STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LLOYD HICKS,

Defendant-Appellant.

UNPUBLISHED
June 6, 1997

No. 161369
Recorder's Court
LC No. 92-5302

Before: O'Connell, P.J., and Sawyer and Markman, JJ.

PER CURIAM.

Following a consolidated jury trial in which defendant Lloyd Hicks was tried with codefendant Jason Armour, defendant was convicted of first-degree felony murder, MCL 750.316; MSA 28.548, armed robbery. MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). Defendant was sentenced to terms of two years with respect to the felony-firearm conviction and life in prison with respect to the first-degree felony murder conviction. He received a suspended sentence for the armed robbery conviction. Defendant now appeals as of right. We affirm.

Defendant first argues that the evidence presented at trial was insufficient to support his conviction of first-degree felony murder. Specifically, defendant contends there was insufficient evidence of malice. We disagree. When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

The elements of felony murder are (1) the killing of a human being, (2) with malice, (3) while committing, attempting to commit, or assisting in the commission of one of the enumerated felonies, which include robbery. MCL 750.316; MSA 28.548, *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995); see also *People v Aaron*, 409 Mich 672, 728-729; 299 NW2d 304 (1980). A person who aids and abets the commission of an offense may be convicted as if he were a principal. MCL 767.39; MSA 28.979. To convict a defendant on a theory of aiding and abetting, the

prosecution must prove that the defendant possessed the intent necessary to be

convicted as a principal, which in this case is malice. *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985); *Turner*, *supra* at 569. Participation in a robbery with knowledge that a coparticipant in the robbery is armed with a gun is sufficient to support a finding of malice. See *Turner, supra* at 572-573.

In the instant case, three of the four witnesses present in the restaurant where the killing occurred testified that codefendant shot and killed the victim. The fourth witness could not see codefendant when the shot was fired. All four witnesses testified that while codefendant openly displayed his gun, defendant, who also displayed a gun, surveyed the restaurant for money and removed money from the cash register. Based on this evidence, a rational trier of fact could find beyond a reasonable doubt that defendant assisted codefendant in the commission of a robbery with knowledge that codefendant was armed with a gun. *Wolfe*, *supra* at 515. Therefore, we hold that the evidence was sufficient to convict defendant of aiding and abetting first-degree felony murder. *Turner*, *supra* at 572-573.

Defendant next argues that he is entitled to a new trial because the trial court did not ascertain on the record whether he knowingly and intelligently waived his right to testify on his own behalf. Defendant's claim raises a constitutional issue. This Court reviews such constitutional questions de novo. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996).

Defendant's argument is without merit. In Michigan, there is no requirement of an on-the-record waiver of a defendant's right to testify. See *People v Simmons*, 140 Mich App 681, 684; 364 NW2d 783 (1985); see also *People v Harris*, 190 Mich App 652, 661; 476 NW2d 767 (1991). Contrary to defendant's contention on appeal, nothing in the United States Supreme Court's opinion in *Rock v Arkansas*, 483 US 44, 51-52; 107 S Ct 2704; 97 L Ed 2d 37 (1987), which expressly recognized that a criminal defendant's right to testify on his own behalf is a fundamental constitutional right, mandates a change in the Michigan rule. This Court, in *Simmons*, also recognized the fundamental importance of defendant's right to testify on his own behalf, but further explained that the existence of a fundamental constitutional right does not necessarily require application of the same procedural safeguards as applied to other constitutional rights, such as waiver of the right to counsel. *Simmons, supra* at 683-685. Accordingly, we hold that trial court made no error with regard to defendant's waiver of his right to testify.

Defendant's next contention on appeal is that he was denied a fair trial when the prosecutor represented to the trial court that he would be able to offer evidence that both defendant and codefendant had been involved in another robbery at the same restaurant and then subsequently was only able to offer evidence that codefendant had been involved. Defendant also argues that he was denied a fair trial when the trial court failed to sua sponte declare a mistrial when it became evident that the prosecution could only offer evidence of codefendant's prior involvement. We disagree. Although framed in terms of prosecutorial misconduct and a denial of due process, defendant's argument is essentially that he was unfairly prejudiced by the admission of evidence of codefendant's prior bad act.

To preserve a claim of error regarding the admission of evidence, a defendant must make a timely objection or motion to strike stating the specific ground, if the specific ground is not apparent from the context. MRE 103(a)(1); *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). The ground for objection asserted at trial must have been the same ground as is asserted on appeal. *Considine, supra* at 162. At trial, defendant argued that the evidence of defendant's and codefendant's participation in the prior robbery should not be admitted because evidence of a prior *robbery* would be too prejudicial. On appeal, defendant now argues that evidence of *codefendant's* prior bad acts should not have been admitted against him. Furthermore, when a defendant attempts to use an alleged error to his tactical advantage at trial, and the results are not to his liking, this Court will not allow him to use the same error as grounds for reversal. *People v Baines*, 68 Mich App 385, 388-389; 242 NW2d 784 (1976). In his closing argument, defendant used the evidence of codefendant's involvement in the prior robbery to argue that the identification of codefendant was more reliable than that of defendant. Because (1) defendant did not raise the same argument below and (2) he then attempted to use the alleged error to his tactical advantage, the issue was not preserved for appeal. *Considine, supra* at 162; *Baines, supra* at 388-389.

Defendant next contends that the prosecution breached its duty to voluntarily disclose favorable information when it failed to promptly disclose the fact that, during the pre-trial investigation, the police utilized two interpreters, in tandem, to produce a written statement from a Chinese-speaking witness. The prosecution does not violate its constitutional duty of disclosure unless its omission is of sufficient significance to result in the denial of the defendant's right to a fair trial. See *People v Carter*, 415 Mich 558, 594; 330 NW2d 314 (1982), quoting *United States v Agurs*, 427 US 97, 108; 96 S Ct 2392; 49 L Ed 2d 342 (1976). The prejudicial effect of the omission of the exculpatory evidence must be evaluated in the context of the entire record. *Carter, supra* at 595.

Criminal defendants have a due process right to obtain information possessed by the prosecution that is favorable to the accused and material to guilt or punishment. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994), citing *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963); *Carter, supra*, 415 Mich 593. Information bearing only on the reliability or credibility of other evidence may be favorable to the defendant and therefore come within the scope of the disclosure rule. See *United States v Bagley*, 473 US 667, 676-677; 105 S Ct 3375; 87 L Ed 2d 481 (1985). Although defendant now claims that use of the procedure pervaded the pre-trial investigation, the record indicates only that it was used to make a written record, in English, of Hui Lian Cheng's initial statement to the police. Because Hui Lian's police statement was not introduced into evidence against defendant, information bearing on the reliability of the statement would not have been favorable to defendant. Moreover, defendant's argument that an independent Chinese investigator might have been able to uncover other favorable information is entirely speculative. Cf. *People v Sawyer*, 215 Mich App 183, 192; 545 NW2d 6 (1996). Therefore, we hold that the prosecutor did not breach its duty to voluntarily disclose favorable information. *Carter, supra* at 594-595.

Defendant next contends he was denied a fair trial as a result of improper prosecutorial comments. When reviewing instances of alleged prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *People v*

McElhaney, 215 Mich App 269, 283; 545 NW2d 18 (1996). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* If a defendant fails to object to improper prosecutorial remarks, appellate review is precluded unless an instruction could not have cured the error or failure to consider the issue would result in a miscarriage of justice. *Stanaway*, *supra* at 687.

Defendant first claims that the prosecutor, in his opening argument, improperly appealed to the sympathies of the jury. The prejudicial effect of an improper appeal to sympathy can generally be cured by timely instruction from the trial court. See, e.g., *People v Biggs*, 202 Mich App 450, 455; 509 Mich App 803 (1993). Because defendant failed to object, appellate review is precluded. *Stanaway*, *supra*, 446 Mich 687. Defendant also challenges two remarks made during the prosecution's closing argument. Defendant did not object to either of the comments and the trial court subsequently instructed the jury to decide the case based only on the evidence and that the lawyers' statements and arguments were not evidence. Thus, we hold that failure to review defendant's claims of improper prosecutorial comments would not result in a miscarriage of justice. *Id.*

Defendant next claims that he was denied a fair trial when the interpreter failed to translate the testimony of the witnesses verbatim. "As a general rule, issues that are not raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances." *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Further, a defendant should not be allowed to assign error on appeal to something his own counsel deemed proper at trial. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995); *People v Roberson*, 167 Mich App 501, 516-517; 423 245 (1988). To do so would allow defendant to harbor error as an appellate parachute. *Roberson*, *supra* at 517. Finally, when a defendant attempts to use an alleged error to his tactical advantage at trial, and the results are not to his liking, this Court will not allow him to use the same error as grounds for reversal. *Baines*, *supra* at 388-389.

During a break in the testimony, defense counsel questioned whether the interpreter understood his role as trial interpreter and asked the trial court to "make sure the interpreter understands" his role. Pursuant to defense counsel's request, the trial court reinstructed the interpreter to translate verbatim. Thereafter, defendant did not (1) request a mistrial, (2) request a different interpreter, or (3) make any further objections to the translation. Finally, defense counsel argued in his closing argument that the questionable trial interpretation cast doubt on the testimony of the Chinese-speaking witnesses. For all of these reasons, this issue was not preserved for appeal. See *Grant*, *supra* at 546; *Barclay*, *supra* at 673; *Baines*, *supra* at 388-389.

Next, defendant contends that the trial court should have sua sponte declared a mistrial when use of the dual-interpreter procedure was discovered. This claim is without merit because, for reasons stated, *supra*, defendant was not prejudiced by the procedure.

Finally, defendant makes several claims of ineffective assistance of counsel. To justify reversal on a claim of ineffective assistance of counsel, a defendant must show that counsel's

performance was both deficient, and that it prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In order to show that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In doing so, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Strickland*, *supra* at 690-691; *Stanaway*, *supra* 687. In order to demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland*, *supra* at 694; *Stanaway*, *supra* at 687-688.

In his closing argument, defense counsel attempted to cast doubt on the testimony of the Chinese-speaking witnesses by arguing that (1) it was apparent that the interpreter was not providing a word-for-word translation, and (2) that the witnesses could not get their stories straight with respect to the identity of codefendant's partner in the prior robbery. Thus, it is evident that counsel's decision not to request a mistrial (1) when it was revealed that the interpreter had not provided verbatim translation or (2) when the prosecution was only able to offer evidence of codefendant's participation in the prior robbery, were exercises of trial strategy. *Strickland*, *supra* at 690-691; *Stanaway*, *supra* at 687. As for defense counsel's decision not to request a mistrial when the dual-interpreter procedure was revealed, defendant has failed to demonstrate the necessary prejudice. *Strickland*, *supra* at 694; *Stanaway*, *supra* at 687-688.

Likewise, defendant has failed to overcome the presumption of trial strategy with respect to counsel's decision not to exclude evidence that .38 caliber ammunition was recovered from codefendant's residence. Given the facts that a spent .38 bullet was recovered from Cheng's clothes, Michael Browner testified that defendant had a .38, Browner testified that defendant pointed in Cheng's direction before the gunshot, and Browner testified that codefendant had a .357, defendant's jury might otherwise have been more likely to believe that defendant was the shooter. Therefore, counsel's performance was not deficient. *Strickland*, *supra* at 690-691; *Stanaway*, *supra* at 687.

Finally, defendant's claim that he was denied the effective assistance of counsel when defense counsel failed to investigate and present his alibi witnesses is without merit. "A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990) To prevail at a post-trial evidentiary hearing, a defendant alleging ineffective assistance of counsel based on trial counsel's failure to present a defense must show (1) that he made a good-faith effort to avail himself of this right and (2) that the defense of which he was deprived was substantial. *Id.* "A substantial defense is one that might have made a difference in the outcome of the trial." *Id.* An alibi is established by testimony that the accused was somewhere other than where the crime occurred at the time the crime occurred. See *People v Mullane*, 256 Mich 54, 58; 239 NW 282 (1931). Failure to offer proof at the post-trial hearing that the proposed alibi witness would have, in fact, provided an alibi precludes a finding of ineffective assistance of counsel. See *People v Tommolino*, 187 Mich App 14, 19-20; 466 NW2d 315 (1991); *Kelly*, *supra* at 527. This is so because, under *Strickland*, *supra*, 466 US 687, the defendant must show that he was prejudiced by trial counsel's alleged deficient performance. *Tommolino*, *supra* at 19-20.

At the evidentiary hearing, defendant's alibi witness, Daryl Prince, testified that he saw defendant outside of a topless dancing club, Henry's Palace, at 11:00 p.m. on the night of the murder. At trial, the evidence showed that the crime occurred at 10:30 p.m. and took approximately five or six minutes. The driving time from the scene of the crime to Henry's Palace was no more than ten minutes. Testimony that defendant was outside a nearby topless dancing club twenty minutes after the crime would not have provided defendant with an alibi. *Mullane*, 256 Mich 58. Therefore, we hold that defendant failed to demonstrate the necessary prejudice. *Strickland*, *supra* at 694; *Stanaway*, *supra* at 687-688; *Tommolino*, *supra* at 19-20.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ Stephen J. Markman