STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM ERIK DOSS,

Defendant-Appellant.

UNPUBLISHED
March 23, 1999

No. 191142
Recorder's Court
LC No. 94-006129 FC

Before: Cavanagh, P.J., and Murphy and White, JJ.

PER CURIAM.

Following a jury trial[1] defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to mandatory life imprisonment for the murder conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right, and we affirm.

I

Defendant first argues that the trial court erred by refusing to give a cautionary instruction regarding the use of prior inconsistent statements for impeachment purposes only. The trial court stated on the record during a post-trial *Ginther*[2] hearing on defendant's claim of ineffective assistance of counsel that it recalled that both parties had requested a cautionary instruction at a side-bar. We therefore address the issue although defendant did not request the instruction on the record and expressed satisfaction with the jury charge read.

Defendant identifies five witnesses who were impeached with prior inconsistent police statements or sworn testimony and argues that it is likely that the jury considered these statements as substantive evidence. While we agree that the court erred in failing to give the instruction regarding prior inconsistent statements, we conclude that the error was harmless.

Most of the witnesses had given statements to the police implicating defendant, but later retreated from those statements at trial. One witness also gave testimony implicating defendant at the preliminary examination. While the earlier statements to the police were, indeed hearsay, admissible for

impeachment purposes only, and not as substantive evidence, the preliminary examination testimony and testimony from the first trial was not hearsay, and could properly be considered as substantive evidence. MRE 801(d)(1)(A).

Henry Miller was impeached with his prior statement to police and with his preliminary examination testimony. Because the preliminary examination testimony largely overlapped the police statement, defendant was not prejudiced by the court's failure to restrict the use of the police statement.

Joe Smith was impeached to a limited extent with testimony from the first trial, which was admissible as substantive evidence, and to a much greater extent with his statement to police. Although Smith denied the truth of parts of the statement to police, stating that he did not in fact see defendant go to the car a second time, he also testified that he told the police the truth. Under these circumstances, a proper instruction would have permitted the jury to consider the statement as substantive evidence if the jury believed Smith's trial testimony that he told the police the truth. We thus find no prejudice with respect to Smith.

Similarly, Darrell Bailey was impeached with his prior statement to the police. However, he then admitted the truth of his prior statement, although he wavered somewhat from this position on cross-examination. Given Bailey's trial testimony stating that he told police the truth and admitting the truth of most of his statement to police, defendant was not prejudiced by the court's failure to give the limiting instruction.

Alandis Hill was impeached with his statement to the police and with his testimony from the first trial. His prior trial testimony was admissible as substantive evidence, MRE 801(d)(1)(A), and that testimony was consistent with the police statement. We therefore find no reversible error respecting Hill's testimony.

The final witness defendant raises, Latasha McCullough, was not impeached with any prior inconsistent statements. Under these circumstances, the trial court's failure to give a cautionary instruction on impeachment by prior inconsistent statement does not warrant reversal or a new trial. MCL 769.26; MSA 28.1096.

II

Defendant's remaining claims of instructional error, that the trial court should have sua sponte instructed the jury on the dangers of eyewitness identification given the conflicting testimony, and that the court erred in instructing the jury on reasonable doubt pursuant to the standard criminal jury instructions, were not preserved through an objection at trial. *People v Pollick*, 448 Mich 376, 386-388; 531 NW2d 159 (1995). Absent an objection, relief will be granted only in cases of manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). We find no manifest injustice in the failure to give the eyewitness identification instruction where defendant was known to the witnesses at the time of the shooting. We further conclude that the trial court's charging the jury on reasonable doubt virtually verbatim to the standard criminal jury instruction, CJI2d 3.2,[3] which does not include the former instruction's "moral certainty" language, does not give rise to error warranting

reversal. *People v Hubbard (After Remand),* 217 Mich App 459, 486-487; 552 NW2d 493 (1996). For the same reasons, we conclude that trial counsel was not ineffective in not requesting a reasonable doubt instruction with "moral certainty" language or a cautionary instruction on identification testimony.

We do not address defendant's claim that the trial court erred in allowing into evidence, and in failing to give a limiting instruction regarding, other bad acts evidence because defendant has failed to identify or provide cites to the transcript of any specific instance of bad acts evidence being admitted, *People v Leonard,* 224 Mich App 569, 588; 569 NW2d 663 (1997), and because defendant did not request an instruction below, *Van Dorsten*, *supra,* and expressed satisfaction with the jury instructions given. *Pollick ,supra*.

III

Defendant next argues that there was insufficient evidence of premeditation to support a conviction for first-degree murder. Alternatively, he claims that the jury's verdict was against the great weight of the evidence. We disagree.

There was testimony that defendant had talked about robbing someone around the time when the victim, who was presumably looking to buy drugs, drove up. There was testimony that defendant approached the victim's car, obtained some money, began to walk away from the car, and then returned to the car, pulled out a gun, and shot the victim in the head. Viewed in a light most favorable to the prosecution, this testimony provided sufficient evidence of premeditation and deliberation to find defendant guilty of first-degree murder beyond a reasonable doubt. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995); *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). Further, the trial court did not abuse its discretion in denying a new trial based on the verdict being against the great weight of the evidence. *People v Lemmon,* 456 Mich 625, 635; 576 NW2d 129 (1998). Questions regarding credibility and conflicts in testimony were within the exclusive province of the jury. *Id.* at 642-647.

