

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PRESTON WADE,

Defendant-Appellant.

UNPUBLISHED

June 1, 1999

No. 194634

Macomb Circuit Court

LC No. 95-002557 FC

Before: MacKenzie, P.J., and Gribbs and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(1). The trial court sentenced him to life in prison without the possibility of parole for the murder conviction and to two years in prison for the felony-firearm conviction. We affirm.

I

First, defendant argues that the prosecutor committed misconduct requiring reversal when he asked a defense witness, Samantha Knox, whether she knew that defendant had a prior armed robbery conviction. We review alleged prosecutorial misconduct to determine whether the defendant was denied a fair trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). The prosecutor argues that the question he posed to Knox was a proper attempt to rebut her prior testimony that during her relationship with defendant, he had never owned a gun and she had never even seen him with a gun. We disagree. An armed robbery conviction does not require the ownership or use of a gun, MCL 750.529; MSA 28.797, and the prosecutor gave no indication that the conviction was, in fact, based on defendant's use of a gun. Evidence of the prior conviction would therefore have been minimally probative on the issue of defendant's prior gun possession, and we conclude that the prosecutor erred in attempting to elicit it. We find, however, that the error was harmless in light of the cautionary instruction issued by the trial court and in light of the strong, untainted evidence of defendant's

guilt, including the testimony of five eyewitnesses, each of whom identified defendant as the perpetrator. See *People v Graves*, 458 Mich 476, 482-483; 581 NW2d 229 (1998).

Defendant argues that the cautionary instruction itself was prejudicial because it permitted the jury to use the exchange between Knox and the prosecutor in evaluating Knox's credibility, even though no evidence of an armed robbery conviction was introduced. However, the record reveals that Knox's testimony offered little to the defense, and impugning her credibility was therefore not overly prejudicial to defendant. Moreover, the exchange, which revealed only that Knox did not know about a prior armed robbery conviction, was minimally relevant to her credibility, and, correspondingly, was minimally prejudicial to defendant.

II

Next, defendant argues that a new trial is warranted because the trial court refused the jury's request to review the testimony of two witnesses. Because defendant did not object below to the trial court's refusal, appellate review is precluded absent manifest injustice. *People v Lyles*, 148 Mich App 583, 595; 385 NW2d 676 (1986); see also *People v Fetterley*, 229 Mich App 511, 518-520; 583 NW2d 199 (1998). We find no manifest injustice, since the court, although it denied the jury's request, instructed the jurors to use their collective memories "at this point." The court's response did not foreclose the possibility of reviewing the testimony at a later time and was therefore not erroneous. See MCR 6.414(H).

III

Next, defendant argues that the prosecutor intimidated a potential defense witness, Lacotte Jhons, into invoking his Fifth Amendment privilege against self-incrimination. As indicated above, we review alleged prosecutorial misconduct to determine whether the defendant was denied a fair trial. *Paquette, supra* at 342. In the instant case, the prosecutor's conduct, in order to warrant reversal, must have changed Jhons from "a willing witness [into] one who refused to testify." *People v Callington*, 123 Mich App 301, 306; 333 NW2d 260 (1983); see also *People v Livery Clark*, 172 Mich App 407, 415-416; 432 NW2d 726 (1988). The record reveals that Jhons announced his intention to invoke the privilege *before* the prosecutor made the allegedly intimidating remarks, meaning that the prosecutor did not provoke his refusal to testify. Moreover, Jhons' decision was based on the advice of his counsel, a fact that weighs against a finding of improper prosecutorial intimidation. *People v Dyer*, 425 Mich 572, 578 n 5; 390 NW2d 645 (1986). We therefore reject defendant's claim that the prosecutor's conduct with respect to Jhons amounted to error requiring reversal.

