

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN THOMAS MCARTHUR,

Defendant-Appellant.

UNPUBLISHED

January 12, 2001

No. 211354

Wayne Circuit Court

LC No. 96-001151

Before: Neff, P.J., and Talbot and J.B. Sullivan, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316; MSA 28.548, and kidnapping, MCL 750.349; MSA 28.581. He was sentenced to concurrent terms of fifteen to twenty-five years' and life imprisonment. We affirm.

First, defendant argues that his custodial statements should have been suppressed because a writ of habeas corpus was used to move him from one jail to another for questioning. Defendant was moved from the Macomb County Jail, where he was in custody, to the Wayne County Jail. Defendant's claim is without merit. We note at the onset that defense counsel conceded on the record that defendant's presence for the interview in Wayne County was lawfully obtained. This Court disfavors consideration of waived and unpreserved claims of error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *People v Carines*, 460 Mich 750, 761; 597 NW2d 130 (1999). In any case, defendant was not illegally detained and his rights were not violated. At the time defendant was interviewed, he was serving a sentence in the Macomb County Jail and there was probable cause to believe that he had committed the crime in the instant case. Any error in the writ procedure was harmless beyond a reasonable doubt. *Id.* at 763.

Defendant also argues that reversal is required because the prosecutor failed to use due diligence to secure the presence of an endorsed witness. There is no merit to this claim. The trial court instructed the jury that it could infer that the witness' testimony would have been unfavorable to the prosecution. Defendant failed to object to the instruction, see *Carter, supra* at 215-216, and relied upon it during closing argument. We find no manifest injustice. *People v Torres*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Defendant was not denied a fair trial

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

and the trial court properly denied his motion for a mistrial. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999).

Next, defendant argues that the prosecutor improperly instructed the police to deny defense counsel's access to a witness, and that the trial court erred in refusing defense counsel's request to interview the witness. Defendant also contends that counsel was ineffective for failing to seek the interview in a timely fashion. There is no merit to this issue. This is not a case like *In re Bay Prosecutor*, 109 Mich App 476, 484; 311 NW2d 399 (1981), where it was clear that the prosecutor was attempting to obstruct counsel. There is no indication in the record that the prosecutor instructed the police to deny defense counsel access. Nor did the trial court err in refusing defense counsel's request to interview the witness. The trial court has wide discretion in matters of trial conduct. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). In addition, defendant has not shown any prejudice resulting from counsel's failure to interview the witness and any error would have been harmless. *Carines*, *supra* at 763.

Defendant argues that he was deprived of a fair trial because of prosecutorial misconduct. This issue is also without merit. Many of the challenged remarks were not objected to below so the trial court had no opportunity to cure the alleged errors. This Court's review of those remarks is precluded unless a curative instruction would not have eliminated the prejudice or where failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We find no error that could not have been cured and no miscarriage of justice here.

Finally, defendant contends that the evidence was insufficient to support the jury verdict. We disagree. This Court views the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). In this case, defendant told the police that he and the victim were fighting, that he took the victim's gun and that the gun went off while his finger was on the trigger. Defendant admitted that he put the victim into the trunk of a car, took some money from the victim's pocket and later sold the gun. The victim died of a close range gunshot to the back of his head. Viewing the evidence in a light most favorable to the prosecution, a reasonable jury could conclude that defendant intended to kill or do great bodily harm and that defendant did, in fact, kill the victim in this case. Defendant does not argue the merits of this issue regarding his kidnapping conviction and has therefore abandoned that portion of his claim. *People v Canter*, 197 Mich App 550, 565; 496 NW2d 336 (1992).

Affirmed.

/s/ Janet T. Neff
/s/ Michael J. Talbot
/s/ Joseph B. Sullivan