STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 23, 2001
v	No. 214694 Wayne Circuit Court
ANTHONY MARTINEZ, Defendant-Appellant.	Criminal Division LC No. 97-010243

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

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316; MSA 28.548, assault with intent to commit murder, MCL 750.83; MSA 28.278, two counts of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent terms of life imprisonment without the possibility of parole for the felony murder conviction, thirty to fifty years for the assault conviction, and twenty to forty years each for the armed robbery convictions, all to be served consecutively to a two-year term for the felony-firearm conviction. He appeals as of right. We affirm in part and vacate defendant's second conviction for armed robbery.

Defendant first argues that he was denied a fair trial because of improper and prejudicial comments by the trial court in front of the jury. Because defendant did not object to the alleged improper comments at trial, appellate relief is precluded absent a showing of plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Sharbnow*, 174 Mich App 94, 99; 435 NW2d 772 (1989); *People v Collier*, 168 Mich App 687, 697, 425 NW2d 118 (1988). Viewed in context, it is apparent that the challenged comments do not constitute plain error. Accordingly, reversal is not warranted.

Defendant also argues that the trial court erred by failing to sua sponte instruct the jury on the defense of intoxication. We disagree. Defendant presented no evidence that any alleged intoxication rose to the level necessary to render him incapable of forming the requisite intent to rob and murder the victims. See *People v Savoie*, 419 Mich 118, 134; 349 NW2d 139 (1984). Indeed, defendant's primary defense at trial was alibi. Therefore, the trial court did not err in failing to instruct the jury sua sponte on the defense of intoxication. *People v Heflin*, 434 Mich 482, 504; 456 NW2d 10 (1990); *People v Stapf*, 155 Mich App 491, 497; 400 NW2d 656 (1986); *People v Freeman*, 149 Mich App 119, 126; 385 NW2d 617 (1985).

Defendant's assertion that trial counsel was ineffective for failing to request an instruction of intoxication is also without merit. To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). From the record, it is clear that counsel's decision to principally pursue an alibi defense and to argue lack of intent as a secondary defense, rather than pursue a defense of intoxication, was a matter of trial strategy. The fact that this strategy did not work does not render its use ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant also claims that he was denied a fair trial by the prosecutor's remarks during closing arguments, which defendant contends improperly denigrated defense counsel's veracity. Because defendant did not object to the challenged remarks at trial, this issue is not preserved. *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995). Viewed in context, it is apparent that the challenged remarks were responsive to defense counsel's remarks during closing argument and were not improper.

Finally, although not specifically raised by defendant on appeal, we note that defendant's conviction and sentence for both first-degree felony murder and the underlying felony of armed robbery violates the state constitutional prohibition against double jeopardy. *People v Wilder*, 411 Mich 328, 347; 308 NW2d 112 (1981). Accordingly, we vacate defendant's second conviction and sentence for armed robbery. *People v Lumsden*, 168 Mich App 286, 300-301; 423 NW2d 645 (1988).

Affirmed in part, vacated in part and remanded to the trial court for preparation of an amended judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald