STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN JAMES BARKLEY,

Defendant-Appellant.

UNPUBLISHED
April 18, 1997

No. 168564
Recorder's Court
LC No. 93-001540

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMIE MEADE,

Defendant-Appellant.

No. 168565
LC No. 93-001540

Before: Doctoroff, P.J., and Michael J. Kelly and Young,* JJ.

PER CURIAM.

In **No. 168564**, defendant, Brian James Barkley, was convicted, following a jury trial, of accessory after the fact to first-degree felony murder, MCL 750.505; MSA 28.773, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Barkley was sentenced to serve concurrent terms of six years and eight months to ten years' imprisonment for his assault conviction and three to five years' imprisonment for his accessory after the fact conviction, both to be served consecutively to two years' imprisonment for his felony-firearm conviction. Barkley now appeals as of right. We affirm.

Barkley argues that the sentence imposed for his assault conviction violates the principle of proportionality and that it constitutes cruel and unusual punishment. We disagree. We review a given

sentence for an abuse of discretion. *People v Poppa*, 193 Mich App 184, 187; 483 NW2d 667 (1992). A sentencing court has abused its discretion when a sentence is not proportionate "to the seriousness of the circumstances surrounding the offense and the offender." *Id*.

Barkley's sentence of six years and eight months to ten years for his assault conviction is presumptively proportionate because the minimum term falls within the recommended guidelines range of three years to six years and eight months. See *People v Wilson*, 196 Mich App 604, 610; 493 NW2d 471 (1992). This presumption of proportionality may be overcome upon a showing of unusual circumstances. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). Because Barkley failed to advance at sentencing any unusual circumstances which would necessitate a downward departure from the guidelines, we find no abuse of discretion. See *People v Cotton*, 209 Mich App 82, 85; 530 NW2d 495 (1995). Further, because Barkley's sentence is not disproportionate, it is therefore not cruel or unusual. See *People v Williams*, 198 Mich App 537, 543; 499 NW2d 404 (1993).

In **No. 168565**, defendant, Jamie Meade, was convicted, following a jury trial, of first-degree felony murder, MCL 750.316; MSA 28.548, accessory after the fact to assault with intent to commit murder, and felony-firearm. Meade was sentenced to serve concurrent terms of life imprisonment for his first-degree felony murder conviction and three to five years' imprisonment for his accessory after the fact conviction, both to be served consecutively to two years' imprisonment for his felony-firearm conviction. Meade now appeals as of right. We affirm.

In his original brief on appeal, Meade raises the following arguments:

First, Meade argues that there was insufficient evidence to sustain his conviction of aiding and abetting first-degree felony murder and, therefore, that the trial court erred in denying his motion for a directed verdict. We disagree. When considering a sufficiency of the evidence challenge, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992); *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). Similarly, when reviewing a trial court's ruling regarding a motion for a directed verdict, we consider the evidence presented up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Davis*, 216 Mich App 47, 52; 549 NW2d 1 (1996); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995).

To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *People v Turner*, 213 Mich App 558, 565-566; 540 NW2d 728 (1995). An aider and abettor must possess the same requisite intent as that required of a principal. *People v Barrera*, 451 Mich 261, 294; 530 NW2d 748 (1996). Thus, to be convicted of aiding and abetting felony murder, a defendant must be shown to have had the intent to kill, the intent to cause

great bodily harm or wantonly and willfully disregarded the likelihood of the natural tendency of his behavior to cause death or great bodily harm. *Id*. Further, to sustain an aiding and abetting charge, the guilt of the principal must be shown, but the principal need not be convicted. *Id.*

Here, the evidence established that Meade accompanied Barkley, who was in possession of a sawed-off shotgun belonging to Meade, into the decedent's bedroom to purchase a half ounce of marijuana. Once inside, Barkley shot the decedent. Meade left the bedroom with a bag of marijuana, for which he never paid the decedent. Meade returned first to the getaway car, ordered the driver to wait for Barkley, then ordered him to drive to the river, where Meade and Barkley disposed of the shotgun, as well as their jackets. Earlier that day, while outside of a local market, Meade displayed the sawed-off shotgun to an acquaintance. Meade told the acquaintance that "he was fixing to go take care of some business" and, more specifically, that "[the decedent] and [his girlfriend] need[ed] to be robbed and ganked." We find that the circumstances surrounding the incident establish that Meade assisted Barkley in the robbery-turned-shooting death of the decedent and that, at the time he offered the assistance, Meade intended to cause great bodily harm. Meade's intent is further evidenced by the fact that Meade and Barkley were long-time friends, that Meade directed the course of events during and after the shooting, and that Meade fled to Kentucky following the incident. See *Turner*, *supra*, 213 Mich App 569. Viewed in the light most favorable to the prosecution, the evidence was sufficient to establish that Meade aided and abetted the crime of first-degree felony murder and to support the trial court's decision to deny Meade's motion for a directed verdict. Furthermore, based on the evidence discussed above, Meade cannot sustain his assertion that his conviction is against the great weight of the evidence. See *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995).

