

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES FLAGGS, SR., a/k/a CHARLES
FLAGG, SR.,

Defendant-Appellant.

UNPUBLISHED
December 16, 1997

No. 188806
Recorder's Court
LC No. 94-008060-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL SHIELDS,

Defendant-Appellant.

No. 189238
Recorder's Court
LC No. 94-008060-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARVIN MINES,

Defendant-Appellant.

No. 190095
Recorder's Court
LC No. 94-008060-FC

Before: Hoekstra, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Defendants were convicted of various offenses arising from a drive-by shooting during which one young woman was killed and seven other young people were wounded. Flaggs was convicted of one count of first-degree murder, MCL 750.316; MSA 28.548, seven counts of assault with intent to murder, MCL 750.83; MSA 28.278, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment for the murder and assault convictions, plus two years' consecutive imprisonment for the felony-firearm conviction. Shields was convicted of seven counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and sentenced to eighty months to ten years' imprisonment for each of those convictions. Mines was convicted of one count of second-degree murder, MCL 750.317; MSA 28.549, seven counts of assault with intent to commit great bodily harm less than murder, and one count of felony-firearm. He was sentenced to eight to twenty-five years' imprisonment for the murder conviction, eighty months to ten years' imprisonment for the assault convictions, and two years' consecutive imprisonment for the felony-firearm conviction. Defendants appeal as of right. We affirm.

Flaggs first argues that the trial court erred in denying his motion for directed verdict. Specifically, he claims there was insufficient evidence of premeditation and deliberation. We disagree.

A trial court's ruling on a motion for directed verdict is reviewed by considering, in a light most favorable to the prosecution, the evidence admitted by the prosecution up to the time the motion is made to determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *People v Vincent*, 455 Mich 110, 121; 565 NW2d 629 (1997), quoting *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). A first-degree murder conviction requires proof that (1) the defendant intentionally killed the victim and (2) the killing was premeditated and deliberate. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). To find a killing premeditated and deliberate, the defendant must have had sufficient time to take a second look. *Id.* Premeditation and deliberation may be inferred from the circumstances of the offense and may be established through evidence of (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide. *Id.*

Considered in a light most favorable to the prosecution, the evidence demonstrates that Flaggs got into the van with at least three other men, at least two of whom were armed. He was seen by one witness carrying a shotgun into the van. After the van drove away and engaged in the shooting, it returned and Flaggs was seen exiting the van with the same gun he had carried into the van. At the scene, the victims testified that they heard different kinds of gunshots. Many shots were fired as the victims either dropped to the ground or ran away. From these facts, premeditation and deliberation can be inferred. Thus, the evidence could have allowed a rational fact finder to find the essential elements of first-degree murder proven beyond a reasonable doubt.

Flaggs also argues that the evidence was insufficient to support his convictions of assault with intent to murder. To prove assault with intent to murder, the prosecution must establish (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Davis*,

216 Mich App 47, 53; 549 NW2d 1 (1996). The intent to kill may be inferred from any acts in evidence. *Id.* On the same evidence as that above, we find that the prosecution presented sufficient evidence of intent for the assault with intent to murder convictions. The trial court properly denied Flaggs' motion for directed verdict.

Flaggs next argues that he was denied the effective assistance of counsel. We disagree. By failing to move in trial court for a new trial or an evidentiary hearing regarding this claim of ineffective assistance of counsel, defendant has failed to preserve the issue for appeal unless the record is sufficient to support his claim. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). This Court's review is limited to the record. *Id.* To establish that defense counsel was ineffective, Flaggs must demonstrate, through the record, that counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced him to the extent that he was denied a fair trial. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995), citing *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

Flaggs asserts that his counsel was ineffective for failing to move for suppression of the evidence seized after his allegedly illegal arrest. The facts demonstrate that the officers had probable cause to arrest Flaggs. His arrest was therefore not illegal, see *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996); MCL 764.15; MSA 28.974, and his counsel not ineffective for failing to seek suppression of the evidence.

Next, Flaggs argues that his trial counsel failed to produce *res gestae* witnesses. Trial counsel's decision regarding calling defense witnesses is presumed to be trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). The failure to call witnesses can amount to ineffective assistance of counsel only when the failure deprives the defendant of a substantial defense, i.e., one which would have affected the outcome of the trial. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990); *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Flaggs has failed to provide evidence that any of the witnesses he believes should have been called would have testified in the manner suggested. Moreover, one of the witnesses did testify that he did not see Flaggs with a gun. Flaggs has also failed to explain how one particular witness' testimony would have benefited him. He has failed to overcome the presumption of trial strategy and has not demonstrated that the failure to call additional witnesses denied him a substantial defense.

Flaggs next argues that his counsel's failure to move for mistrial when the prosecution interjected prejudicial hearsay into the trial constituted ineffective assistance of counsel. Trial courts should grant a motion for mistrial only where there is an irregularity that is prejudicial to the defendant's rights and impairs the defendant's ability to receive a fair trial. *People v Griffis*, 218 Mich App 95, 100; 553 NW2d 642 (1996). Flaggs has failed to demonstrate that he was denied the ability to receive a fair trial through this alleged defective performance.

Next, Flaggs asserts that he was denied the effective assistance by his counsel's failure to effectively impeach a witness and failure to question the firearms expert. The questioning of witnesses is a matter of trial strategy and is not a basis for a claim that a defendant was denied the effective

assistance of counsel. *People v Robideau*, 94 Mich App 663, 669; 289 NW2d 846 (1980), aff'd 419 Mich 458; 355 NW2d 592 (1984). Flaggs has failed to fully explain how he was prejudiced by his trial counsel's questioning of the witness. He also has failed to overcome the presumption that the lack of questioning of the firearms technician was a matter of trial strategy.

Next, Flaggs argues that he was denied a fair trial through prosecutorial misconduct. This issue is not preserved because defendant failed to object to the alleged instances of prosecutorial misconduct. *People v Mitchell*, 223 Mich App 395, 400; ___ NW2d ___ (1997). Absent an objection to alleged misconduct, this Court's review is limited to whether the failure to review would result in a miscarriage of justice. *Id.* We find that a failure to review this issue would not result in a miscarriage of justice.

Flaggs next claims that the jury was improperly instructed. This issue is not preserved because Flaggs did not object to the alleged erroneous instruction. MCR 2.516(C); see also *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996). In the absence of an objection to the jury instructions, this Court's review is limited to determining whether relief is necessary to avoid manifest injustice. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Because the evidence supports the prosecution's theory that it was possible that defendants were seeking to kill a particular person, but instead shot and killed another, the instruction on transferred intent did not constitute reversible error. See *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996). Relief on this issue is not necessary to avoid manifest injustice.

Next, Flaggs argues that he was denied his constitutional rights due to an illegal search and seizure and an illegal arrest. This issue is not preserved because it was not raised below. *People v Zuccarini*, 172 Mich App 11, 17; 431 NW2d 446 (1988). Moreover, Flaggs has failed to demonstrate that he could not have discovered and produced at trial the new evidence that is presented in support of his argument. *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995). We may not consider this evidence on appeal because it is not part of the trial court record. *People v Willett*, 110 Mich App 337, 346; 313 NW2d 117 (1981).

Flaggs next argues that he was denied a fair trial through perjury that was introduced at trial. By failing to object to the witness' testimony, Flaggs has failed to preserve this issue for appeal. MRE 103(a).

Finally, Flaggs argues that the magistrate abused her discretion in binding him over for trial. We disagree.

