

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STANLEY JAMES ADAMS,

Defendant-Appellant.

UNPUBLISHED

March 14, 1997

No. 172823

Genesee Circuit Court

LC No. 93-049028

Before: Griffin, P.J., and McDonald and C. W. Johnson*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, armed robbery, MCL 750.529; MSA 28.797, and conspiracy to commit armed robbery, MCL 750.529(C); MSA 28.797(C). He was sentenced to three concurrent terms of life imprisonment. Defendant now appeals as of right and we affirm.

Defendant first argues there was insufficient evidence to submit the charge of felony murder to the jury because he did not have the requisite intent to kill Kevin Clark, nor did he know or anticipate that Victor Polk would shoot anybody when he participated in the robbery. We disagree.

When ruling on a motion for a directed verdict, the trial court must consider the evidence presented by the prosecutor up to the time the motion was made and determine whether any rational trier of fact could find the essential elements of the charged crime were proven beyond a reasonable doubt. This Court applies the same standard on review of a ruling on such a motion. *People v Daniels*, 192 Mich App 658; 482 NW2d 176, amended 440 Mich 882 (1992). The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b); MSA 28.548 (1)(b). *People v Turner*, 213 Mich App 558; 540 NW2d 728 (1995).

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

Defendant was charged as an aider and abettor. MCL 767.39; MSA 28.979, provides:

Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

Aiding and abetting describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. *Turner, supra*. An aider and abettor's state of mind may be inferred from all the facts and circumstances. *Id.* Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Id.* To sustain an aiding and abetting charge, the guilt of the principal must be shown. *Id.*

In order to convict one charged as an aider and abettor of a first-degree felony murder, the prosecutor must show that the person charged had both the intent to commit the underlying felony and the same malice that is required to be shown to convict the principal perpetrator of the murder. Therefore, the prosecutor must show that the aider and abettor had the intent to commit not only the underlying felony, but also to kill or to cause great bodily harm, or had wantonly and wilfully disregarded the likelihood of the natural tendency of this behavior to cause death or great bodily harm. Further, if it can be shown that the aider and abettor participated in a crime with knowledge of his principal's intent to kill or to cause great bodily harm, he was acting with wanton and wilful disregard sufficient to support a finding of malice.

Intent is a question of fact to be inferred from the circumstances by the trier of fact. It is likewise a factual issue whether a particular act or crime committed was fairly within the intended scope of the common criminal enterprise. [*Id.* at 567.]

Defendant, Victor Polk, Kevin Griffin, Lawrence White and Freddie Griffin planned and agreed to drive to a store and steal some beer. Freddie testified he first knew Victor was carrying a gun when he showed it to them as they were driving to the store. Diane Barrett testified when Victor pulled the gun and pointed it in her face, none of the other men left the store or stopped him from using the gun. Rather, Kevin Griffin came around the counter, and pushed her out of the way so he could open the cash register. Another witness, Amantha Helms, stated when Kevin saw her and Sally Dean at the door of the store he told them "get outta here, Hoa's." As they began to leave, one of the men said "those bitches saw us. Catch 'em." Defendant then began chasing after them while carrying a case of beer. However, before catching them, defendant entered into the car with the other men, after which she heard a gun shot.

Freddie testified that after Victor pulled the gun, he and Lawrence left the store, entered the car, and apparently waited for the other men.¹ After all the men were in the car, somebody said Kevin

Clark saw them and was looking at them, but he did not know who said it. The prosecutor attempted to impeach Freddie with a prior inconsistent statement in which he stated that defendant said “[Clark is] getting our license plate number.” Freddie testified that somebody said Clark was looking at their license plate, but he did not know who it was. Victor then fired one shot. Freddie inconsistently testified Victor fired into the air and he aimed toward the store. Freddie did not look back to see if anybody had been shot. Rather, after Victor fired the shot, the men drove away, drank the beer and divided up the money.

Viewed in a light most favorable to the prosecution, we find the jury, as the trier of fact, was able to infer from these facts and circumstances that defendant had the requisite intent for aiding and abetting felony murder beyond a reasonable doubt. Defendant knew, either before or during the commission of the robbery that Victor Polk had a gun. However, even if defendant did not know whether Victor would use the gun before the robbery, Victor pulled out the gun and pointed it at Barrett’s face during the robbery. After Victor pulled the gun, defendant carried a case of beer out of the store, and attempted to chase after Amantha Helms and Sally Dean because they saw the men robbing the store. Although Freddie’s testimony was inconsistent regarding whether defendant was in the car at the time the shot was fired, Helms stated that defendant entered the car before the shot was fired. Similarly, although Freddie gave inconsistent testimony whether defendant said Clark was getting their license plate number, he admitted that somebody in the car said Clark saw their license plate before Victor fired the shot. The jury could determine by the conduct of the five men that Clark was looking at their license plate, and they did not want anybody to see them conduct the robbery. The jury was entitled to weigh the witnesses’ credibility and believe the comment encouraged Victor to fire a shot in order to deter Clark from identifying the men, and therefore to determine defendant either had the intent to kill or to cause great bodily harm to Clark, or had wantonly and wilfully disregarded the likelihood of the natural tendency of his behavior to cause death or great bodily harm. Malice is a permissible inference from the use of a deadly weapon. *Turner, supra*. Thus, by knowingly participating in the armed robbery, the jury could determine beyond a reasonable doubt that defendant was acting with wanton and wilful disregard sufficient to support a finding of malice.

Defendant also claims there was insufficient evidence to support a second-degree murder conviction. We disagree.

The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) absent circumstances of justification, excuse, or mitigation, (4) done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm. *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325, amended, reh den, in part, remanded 453 Mich 1204 (1996). Again, because defendant wilfully participated in the armed robbery and was present when someone encouraged Victor to shoot Clark, or shoot at Clark in order to avert him from obtaining the license plate number, the jury could determine an intent to kill Clark or to create a very high risk of death with the knowledge that Victor’s shot would probably cause death or great bodily harm. Accordingly, there was sufficient evidence from which rational triers of fact could determine beyond a reasonable doubt that defendant was guilty of second-degree murder.

Defendant next argues the court's comment during voir dire that an armed robbery had occurred which resulted in someone being killed was tantamount to establishing the robbery was committed and that Clark was killed as a result of the robbery. We disagree.

Because defendant did not object to the court's conduct at trial, this Court may review the matter only if manifest injustice results from the failure to review. *People v Paquette*, 214 Mich App 336; 534 NW2d 342 (1995). A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct. *Paquette, supra*. Portions of the record should not be taken out of context in order to show trial court's bias against defendant; rather the record should be reviewed as a whole. *Id.* A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. *Id.*

We find taken in context, the trial court's comment did not pierce the veil of judicial impartiality because it did not unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. The court was merely attempting to determine whether any of the potential jurors knew about the case and if so, whether they could be fair and impartial triers of fact. The court did not state defendants committed the crimes charged or indicate that culpability had been established. It only stated a crime occurred and a man was killed, which are facts not disputed by defendant. Defendant only contests he was responsible for the death of Kevin Clark, not that he conspired and in fact committed an armed robbery, or Clark was killed by Victor's shooting a gun. Moreover, the comment of the potential juror does not establish that there was any impropriety because the juror only stated during voir dire what she had heard about the case from other potential jurors.

Defendant also argues the trial court's ruling regarding the impeachment testimony of Freddie Griffin reinforced that it believed the issues of culpability had already been established. Because Freddie gave inconsistent testimony at trial and also gave testimony inconsistent with prior statements he had made, the prosecutor attempted to impeach his testimony. Freddie fluctuated between testifying he was driving the car when the men left the store and that Victor took over the driver's seat from him. When the prosecutor was impeaching him, the prosecutor stated it did not matter whether Freddie was driving the car for purposes of his responsibility for the crime. Defense counsel objected to the comment, but the trial court agreed with the prosecutor's statement.

Again, this exchange does not establish the trial court believed that the issues of culpability had been established or the court acted improperly. Because Freddie's testimony was very inconsistent, the prosecutor was attempting to obtain truthful testimony from him regarding who drove the car after the robbery. He did so presumably to establish how Victor shot the gun out of the car. The prosecutor correctly stated that whether Freddie was driving did not change his responsibility for the crime. Freddie had accepted a plea bargain and was not charged with felony murder and there was no question Victor fired the gun. Thus, the court's statement did not deny defendant a fair trial. Accordingly, the trial court's conduct did not produce manifest injustice.

Next, defendant argues he was denied a fair trial by the prosecutor's misconduct, which was compounded by the trial court's erroneous jury instruction. We disagree.

The test of misconduct by the prosecutor is whether a defendant was denied a fair and impartial trial. *People v Kulick*, 209 Mich App 258; 530 NW2d 163, remanded 449 Mich 851 (1995). However, where defendant failed to object to an alleged instance of prosecutorial misconduct, appellate review is precluded unless failure to review the issue would result in a miscarriage of justice or if a cautionary instruction could not have cured the prejudicial effect. *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994). Issues of misconduct by a prosecutor are decided case by case. *Kulick, supra*. The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Id.*

Defendant objected to a comment made by the prosecutor during rebuttal closing argument, in which he told the jury that Freddie Griffin stated defendant was the person in the car who said Clark was looking at their license plate. However, Freddie had made the statement prior to trial, but denied at trial he knew who said Clark was looking at their license plate number. When a witness claims not to remember making a prior inconsistent statement, he may be impeached by extrinsic evidence of that statement. *People v Jenkins*, 450 Mich 249; 537 NW2d 828, reh den 450 Mich 1212 (1995). The purpose of extrinsic impeachment evidence is to prove a witness made a prior inconsistent statement - not to prove the contents of the statement. *Id.*²

Although the prosecutor improperly stated "Freddie said, Stanley said [Clark's] looking at his plate," any prejudice from the prosecutor's comment was likely cured by the trial court's cautionary instruction that attorney comments were not evidence and by the prosecutor's clarification following the instruction that "the testimony is that someone said [Clark's] looking at the plate. That's what Freddie Griffin said." The prosecutor continued to explain he believed the jury could conclude defendant was the person who said that Clark was getting the license plate number by the facts and circumstances. The prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to his theory of the case. *People v Bahoda*, 448 Mich 261; 531 NW2d 659, reh den 448 Mich 1225 (1995).

