

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM HALL CURTIS,

Defendant-Appellant.

UNPUBLISHED

August 20, 2002

No. 227968

Washtenaw Circuit Court

LC No. 91-026449-FC

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of first-degree felony murder, MCL 750.316, after a jury retrial. This case arose when defendant's wife, Sue Curtis, was murdered during an armed robbery committed by defendant's lover, Todd Plamondon, at the Curtis' home in 1991.

Defendant was originally convicted in a 1992 trial of first-degree felony murder as well as two counts of armed robbery, MCL 750.529; two counts of conspiracy to commit armed robbery, MCL 750.157a; and two counts of felony firearm, MCL 750.227b. The armed robbery conviction that provided the predicate offense for felony murder was dismissed by the first trial court to avoid a double jeopardy violation, and the felony-murder conviction was reversed and remanded by a different panel of this Court due to improper prosecutorial arguments and an improper jury form. Defendant moved to quash, and argued that a second trial would violate double jeopardy principles. After this Court denied plaintiff's application for leave to appeal, defendant requested leave to appeal to the Supreme Court, which remanded the case to this Court for consideration as on leave granted. This Court affirmed, and defendant was retried and found guilty of felony murder.

Defendant argues that by allowing defendant to be retried for felony murder while he stood convicted for the predicate felonies was a violation of his constitutional protection from double jeopardy. A double jeopardy claim presents a question of law that we review de novo, *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). Because defendant did not raise this issue at trial, we review the issue for plain error affecting defendant's substantial rights. *People v Pfaffle*, 246 Mich App 282, 306; 632 NW2d 162 (2001).

Defendant's argument is based on the premise that he stood convicted of the predicate "felonies" supporting his felony-murder conviction while being retried for that offense. Had this been the case, we agree that a double jeopardy violation would have occurred. *People v Gimotty*,

216 Mich App 254, 259; 549 NW2d 39 (1996). However, defendant's felony-murder conviction was supported by only a single predicate felony – namely, the armed robbery of his wife – and that count was dismissed by the original trial court to avoid a double jeopardy violation. Because defendant's remaining convictions were not predicate felonies, no double jeopardy violation occurred.

Defendant also says that portions of his accomplice's testimony from defendant's first trial were not statements against penal interest and therefore should not have been admitted under MRE 804(b)(3). However, this argument is inapplicable because the trial court did not admit the challenged testimony pursuant to this hearsay exception. Rather, the testimony was admitted pursuant to MRE 804(b)(1), which allows the admission of testimony given at a previous trial if the declarant was unavailable and defendant had an opportunity and motive to subject the testimony to examination. We note that the prosecutor's refusal to provide the favorable letter that the accomplice was supposedly promised in exchange for the testimony did not improperly contribute to defendant's unavailability. See *People v Oaks*, 94 Mich App 745, 750; 290 NW2d 70 (1980); *People v Castaneda*, 81 Mich App 453, 459; 265 NW2d 367 (1978).

Furthermore, admitting the accomplice's transcript testimony did not violate defendant's constitutional right of confrontation. Admission of a hearsay statement by an unavailable declarant does not violate a defendant's right to confront his accusers if the statement falls within a firmly rooted hearsay exception. *People v Meredith*, 459 Mich 62, 69; 586 NW2d 538 (1998). Because MRE 804(b)(1) is a hearsay exception firmly rooted in American jurisprudence, the Confrontation Clause was satisfied when the testimony was admitted under that exception. *People v Adams*, 233 Mich App 652, 659-660; 592 NW2d 794 (1999).

Defendant's remaining arguments relating to jury instructions, other acts evidence, and alleged prosecutorial misconduct were not preserved for appellate review, because defendant failed to object at trial. MRE 103(a)(1); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). To avoid forfeiture of these unpreserved claims, defendant was required to demonstrate plain error that was outcome determinative. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

However, defendant failed to make this showing. First, the trial court properly instructed the jury with respect to the intent element of armed robbery, and any imperfections in the instructions were harmless in light of the fact that the intent element was not contested. See *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Second, defendant may not argue that evidence of his sexual relationship with his accomplice was improperly admitted, because his own defense theory of blackmail required him to introduce this very fact. See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Third, the prosecutor did not express his personal belief in defendant's guilt, but rather made the permissible argument that the evidence showed that the defendant was guilty. *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973).

Because defendant failed to make a showing of plain error, and because we are convinced no manifest injustice will result, we decline to review these unpreserved issues. *Griffin, supra* at 44.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski