STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL PETERS,

Defendant-Appellant.

UNPUBLISHED
September 24, 1999

No. 205654
Muskegon Circuit Court
LC No. 96-140101 FC

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of first-degree felony murder, MCL 750.316; MSA 28.548, for which he was sentenced to life imprisonment without parole. We affirm.

The present case arose from the brutal slaying of Brian Wierda, who died as the result of injuries which included numerous fractures and lacerations.

Defendant first argues that prejudicial error resulted from the introduction into evidence at trial of certain inculpatory statements made in his presence by Ronald Peters, his brother and alleged accomplice. He claims that the statements were inadmissible hearsay. However, because defendant did not object to the admission of this evidence, appellate review of this issue is waived absent manifest injustice. *People v Turner*, 213 Mich App 558, 583; 540 NW2d 728 (1995). We conclude that manifest injustice will not result from our failure to review this question and, accordingly, decline to do so.

Defendant's further contention, that the trial court erred by sustaining plaintiff's hearsay objection to defense counsel's question of Michigan State Police Trooper Brian Cribbs during cross-examination, is meritorious because the question could have been answered with a non-hearsay response. Nevertheless, exclusion of the testimony in question did not affect defendant's substantial rights and we conclude that any error was harmless. MRE 103(a).

Defendant next maintains that error necessitating reversal occurred when the prosecutor introduced evidence that, shortly after the alleged murder, defendant made sexual advances to a

prosecution witness. We disagree. Admission of "other acts" evidence is within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Here, defendant did not invoke the trial court's discretion by timely objection and, therefore, there could be no abuse of that discretion. *City of Troy v McMaster*, 154 Mich App 564, 570; 398 NW2d 469 (1986). Furthermore, in light of the overwhelming evidence of defendant's guilt, no manifest injustice resulted and, therefore, reversal is not required. *Id.*

Defendant further argues that the prosecutor erred by questioning a witness regarding whether he and his brother Robert were employed, had any income, or possessed any money, and by referring to this evidence during closing argument to support his assertion that they had a motive for robbery. "Evidence of poverty and unemployment to show motive is generally not admissible because its probative value is outweighed by unfair prejudice and discrimination toward a large segment of the population, and the risk is that the jurors will view defendant as a 'bad man.'" *People v Stanton*, 97 Mich App 453, 460; 296 NW2d 70 (1980). However, where, as here, defense counsel failed to object promptly to the prosecutor's questioning, reversal is unwarranted absent a showing of manifest injustice. *Id.* No manifest injustice appears in this case because defendant admitted in a statement to the police that Robert Peters told him that they should rob the victim so Robert could obtain money to leave town, and defense counsel stated during closing argument that Robert had no money, but wanted to get some, and that defendant would not hesitate to do whatever Robert asked.

Defendant's contention that the trial court erred by admitting into evidence allegedly gruesome photographs of the victim's body has been waived because defendant has failed to provide this Court's with the photographs in question, despite requests to do so. MCR 7.210(C).

Defendant next maintains that he was denied the effective assistance of counsel at trial. In reviewing a claim of this type, we must determine whether counsel's performance was objectively reasonable and whether defendant was prejudiced by any deficient performance. *People v Mitchell*, 454 Mich 145, 155-156, 164-165; 560 NW2d 600 (1997); *People v Pickens*, 446 Mich 298, 318; 521 NW2d 797 (1994). Because defendant did not move for a hearing pursuant to *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973), our review is limited to the facts contained in the record, *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

Defendant first posits as error his counsel's failure to object to testimony by a witness that defendant made sexual advances towards her. Although this evidence is incompetent, defense counsel's failure to object to it was not so egregious as to constitute ineffective assistance. Defendant's criticism of his attorney's failure to object to the admission of his statements to the police is not well founded. No hearing pursuant to *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965) was held. The record is devoid of any indication that the statements were involuntary, and a detective testified that he read defendant his *Miranda*[1] rights before each statement was taken. Thus, no error is apparent from the record. Next, defense counsel did not err by failing to object to the admission of inculpatory statements made in defendant's presence by Robert Peters because the statements were admissible as adoptive admissions. MRE 801(d)(2)(B); *People v Godboldo*, 158 Mich App 603, 607; 405 NW2d 114 (1986). Finally, counsel's failure to object to the prosecutor's argument

regarding defendant's unemployment and penury was not ineffective assistance pursuant to the criteria enunciated in *Mitchell* and *Pickens, supra*.

As his next claim of error, defendant argues that his January 8, 1997, statement to the police was improper because it was made in the absence of his attorney. Defendant concedes on appeal that it was he who initiated contact with the authorities before making the statement. The record reveals that defendant was advised of his *Miranda* rights before the interview and waived them, that he was no stranger to the criminal justice system and understood the gravity of the situation, and that he had an opportunity to confer with his counsel. He therefore waived his Fifth and Sixth Amendment rights regarding the interview. *People v McElhaney*, 215 Mich App 269, 274-275, 277-278; 545 NW2d 18 (1996); *People v Kvam*, 160 Mich App 189, 195; 408 NW2d 71 (1987).

As his final allegation of error, defendant contends that his conviction is not supported by the evidence because any attempt to steal the victim's car was not so contemporaneous with the killing as to be within the ambit of felony murder. We disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748, amended 441 Mich 1201 (1992). Trial testimony established that defendant was attempting to steal the victim's car when the victim interrupted him, they began to fight, and the struggle ended when defendant and Robert Peters killed the victim. Furthermore, defendant told a detective that he and Robert killed the victim in an attempt to rob him. A rational trier of fact could therefore find that defendant murdered the victim in the perpetration of, or attempt to perpetrate, larceny or robbery. MCL 750.316(1)(b); MSA 28.548(1)(b).

Affirmed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ Michael R. Smolenski

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).