

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORDELL SANJUAN POWELL,

Defendant-Appellant.

UNPUBLISHED

May 18, 2004

No. 244915

Wayne Circuit Court

LC No. 02-002144

Before: Talbot, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felony murder, MCL 750.316, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to concurrent terms of life imprisonment for his felony murder conviction, and 225 months to 50 years' imprisonment for the armed robbery conviction, and a consecutive term of two years' imprisonment for the felony-firearm conviction. We affirm.

I

Defendant was charged with armed robbery and killing the owner of a barbershop in Detroit. According to witnesses, on November 15, 2001, defendant was in the barbershop waiting to be served along with other customers. After defendant was seated in the barber chair, he excused himself to the restroom. He returned from the bathroom with a revolver and announced a hold-up. During the robbery, defendant shot and killed the owner. Two customers witnessed the robbery and were held-up as well, but were unharmed. Defendant took a cell phone belonging to one customer. When the customer later received the phone bill, it included a charge for a call to defendant's girlfriend's father.

Defendant admitted in a statement to police that he went to the barbershop to commit a hold-up and that he had a gun. He stated, however, that he only shot the gun once and did not hit anyone. According to defendant, the barber and two other men rushed him, and he shot the gun to get them off him. The decedent also had a gun. Defendant stated that he obtained no money during the hold-up and only took a cell phone, which he used to call his girlfriend's father.

II

Defendant first argues that the judge gave certain instructions to the jury after it had begun deliberations, and that those instructions skewed the deliberative process, thereby denying defendant a fair trial. Defendant contends that the judge's remarks coerced a guilty verdict by belittling and intimidating the jury, expressing irritation with the jury's questions, suggesting proof of guilt was clear cut, and implying the jury should immediately find defendant guilty. We disagree.

The judge's remarks and instructions did not coerce the jury into returning a guilty verdict. In any event, defendant expressed his acquiescence to the judge's instructions after they were given. He therefore waived any claim of error with regard to the instructions now challenged.

After the jury began deliberating, it communicated to the trial judge several evidentiary questions, such as the caliber of bullets found and the identification of fingerprints and blood evidence. The judge responded to the jury's questions, indicating rather colloquially that the attorneys did not argue those issues and that the jury should limit its consideration to the issues and evidence presented.¹ Defendant takes issue with certain comments in the judge's instruction:

But I will tell you this: This is what you're supposed to do.

You decide that on November 14th, 2001, if [the decedent] was alive. You're supposed to make that decision.

Then you decide on the 15th of November, was he dead.

And if he was dead on the 15th of November, did the defendant kill him.

* * *

Did he die naturally, did he commit suicide.

* * *

Can you handle it now?

Defendant complains that the court's instructions coerced a guilty verdict because within six minutes, the jury returned its verdict. We disagree that the court's comments induced the jury to hastily render a guilty verdict. The court repeatedly instructed that it was the jury's task to decide issues of guilt on the basis of the evidence. The jury presumably followed the court's instructions. *People v Carines*, 460 Mich 750, 772; 597 NW2d 130 (1999).

¹ For instance, the judge instructed that "you are not detectives, you are not attorneys, and this is not television" ... and that the jury's task was only to answer the questions whether the barber was killed, if defendant killed him, and if it was during a robbery.

Further, immediately after the judge's instructions and the jury was excused, the following exchange between the judge and defense counsel occurred:

Q. [Court] Mr. Burgess?

A. [Defense Counsel] Yes, your Honor?

Q. Any problem?

A. No, your Honor.

Considered in context, defense counsel's response expressed acquiescence to the instructions given by the trial court. By expressly approving the instructions, defendant has waived this issue on appeal. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Where the defense affirmatively approves or agrees to a course of action, any error is extinguished, and thus there is no error to review. *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001); *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

III

Defendant next argues that he was denied a fair trial when the prosecutor improperly argued that the jury had a "civic duty" to convict defendant, thereby injecting into the trial issues beyond the guilt or innocence of the defendant. We disagree. Because defendant did not object to this argument at trial, this Court's review is for plain error that affected defendant's substantial rights. *Carines*, *supra* at 763-764.