Defendant also argues the trial court's incorrect instruction compounded the prejudicial effect of the prosecutor's improper comment and mandates reversal of defendant's convictions. However, because defendant did not object to the court's instruction, the issue whether the trial court erred is not preserved for appellate review absent manifest injustice. *People v Hess*, 214 Mich App 33; 543 NW2d 332 (1995).

Although the trial court's initial instruction was incorrect when it indicated the jury was required to consider the prior inconsistent statement of Freddie Griffin in determining whether the elements of the crime had been proven, the court continued by properly explaining that the jury could only consider the prior inconsistent statement to determine whether Freddie's testimony was truthful. We do not believe the incorrect instruction produced manifest injustice because there was ample other evidence presented from which the jury could infer that defendant possessed the requisite intent for murder aside from Freddie's prior statement the defendant was the person who stated Clark was looking at the license plate. Therefore, the trial court's improper instruction did not produce manifest injustice.

Defendant further claims the prosecutor improperly placed the prestige of his office behind the testimony of Freddie Griffin and Lawrence White when he commented during rebuttal closing argument that he, as an assistant prosecutor, could not stand before the jury and say Freddie Griffin and Lawrence White were guilty of felony murder. Although the prosecutor was properly responding to defense counsel's comments that defendant did not do anything differently than the two men who received a plea bargain from the prosecutor, *People v Simon*, 174 Mich App 649; 436 NW2d 695 (1989), in making his comment, the prosecutor improperly asserted his own credibility to the jury to essentially convince them he, as the prosecutor could not stand before them and say Freddie and Lawrence were not guilty of felony murder when they were. Yet, because defendant did not object to the comment, this Court may only consider it if it produced a miscarriage of justice or a cautionary instruction could not have cured the prejudicial effect. *Stanaway, supra*. We believe that a cautionary instruction could have cured the prejudicial effect. Furthermore, as discussed above, there was ample other evidence, apart from the fact Freddie and Lawrence received plea bargains, from which the jury could determine defendant was guilty of second-degree murder beyond a reasonable doubt.

Finally, defendant argues he was denied due process because the trial court sentenced him based on inaccurate information as a result of prohibiting Mrs. Adams from speaking at sentencing. We disagree.

Defendant did not raise the issue the trial court based its sentencing on inaccurate information in the trial court. Thus, the issue is not preserved for appeal. See *People v Maxson*, 163 Mich App 467; 415 NW2d 247 (1987). In any event, defendant points to no authority to support his claim the trial court was required to allow his mother to address the court before sentencing.³ To the contrary, MCR 6.425(D)(2)(c) specifically states that only a defendant, his lawyer, the prosecutor and victim must have the opportunity to address the court at sentencing. Although defendant claims his mother could have provided the court with valuable information regarding the powerful psychotropic drugs he was taking, there is nothing that precluded defendant from raising the issue before the court or including it in the PSIR. Moreover, defendant had an opportunity to challenge any inaccuracies in the PSIR and acknowledged the information in the PSIR was accurate. In addition, defendant was sentenced within the sentencing guidelines recommended range of 180 to 360 months or life. Accordingly, defendant was not denied due process because there is no indication that he was sentenced based on inaccurate information.

Affirmed.

/s/ Richard Allen Griffin

/s/ Gary R. McDonald

/s/ Charles W. Johnson

¹ At the time defendant moved for a directed verdict, Lawrence White had not yet testified. Therefore, we do not consider his testimony in determining whether there was sufficient evidence to sustain the conviction.

² Although the Court in *Jenkins* discussed at length whether a proper foundation was laid for the reading of the witnesses' prior inconsistent statement by a police officer and that it constituted inadmissible hearsay, in the present case, the parties agreed at trial that Freddie's prior inconsistent statement was only admissible for purposes of impeachment and not as substantive evidence (presumably because his prior inconsistent statement was not made under oath).

³ Defendant cites two cases in his brief to establish that a parent can speak at sentencing: *People v Barrows*, 358 Mich 267; 99 NW2d 347 (1959) and *People v Hill*, 192 Mich App 102; 480 NW2d 913 (1991). However, in both cases, the parents of the defendant apparently spoke at sentencing, but neither case addressed the issue whether a parent has the right to speak at their child's sentencing.