STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 27, 2011
v	No. 298415 Oakland Circuit Court
DEWAYNE KAWON WILLIAMS, Defendant-Appellant.	LC No. 2009-226443-FC

Before: SERVITTO, .P.J., and MARKEY and K.F. KELLY

PER CURIAM.

Defendant appeals as of right following his jury trial convictions for felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, and two counts of felony-firearm, MCL 750. 227b. Defendant was sentenced to life imprisonment for the felony murder conviction, 25 to 50 years' imprisonment for the armed robbery conviction, and two years' imprisonment for the felony-firearm convictions.

I.

Defendant admitted that he approached the victim as the victim was getting out of his truck, held a gun up to the victim and demanded the victim's belongings. After the victim uttered, "you're going to have to shoot me," the gun discharged, and the victim was shot in the head and killed. Defendant's theory in the trial court was that the gun went off accidentally.

II.

Defendant first argues that Detective Buchmann was impermissibly permitted to comment on other witnesses' credibility. We disagree. Although defendant objected to Buchmann's testimony during re-direct, he failed to do so when Buchmann was similarly questioned on direct examination; therefore, the issue is not preserved and defendant must demonstrate plain error affecting his substantial rights, meaning that he was actually innocent or that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of his innocence. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Detective Buchmann interviewed defendant within hours of the shooting. Defendant initially told Buchmann that another person – Javon Harriston – shot the victim. The prosecutor asked:

> *Q.* And was that consistent with what you understood after talking to the officers?
>
> *A.* No.
>
> *Q.* Why not?
>
> *A.* Because we hadn't had any accounts of two people leaving the scene.
>
> *Q.* Aside from the fact that there were two people – I'm sorry, that there were – was only one, your account was that there was only one person at the scene, was Mr. Williams' version consistent with what Mr. Rathnow had said?
>
> *A.* Except for the one person?
>
> *Q.* Yes, except for the one person.
>
> *A.* Except – yes.
>
> *Q.* Okay. So --
>
> *A.* Very similar.

Then, during re-direct, the prosecutor asked:

> *Q.* The first version that he gave, was it consistent with what the witnesses told you except for the fact that he said Javon Harriston did it rather than himself?
>
> MR. TOBY: Objection as to what conclusion – (inaudible).
>
> THE COURT: Well –
>
> MR. PERNICK: No –
>
> THE COURT: -- I couldn't hear what your objection was.
>
> MR. TOBY: I'm objecting as to what this concludes. He's asking if it conformed.
>
> MR. PERNICK: No, I'm asking if it – his first statement was consistent with what the witnesses said, not whether it conformed with what the witnesses said, not whether it conformed but whether it's consistent with what other witnesses said that he learned as a result of the investigation.

MR. TOBY: That would be something for the jury to – (inaudible).

THE COURT: Overruled.

MR. PERNICK: Thank you.

Q. Can you answer the question please, Detective?

A. I'm sorry, can you ask it one more time?

Q. Sure. The first version that the defendant gave about the Javon Harriston doing it, was that consistent with what the witnesses had told you or had said with the exception of the fact that the defendant said it wasn't he that did it but it was Javon Harriston?

A. It was consistent, yes.

Q. Anything in that first version at all about it being an accident or unintentional or not meaning to do it?

A. No.

A witness may not comment on or offer an opinion regarding the credibility of another witness, as witness credibility is a matter within the exclusive province of the trier of fact. *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007); *People v Buckley*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, it is clear from the record that Detective Buchmann was not asked to comment on the credibility of the prosecution's witnesses. Before the interview, Buchmann had been apprised of the events surrounding the shooting, including the eyewitness accounts and the fact that defendant had the victim's identification on him when he was arrested. Defendant first claimed Javon Harriston was responsible. Buchmann did not believe that Harriston was responsible for the shooting, but he wanted defendant's statement in writing because Buchmann wanted to "lock him into" the fact that he was even at the scene. After defendant wrote his first statement, Buchmann confronted defendant, telling defendant that his statement "wasn't adding up to what the witnesses had said." At that point, defendant provided the officers with a second version of events in which he claimed that the shooting was accidental. Taken in context, it is clear that the testimony was not offered as an opinion regarding the credibility of the prosecution's primary eyewitness; rather, it was offered to explain how the officer proceeded to conduct his investigation. The officer's statements were not intended to bolster other witnesses' credibility, but were merely introduced to provide context for Buchmann's actions.

III.

Defendant's next claim that the principles of double jeopardy precludes his convictions for both felony murder and the predicate offense of armed robbery is without merit. The Michigan Supreme Court has previously held "that convicting and sentencing a defendant for both felony murder and the predicate felony does not necessarily violate the 'multiple punishments' strand of the Double Jeopardy Clause." *People v Ream*, 481 Mich 223, 225; 750

NW2d 536 (2008). First-degree felony murder requires: (1) the killing of a human being; (2) with the intent to kill, do great bodily harm, or create a very high risk of death or great bodily harm, knowing that death was the probable result; (3) while committing an enumerated felony in MCL 750.316(1)(b); *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007). In contrast, an armed robbery under MCL 750.529 occurs if: (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear; and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. *People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007). Because first-degree felony murder and the predicate offense of armed robbery each contain an element that the other does not, they are separate offenses, and defendant was properly convicted of, and punished for, each crime without violating his double jeopardy protections against multiple punishments.

IV.

Defendant next argues that the jury was not properly instructed. He argues that the trial court's instruction regarding mens rea as applied to involuntary manslaughter was so confusing as to be useless and that the trial court should have instructed the jury on voluntary manslaughter. We disagree. Defendant has waived the issue by specifically indicating his satisfaction with the instructions. *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003). Therefore, our review is once again limited to whether there was plain error affecting defendant's substantial rights. MCL 768.29; *Carines*, 460 Mich at 764-765; *People v Martin*, 271 Mich App 280, 353; 721 NW2d 815 (2006).

Defendant complains that the following instruction was confusing for the jury:

> With regard to first degree felony murder, the defense of accident, involuntary act, applies solely with regard to state of mind number one and state of mind number two. The defense of accident does not apply to state of mind number three.

Taken alone, the instruction is confusing. However, the trial court previously instructed the jury on mens rea as follows:

> He intended to kill, which I'm going to refer to as state of mind number one, or, he intended to do great bodily harm to Brian Bailo, which I'm going to refer to as state of mind number two, or, he knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions, which I'm going to refer to as state of mind three.

It is a judge's responsibility to instruct the jury as to the applicable law and fully and fairly present the case to the jury in an understandable manner. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). The instructions must include all of the elements of a crime and any material issues, defenses, and theories for which there is evidence in support.

McGhee, 268 Mich App at 606. Jury instructions must be evaluated as a whole and, even if somewhat imperfect, instructions will not be grounds for reversal as long as they fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994). Here, taken as a whole, the trial court's instructions fairly presented the issue of defendant's state of mind to the jury.

There is absolutely no support for defendant's claim that the trial court was obligated to instruct the jury as to voluntary manslaughter. A voluntary manslaughter instruction need only be given as a lesser included offense to murder if supported by a rational view of the evidence. *People v Gillis*, 474 Mich 105, 137; 712 NW2d 419 (2006). To prove voluntary manslaughter, the prosecution must prove that: (1) the defendant killed in the heat of passion; (2) the passion was caused by adequate provocation; and (3) there was no lapse of time during which a reasonable person could have controlled his passions. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998), aff'd 461 Mich 992 (2000). The level of provocation must cause the defendant to act out of passion rather than reason. *Sullivan*, 231 Mich App at 518. The provocation must also be that which would cause a *reasonable person* to lose control. *Id.* While the determination of whether provocation was reasonable is generally a question of fact for the fact-finder, a trial court may decline to instruct the jury on voluntary manslaughter where no reasonable jury could conclude that the provocation was adequate. *People v Pouncey*, 437 Mich 382, 391-392; 471 NW2d 346 (1991); *Sullivan*, 231 Mich App at 518.

A voluntary manslaughter instruction was unnecessary because the evidence did not support a finding that defendant was adequately provoked to kill in the heat of passion. Defendant cannot argue that the victim's statement, "You're going to have to shoot me" was adequate provocation. There was no prior relationship or altercation between the victim and defendant. The victim was never an instigator or aggressor. He was simply the victim throughout the ordeal. Defendant pointed a gun at the victim and demanded his money. The victim – unarmed and ambushed – merely uttered, "[Y]ou're going to have to shoot me." No reasonable jury could ever find that defendant was properly provoked. Defendant's acts in methodically going through the victim's pockets after the shooting also refute that the shooting was done in the heat of passion; rather, it supports a finding that the shooting was intentional.

Further, had the trial court sua sponte instructed the jury on voluntary manslaughter, defendant's theory of the case would have been severely jeopardized. During opening statements, defense counsel argued that the only issue in the case was defendant's intent. Defense counsel maintained throughout the proceedings that, while defendant held the gun up to the victim and demanded his money, the shooting was accidental and defendant did not intend to pull the trigger. Defendant meant only to scare the victim and did not realize it was loaded. Counsel pleaded with the jury to find defendant guilty of the lesser offenses of second-degree murder or involuntary manslaughter. Therefore, defendant did not want to the jury to think he was provoked into shooting Bailo when, in fact, defendant argued that the shooting was accidental.

V.

Finally, defendant argues that counsel was ineffective for failing to object to the trial court's mens rea instruction and in failing to request a voluntary manslaughter instruction.

Because we conclude that the trial court did not err in instructing the jury as to mens rea, defense counsel was not required to object to the instruction as given because an objection would have been meritless. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Additionally, because the record contains no rational foundation for a voluntary manslaughter instruction, defense counsel's neglect to ask for such an instruction did not fall below an objective standard of reasonableness. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Affirmed.

/s/ Deborah A. Servitto
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly