

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

March 19, 1999

No. 206291

Berrien Circuit Court

LC No. 96-505531 FC

Before: Holbrook, Jr., P.J., and Murphy and Talbot, JJ.

PER CURIAM.

A jury convicted defendant of four counts of first-degree felony murder (arson), MCL 750.316(b); MSA 28.548(b). The jury also convicted defendant of burning a dwelling house, MCL 750.72; MSA 28.267; however, before sentencing, the trial court vacated this conviction. Defendant was sentenced to life in prison for each count of felony murder. On appeal, defendant alleges that he was denied effective assistance of counsel and that the trial court erred in instructing the jury. Because we find his appeal to be without merit, we affirm.

I

Defendant alleges that his trial counsel was ineffective for three reasons: he failed to challenge defendant's capacity to form the specific intent required for arson; he failed to object to evidence of prior bad acts; and he failed to ensure that the jury was properly instructed. To establish a claim for ineffective assistance of counsel, defendant must show that "counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment." *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). When reviewing a claim of ineffective assistance of counsel, our review is limited to the facts contained on the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). The defendant must make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), unless the details of the alleged deficiency are apparent in the existing record. *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987).

Defendant first argues that defense counsel erred in failing to challenge defendant's state of mind, because such evidence might have confounded the prosecutor's efforts to prove the specific intent required for arson. However, there was no evidence in the record that a diminished capacity defense was warranted in this case. A court-ordered psychiatric evaluation determined that defendant was competent, and the trial court correctly held that there was no evidence that defendant was intoxicated when he set the fire, only that he had been drinking.

Defendant also argues that his defense counsel erred in conceding that defendant was guilty of arson, but not guilty of felony murder, because that concession provided the underlying felony necessary for a felony-murder conviction. Defendant is mistaken. Defense counsel's strategy relied on showing that defendant only wanted to burn down an empty building, because simply killing someone in the course of committing a felony enumerated under MCL 750.316(b); MSA 28.548(b) is not an adequate basis for a felony-murder conviction. Rather, felony murder requires:

(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548. [*People v Warren*, 228 Mich App 336, 347; 578 NW2d 692 (1998), quoting *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995).]

Because intent to commit arson is not, by itself, adequate to convict defendant of felony murder, defense counsel's strategy must be considered sound. Therefore, defendant was not deprived of effective assistance of counsel.

Defendant next argues that defense counsel erred in failing to object to evidence of prior bad acts under MRE 404(B)(1) and move for a mistrial on the same basis. Specifically, he contends that unsolicited testimony from a prosecution witness that defendant beat his child so prejudiced the jury that it was below an objective standard of professional competency for defense counsel not to object. On the basis of the current record, we cannot agree. Defense counsel likely did not object because the comment was brief and unsolicited, and an objection would have called more attention to it. In addition, the trial court probably would not have granted a mistrial, because any error could have been adequately addressed by a curative instruction. *People v Stewart*, 199 Mich App 199, 200; 500 NW2d 756 (1993). Finally, we note that similar testimony was introduced through other witnesses and as part of defendant's taped confession. Therefore, defendant has shown no error or prejudice.

Defendant next argues that defense counsel was ineffective because he failed to request a jury instruction on the issues of defendant's out-of-court statements, specific intent, and similar acts evidence. He argues that, had counsel requested these instructions, the trial court would have been obligated to issue them. Defendant offers no analysis, however, suggesting that defense counsel's failure to request these instructions materially prejudiced him, choosing instead to simply state that these legal conclusions are "obvious." Defendant's claim that all of these instructions must be given if requested is incorrect. A trial court need only give those instructions that are supported by the evidence. *People v*

Mills, 450 Mich 61, 81; 537 NW2d 909 (1995), order modified by 450 Mich 1212 (1995). Defendant makes no meaningful effort to link any specific harms with defense counsel's failure to request these instructions, nor does he show that they were supported by the evidence so that the trial court would have been required to issue them had defense counsel requested them. We find, therefore, that defense counsel's decision not to request the instructions does not amount to ineffective assistance of counsel.

II

Defendant next argues that the trial court erred when it failed to instruct the jury, *sua sponte*, on defendant's flight, his out-of-court statements, and the similar acts evidence. In addition, defendant claims that the trial court also erred in denying defense counsel's request for instruction on intoxication as a defense and diminished capacity.

The trial court has a duty to instruct the jury as to the law applicable to a given case. MCL 768.29; MSA 28.1052. We review claims of instructional error *de novo*, and we consider the instructions as a whole to determine whether there is error requiring reversal. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). In *Bartlett*, we recently discussed at length the law governing review of instructional error:

The instructions must include all the elements of the charged offense and must not omit material issues, defenses, and theories if the evidence supports them. Even if somewhat imperfect, instructions do not create error if they fairly present to the jury the issues tried and sufficiently protect the defendant's rights. A conviction shall not be reversed where the error is harmless, however. In reviewing a claim that the jury was improperly instructed, we will not reverse a verdict or order a new trial unless, after reviewing the record, it appears to this Court that the error resulted in a miscarriage of justice. A miscarriage of justice, or manifest injustice, occurs when an erroneous or omitted instruction pertained to a basic and controlling issue in the case. The defendant usually bears the burden of establishing error requiring reversal stemming from the issuance of an inappropriate jury instruction. [*Id.* at 143-144 (internal citations omitted).]

However, none of the instructions defendant claims should have been issued *sua sponte* relate to issues material to his case. There was no basis for questioning the veracity of defendant's out-of-court statements, especially given that the most damaging of the statements – his confession – was taped. Although the prosecutor mentioned during his closing argument that defendant fled the scene, the overwhelming bulk of his argument focused on defendant's confession and eyewitness accounts of defendant's actions before he set the fire. Regarding the similar acts evidence, defendant merely asserts that failure to instruct on this issue constitutes error mandating reversal; he offers no argument supporting this assertion.

A trial court's instructional errors are preserved for review when defendant objects or requests that an instruction be given, and we will only review unpreserved instructional errors if we find manifest

injustice. *People v Ferguson*, 208 Mich App 508, 510; 528 NW2d 825 (1995). These alleged errors were not objected to below, and on these facts, we can find no manifest injustice.

Defendant argues further that the trial court erred in denying defense counsel's request for an instruction on intoxication as a defense to specific intent or diminished capacity. Although this instruction appears to pertain to a material issue, intent, and strikes at the heart of defendant's defense that he did not intend to kill anyone, only damage the building, the trial court has discretion in determining whether an instruction is accurate and applicable in view of all the factors present in a particular case. *People v Perry*, 218 Mich App 520, 526; 554 NW2d 362 (1996). We find that the trial court was correct; there was no evidence that defendant was intoxicated, only that he had been drinking. Therefore, the trial court did not err in denying defense counsel's request to give the instruction on intoxication and diminished capacity.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ William B. Murphy

/s/ Michael J. Talbot