# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEVON LEE WYRICK,

Defendant-Appellant.

UNPUBLISHED
June 9, 1998

No. 199667
Kalamazoo Circuit
LC No. 96-000169

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Before: Gage, P.J., and Reilly and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of one count of felony murder, MCL 750.316; MSA 28.548, two counts of assault with intent to murder, MCL 750.83; MSA 28.278, two counts of armed robbery, MCL 750.529; MSA 28.797, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to life in prison for the felony murder conviction, twenty to forty years' imprisonment for each of the assault with intent to murder convictions, and fifteen to thirty years' imprisonment for each of the armed robbery convictions. Defendant was also sentenced to three concurrent terms of two-years' imprisonment for each of his felony-firearm convictions, to run prior to his other sentences. We affirm.

This case arises out of an incident in which defendant and Charles Cooper, each holding guns, entered an apartment and shot three men. Both defendant and Cooper shot their guns and one man in the apartment died. Much of the evidence at trial indicated that the man who died was shot by Cooper. After the shootings, defendant and Cooper took money from the men and left the apartment. On the following day, the police arrested defendant and Cooper, who were riding in a stolen car. Defendant's theory of defense at trial was that he participated in the robbery and shootings under duress, fearing that Cooper would kill him if he refused to cooperate.

On appeal, defendant first argues, through counsel, that the trial court erred reversibly when it refused to specifically instruct the jury that the defense of duress could apply to the predicate crime of robbery, which provided the basis for the charge of felony murder.[1] We disagree. Instructions to the jury should be considered as a whole rather than extracted piecemeal to establish error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). "Even if somewhat imperfect, there is no error if

the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.*

A trial court is required to instruct the jury concerning the law applicable to the case and to fully and fairly present the case to the jury in an understandable manner. MCL 768.29; MSA 28.1052; *People v Mills*, 450 Mich 61, 80; 537 NW2d 909, modified 450 Mich 1212; 539 NW2d 504 (1995). Jury instructions must include all of the elements of the charged offense and must not exclude material issues, defenses, and theories if there is evidence to support them. *People v Harris*, 190 Mich App 652, 664; 476 NW2d 767 (1991). In this case, the trial court accurately instructed the jury on the elements of felony murder, the elements of the predicate offense of robbery, and the elements of the lesser included offense of second-degree murder. After instructing the jury on the elements of the other charged offenses (including armed robbery), the trial court instructed the jury on the defense of duress. As part of its instruction on the defense of duress, the trial court instructed the jury that "[d]uress is not a defense to murder or assault with intent to commit murder." The remainder of the trial court's duress instruction corresponded to the standard instruction on duress set out in CJI2d 7.6.

An act which would otherwise constitute a crime may be excused on the ground that it was committed under duress. See *People v Merhige*, 212 Mich 601, 610-611; 180 NW 418 (1920). Duress is a defense to robbery. See 1 ALR4th 481, § 2[a], pp 485-486; see also *People v Holyfield*, 445 Mich 893, 894; 519 NW2d 850 (1994) (Levin, J., dissenting from denial of leave to appeal). However, for policy reasons, duress does not excuse crimes of homicide, the rationale being that one cannot submit to coercion to take the life of a third person, but should risk or sacrifice his own life instead. *People v Dittis*, 157 Mich App 38, 40-41; 403 NW2d 94 (1987). In order to prove the crime of felony murder, the prosecution must prove the elements of second-degree murder plus the elements of one of the statutorily enumerated felonies. See *People v Dumas*, 454 Mich 390, 397 (Riley, J.), 414 (Boyle, J., dissenting); 563 NW2d 31 (1997). Accordingly, the underlying felony is a necessary and independent element of every felony murder. See, e.g., *People v Wilder*, 411 Mich 328, 345; 308 NW2d 112 (1981).

Defendant contends that because duress is a defense to the crime of robbery (the predicate crime of defendant's felony murder conviction), it should have been available as a partial defense to the charge of felony murder which, if accepted by the jury, would operate to mitigate that crime to second-degree murder. Defendant further contends that the jury could have been mislead on this issue by the trial court's broad instruction that duress is not a defense to murder. Although this Court has twice stated in the context of felony murder convictions that duress is not a defense to murder, see *People v Gimotty*, 216 Mich App 254, 257; 549 NW2d 39 (1996); *People v Etheridge*, 196 Mich App 43, 46, 56; 492 NW2d 490 (1992), it has not squarely addressed the issue of whether the defense of duress may operate to excuse the *predicate felony* of a felony murder charge. We need not decide that issue now. Even if defendant was entitled to a specific instruction on the application of the defense of duress to the predicate crime of the felony murder charge, and the trial court erred in refusing defendant's request for such an instruction, we would hold that the error was harmless. An erroneous jury instruction is harmless as long as the error was not prejudicial. See MCL 769.26; MSA 28.1096; *People v Woods*, 416 Mich 581, 597; 331 NW2d 707 (1982). But cf. *People v Vaughn*, 447 Mich 217, 270-272; 524 NW2d 217 (1994) (Levin, J., dissenting). Here, defendant's actions as to all three

victims constituted a single criminal incident, under which he was either acting under duress or not acting under duress. Accordingly, when the jury rejected defendant's claim of duress as to the two surviving victims (by finding defendant guilty of two counts of armed robbery), it implicitly rejected his claim of duress as to the entire incident. Therefore, if there was any instructional error with respect to the interplay between the defense of duress and the charge of felony murder, such error was harmless.[2]

