S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER ALPHONZO MAYE,

Defendant-Appellant.

UNPUBLISHED
March 25, 1997

No. 185607
Kalamazoo County
LC No. 94-0706-FC

Before: Hoekstra, P.J., and Markey and J.C. Kingsley,* JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of felony murder, MCL 750.316; MSA 28.548, and two counts of armed robbery, MCL 750.529; MSA 28.797. He was sentenced to life imprisonment without parole for each of the felony murder convictions, and fifty to seventy-five years' imprisonment for the armed robbery convictions. He appeals as of right. We affirm defendant's convictions and sentences for felony murder, but vacate his convictions and sentences for armed robbery.

Defendant's convictions and sentences for both felony murder and armed robbery are violative of double jeopardy. Contrary to defendant's assertions on appeal, larceny rather than armed robbery was the predicate offense for his felony murder convictions. Defendant was separately convicted of armed robbery. It is well-settled that convictions for both felony murder with armed robbery as the predicate felony and armed robbery constitute a violation of double jeopardy principles, *People v Harding,* 443 Mich 693, 712 (Brickley, J.), 735 (Cavanagh, C.J.); 506 NW2d 482 (1993), as do convictions for both felony murder with larceny as the predicate felony and larceny, *People v Minor,* 213 Mich App 682, 690; 541 NW2d 576 (1995). Because larceny is a necessarily included lessor offense of armed robbery, and because larceny and armed robbery involve a hierarchy of offenses, convictions for both larceny and armed robbery also would violate double jeopardy. *Harding, supra* at 714 n 23; *People v Robideau,* 419 Mich 458, 487-488; 355 NW2d 592 (1984). Here, because defendant was convicted of both first-degree felony murder having the predicate offense of larceny and

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

armed robbery, we conclude that defendant's convictions violate the double jeopardy protection against multiple punishments under the Michigan Constitution. Const 1963, art 1, § 15. Accordingly, we direct that defendant's convictions and sentences for armed robbery be vacated. *People v McCrady*, 213 Mich App 474, 483; 540 NW2d 718 (1995).

Defendant's claims of instructional error are without merit. In fashioning its instruction regarding prior false statements made by defendant, the trial court appropriately instructed the jury with the applicable law. *People v Wolford,* 189 Mich App 478, 482; 473 NW2d 767 (1991); *People v Dandron,* 70 Mich App 439; 245 NW2d 782 (1976). Usage of the criminal jury instructions is not required. *People v Ullah,* 216 Mich App 669, 677; 550 NW2d 568 (1996). The trial court properly instructed the jury because the false statements by defendant were not the sole basis for his convictions, *Wolford, supra; Dandron, supra* at 443 n 2, and, as noted by the trial court, defendant admitted at trial that he had lied in statements that he gave to the police concerning the case. The statements, if believed, tended to lead suspicion and investigation in another direction. *Wolford, supra.* Second, the court correctly declined to give an instruction on accessory after the fact where defendant's own testimony indicated that he assisted in the completion of the crimes, albeit allegedly under duress. See *People v Perry,* 218 Mich App 520, 534; 554 NW2d 362 (1996). Even assuming that defendant was entitled to an instruction on accessory after the fact, the trial court's failure to give such an instruction was harmless error because the jury had a choice to, but did not, convict defendant on another intermediate charge, i.e., second-degree murder. See *People v Mosko,* 441 Mich 496, 502; 495 NW2d 534 (1992); *People v Beach,* 429 Mich 450, 481, 490-491; 418 NW2d 861 (1988); *Perry, supra* at 536.

The remainder of defendant's claims regarding instructional error are not preserved for appeal and need not be addressed absent manifest injustice. *People v Van Dorsten,* 441 Mich 540, 544-545; 494 NW2d 737 (1993). Because we find defendant's unpreserved claims of instructional error to be without merit, no manifest injustice will result to defendant from our declining to review them.

Defendant next asserts that the prosecution did not prove the required elements of premeditation and deliberation for felony murder. We disagree. Premeditation and deliberation are not elements of felony murder. Rather, they are elements of first-degree premeditated murder, which is an offense with which defendant was not charged. See *People v Aaron,* 409 Mich 672, 714-717; 299 NW2d 304 (1980); *People v Turner,* 213 Mich App 558, 566; 540 NW2d 728 (1995); *In re Robinson,* 180 Mich App 454, 462; 447 NW2d 765 (1989).

