

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROSH HOLMES,

Defendant-Appellant.

UNPUBLISHED

August 4, 1998

No. 198516

Recorder's Court

LC No. 95-010458

Before: Markman, P.J., and Saad and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). These convictions arose from the shooting of an acquaintance, Timothy Bonds, whom defendant suspected of having shot and killed defendant's nephew, Frederick Simmons. Defendant was sentenced to a term of fifteen to twenty-five years for the assault conviction pursuant to the second habitual offender statute, MCL 769.10; MSA 28.1082, and to a consecutive term of two years for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court committed error in its instructions to the jury regarding prior statements he made to the police. We disagree. Defense counsel failed to object to this jury instruction and therefore, the issue is not properly preserved for appeal. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Further, review of this issue is not required to prevent manifest injustice because this instruction was not confusing or prejudicial to defendant.

Defendant argues that the jury could have been confused by the court's reference to statements he made to police "after he was arrested" because such arrest was in connection with a different crime. At the time of his interrogation for the instant crime, defendant was not under arrest. Defendant also argues that the court's reference to whether certain statements were made to avoid responsibility for "the crime" was potentially ambiguous and could have related either to the instant crime or the crime for which defendant had actually been under arrest.

While the specific statements in question were made during an interrogation for a different crime, the questions from police nevertheless specifically pertained to the shooting of the victim in this case. It is highly unlikely that the jury would have been confused about which statements the trial court was referring to even if the court was mistaken when it said that the statements were made after defendant was “arrested,” presumably for the instant crime. The court’s reference to “the crime” was also not reversible error, even if ambiguous, because the jury instructions as a whole clearly pertained to the shooting of the victim, not to any other crime. The prior statements referred to by the court pertained wholly to the shooting of Bonds. It is irrelevant that these statements were made in the context of an interrogation that began with questioning about the death of another individual. Therefore, when read as a whole, the jury instructions were not misleading or otherwise flawed. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). Further, the court’s instructions regarding how the jury should assess defendant’s prior statements to police was not dependent on the precise context of those statements or specifically when the interrogation took place. Therefore, even if the instructions were imperfect, there was no error because defendant’s rights were sufficiently protected. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996).

Defendant next argues that he was deprived of his right to a fair and impartial trial because the prosecutor cried during her closing argument. We disagree. The nature of the prosecutor’s closing argument did not deprive defendant of his right to a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). There was no explicit evidence in the record that the prosecutor actually cried during her argument or otherwise improperly appealed to the sympathy of the jury. The use of an emotional argument by itself is not proof of any error or prejudice to defendant. See *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996) (a prosecutor need not phrase arguments in the blandest possible terms). Further, review of this issue is precluded because it was not properly preserved and because any alleged error could have been cured by a timely objection and curative instruction from the trial court. *People v Swartz*, 171 Mich App 364, 372-373; 429 NW2d 905 (1988).

Defendant next argues that the trial court erred by failing to limit improper rebuttal testimony. While we agree that some of the rebuttal testimony was improper, the admission of that testimony was harmless and, therefore, reversal is not required. MCR 2.613(A). Further, review of this issue is precluded because it was not properly preserved and because no manifest injustice would result if this Court declined to review it. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). Only evidence which refutes, contradicts, or explains evidence presented by the other party can be properly presented in rebuttal. *People v Nantelle*, 215 Mich App 77, 85; 544 NW2d 667 (1996). The testimony regarding whether the victim was ever known by a nickname was in direct refutation of defendant’s claim that he only knew the victim by the name of “T,” and did not know the victim’s real name. The victim’s testimony on rebuttal was also admissible because it contradicted defendant’s version of the events on the night of the shooting. The only evidence that was inadmissible in rebuttal was Cassandra Simmons’ statement that the victim called her from the hospital and told her that defendant shot him. The admission of this testimony, however, was harmless error because it added little, if anything, to the victim’s direct testimony regarding the shooting and to his testimony that he immediately told police that defendant shot him as soon as he was well enough to speak to them.

People v Mateo, 453 Mich 203, 215; 551 NW2d 891 (1996) (whether an error is harmless depends on the nature of the error and its effect on the outcome of the trial in light of the weight of the untainted evidence).

Defendant also argues that his trial counsel was ineffective. We disagree. Defendant failed to show that his trial counsel's actions were unreasonable or that the result of the trial would have been altered if defense counsel had made the objections discussed by defendant on appeal. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). As discussed above, the trial court's instruction to the jury regarding defendant's prior statements was not erroneous and the prosecutor's behavior during closing argument did not constitute prejudicial misconduct. Therefore, defense counsel's failure to object to the jury instructions or the prosecution's closing argument was not ineffective because neither objection would have been meritorious. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991) (counsel is not ineffective for failing to argue a frivolous or meritless motion). Although some of the prosecution's rebuttal testimony was inadmissible, its admission constituted harmless error. Therefore, even if defense counsel erred by failing to object to this testimony, defendant fails to establish on appeal that there was a reasonable probability that, but for counsel's failure to object, the result of the trial would have been different.

Affirmed.

/s/ Stephen J. Markman

/s/ Henry William Saad

/s/ Joel P. Hoekstra