Defendant also argues that the trial court erred when it instructed the jury that duress is not a defense to the crime of assault with intent to murder. We disagree. We conclude that the trial court's decision was sound in light of the policy excluding duress as a defense to homicide. As stated above, the rationale for the policy against allowing duress to excuse homicide is that one should risk or sacrifice his own life before submitting to coercion to take the life of another. *Dittis*, *supra* at 40-41. By the same rationale, we hold that one should not be permitted to save one's own life by trying, albeit unsuccessfully, to take the life of a third person.

Defendant next argues, through counsel and in a supplemental brief filed in propria persona, that the trial court's instructions to the jury on the intent requirement for aiding and abetting constituted reversible error. We disagree. Defendant did not object to the instructions at trial. Moreover, defendant indicated his approval of the trial court's response to questions regarding aiding and abetting that were submitted by the jury during their deliberations. Issues involving erroneous jury instructions are not considered on appeal unless they have been preserved by an objection at trial. Without an objection, relief will be granted only in cases of manifest injustice. *People v Marji*, 180 Mich App 525, 534; 447 NW2d 835 (1989). Generally, an unpreserved error may not be considered by this Court for the first time on appeal unless the error could have been decisive to the outcome. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). Specifically, defendant argues that the trial court's various instructions on aiding and abetting erroneously allowed the jury to find him guilty as an aider or abettor on the basis of a lesser intent requirement of either (1) the intent to help another or (2) knowledge of the principal's intent. Although the trial court's instructions on aiding and abetting were certainly complex (given the complexity of the multiple charges) and arguably erroneous, no injustice occurred in this case because the prosecution presented overwhelming evidence of defendant's intention to aid and abet in the commission of the charged crimes. Cf. *People v Kelly*, 423 Mich 261, 280; 378 NW2d 365 (1985).

Defendant next argues, again through counsel and in a supplemental brief filed in propria persona, that his convictions must be reversed because the bailiff of the trial court engaged in an ex parte communication with the jury during the jury deliberations. We disagree.

A reviewing court must reverse a conviction if it determines that there is any reasonable possibility that the defendant has been prejudiced by an ex parte communication with the jury. *People v French*, 436 Mich 138, 162-163; 461 NW2d 621 (1990). Before a reviewing court can make a determination regarding the prejudicial effect of an ex parte communication, it must first categorize the communication into one of three categories: substantive, administrative, or housekeeping. *Id.* at 163. In this case, defendant contends that the bailiff's communication with the jury was substantive in nature. We disagree. The bailiff did not instruct the jury on the law, but merely suggested that they deliberate in private in their attempt to clarify an ambiguous question that they had submitted to the judge.

Accordingly, this communication was administrative. *Id.* Administrative communications carry no presumption of prejudice. *Id.* Moreover, although defense counsel was aware of the bailiff's ex parte communication, defendant made no objection. Defendant's failure to object is evidence that the instruction was not prejudicial, and indicated that defendant agreed with the trial court's handling of the situation. *Id.*; *People v Gonzales*, 197 Mich App 385, 403; 496 NW2d 312 (1992). Because we perceive no reasonable possibility of prejudice to defendant, we decline defendant's request for relief on this issue.

Finally, defendant argues in his supplemental brief filed in propria persona that he was denied his right to effective assistance of counsel when his trial counsel failed to "object and request a different jury" after the bailiff's ex parte communication with the jury. We disagree. To properly advance a claim of ineffective assistance of counsel, a defendant must make a testimonial record at the trial court level in an evidentiary hearing or in connection with a motion for a new trial. *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973). Because defendant failed to do so in this case, our review is limited to mistakes apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

To justify reversal on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Strickland*, *supra* at 690-691; *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland*, *supra* at 694; *Stanaway*, *supra* at 687-688. In this case, defendant has failed to overcome the presumption that counsel's decision not to request a new jury (and, consequently, a second trial) constituted sound trial strategy. Moreover, defendant has failed to make the necessary showing of prejudice. Accordingly, defendant is not entitled to relief on this claim of error.

Affirmed.

/s/ Hilda R. Gage
/s/ Maureen Pulte Reilly
/s/ Kathleen Jansen

[1] Defendant states in his brief on appeal that the predicate crime for his felony murder conviction was armed robbery. However, the predicate crime listed on the information was simply "robbery," and the jury was instructed that to find defendant guilty of first-degree felony murder, it must find that he committed a "robbery." In defining "robbery," the trial court instructed the jury on the elements of unarmed robbery, MCL 750.530; MSA 28.798, pursuant to CJI2d 18.2.

[2] For the reasons stated, we would also find any error to have been harmless under the harmless error test espoused by Justice Levin, dissenting in *Vaughn*, *supra*, at 270-272.