STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEVONN BOYKIN,

Defendant-Appellant.

UNPUBLISHED
November 21, 1997

No. 193985
Recorder's Court
LC No. 95-009049

Before: MacKenzie, P.J., and Sawyer and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of one count of second-degree murder, MCL 750.317; MSA 28.549, four counts of felonious assault, MCL 750.82; MSA 28.277, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to twenty to forty years in prison for his second-degree murder conviction and to four terms of two to four years in prison for each of his felonious assault convictions, these terms to be served concurrently with each other but consecutively to a two-year prison term for defendant's felony-firearm conviction. We affirm in part, reverse in part and remand for a new trial.

Defendant's first issue on appeal is that the trial court erred by denying defendant's motion to suppress his statement to police. Defendant argues that his statement should have been suppressed because it followed his arrest made without a warrant or probable cause, and not falling within any exceptions to the warrant requirement of US Const, Am IV, and Const 1963, art 1, § 11. We disagree.

Defendant first contends that the tip that led police officers to his home to arrest him was insufficient to provide probable cause for his arrest. We disagree. Evidence derived from an informant will not, by itself, constitute probable cause for an arrest without a warrant unless: (1) the police have reason to believe the information is reliable, and (2) the police are informed of the underlying circumstances upon which the informant based his conclusion. *People v Beachman*, 98 Mich App 544, 549; 296 NW2d 305 (1980). The sergeant in charge of the officers arresting defendant testified that the informant had previously given him information that led to an arrest for murder. The information

supplied by the informant in defendant's case was quite detailed, including the time and place of the victim's death, the names and addresses of defendant and his three companions, the fact that the murder weapon was in the trunk of defendant's car and the location of defendant's car. The sergeant verified the time and place of the victim's death by reading the police reports generated at the scene. We conclude that the tip supplied in this case was sufficient to provide the arresting officers with probable cause.

Defendant next argues that the police officers should have obtained a warrant before entering his home to arrest him. Pursuant to MCL 764.15(1)(c); MSA 28.874(1)(c), a peace officer may arrest a person without a warrant when a felony in fact has been committed and the peace officer has reasonable cause to believe that the person has committed it. *People v Richardson,* 204 Mich App 71, 78-79; 514 NW2d 503 (1994); *People v Thomas,* 191 Mich App 576, 579-580; 478 NW2d 712 (1991). As we have noted, the informant's tip provided reasonable or probable cause for the arresting officers to believe that defendant committed the victim's murder. Further, we hold that exigent circumstances permitted the officers to enter defendant's home. The sergeant testified that the homes of defendant and his three companions were raided simultaneously to avoid the chance that one of the four would flee or warn the others, leading to the destruction of evidence. *Beachman, supra* at 554-555.

Defendant also argues that his aunt and guardian did not consent to the officers' entry into the home because she was frightened at the time she let them in. We disagree. Although the aunt testified that she opened the door because the officers threatened to knock it down, the sergeant never admitted that such a threat was made, nor did defense counsel ask him about such a threat. The officers outside the house had their guns drawn, but there is no per se rule that an approach by officers with drawn guns vitiates an otherwise valid consent. *People v Randle,* 133 Mich App 335, 339; 350 NW2d 253 (1984). Moreover, although the sergeant testified that the aunt was "reluctant" to open the door, he also testified that she did not refuse to open it. We conclude that defendant's aunt unequivocally, freely and intelligently consented to the police officers' entry into the home to search for defendant. *People v Jordan,* 187 Mich App 582, 587; 468 NW2d 294 (1991).

Finally, defendant contends that his waiver of constitutional rights before making his statement does not cure the error of admitting his statement. We disagree, having already held that defendant's arrest was valid. Further, this Court has held that the exclusionary rule does not bar the prosecution's use of a defendant's statement made outside his home, even though the statement is made after an unconstitutional entry into the defendant's home to arrest him, if the arrest would have been valid outside the home. *People v Dowdy,* 211 Mich App 562, 568-570; 536 NW2d 794 (1995). We conclude that the trial court did not commit error requiring reversal by denying defendant's motion to suppress his statement and by allowing the statement to be used at trial. *People v Houstina,* 216 Mich App 70, 73; 549 NW2d 11 (1996).

Defendant's second issue on appeal is that the trial court abused its discretion in allowing the prosecution to introduce the rifle seized from the trunk of defendant's car into evidence as the murder weapon, because defendant's car was seized without a warrant. We disagree, noting that we review this issue despite defendant's failure to move to suppress the rifle or object to its introduction because

an important constitutional question is involved. *People v Feazel,* 219 Mich App 618, 621-622; 558 NW2d 219 (1996).

