STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY LOUIS TAYLOR,

Defendant-Appellant.

UNPUBLISHED
December 11, 1998

No. 188688
Ingham Circuit Court
LC No. 95-068767 FC

Before: Gage, P.J., and MacKenzie and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felony-murder, MCL 750.316; MSA 28.548, assault with intent to murder, MCL 750.83; MSA 28.278, and armed robbery, MCL 750.529; MSA 28.797. He was subsequently convicted of being an habitual offender, third offense, MCL 769.11; MSA 28.1083. Defendant was sentenced to life imprisonment without parole for the felony-murder conviction and sixty to ninety years each for the assault with intent to murder and armed robbery convictions, to be served concurrently. He appeals as of right. We affirm.

This case involves the stabbing of Julie DeNike and Edward Crapo in their apartment at approximately 6:00 a.m. on February 25, 1995. DeNike was killed and Crapo suffered serious injuries. Defendant had previously befriended the victims, both of whom were visually impaired, and Crapo identified the voice of the attacker as that of defendant. Crapo testified that defendant had been in the victims' apartment in January, 1995, when they discovered that their television set was missing. Crapo later bought a new television. Approximately two hours before the assault, the victims called the police to report that the new television set had been stolen and that defendant had just been at their apartment. Crapo testified that after the victims made the police report, defendant returned to the apartment, stabbed both victims and took Crapo's wallet, watch, and ring. Defendant testified that he went to the victims' apartment after speaking with DeNike on the telephone about the missing new television. He testified that he was grabbed at gunpoint by a man and woman as he entered the victims' apartment building. According to defendant, the unknown couple stabbed the victims and then made him drive them to a motel. Defendant testified that he cradled DeNike in his arms as she died.

On appeal, defendant first contends that the trial court abused its discretion in admitting the evidence regarding the first missing television set. The admission of this evidence did not violate MRE 404(b) because it was offered for a proper purpose, it was relevant, and its probative value was not substantially outweighed by the potential for unfair prejudice. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). Specifically, the purpose of the evidence was to show defendant's motive, opportunity, scheme, or plan in returning to the victims' residence at approximately 4:00 a.m. on the morning of the offense, after a second television set was discovered missing under circumstances similar to the disappearance of the first television set. The evidence was not admitted to prove character in order to show action in conformity therewith; there was no claim that defendant took the missing television. Rather, the evidence was introduced to explain the reason for the repeated contacts between defendant and the victims, who regularly allowed defendant to enter their apartment. Finally, the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice. MRE 403.

We also conclude that the trial court did not abuse its discretion in permitting plaintiff to impeach defendant with evidence of his two prior convictions for attempted breaking and entering and attempted larceny. MRE 609; *People v Allen*, 429 Mich 558, 605-606; 420 NW2d 499 (1988). Moreover, even if improper, any error in the admission of this evidence was harmless. *People v Gearns*, 457 Mich 170; 577 NW2d 422 (1998).

Defendant was not denied the effective assistance of counsel due to trial counsel's stipulation to the DNA evidence. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Defense counsel's testimony at the evidentiary hearing on this issue clearly established that the decision to stipulate to the DNA evidence was a matter of trial strategy, and defendant has not overcome the presumption that this strategy was unsound. *Id.*; *People v Murph*, 185 Mich App 476, 479; 463 NW2d 156 (1990). Furthermore, defendant was not prejudiced by the admission of the DNA evidence because he admitted being present at the crime scene and to having the victims' blood on his body.

Defendant failed to object to the police officer's testimony concerning the second missing television set and, therefore, has waived appellate review of this issue absent manifest injustice. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). Here, manifest injustice is not present.

Next, defendant has not cited any authority in support of his position that the trial court erred in denying his motion for a directed verdict of the first-degree felony-murder charge. *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994). In any event, there is no merit to defendant's argument on appeal because it is well settled that, for purposes of a felony-murder conviction, the victim of the underlying felony need not be the same person who is actually murdered. *People v Podolski*, 332 Mich 508, 515-516; 52 NW2d 201 (1952); *People v Graves*, 52 Mich App 326, 330; 217 NW2d 78 (1974).

There is also no merit to defendant's claim that he was denied his right to due process on the ground that the police were derelict in their duty to investigate the information supplied by defendant regarding the unknown couple who allegedly committed the crimes. The police do not have the burden

of locating, endorsing, or producing unknown persons who might be witnesses. MCL 767.40a(5); MSA 28.980(1)(5); *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). In any event, the police talked to persons at the motel where defendant said he drove the couple, without any success.

Defendant next claims that his convictions for assault with intent to murder and armed robbery violate the constitutional prohibition against double jeopardy. The claim is without merit. *People v Harding*, 443 Mich 693; 506 NW2d 482 (1993); *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995). Defendant is not being multiply punished for the "same offense" because the social norms underlying the offenses of assault with intent to murder, MCL 750.83; MSA 28.278, *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995), and armed robbery, MCL 750.529; MSA 28.797, *People v Rockwell*, 188 Mich App 405, 411; 470 NW2d 673 (1991), are different. The social norm underlying armed robbery is the prohibition against permanently depriving another of property by force or threat of force while armed with a weapon, whereas that of assault with intent to murder is to prevent homicides. Thus, conviction of both offenses does not violate the constitutional prohibition against double jeopardy. Cf. *People v Leach*, 114 Mich App 732, 735-736; 319 NW2d 652 (1982).

Next, defendant waived review of his Sixth Amendment challenge to the composition of the jury array by not timely raising the issue below and by expressing satisfaction with the jury on the record. *Cf. People v Hubbard (After Remand)*, 217 Mich App 459, 464-467; 552 NW2d 493 (1996).

Finally, appellate review of defendant's prosecutorial misconduct argument is foreclosed because he did not object to the allegedly improper remarks at trial and a timely objection could have cured any prejudice caused by the remarks. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). In any event, our review of the challenged remarks does not convince us that the prosecutor was improperly attempting to appeal for sympathy.

Affirmed.

/s/ Hilda R. Gage
/s/ Barbara B. MacKenzie
/s/ Helene N. White