Defendant has waived any claim of a defect in the complaint and arrest warrant because he did not challenge the validity of his arrest warrant or move to suppress the arrest warrant in the trial court. *People v Burrill,* 391 Mich 124, 127 n 2; 214 NW2d 823 (1974); *People v Hill,* 44 Mich App 308, 317; 205 NW2d 267 (1973). See also *People v Collins,* 52 Mich App 332, 336; 217 NW2d 119 (1974). Accordingly, we will not address defendant's arguments in this regard.

Defendant also raises several claims in regard to witness Marcia Betz, all of which are without merit. The trial court followed the correct procedure in holding a hearing outside of the jury's presence

to establish the witness' intention to invoke her Fifth Amendment right against self-incrimination. See *People v Dyer,* 425 Mich 572, 579; 390 NW2d 645 (1986); *People v Giacalone,* 399 Mich 642, 645-646; 250 NW2d 492 (1977); *People v Paasche,* 207 Mich App 698, 708-709; 525 NW2d 914 (1994). The trial court correctly determined that Betz was unavailable as a witness to testify because she asserted the Fifth Amendment privilege not to testify. MRE 804(a)(1). Where defense counsel had the opportunity to cross-examine Betz at the preliminary examination and exercised the opportunity to do so, the trial court did not abuse its discretion in admitting Betz' preliminary examination testimony at trial. MRE 804(b)(1). To the extent that defendant claims he was denied a fair trial by the trial court's admission of those portions of Betz' preliminary examination testimony concerning the codefendant, defendant has not preserved this issue for appellate review. Although defense counsel lodged a general objection to the admission at trial of Betz' preliminary examination testimony, he did not specifically object to the admission of those portions of Betz' preliminary examination testimony concerning the codefendant. MRE 103(a)(1). Defendant was not denied his right of confrontation, did not have a substantial right adversely affected, and did not suffer unfair prejudice by the admission of Betz' entire preliminary examination testimony. MRE 103(a)(1); *People v Grant,* 445 Mich 535, 552-553; 520 NW2d 123 (1994). Defense counsel cross-examined Betz extensively regarding the codefendant, and the reading of Betz' entire testimony helped prevent confusion by the jury regarding her testimony and the events in question.

Defendant next raises two claims of ineffective assistance of counsel; one based on counsel's failure to object to the jury array, and the other based on counsel's failure to object to statements made in the prosecutor's closing arguments. Defendant did not establish a record below to support his claim of ineffective assistance of counsel and, on September 26, 1996, this Court denied defendant's motions to remand for an evidentiary hearing on his claims of ineffective assistance of counsel. Therefore, our review is limited to the existing record. *People v Ginther,* 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Dixon,* 217 Mich App 400, 408; 552 NW2d 663 (1996).

Here, there is no support in the record for defendant's claim that the jury was not representative of a cross-section of the community. Because defendant challenges the jury array for the first time on appeal and has failed to create a factual record to support his claim, he has forfeited this Court's consideration of the claim. MCL 600.1354; MSA 27A.1354(1); *Dixon, supra* at 404; *People v Hubbard (After Remand),* 217 Mich App 459, 465; 552 NW2d 593 (1996). Given that defendant's claim in regard to the jury array must fail, his claim based on ineffective assistance of counsel in that regard also must fail.

An analysis of the prosecutor's remarks regarding Joe Freeman challenged by defendant on appeal reveals that the prosecutor did not vouch for the credibility of the witness and did not deny defendant a fair trial by engaging in prosecutorial misconduct. The prosecutor's remarks were proper arguments based on inferences from the evidence as it related to his theory of the case. *People v Bahoda,* 448 Mich 261, 276, 282; 531 NW2d 659 (1995); *People v McElhaney,* 215 Mich App 269, 284; 545 NW2d 18 (1996). Therefore, there was no basis for defense counsel to object. Counsel is not required to argue a frivolous or meritless motion. *People v Gist,* 188 Mich App 610, 613; 470 NW2d 475 (1991). Defendant's claims of ineffective assistance of counsel are without merit.

Finally, we find no cumulative error that denied defendant a fair trial. Although defendant's convictions of armed robbery together with his convictions of felony murder are violative of double jeopardy protections, defendant is being afforded all the relief to which he is entitled by the vacation of his convictions and sentences for armed robbery.

Defendants convictions and sentences for felony murder are affirmed, but his convictions and sentences for armed robbery are vacated.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ James C. Kingsley