It is well settled that an automobile, because it is mobile and offers unique opportunities for the loss or destruction of evidence, may be searched without a warrant under circumstances that would not justify the search of a home. However, there must be probable cause to believe that the car contains articles that the officers are entitled to seize. *People v Armendarez,* 188 Mich App 61, 71-72; 468 NW2d 983 (1991); *People v Julkowski,* 124 Mich App 379, 383; 335 NW2d 47 (1983).

We conclude that the seizure of defendant's car fell squarely within the automobile exception to the Fourth Amendment warrant requirement. The same tip that provided probable cause to arrest defendant also provided probable cause to seize his car. The tip was reliable and detailed, and included the information that the murder weapon would be found in the trunk of defendant's car as well as the location of the car. *Beachman, supra* at 549-550; *People v O'Brien,* 89 Mich App 704, 713-714; 282 NW2d 190 (1979). Further, the car could have been driven away. It was unknown what other persons might have had access to the car if it had been left by defendant's house. *Julkowski, supra* at 383; *O'Brien, supra* at 715. Defendant also concedes that the car was searched pursuant to a valid search warrant. We hold that the trial court did not abuse its discretion in admitting the rifle into evidence. *People v McElhaney,* 215 Mich App 269, 280; 545 NW2d 18 (1996); *Armendarez, supra* at 71-72.

Defendant next claims that he received ineffective assistance of counsel at trial because his trial attorney failed to move to suppress the rifle and failed to object to its introduction into evidence. We disagree. We have already concluded that the seizure and search of defendant's car were valid. A claim of ineffective assistance of counsel based on defense counsel's failure to object or make motions that could not have affected defendant's chances for acquittal is without merit. *People v Lyles,* 148 Mich App 583, 596; 385 NW2d 676 (1986). Further, defense counsel's failure to move to suppress or to object to the introduction of the rifle did not result in a fundamentally unfair proceeding. *People v Poole,* 218 Mich App 702 718; 555 NW2d 485 (1996). Defendant's three companions, and defendant in his statement to police, all stated that the rifle belonged to defendant, that he brought it along with the intention of using it, and did use it on the victim. Another witness testified that he saw a rifle protruding from the rear passenger window of the car in which defendant and his three friends were riding at the time of the shooting. We hold that defendant received effective assistance of counsel at trial. *People v Daniel,* 207 Mich App 47, 58; 523 NW2d 830 (1994).

For his fourth issue on appeal, defendant claims that the trial court abused its discretion by allowing the prosecutor to ask him about his prior arrests. We agree. The prosecutor attempted to use evidence of defendant's prior arrests to impeach defendant's claim that he was unfamiliar with the constitutional rights notification form and procedure and therefore did not make a knowing and voluntary waiver of his rights. Evidence of arrests not resulting in convictions is inadmissible to impeach the credibility of any witness. *People v Yarbrough,* 183 Mich App 163, 165; 454 NW2d 419 (1990). Further, defense counsel's question to defendant regarding whether defendant had ever been convicted of a felony did not open the door to the prosecutor's questions. *People v Cole,* 50 Mich App 563, 566; 213 NW2d 814 (1973). We conclude that the trial court committed error requiring reversal in

allowing the prosecutor to attempt to impeach defendant with his prior arrests. *McElhaney, supra* at 280.

Finally, defendant argues that the trial court erred by refusing to instruct the jury that defendant's three companions at the time of the shooting could be considered as defendant's accomplices and that their testimony could be viewed with suspicion if the jury found that the companions were accomplices. We agree. Defendant requested the instructions, and there was enough evidence at trial to support giving the accomplice and accomplice testimony instructions. *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994); *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988); *People v Jensen*, 162 Mich App 171, 188; 412 NW2d 681 (1987). One of defendant's companions, not defendant, initiated the group's travels on the night of the shooting, in an attempt to find three men who had confronted him earlier in the evening. One of the other companions supplied the car. Two of the companions made statements that indicated that the third also considered shooting at the gang members defendant sought. Defendant claimed that the third companion shot the victim and owned the rifle. All four young men were sought for arrest. One companion testified that he did not give his statement voluntarily and another tried to evade arrest. Further, it was the word of the three companions against defendant that defendant and not one of the companions was the shooter, as there were no independent witnesses who saw defendant shoot the victim. *People v Smith*, 158 Mich App 220, 229; 405 NW2d 156 (1987). We conclude that the trial court committed error requiring reversal in failing to instruct the jury that it could consider defendant's three companions as accomplices and could consider their testimony with the appropriate amount of skepticism. *Daniel, supra* at 53.

Affirmed in part, reversed in part and remanded for a new trial. We do not retain jurisdiction.

/s/ Barbara B. MacKenzie
/s/ David H. Sawyer
/s/ Janet T. Neff