

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICHOLAS E. SCOTT,

Defendant-Appellant.

UNPUBLISHED

May 29, 2001

No. 216500

Wayne Circuit Court

Criminal Division

LC No. 98-007096

Before: K. F. Kelly, P.J., and O'Connell and Cooper, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree, premeditated murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to life imprisonment for the murder conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right, and we affirm.

I. Claims of Instructional Error

Defendant argues that three of the jury instructions were erroneous and require reversal. However, defendant failed to object to the challenged instructions at trial; accordingly, this issue is not preserved for appellate review. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Thus, we review this forfeited issue for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant bears the burden of demonstrating that an error occurred, that it was clear or obvious, and that it affected the outcome of the proceedings. *Id.* Further, we will exercise our discretion to reverse only where the error complained of resulted in the conviction of an actually innocent defendant or where the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* We discern no error in the instructions given, let alone plain error.

In reviewing defendant's claims of instructional error, we bear in mind that a defendant has the right to a properly instructed jury. *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). However, jury instructions must be viewed as a whole, and they must not be extracted piecemeal to establish error. *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000). Additionally, even imperfect instructions do not create error if they

fairly present the issues to the jury and sufficiently protect the defendant's rights. *People v Bartlett*, 231 Mich App 139, 143-144; 585 NW2d 341 (1998).

Defendant first challenges the trial court's alibi instruction, claiming that it directed the jury to convict defendant if the jury simply believed that defendant was at the scene of the crime. Defendant presented an alibi defense, claiming that he could not have shot the victim because he was stealing cars with someone else at the time of the shooting. The trial court instructed the jury on defendant's alibi defense as follows:

Now, the defendant has presented a defense known as Alibi. And that simply means I was someplace else. That's the only meaning in law, what an alibi is. "I was someplace else."

The defendant doesn't have to prove his alibi. The People have to prove to you, beyond a reasonable doubt, that he was at the place at the time the crime was committed.

And if you have a reasonable doubt that he was at the place at the time the crime was committed, find him not guilty. *If you have no reasonable doubt that he was at the place at the time that the crime was committed, then it's your duty to find him guilty.* [emphasis added.]

According to defendant, this instruction improperly directed the jury to convict him simply on the basis of finding that he was present at the crime scene. However, viewing the totality of the instructions given, we discern no error. The instruction extracted by defendant simply addresses the jury's assessment of his alibi defense. Also included in the trial court's jury instructions were admonishments that the prosecutor bore the burden of proving defendant's identity as the perpetrator beyond a reasonable doubt and that the prosecutor bore the burden of proving all elements of the charged offenses beyond a reasonable doubt. Thus, far from being directed to convict defendant by simply concluding that he was present at the crime scene, the jury was properly instructed to convict defendant only if the prosecutor proved, beyond a reasonable doubt, that the defendant committed every element of the charged offenses. Viewed in their entirety, the trial court's instructions to the jury regarding the prosecutor's burden of proof were not erroneous. See *People v Lee*, 243 Mich App 163, 183; 622 NW2d 71 (2000) (holding that instructions were not erroneous where they "accurately reflected the burden of proof and elements of the crime"). Moreover, we reject defendant's assertion that informing the jury of the circumstances in which it *must* return a guilty verdict improperly dilutes the jury's power to dispense mercy in spite of the requirements of the law. See *People v Bailey*, 451 Mich 657, 671 n 10; 549 NW2d 325 (1996) (noting that jury nullification is simply a power, not a right).

Defendant also challenges the trial court's instruction defining reasonable doubt for the jury. "To pass scrutiny, a reasonable doubt instruction, when read in its entirety, must leave no doubt in the mind of the reviewing court that the jury understood the burden that was placed upon the prosecutor and what constituted a reasonable doubt." *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). The trial court instructed the jury as follows:

Now, we have a standard of proof, and the only standard of proof in the State of Michigan is proof beyond a reasonable doubt.

A reasonable doubt can be defined in a million different ways, but it really boils down to what the words imply, or what the words signify. A doubt that's based on reason and common sense. A doubt for which you can assign a reason for having.

The people have to prove to you the case beyond a reasonable doubt. Not beyond all doubt, not beyond a shadow of a doubt, not to a mathematical certainly [sic]. A doubt for which you can assign a reason for having.

A reasonable doubt is defined as a fair and honest and reasonable doubt. The kind of doubt that would make you hesitate before making an important decision.

A reasonable doubt is not a vain or imaginary or flimsy or fictitious doubt. It is not a doubt that's based on a feeling or a hunch, or even a possibility of innocence. It's a fair, honest and reasonable doubt. The kind of a doubt that you can assign a reason for having.

It is not a vain or imaginary, flimsy or fictitious doubt. A reasonable doubt can grow out of the evidence in the case, or the unsatisfactory nature of the case, or the lack of evidence in the case.

Contrary to defendant's arguments, this instruction was not erroneous. The instruction "conveyed to the jury that a reasonable doubt is an honest belief based upon reason." *Id.* at 488. Also, the court correctly stated that a reasonable doubt is one "that would cause the jurors to hesitate when acting in the graver and more important affairs of life." *People v Jackson*, 167 Mich App 388, 391; 421 NW2d 697 (1988).

Defendant also argues that the trial court erred when it informed the jury that the law required it to allow the jury to consider the lesser-included offense of second-degree murder. According to defendant, this conveyed to the jury that the trial court only reluctantly instructed it on second-degree murder, but that the court viewed the case purely as a first-degree murder. However, even though this instruction was imperfect, it sufficiently protected defendant's rights. *Bartlett, supra* at 143-144. The jury was informed that it could find defendant guilty of second-degree murder instead of first-degree murder, and the jury was instructed on the elements of second-degree murder. Defendant has not shown error, let alone plain error.

II. Claims of Prosecutorial Misconduct

Defendant claims that comments made by the prosecutor during closing and rebuttal arguments constitute misconduct requiring reversal. However, defendant failed to object to the comments at trial; accordingly, this issue is not preserved for appellate review. *People v Messenger*, 221 Mich App 171, 179; 561 NW2d 463 (1997). Thus, we review this forfeited issue for plain error that affected defendant's substantial rights. *Carines, supra* at 763; *People v*

Schutte, 240 Mich App 713, 720; 613 NW2d 370 (2000). No plain error will be found where the prejudicial effect of the prosecutor's comments could have been cured by a timely cautionary instruction. *Id.* at 721.

Having reviewed all of the challenged comments in context, we conclude that none of them were improper. The prosecutor permissibly argued reasonable inferences from the evidence, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), and permissibly argued from the facts that certain witnesses were credible and others were not credible. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1998). Defendant was not denied a fair trial. *Bahoda*, *supra* at 266-267. Thus, we discern no error, let alone plain error.

Defendant also argues that the prosecutor presented perjured testimony to secure defendant's convictions. However, defendant has failed to demonstrate that the prosecutor knowingly presented false testimony. See *People v Thornton*, 80 Mich App 746, 749-750; 265 NW2d 35 (1978). Simply because the witness's testimony differed from that of other witnesses does not establish that it was false. Also, given that the witness expressed fear of defendant, it is not remarkable that she gave different accounts to the police at different times. Indeed, the witness explained that she initially withheld information from the police out of fear. Again, we discern no error.

III. Ineffective Assistance of Counsel

Defendant also claims that he was denied the effective assistance of counsel where counsel failed to object to the now-challenged jury instructions and prosecutorial comments. To justify reversal, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). However, defendant has not shown that counsel's performance was deficient. None of the challenged instructions or comments were improper; thus, any objection would have been without merit. Counsel need not make meritless objections. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper