STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 28, 2000
v	No. 210117 Berrien Circuit Court
ANTHONY ROBERT DEPALMA, Defendant-Appellant.	LC No. 97-403845-FC

Before: White, P.J., and Wilder and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b). The trial court sentenced him to life in prison without the possibility of parole. We affirm.

I

Defendant first argues that the prosecutor committed misconduct requiring reversal during closing arguments by (1) improperly conveying her personal belief that defendant was guilty, and (2) improperly suggesting that the jurors had a civic duty to convict defendant. We review alleged prosecutorial misconduct to determine whether the defendant was denied a fair trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). We review each case on its own particular facts and analyze allegedly improper remarks in context. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). A determination of impropriety must rest on an evaluation of all the facts, evidence, and arguments in a case. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Here, defense counsel did not object at trial to the prosecutor's comments, and we therefore will not review this issue on appeal "unless the prejudicial effect could not have been cured by a jury instruction or failure to consider the issue would result in manifest injustice." *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996).

Contrary to defendant's argument, the challenged comments by the prosecutor did not convey her personal belief in defendant's guilt. Instead, the comments conveyed the notion that *the evidence supported defendant's guilt*. The prosecutor stated that "the overwhelming evidence, the physical

evidence and the words from [defendant's] very own mouth" compelled a guilty verdict. This comment about the evidence was entirely proper. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Also proper was the prosecutor's statement that "[t]he truth is this [d]efendant is guilty of felony murder," since this was argued in response to defendant's closing argument that he was guilty of a lesser charge, and since this statement was a reasonable inference based on the evidence introduced at trial. *Id*. At no time did the prosecutor state, "I believe that this defendant is guilty." The comments at issue here directed the jury toward the evidence in the case and did not at all emphasize, or even mention, the authority of the prosecutor's office. Accordingly, the comments did not improperly emphasize the prosecutor's personal belief in defendant's guilt. See *People v Swartz*, 171 Mich App 364, 370-371; 429 NW2d 905 (1988).

Nor did the prosecutor's comments improperly appeal to a civic duty to convict. Indeed, the prosecutor made no suggestion that the jurors must convict defendant in order to keep the community safe. Even assuming that defendant, in referring to a "civic duty" argument, meant to argue that the prosecutor improperly focused on sympathy for the decedent, reversal would nonetheless be inappropriate, since the prosecutor, although she did mention the victim, kept her main focus on the evidence introduced at trial. See *People v Hedelsky*, 162 Mich App 382, 385-386; 412 NW2d 746 (1987).

Because the prosecutor did not improperly convey her personal belief that defendant was guilty, did not improperly suggest that the jurors had a civic duty to convict defendant, and did not improperly appeal to sympathy for the victim, this issue does not require reversal, even assuming, arguendo, that defense counsel had preserved the issue by objecting at trial to the prosecutor's comments.

Defendant additionally argues that his trial attorney rendered ineffective assistance of counsel by failing to object to the challenged comments. To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of the prevailing professional norms, and (2) that but for the attorney's error or errors, a different outcome would reasonably have resulted. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Given that the prosecutor's comments were proper, defense counsel did not act unreasonably in failing to object to them. Accordingly, reversal based on ineffective assistance of counsel is inappropriate. *Id*.

II

Next, defendant contends that the trial court committed error requiring reversal by erroneously instructing the jury regarding defendant's theory of the case. We review jury instructions as a whole. *People v Federico*, 146 Mich App 776, 790; 381 NW2d 819 (1985). As long as the instructions fairly presented the issues to the jury and protected the defendant's rights, imperfections do not constitute error. *People v Brown*, 179 Mich App 131, 135; 445 NW2d 801 (1989). In the instant case, because defense counsel did not object to the jury instructions below, a new trial is warranted only if our examination of the entire record indicates that the allegedly defective instructions caused a miscarriage of justice. *People v Hess*, 214 Mich App 33, 36; 543 NW2d 332 (1995); see also *People v Graves*, 458 Mich 476, 484; 581 NW2d 229 (1998).

Defendant first objects to the following instruction given by the trial court:

> The [d]efendant says that he is not guilty of first degree felony murder because [the decedent's] death was accidental. By this the [d]efendant means that he did not mean to kill or did not realize what he did would probably cause . . . death or cause great bodily harm.

Defendant contends that this instruction, combined with the court's instruction that the word "defendant" in the instructions referred to each defendant individually (i.e., to both defendant and his codefendant, Mark Abbatoy), severely prejudiced him because it did not reflect his theory of the case, which was that Abbatoy had "gone nuts" and killed the decedent without any aid or encouragement from defendant. Defendant's contention is without merit. As evidenced by his attorney's closing argument, defendant admitted that he, along with Abbatoy, planned to knock the decedent unconscious. On this admission alone, the jury could have found defendant guilty of felony murder, given that (1) a pathology witness testified that knocking someone out was serious and could be lethal, and (2) one of the possible mental states the trial court gave for felony murder was "knowingly creat[ing] a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of [the] actions." Accordingly, the trial court's instruction that the decedent's death was accidental and that "[d]efendant means that he did not mean to kill or did not realize what he did would probably cause . . . death or cause great bodily harm" did in fact reflect defendant's theory of the case. Indeed, defendant wanted the jury to conclude that when he planned to knock the decedent unconscious, he did not realize that he was creating a high risk of death or great bodily harm. Given the applicability of the challenged instruction to defendant's theory of the case, the instruction fairly protected defendant's rights, fairly presented the issues to the jury, and does not require reversal, even assuming, arguendo, that defendant had preserved this issue by objecting at trial to the instruction.