We similarly reject defendant's claim that the trial court erred by failing to determine the validity and scope of Jhons' assertion of the privilege. As we indicated in *People v Lawton*, 196 Mich App 341, 346; 492 NW2d 810 (1992), testimony "having even a possible tendency to incriminate is protected against compelled disclosure." Jhons was facing second-degree murder charges in connection with the instant crime, and defendant, as indicated by his offer of proof, planned to ask him about the weapon used in the instant crime. Under these circumstances, it was clear that any statement

Jhons made would have “a possible tendency to incriminate,” and therefore the trial court did not err in failing to inquire into the validity of Jhons’ decision to remain silent. *Id.*

IV

Next, defendant argues that the trial court erred when it failed to sua sponte instruct the jury on the unreliability of accomplice testimony with regard to the testimony of Harry Mitchell. We disagree. We review jury instructions as a whole in deciding whether reversal is warranted. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995). As long as the instructions as a whole fairly presented the issues to the jury and protected the rights of the defendant, imperfections do not constitute error. *People v Brown*, 179 Mich App 131, 135; 445 NW2d 801 (1989). A court is required to give a cautionary instruction on accomplice testimony sua sponte only “when potential problems with an accomplice’s credibility have not been plainly presented to the jury.” *People v Reed*, 453 Mich 685, 692-693; 556 NW2d 858 (1996). Here, Mitchell’s potential credibility problems were plainly presented to the jury. Moreover, a sua sponte accomplice instruction is generally warranted only when “the trial is essentially a credibility contest between the defendant and the accomplice.” *People v Jensen*, 162 Mich App 171, 188-189; 412 NW2d 681 (1987). Here, there was no such direct credibility contest, since four people other than Mitchell testified that defendant was the perpetrator. Thus, we conclude that the trial court did not err in failing to sua sponte give an accomplice instruction.

Defendant also claims that his trial counsel was ineffective for failing to request a cautionary instruction on accomplice testimony. Because defendant did not raise the issue of ineffective assistance of counsel in the trial court, our review is limited to mistakes that are apparent on the record. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). To establish ineffective assistance of counsel, a defendant must overcome a strong presumption that counsel’s assistance constituted sound trial strategy and show that there is a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Here, although there was no actual accomplice instruction, the possible problems with Mitchell’s credibility were plainly presented to the jury on cross-examination. Thus, counsel’s failure to request an accomplice instruction was not outcome determinative and did not amount to ineffective assistance of counsel.

V

Next, defendant contends that the evidence was insufficient to prove intent to kill, a necessary element for first-degree murder. “In determining whether sufficient evidence was presented to sustain a conviction, [we] . . . view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). The evidence showed that defendant shot the victim three times. Witnesses testified that defendant aimed a shot at the victim’s stomach or chest, both of which are areas of the body containing vital organs. Accordingly, we conclude that sufficient evidence was presented to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant intended to kill the victim. See *People v Kvam*, 160 Mich App 189, 193-194; 408 NW2d 71 (1987).

VI

Finally, defendant objects to the trial court's statement that "[y]ou may infer that the defendant intended to kill if he used a dangerous weapon in a way that was likely to cause death." Defendant argues that this instruction improperly allowed the jury to convict defendant of first-degree, premeditated murder, which requires an intent to kill, if he "knowingly created a very high risk of death with knowledge of the likely results" but did not actually intend to kill. Because defendant did not object to the challenged jury instruction at trial, appellate review is precluded absent manifest injustice. *People v Green*, 196 Mich App 593, 596; 493 NW2d 478 (1992). CJI2d 16.21, which focuses on inferring intent from the use of a dangerous weapon, states, "[y]ou may infer that the defendant intended to kill if [he] used a dangerous weapon in a way that was likely to cause death." Because the trial court's instruction was identical to the standard jury instruction, we find no manifest injustice. Moreover, given the accuracy of the challenged instruction, defense counsel was not, as defendant argues, ineffective for failing to object to it.

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Roman S. Gibbs

/s/ Kurtis T. Wilder