STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINAL DORRAY BLUNT,

Defendant-Appellant.

UNPUBLISHED
September 25, 1998

No. 199656
Saginaw Circuit Court
LC No. 96-012253 FC

Before: Gribbs, P.J., and Sawyer and Doctoroff, JJ.

PER CURIAM.

Defendant[1] appeals as of right from his jury convictions of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1) and MCL 750.89; MSA 28.284, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life imprisonment for the first-degree murder conviction, twenty to thirty years' imprisonment for the conspiracy to commit armed robbery conviction, and a consecutive two-year term for the felony-firearm conviction. The charges arose in connection with a fatal shooting committed during an attempted armed robbery of a house in which an illegal lottery operation was being conducted. We affirm.

Defendant's first claim of error on appeal is that trial counsel was ineffective and that he was denied a fair trial when counsel called additional character witnesses knowing that their testimony would be impeached by the prosecutor. Because defendant did not move for a new trial or an evidentiary hearing on the basis of this claim, appellate review is limited to those errors apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996); *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). The decision to present character witnesses is a matter of trial strategy that will not be second-guessed on appeal. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997); *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987); *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987). Counsel's decision to present additional character witnesses to testify to defendant's reputation for peacefulness, even though he knew that the prosecutor would impeach them with the same reports of violent acts by defendant, could be seen as a strategic attempt to bolster the first character witness' testimony and suggest to the jury that the prosecutor's information

was questionable. The fact that the strategy did not work does not mean that counsel was ineffective. *Stewart, supra* at 42. Thus, because there are no errors apparent in the record in regard to the presentation of the character witnesses, this issue does not provide grounds for disturbing the jury's verdict. *Id.*; *People v Vasher*, 449 Mich 494, 503; 537 NW2d 168 (1995).

Defendant next contends that the trial court abused its discretion when it refused to allow him to testify with regard to his knowledge of the other acts referred to by the prosecutor when impeaching defendant's character witnesses. We disagree. The trial court correctly determined that there is no basis in the rules of evidence for allowing such testimony. Defendant could not testify on direct examination regarding specific instances of his conduct because such evidence is admissible only on cross-examination under MRE 405(a). *People v Champion*, 411 Mich 468, 471; 307 NW2d 681 (1981); *Della Pella v Wayne Co*, 168 Mich App 362, 370-371; 424 NW2d 50 (1988). MRE 405(b), which allows proof of specific instances of conduct in cases in which a trait of character is an essential element of a charge, claim or defense, is inapplicable to this case because the charges against defendant did not contain an element involving character. Contrary to defendant's arguments, MRE 404(b), which governs the admissibility of other acts evidence for purposes *other than* character, is also inapposite because the evidence was admitted for the purpose of showing character.

Next, defendant argues that the trial court again abused its discretion when it permitted the prosecution to introduce hearsay evidence under the excited utterance exception to the hearsay rule, MRE 803(2). In order for a hearsay statement to be admissible under this rule, there must be a showing that there was a startling event, and the statement sought to be admitted must have been made while the declarant was under the stress of the excitement caused by the event. *People v Smith*, 456 Mich 543, 550-551; ___ NW2d ___ (1998). This Court has previously held that a shooting qualifies as a startling event. *People v Jones*, 115 Mich App 543, 550; 321 NW2d 723 (1982), aff'd 419 Mich 577 (1984). The witness testified that the statement was made within fifteen minutes of the shooting, and the declarant appeared to be "shocked and scared" when she twice said "he shot him" and identified defendant as the shooter. Under these circumstances, we find that the trial court did not abuse its discretion in admitting the statement as an excited utterance. Defendant claims that the statement should not have been admitted because it was inconsistent with the declarant's testimony at trial, during which she said she did not know who did the shooting; however, such inconsistencies affect the weight to be given the evidence, not its admissibility. *Cole v Detroit Automobile Inter-Ins Exchange*, 137 Mich App 603, 609-610; 357 NW2d 898 (1984).

Defendant also claims that reversal is required because the prosecutor introduced improper rebuttal testimony regarding collateral matters. Appellate review of this issue has been waived because defense counsel did not object to the testimony of the rebuttal witnesses. MRE 103(a); *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994).

Defendant also argues that the prosecutor's improper remarks during closing and rebuttal arguments prejudiced the jury and denied him a fair trial. In the absence of a timely objection, review is foreclosed unless the prejudicial effect of the remark was so great that it could not have been cured by an appropriate instruction or failure to review the issue would result in a

miscarriage of justice. *Stanaway*, *supra* at 687; *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996). Our review of the record indicates that the prosecutor's remarks were not so prejudicial that their effect could not have been countered by a curative instruction. *Stanaway*, *supra* at 687. A prosecutor may argue that a witness' testimony is worthy of belief or that it is not credible in light of other evidence presented. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996); *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988).