Defendant additionally argues that the trial court erred by failing to give an instruction on his theory that Abbatoy had "gone nuts" and killed the decedent. Defendant admits, however, that his trial attorney did not request such an instruction, and the trial court was under no duty to sue sponte give such a specific, factual instruction on defendant's theory. See MCR 2.516(B)(3), MCR 6.001(D), and *People v Mills*, 450 Mich 61, 81; 537 NW2d 909, modified on other grounds 450 Mich 1212 (1995). Moreover, the trial court informed the jury that defendant "claims that if guilty of anything he is only guilty of manslaughter," and this instruction accurately reflected the position taken by defense counsel during closing arguments. Accordingly, the jury instructions as a whole fairly presented the issues to the jury and do not require reversal, even assuming, arguendo, that defense counsel *had* requested an additional instruction below.

Given that the jury instructions, as a whole, fairly presented the issues to the jury and sufficiently protected defendant's rights, defendant cannot show that a different result would reasonably have occurred if his trial attorney had objected to the challenged instruction or had requested an additional instruction on defendant's theory of the case. Accordingly, contrary to defendant's argument, reversal based on his trial attorney's failure to take these actions is inappropriate. *Pickens*, *supra* at 303.

III

Next, defendant argues that the trial judge committed error requiring reversal by (1) allowing a witness to testify about Abbatoy's plans to escape from jail, and (2) allegedly testifying at the trial over which he was presiding by telling the jury that a judge cannot change a person's sentence once it is imposed (thus implying that the witness, a convict, could not have expected any leniency in exchange for his information regarding Abbatoy). We review a trial court's decision regarding the admission of evidence for an abuse of discretion. *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). Here, however, because defense counsel did not object at trial to the witness' testimony, we are to review its admission only for manifest injustice. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). Whether the trial court improperly testified at trial is a question of law. This Court reviews questions of law de novo. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999). Although defense counsel did not object at trial to the court's alleged "testimony," we are nonetheless to treat defendant's challenge to it on appeal as preserved. See MRE 605.

We agree that evidence of Abbatoy's plan to escape from jail should not have been presented at defendant's trial, since it had no relevance to the charge against defendant. Its admission, however, was harmless. Defendant *admitted* that Abbatoy killed the decedent and thereby acknowledged that he was friends with a killer. It is untenable for defendant to suggest that the evidence about Abbatoy's escape plans so tainted defendant – because of his association with Abbatoy – that reversal is required, since the jurors had already heard much more damning information about Abbatoy. Accordingly, this issue does not require reversal, even assuming, arguendo, that defendant had preserved this issue by objecting at trial to the testimony. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (preserved, nonconstitutional error does not require reversal unless "it is more probable than not that the error was outcome determinative"). Nor, contrary to defendant's argument, is reversal required based on defense counsel's failure to object to the testimony, because, given the testimony's harmless nature, defendant cannot show that a successful objection would have affected the outcome of the trial. *Pickens*, *supra* at 303.

Regarding the trial court's alleged 'testimony" at trial, defendant does not indicate how the court's comments prejudiced him. As this Court stated in *People v Heard*, 31 Mich App 439, 446-447; 188 NW2d 24 (1971), reversed on other grounds 388 Mich 182 (1972), a defendant may not merely assert a basis for reversal and leave it up to this Court to search for the defendant's underlying rationale. However, assuming that defendant meant to argue on appeal that the trial court's comments were prejudicial because they allegedly bolstered the witness' testimony, such an argument would be without merit. When the trial court made the comments, the prosecutor had already elicited that (1) the witness received no promises in exchange for the information about Abbatoy, (2) the witness had already been sentenced at the time of trial, and (3) the witness' sentence could not be changed. Accordingly, the trial court's comments merely repeated something that the jury had already heard. Moreover, the court implied that the witness might receive other favors, such as being transferred to a more favorable correctional facility, in exchange for his testimony. Therefore, the court actually impugned the witness' testimony to a greater degree than had already been done. Accordingly, even if the trial court's comments could be construed as "testimony" in violation of MRE 605, defendant cannot show that this "testimony" prejudiced him, and this issue therefore does not require reversal. See *Lukity*, *supra* at 495-496. Nor, contrary to defendant's argument, is reversal warranted based on

ineffective assistance of counsel, since defendant cannot show that a different result would have occurred if his trial attorney had successfully objected to the trial court's comments. *Pickens, supra* at 303.

