

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH EUGENE DOWNER,

Defendant-Appellant.

UNPUBLISHED

December 27, 1996

No. 181036

LC No. 94-009007-FC

Before: Neff, P.J., and Hoekstra and G.D. Lostracco,* JJ.

PER CURIAM.

Defendant was charged with one count of open murder, MCL 750.316; MSA 28.548, one count of first-degree felony murder, MCL 750.316; MSA 28.548, and one count of kidnapping, MCL 750.349; MSA 28.581. At a jury trial, defendant was found guilty of first-degree felony murder and first-degree premeditated murder. At sentencing, the trial court, upon motion of the prosecutor, vacated the conviction for first-degree premeditated murder and sentenced defendant to imprisonment for life on the first-degree felony murder conviction. Defendant appeals as of right, and we affirm.

I

In February 1994, defendant and some friends went to a party at a house located in Covert. While at the party, defendant, Lonnie Parrigin, and Cliff Woodward engaged in a conversation wherein they decided to leave Michigan and go to Arkansas. Because nobody in this group had any money to make the trip, defendant and Parrigin plotted to go to the home of the victim and steal his gun collection so they could sell the guns to obtain cash for the trip to Arkansas. After arming themselves with knives, defendant and Parrigin left the party. When they returned approximately twenty minutes later, defendant had blood on his cheeks and hands, and there was blood on a knife. Defendant gathered the rest of the group, and together they fled the area. The next day, the victim was discovered dead in his house. Subsequently it was determined he died as the result of eighteen stab wounds. Defendant was apprehended in Arkansas and returned to Michigan to stand trial. In a taped statement played to the jury, defendant confessed to stabbing the victim.

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

II

Defendant argues that an altercation between the prosecutor and a witness constituted prosecutorial misconduct that denied him a fair trial. We disagree. This issue is unpreserved because defendant failed to object to the prosecutor's conduct. Appellate review of allegedly improper remarks is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Our review of the record below reveals that the altercation in question in no way constituted prosecutorial misconduct. Further, the entire episode occurred outside the presence of the jury.

III

Next, defendant argues that the trial court erred when it gave various jury instructions. We disagree. This Court reviews the jury instructions in their entirety to determine whether reversal is warranted. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995). This Court will not find error if the instructions, when taken as a whole, sufficiently protect the defendant's rights. *People v Ullah*, 216 Mich App 669, 677; 550 NW2d 568 (1996).

Defendant argues that the trial court erred when it refused to pose the instructions on premeditated murder and felony murder in the alternative because the trial court's action violated his right to be free from double jeopardy. In situations where the jury convicts the defendant of premeditated murder and felony murder, even though there was only one killing, a double jeopardy violation does lie. *People v Passeno*, 195 Mich App 91, 95; 489 NW2d 152 (1992). Nevertheless, the remedy in this situation is merely to vacate one of the convictions. *Id.* Here, the trial court vacated the premeditated murder conviction at sentencing, and as a result, defendant was sentenced on the felony murder conviction only. Consequently, defendant received the relief to which he was entitled and this issue is moot. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

Defendant also argues that the trial court improperly instructed the jury on the specific intent element of felony murder. Because defendant failed to object to the trial court's supplemental instruction on this point, this issue is unpreserved and review is precluded absent manifest injustice. *People v Ferguson*, 208 Mich App 508, 510; 528 NW2d 825 (1995). Our review of the instructions as a whole reveals that the instructions were correct and protected defendant's rights, so no manifest injustice will result from our failure to review this issue. *Ullah, supra* at 677.

IV

Next, defendant argues that the trial court abused its discretion when it allowed Woodward to testify to a conversation between defendant and Parrigin because Woodward did not have personal knowledge of the conversation in question; thus, defendant's confrontation rights were violated. In effect, defendant argues that the trial court admitted Woodward's testimony in violation of MRE 602.¹

We disagree. The decision whether to admit or exclude evidence is within the trial court's discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

The statements in question are conversations between defendant, Parrigin, and Woodward, who is defendant's accomplice. In Michigan, it has been a long-standing rule that "a defendant may be convicted solely by the uncorroborated testimony of an accomplice." *People v Ochko*, 88 Mich App 737, 741; 279 NW2d 294 (1979). The key to this rule is that the accomplice is testifying from his personal knowledge and is subject to cross-examination. *Id.* Contrary to defendant's assertion, the record clearly shows that Woodward had personal knowledge of the conversation between defendant and Parrigin. Because defendant failed to offer any argument beyond a mischaracterization of the record that Woodward had no personal knowledge of the conversation to support his assertion that the testimony violated his confrontation rights, his argument must fail.

Finally, defendant raises several challenges in a supplemental pro per brief. We have reviewed these claims and find that only two issues raised therein merit discussion. First, defendant contends that the trial court erred when it failed to instruct the jury that the prosecutor had the burden to prove beyond a reasonable doubt that defendant was not intoxicated. We disagree. The intoxication defense instruction given by the trial court stated that the prosecutor had the duty to prove beyond a reasonable doubt that defendant had the intent to specifically kill the victim or permanently deprive the victim of his property. See CJI2d 6.2(3). This instruction is a complete and accurate statement of the law. *People v Belanger*, 158 Mich App 522, 526, 530; 405 NW2d (1987), vacated on other grounds, 432 Mich 880; 436 NW2d 667 (1989).

Defendant further claims that the trial court erred by providing the jury with an incomplete set of written instructions. We disagree. Our review of the record shows that the purported incomplete set of written instructions was in actuality a flow chart intended to guide the jury during their deliberation of a complex case with many issues. The mere fact that the flow chart did not contain all the oral instructions does not render the trial court's instructions infirm. When taken as a whole, the jury instructions completely and accurately presented the jury with the issues to be tried and sufficiently protected defendant's rights. *Ullah, supra* at 677. Thus, we find no error requiring reversal.

Affirmed.

/s/ Janet T. Neff
/s/ Joel P. Hoekstra
/s/ Gerald D. Lostracco

¹ This rule of evidence provides that "[a] witness may not testify to a matter unless evidence is introduced to support a finding that the witness has personal knowledge of the matter."