

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARVIN LEE PRINCE,

Defendant-Appellant.

UNPUBLISHED

August 15, 2000

No. 210927

Saginaw Circuit Court

LC No. 97-014490-FC

Before: Wilder, P.J., and McDonald and Doctoroff, JJ.

PER CURIAM.

Following a jury trial on a charge of open murder, defendant was convicted of first-degree 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(2). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12; MSA 28.1084, to life without the possibility of parole for the first-degree murder conviction and to a consecutive two year prison term for the felony-firearm conviction. Defendant appeals by right. We affirm.

Defendant first argues that he was deprived of his due process rights when the prosecutor included in his voir dire remarks that defendant characterizes as being the equivalent of an opening statement. We disagree. Although defendant challenged these remarks in his motion for a new trial, he did not object to the remarks or request a curative instruction at trial. Appellate review of a claim of prosecutorial misconduct is generally precluded absent an objection by counsel because the trial court is otherwise deprived of an opportunity to cure the error. *People v Buckey*, 424 Mich 1, 17-18; 378 NW2d 432 (1985); *People v Gonzalez*, 178 Mich App 526, 534-535; 444 NW2d 228 (1989). Moreover, defendant can avoid forfeiture of this unpreserved issue only by showing clear error that affected his substantial rights, i.e., that affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994). The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

The purpose of voir dire is to allow counsel an opportunity to elicit sufficient information to develop a rational basis for excluding jurors for cause or by peremptory challenge. *People v Smith*

(*After Remand*), 122 Mich App 202, 206-207; 332 NW2d 401 (1981). A trial court may not restrict voir dire in a manner that prevents the development of a factual basis for the exercise of peremptory challenges. *People v Taylor*, 195 Mich App 57, 59; 489 NW2d 99 (1992); *People v Mumford*, 183 Mich App 149, 155; 455 NW2d 51 (1990). In the present case, the prosecutor's questions could have helped in assessing whether the jurors could understand the difference between first- and second-degree murder and whether they could infer intent based on the use of a particular type of weapon. The prosecutor's questions regarding the child witnesses also could have helped to determine whether the jurors were capable of giving the children's testimony appropriate weight. Compare *People v Dunham*, 220 Mich App 268, 270-271; 559 NW2d 360 (1996). Defendant has not demonstrated that the prosecutor's questions during voir dire constituted plain error that affected his substantial rights. *Carines, supra; Grant, supra*.

Defendant next contends that he was denied his due process rights when the trial court allowed group selection of jurors. However, defendant failed to object at trial to the method of jury selection. Where a party fails to object at trial to the method of jury selection, he has waived the issue on appeal. *People v Miller*, 411 Mich 321, 326; 307 NW2d 335 (1981); *People v Schmitz*, 231 Mich App 521, 526; 586 NW2d 766 (1998). Accordingly, we will not address this issue.

Defendant also argues that he was deprived of due process when the trial court denied his motion for a new trial as untimely. However, on remand from this Court, defendant renewed his motion for a new trial, including the two issues concerning voir dire, and his claims were heard by the trial court. Since defendant has received the remedy he sought, his claim that the trial court improperly refused to hear his motion for new trial is now moot. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994). This Court will not review moot issues. *Rutherford, supra; People v Greenberg*, 176 Mich App 296, 302; 439 NW2d 336 (1989).

Finally, defendant argues that he was denied due process when the trial court denied his motion for a new trial brought on the basis of newly discovered evidence. However, defense counsel has affirmatively stated to this Court that defendant no longer wishes to pursue this issue. The issue is therefore waived.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Gary R. McDonald

/s/ Martin M. Doctoroff