IV

Defendant next argues that the trial court erred in denying his motion for a new trial based on ineffective assistance of counsel. We disagree.

The testimony at the evidentiary hearing established that the claimed errors involved matters of trial strategy. Defendant has failed to overcome the presumption of sound trial strategy, and has further failed to show that he was prejudiced by counsel's alleged errors. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Pickens*, 446 Mich 298, 312, 314; 521 NW2d 797 (1994).

Defendant also argues that he was deprived of a fair trial by prosecutorial misconduct. Because defendant failed to object to the alleged acts of misconduct at trial,[4] appellate review of this issue is precluded unless a curative instruction would have been futile, or failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

We conclude from our review of the record that, although the prosecutor's conduct was at times objectionable, neither circumstance has been shown and defendant was not denied a fair trial by the challenged statements. *People v Bahoda*, 448 Mich 261, 272; 531 NW2d 659 (1995).

V

Defendant further claims that the trial court used an improper "struck jury" method during jury selection. We again disagree. Following voir dire of the jurors initially seated, the prosecution and defense passed the jurors for cause. The trial court then asked the prosecution if it had any peremptory challenges, and the prosecutor excused one juror. At that point, the trial court asked if the prosecution wanted to exercise any other challenges "at this time," and the prosecution excused two more jurors. The court then asked the defense if it had any peremptory challenges and the following exchange took place:

[*Defense counsel*]: We were doing okay.

THE COURT: Okay.

[*Defense counsel*]: We would ask that those three be put back.

THE COURT: Can't do that. The law won't permit that.

Three new jurors were then seated and questioned. The prosecution passed on challenges for cause, as did the defense. The prosecution then excused one juror by peremptory challenge and the defense excused two. Three new jurors were seated and questioned. The prosecution then passed for cause, as did the defense, and the prosecution passed on peremptory challenges, as did the defense. Defense counsel stated at that time "Satisfied." Then a juror raised that he was on probation and the court excused him. Another juror was seated and questioned, after which both counsel passed for cause and peremptory challenges. Defense counsel again stated "Satisfied."

Although there were irregularities in the jury selection process in that counsel exercised several challenges at a time, contrary to MCR 2.115(F), reversal is not required because defendant did not object to the procedure,[5] failed to use all his peremptory challenges and expressed satisfaction with the jury impaneled. See *People v Russell*, 434 Mich 922; 456 NW2d 83 (1990), reinstating the defendant's conviction for the reasons stated in this Court's dissent in *People v Russell*, 182 Mich App 314, 322-325; 451 NW2d 625 (1990) (Sawyer, J., dissenting).

VI

Next, we reject defendant's argument that the trial court erred by failing to obtain an on-the-record waiver of his right to testify as there is no such requirement in Michigan. *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991).[6]

VII

Next, defendant's mandatory life sentence for first-degree murder is not cruel or unusual. *People v Fernandez*, 427 Mich 321, 339; 398 NW2d 311 (1986). Defendant's claim that the sentence is unlawful because it is not indeterminate is without merit. Whether to make a crime punishable by an indeterminate sentence is a discretionary matter for the Legislature, Const 1963, art 4, § 45, and the Legislature has provided that the indeterminate sentencing act does not apply to non-parolable life sentences. MCL 769.9(1); MSA 28.1081(1). One convicted of first-degree murder must be sentenced to imprisonment without parole. *Fernandez, supra* at 329-330; MCL 750.316; MSA 28.548.

Lastly, for the reasons stated above, we conclude that defendant was not deprived of a fair trial because of cumulative error. *People v Cadle*, 204 Mich App 646, 658; 516 NW2d 520 (1994).

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Helene N. White

[1] The instant trial was defendant's second jury trial. The first jury trial, held in April 1995, ended in a hung jury. The second trial was held in September 1995. Initially, defendant had waived a jury trial, but on the day a bench trial was to begin, defendant's counsel withdrew, different counsel was retained, and the trial was adjourned. Defendant then decided to proceed with the April jury trial.

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[3] The trial court's instruction was taken almost entirely from CJI2d 3.2. The trial court instructed in pertinent part:

> A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence in this case. It is not merely an imaginary or flimsy doubt, but a doubt based upon reason and common sense. A reasonable doubt is just that, a doubt that is reasonable after a careful and considered examination of circumstances of this case.

[4] Defense counsel objected to the prosecutor's questions to Miller regarding whether he had resisted a subpoena, but the objection was sustained.

[5] We do not read the colloquy regarding reseating the jurors as an objection to the exercise of more than one peremptory challenge at a time. Counsel simply stated that he was happy with the three jurors excused by the prosecutor and would like to see them reseated. The court properly responded that that was not permitted.

[6] *Harris* was decided after *Rock v Arkansas*, 483 US 44, 107 S Ct 2704, 97 L Ed 2d 37 (1987), upon which defendant relies.