To avoid forfeiture of an unpreserved issue on appeal, a criminal defendant must show that (1) an error occurred, (2) the error was plain, and (3) the plain error affected substantial rights, which generally requires a showing of prejudice, i.e., that the error was outcome determinative. Once these three requirements have been satisfied, the appellate court must then exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Carines*, *supra* at 763.

During its closing statement, the prosecution said the following:

Regardless of which gun [defendant] used to kill [decedent], he used a gun to kill [him]. And when he did that, he committed a murder. And when he committed that murder while he was committing a robbery, that makes it felony murder.

Because essentially, all felony murder is second[-]degree murder plus a felony. Plus a [sic] armed robbery.

If you've got a second[-]degree murder, and an armed robbery, you have felony murder. And when you hear the instructions, you'll hear that and you'll understand that.

Ask the judge to give you an instruction, he'll let you take it back there and look at it. So you can put it together. So you can see.

And when you do that, there's only one result. There is only one result.

It's sad; it's unfortunate; but it's our duty. It's our responsibility. And at this point we owe it to [decedent]. Guilty as charged. Thank you.

Defendant contends that by using the phrases "it's our duty," "it's our responsibility," and "we owe it to [decedent]," the prosecution "impermissibly injected issues beyond the guilt or innocence of defendant and encouraged the jurors to convict based on some societal obligation apart from the evidence.

Generally, prosecutors are afforded great latitude regarding their arguments and conduct. They are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. Still, prosecutors should not resort to civic duty arguments which appeal to the fears and prejudices of jurors. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

This Court reviews a prosecutor's comments during closing argument in context to determine whether they constitute error requiring reversal. *Id.* at 283. The remarks at issue were made during the prosecutor's rebuttal closing argument, after summarizing the evidence supporting a conviction for felony murder, and after defendant, in his closing argument, had attacked the prosecution's evidence of defendant's intent, and its evidence regarding which gun was used to kill decedent. In this context, the challenged remarks on the whole may have been a reference to the jury's responsibility to convict based on the evidence, i.e., an obligation to find the defendant guilty. Nonetheless, we find the remarks as expressed improper argument because on their face, they invoke a sense of civic duty with regard to the jury's responsibility in rendering a verdict. These types of remarks improperly encourage jurors not to make reasoned judgments. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003).

Even assuming error, however, we find that reversal of defendant's conviction is unwarranted. Defendant has failed to show that the error was prejudicial, i.e., that it was outcome determinative. And we are unconvinced that any error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.

The defendant bears the burden of persuasion with respect to prejudice. *Carines, supra* at 763. Defendant has failed to carry this burden by showing that the prosecutor's argument, which was brief and isolated, affected the outcome. Moreover, any undue prejudice could have been cured by a cautionary instruction had defendant timely objected to the improper argument. *Bahoda, supra* at 285; *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Given the weight of the evidence against defendant, we find no error requiring reversal of defendant's convictions. *Carines, supra* at 763; *People v Cooper*, 236 Mich App 643, 652; 601 NW2d 409 (1999).

IV

Defendant's final argument is that the trial court denied him his due process rights when it failed to suppress the unrecorded statements defendant made while in custody. We disagree. Defendant did not object at trial to the admission of his statement to the police, and therefore, this Court's review is for a plain error that affected defendant's substantial rights. *Carines*, *supra* at 763-764.

People v Fike, 228 Mich App 178, 186; 577 NW2d 903 (1998), is binding precedent in this state with regard to the issue of the admissibility of an unrecorded custodial statement made by a defendant. Under Michigan law, the mere failure to electronically record a police interrogation where recording is feasible does not violate a defendant's right to due process. *Id.* at 183-185. The *Fike* Court stated, in a passage that could just as easily refer to the case at bar:

[W]e note that defendant does not claim that he was threatened or coerced or that he did not, in fact, waive his constitutional rights. In fact, we are hard pressed to see how a recording of defendant's confession might have benefited the defense. Accordingly, because no claim of material misconduct has been presented, we find that the trial court did not commit error requiring reversal in admitting defendant's confession without a recording of that statement. [*Id.* at 186.]

Defendant makes no attempt to distinguish *Fike*, but only cites cases from other jurisdictions to support his argument. The trial court was not required to suppress defendant's statement to the police merely because it was not electronically recorded, and therefore, its failure to do so was not error.

Affirmed.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ Pat M. Donofrio