Meade next argues that he was denied a fair trial when the prosecutor: (1) failed to produce witness Brian Patterson; (2) asked defense witness Joseph Franklin whether he sold marijuana from his place of employment; (3) made references to the process by which his office obtained a warrant for Meade's arrest; (4) questioned Meade regarding the credibility of several prosecution witnesses; and, (5) expressed his personal opinion regarding the strength of the prosecution's case, as well as Meade's guilt. We disagree. We review allegations of prosecutorial impropriety in context and determine whether the allegedly improper conduct denied the defendant a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). However, when a defendant fails to object to the alleged misconduct below, appellate review is precluded unless failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Slocum*, 213 Mich App 239, 241; 539 NW2d 572 (1995). When reviewed in context, we find that the prosecutor's conduct was not improper. Further, we find that a timely request by Meade for a curative instruction could have eliminated any possible prejudice.

Meade also argues that the trial court's charge to the jury regarding jury deliberations undermined his presumption of innocence. Stated somewhat differently, Meade claims that the challenged instruction coerced the verdict of aiding and abetting first-degree felony murder by requiring the jury to consider the principal charge first and thereby implying that the evidence supported this charge. We disagree. When reviewing claims of instructional error, we read the instructions as a whole and determine whether they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995); *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991).

The trial court instructed the jury as follows:

> In the [sic] case there are several different crimes that you may consider. When you discuss the case, you must consider the principal offenses charged in Counts I and II. That is, felony murder in the first degree, and assault with intent to commit murder first. If you all agree that the defendant you are considering is guilty of that crime, in that Count, you may stop your discussions and return your verdict on this Count.
>
> If you believe that defendant is not guilty of the principal charge in that Count, or you cannot agree about that crime, you should consider the less serious crimes which I have defined to you applying to that Count.
>
> You decide how long to spend on the principal Count, the principal charge, the main Count before discussing the less serious charges. You can go back to the principal charge after discussing the less serious offenses if you want to.

In *People v Sullivan*, 392 Mich 324, 341-342; 220 NW2d 441 (1974), our Supreme Court stated that courts are to give an instruction that substantially reflects the language of CJI2d 3.11. To determine whether a jury found an instruction to be unduly coercive, a reviewing court should consider the timing and full content of the instructions within the context of the case. *People v Pollick*, 448 Mich 376, 385-386; 531 NW2d 159 (1995). In the instant case, the challenged instruction is an almost verbatim reading of CJI2d 3:11, it was issued *before* the jury commenced its deliberations, and it does not contain any "improvidently added language." See *Pollick*, *supra*, 448 Mich 385-386. Moreover, the trial court specifically instructed the jury regarding Meade's presumption of innocence. For want of some indication that the jury's verdict was coerced, we find that the instructions fairly presented the issues to be tried and sufficiently protected Meade's rights.

Lastly, Meade argues that he was denied the effective assistance of counsel. We disagree. Effective assistance of counsel is presumed, and the defendant bears the burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish a claim of ineffective assistance of counsel, the defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance was deficient, and (2) that the performance so seriously prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Further, the defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 13, 17; 466 NW2d 315 (1991).

At trial, a videotaped statement made by Meade was introduced into evidence, without counsel's objection. Meade contends that the statement was involuntary and that, as a result, counsel was deficient in failing to file a timely motion to suppress the videotaped statement which he made to police. Involuntary confessions may not be used for any purpose at trial, either for substantive evidence or for impeachment purposes. *People v Tyson*, 423 Mich 357, 377; 377 NW2d 738 (1985); *People v Switzer*, 135 Mich App 79, 784; 355 NW2d 670 (1984). Accordingly, Michigan courts, upon a contemporaneous challenge to the use of a statement, provide for a voluntariness hearing outside the presence of the jury. *People v Ray*, 431 Mich 260, 269; 430 NW2d 626 (1988). Counsel failed to

object to or otherwise challenge the use of Meade's videotaped statement. However, we believe that any objection would have been futile because, as the trial court determined, the statement was voluntary.