Moreover, failure to review this issue will not result in a miscarriage of justice in view of the overwhelming evidence of defendant's guilt. *Duncan*, *supra* at 16. Defendant's accomplices testified that he planned, organized and initiated the robbery; he was seen by two witnesses with a gun prior to the shooting; several witnesses testified that defendant admitted shooting the victim; the victim was killed with a bullet from the same kind of gun defendant carried that night; and defendant's alibi witnesses could not conclusively account for his whereabouts at the time of the offense. Finally, any prejudice that may have resulted from the prosecutor's remarks was alleviated by the trial court's instruction to the jury that the arguments of the attorneys are not evidence. Consequently, reversal is not required on the basis of this issue.

Defendant also claims that the trial court erred by failing to sua sponte instruct the jury with regard to evidence of flight, concealment or escape, and failed to adequately instruct the jury with regard to the evidence used by the prosecutor to impeach his character witnesses. This issue has not been preserved for review because defendant did not request the instructions that he claims the trial court should have given and did not object to the trial court's failure to so instruct the jury. Failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice. MCL 768.29; MSA 28.1052, *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). As discussed above, in view of the overwhelming evidence of defendant's guilt, we find that no manifest injustice would result from our failure to review this issue. Nonetheless, we find that the jury instructions as read fairly presented the issues to be tried to the jury. *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997). For this reason, we also find defendant's claim that counsel was ineffective for failing to request the instructions or object to their omission to be lacking in merit.

Finally, defendant argues that there was insufficient evidence to support his conviction for felony murder because there was no showing of malice, asserting that the homicide was completed before there was any attempt to steal anything and that the discharge of the firearm was probably accidental. He also claims that assault with intent to commit armed robbery cannot provide the predicate felony for felony murder, and that for these reasons his conviction should be reduced to second-degree murder. We find both these arguments lacking in merit.

A jury may not convict a defendant of felony murder from the fact alone that a defendant committed the underlying felony and death resulted; "[t]o prove murder, the people must demonstrate that the defendant acted with malice in causing the death of another." *Dumas*, *supra* at 396; *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980). The evidence must show that the defendant had the intent to kill or do great bodily harm, or wantonly and wilfully disregarded the likelihood that the

natural tendency of his act was to cause death or great bodily harm. *Dumas*, *supra* at 396-397. Defendant claims that, in this case, he did not have the requisite intent to kill when he shot Williams.

There was sufficient evidence to support the jury's finding that defendant conspired with others to commit an armed robbery of the victim before going to the victim's house. Because the circumstances demonstrated that defendant went to the victim's house armed and with the intent to use whatever force was necessary to take the victim's money, there was sufficient evidence from which the jury could have found that defendant had a "wanton and willful disregard of the likelihood that the natural tendency of [his] . . . behavior [was] . . . to cause death or great bodily harm." *Aaron*, *supra* at 728-729.[2] Consequently, defendant's first argument is without merit.

MCL 750.316(1)(b); MSA 28.548(1)(b) defines felony murder as "murder committed in the perpetration of, or attempt to perpetrate . . . robbery, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, or kidnapping." In order to be convicted of felony murder, a defendant must also be found guilty of one of the statutorily enumerated predicate felonies. *People v Nix*, 453 Mich 619, 640; 556 NW2d 866 (1996); *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995). Essentially, defendant contends that because robbery or attempted robbery was not specifically charged or proven, felony murder was not established. This argument also fails.

In *People v Patskan*, 387 Mich 701, 714; 199 NW2d 458 (1972), our Supreme Court held that attempted armed robbery is a necessarily included lesser offense of assault with intent to commit armed robbery. The Court stated that "[t]he distinction between the element of intent and attempt is, under the circumstances of this case, a matter of semantics." *Id*. Therefore, defendant's claim that there was insufficient evidence to support defendant's conviction of felony murder because there was no proof of one of the statutorily enumerated felonies is without merit.

Defendant also claims that the information, which charged him with the murder of the victim in conjunction with the perpetration or attempted perpetration of a robbery or larceny, was inadequate to inform him of the charges against him and did not conform to the proofs at trial, which defendant claims did not show an attempted robbery. However, defendant did not challenge the sufficiency of the charges in the information in the trial court. Failure to object to or move for amendment of an allegedly defective information before trial precludes appellate review absent manifest injustice. MCL 767.76; MSA 28.1016; *People v Sabin*, 223 Mich App 530, 531-532; 566 NW2d 677 (1997). As discussed previously, in view of the evidence, manifest injustice will not result from our decision to decline review of this issue.

Affirmed.

/s/ Roman S. Gribbs
/s/ David H. Sawyer
/s/ Martin M. Doctoroff

[1] Although the judgment of sentence, the felony information and the complaint list defendant's first name as "Reginal," our review of the record indicates that defendant spells his first name "Reginald."

[2] Defendant attempts to raise the doctrine of imperfect self-defense for the first time on appeal. Not only was this defense not raised below, but defendant is not entitled to claim imperfect self-defense where the circumstances indicate that he initiated the confrontation with the intent to kill or to do great bodily harm. In addition, although defendant claimed that the victim drew a gun on him, the uncontroverted testimony showed that the victim's gun was still in his pocket when he died. Moreover, the doctrine of imperfect self-defense, when applicable, mitigates second-degree murder to manslaughter; it has no application where a defendant is convicted of first-degree murder. See *People v Butler*, 193 Mich App 63, 67-68; 483 NW2d 430 (1992).