IV

Next, defendant argues that the trial court committed error requiring reversal by instructing the jurors on the crime of larceny (the predicate crime for defendant's felony-murder conviction) without informing them that defendant must have intended to permanently deprive the owner of the property in question. As stated earlier, we review jury instructions as a whole. *Federico, supra* at 790. As long as the instructions fairly presented the issues to the jury and protected the defendant's rights, imperfections do not constitute error. *Brown, supra* at 135. In the instant case, defense counsel did not object to the jury instructions below, and a new trial is therefore warranted only if our examination of the entire record indicates that the allegedly defective instructions caused a miscarriage of justice. *Hess, supra* at 36; see also *Graves, supra* at 484.

Prior to giving the instruction about which defendant complains, the court, while instructing the jurors on the crime of first-degree felony murder, clearly stated that larceny requires the intent to permanently deprive the owner of the property in question. As a whole, therefore, the instructions did indeed inform the jurors that larceny requires an intent to permanently deprive the owner of the property. Accordingly, the instructions fairly presented the issues to the jury, fairly protected defendant's rights, and do not require reversal, even assuming, arguendo, that defendant had preserved this issue by objecting at trial to the challenged instruction.

Since the instructions as a whole adequately stated the correct elements of larceny, defendant cannot show that a different outcome would have resulted if his trial attorney had objected to the challenged instruction. Accordingly, contrary to defendant's argument, he has failed to show that his trial attorney rendered ineffective assistance of counsel by failing to object to the instruction. *Pickens, supra* at 303.

V

Next, defendant argues that the trial court violated defendant's constitutional rights to a public trial and to be present during all phases of his trial when the court, in order to avoid tainting Abbatoy's still-deliberating jury, accepted the sealed verdict of defendant's jury, dismissed the jurors, and then announced the verdict of defendant's jury after Abbatoy's jury returned with a verdict. This issue involves a constitutional question that we review de novo. See *People v Slocum (On Remand)*, 219 Mich App 695, 697; 558 NW2d 4 (1996). We disagree that the procedure employed by the trial court violated defendant's constitutional rights, since the trial court (1) verified in open court and in the presence of defendant, all counsel, and the jury that the jury foreperson had checked one box on the verdict form and that each juror agreed with the checked verdict, and (2) subsequently announced the verdict in open court. This procedure satisfied MCR 2.512 and MCR 6.420. Moreover, defendant consented to the procedure employed by the trial court. As stated in *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995) a "defendant may not assign error on appeal to an act that his own

counsel deemed proper at trial." See also *People v Nettles*, 246 NE2d 29, 32-34 (Ill App, 1969) (similar procedure deemed proper because the parties had assented to it at trial).

VI

Finally, defendant argues that trial court committed error requiring reversal when it instructed the jurors that "you must all agree, in order to return a verdict." Again, defense counsel did not object to the jury instructions below, and a new trial is therefore warranted only if our examination of the entire record indicates that the allegedly defective instructions caused a miscarriage of justice. *Hess, supra* at 36; see also *Graves, supra* at 484. Defendant contends that the instruction at issue essentially foreclosed the possibility of a hung jury. We disagree. Whether such a foreclosure occurred depends on the coercive nature of the instruction. *People v Pollick*, 448 Mich 376, 384; 531 NW2d 159 (1995). In other words, the instruction must not have caused a juror to abandon his or her conscientious opinion solely for the sake of reaching a unanimous agreement. *Id*. Here, after giving the challenged instruction, the trial court stated:

> However, although you should try to reach agreement, none of you should give up your honest opinion about the case just because other jurors disagree with you or just for the sake of reaching a verdict. In the end, your vote must be your own, and you must vote honestly and in good conscience.

This statement clearly indicated that the jurors were free to dissent from the majority if they chose. Accordingly, keeping in mind that jury instructions are to be reviewed as a whole, *Federico, supra* at 790, the trial court did not unduly coerce the jurors into reaching a unanimous verdict, especially since the challenged instruction was given before deliberations began and not in response to an already deadlocked jury. See *Pollick, supra* at 385 ("there is a greater coercive potential when [a unanimity] instruction is given to a jury that already believes itself deadlocked" than when it is given prior to the start of deliberations). Indeed, the instructions here were far less coercive than the instruction given in *Pollick* ("Your second duty is to agree upon a unanimous verdict"), which, according to the Supreme Court, did not require reversal. *Id*. at 380, 386.

Because the court's instructions as a whole did not preclude the possibility of a hung jury, the challenged instruction does not require reversal, even assuming, arguendo, that defendant had preserved this issue by objecting at trial to the challenged instruction. Nor, contrary to defendant's argument, is reversal required based on defense counsel's failure to object, since (1) defense counsel did not act unreasonably in failing to object to the challenged instruction, given its propriety, and (2) defendant cannot show that a different result would reasonably have resulted even if defense counsel *had* successfully objected to the instruction. *Pickens, supra* at 303.

Affirmed.

/s/ Helene N. White
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter