Defendant next argues that the trial court erroneously provided the jury with an involuntary manslaughter instruction when the jury requested clarification on the crime of voluntary manslaughter. We disagree. The transcript indicates that the trial court provided a copy of "2nd Degree Involuntary Manslaughter" to the jury. Our review of the record leads us to conclude that the trial court misspoke or the trial court's statement was mistranscribed by the court reporter. The crime of involuntary

manslaughter was not at issue in this case. Furthermore, there is no evidence in the record to support a conclusion that the jury was in fact given an instruction on involuntary manslaughter.

Affirmed.

/s/ Myron H. Wahls
/s/ Clifford W. Taylor
/s/ Joel P. Hoekstra