In evaluating the admissibility of a statement, this Court reviews the totality of the circumstances surrounding the making of the statement to determine whether it was freely and voluntarily made in light of the factors articulated in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). *People v Haywood*, 209 Mich App 217, 226; 530 NW2d 497 (1995). These factors include:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was any unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprive of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id*.]

Here, Meade, completed tenth-grade, admitted that he was advised of his rights and that he understood his rights. More importantly, Meade testified that he agreed to speak with interrogating officers simply because "he was bored and fed-up with everything." Although Meade claims that he was deprived of food, drink, and use of the restroom, there is no evidence that he ever requested, or otherwise indicated, to the interrogating officers, that he was hungry, thirsty or in need of a restroom. Further, there is no evidence of physical coercion or abuse by the interrogating officers. Having reviewed the totality of the circumstances surrounding the making of the statement, we conclude that Meade's statement to police was freely and voluntarily given and, therefore, that it was properly admissible. Because the admission of the videotaped statement was proper, counsel's failure to challenge the voluntariness of Meade's statement did not affect Meade's chances of acquittal. In addition, there was other strong evidence against Meade. See discussion, *supra*. Thus, counsel's inaction did not prejudice Meade and, therefore, did not deprive Meade of the effective assistance of counsel.

Meade also contends that counsel provided ineffective representation by failing to object to the prosecutor's allegedly improper conduct. Because the prosecutor's conduct was not improper, counsel's failure to object could not have affected Meade's chances for acquittal and, therefore, Meade's claim of ineffective assistance of counsel on this ground is without merit. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986).

Meade also filed a supplemental brief on appeal in which he raised the following arguments:

First, Meade argues that the trial court erred in finding that the prosecutor did not willfully violate the trial court's discovery order by failing to provide trial counsel with a copy of Meade's videotaped statement prior to trial. We disagree. A trial court's findings of fact will not be set aside

unless clearly erroneous. *In re Forfeiture of $19,250*, 209 Mich App 20, 29; 530 NW2d 759 (1995). A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*.

Examination of the record reveals that, although the prosecutor knew prior to trial of the existence of Meade's videotaped statement, the prosecutor was not *in possession* of the videotape prior to trial and in no way attempted to withhold information regarding the statement's existence from Meade. Thus, we conclude that the trial court's finding was not clearly erroneous.

Meade also argues that the trial court abused its discretion by admitting the preliminary examination testimony of prosecution witness Daniel Beaty without also admitting evidence regarding the reason for Beaty's unavailability. We disagree. We review a trial court's decision regarding the admission of evidence for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Here, Meade maintains that the trial court's decision to withhold from the jury the fact that Beaty committed suicide interfered with Meade's ability to attack Beaty's credibility. In other words, Meade claims that he was deprived of a fair trial because he did not have an opportunity to fully confront a prosecution witness. The United States and Michigan constitutions guarantee an accused the right to "be confronted with the witnesses against him . . . ." US Const, Am VI; Const 1963, art 1, § 20. Consistent with these guarantees, MRE 804(b)(1) permits the use, by the prosecution, of former testimony if the witness is unavailable and if the former testimony bears satisfactory indicia of reliability. *People v Conner*, 182 Mich App 674, 680-681; 452 NW2d 877 (1990).

Clearly, Beaty's suicide rendered him "unavailable as a witness" for purposes of MRE 804(b)(1). See *People v Missouri*, 100 Mich App 310, 334-336; 299 NW2d 346 (1980) (the trial court properly admitted the witness' preliminary examination testimony because the witness died prior to trial). In our opinion, it is equally clear that Beaty's former testimony bears the satisfactory indicia of reliability necessary for it to be presented to the trier of fact. Examination of the record reveals that Meade, not only had an opportunity to but, thoroughly cross-examined Beaty at the preliminary examination. The cross-examination included detailed questioning as to Beaty's powers of observation, recall, and credibility. In fact, Meade's attorney attempted to impeach Beaty's credibility with a prior statement to police. Because Beaty's preliminary examination testimony was properly admitted pursuant to MRE 801(b)(4), we find no abuse of discretion.

Affirmed.

/s/ Martin D. Doctoroff
/s/ Michael J. Kelly
/s/ Robert P Young, Jr.