This Court reviews the district court's decision to bind a defendant over for trial for an abuse of discretion. *People v Whipple*, 202 Mich App 428, 431; 509 NW2d 837 (1993). A defendant must be bound over for trial if, at the preliminary examination, the prosecution presented evidence that a crime was committed and there is probable cause to believe that the defendant committed the crime. *People v Melotik*, 221 Mich App 190, 197; 561 NW2d 453 (1997). The court is charged with determining whether the evidence is sufficient to cause an individual marked by discreteness and caution to have a reasonable belief that the defendant is guilty as charged. *People v Justice (After Remand)*, 454 Mich 334, 343; 562 NW2d 652 (1997). The bind over decision need not be made on evidence

establishing guilt beyond a reasonable doubt. A defendant may be bound over for trial in the presence of evidence leaving some doubt in the mind of the magistrate. *Id.* Probable cause signifies evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt. *Id.*

The prosecution must present evidence from which each element of the charged offense may be inferred. *People v Reigle*, 223 Mich App 34, 37; ___ NW2d ___ (1997). However, each element need not be proved beyond a reasonable doubt. A jury should be given the opportunity to resolve factual questions where there is credible evidence that both supports and negates an element of the offense. *Id.*

The evidence at the preliminary examination was sufficient to establish probable cause that Flaggs participated either directly or as an aider and abettor in the shootings. A witness saw him get into the van carrying a shotgun, and get out of the van with the shotgun after the shootings. There was evidence that the van was seen at the shooting. Moreover, where sufficient evidence is presented at trial upon which to convict a defendant, an error in the binding over of the defendant is harmless. *People v Dunham*, 220 Mich App 268, 276-277; 559 NW2d 360 (1996).

Shields argues that the denial of his motion for a hearing to suppress his statement on the basis of an illegal arrest constitutes reversible error. The record indicates that the police officers had probable cause to arrest Shields. See *Champion, supra*. Because the record demonstrates that Shields' arrest was legal, the trial court's denial of his motion for suppression of his statement because of an illegal arrest was not reversible error.

Next, Shields argues that he was denied due process because the verdict was against the great weight of the evidence and the evidence was insufficient to support his convictions. We disagree.

Shields failed to move for new trial on the ground that the verdict was against the great weight of the evidence. Therefore this issue is waived on appeal. *People v Dukes*, 189 Mich App 262, 264; 471 NW2d 651 (1991). This Court reviews a claim that a conviction was not supported by sufficient evidence by viewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the offense proved beyond a reasonable doubt. *People v McCoy*, 223 Mich App 500, 501; ___ NW2d ___ (1997).

Shields was convicted of seven counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. To convict a defendant of this offense, the prosecution must prove (1) an assault, ie., an attempt or offer with force and violence to do corporal hurt to another, coupled with (2) a specific intent to do great bodily harm less than murder. *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996). The jury was instructed on aiding and abetting. The following elements must be proved for a conviction of aiding and abetting:

- (1) the underlying crime was committed by either the defendant or some other person, (2) the defendant performed acts or gave encouragement which aided and 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 of giving aid or encouragement. [*People v Wilson*, 196 Mich App 604, 609; 493 NW2d 471 (1992).]

Circumstantial evidence and reasonable inferences arising from the evidence may be used to prove the elements of an offense. *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995).

A witness saw Shields get into the van with the other defendants. The other defendants were carrying guns. The witness testified at one time that he heard Shields say he was going around the corner to shoot some people, although the witness later stated he was not sure who he heard saying this. Shields was upset about an earlier shooting and knew that Flaggs was angry about it. He agreed to take Flaggs around the corner to talk to the men who had shot at his house earlier in the day. This evidence, viewed in a light most favorable to the prosecution, is sufficient to convict Shields of assault with intent to do great bodily harm less than murder. It could be inferred that Shields willingly participated in driving the armed codefendants to the corner where the shooters could be found. It could be inferred that Shields knew the codefendants were armed and that they sought vengeance and were going to shoot the other men. Witnesses testified that a man was hanging out the van, over its top, and that the van drove slowly around the corner while shots were fired. Thus, there was sufficient evidence of intent to cause great bodily harm less than murder.

Finally, Shields argues that his sentence is disproportionate. Shields has failed to present unusual circumstances to overcome the presumption of proportionality. *People v Rivera*, 216 Mich App 648, 652; 550 NW2d 593 (1996).

Mines argues that the trial court's findings of fact were clearly erroneous. We disagree. The trial court's findings were sufficient and reveal that it was aware of the issues presented and correctly applied the law. *People v Reeves*, 222 Mich App 32, 35; 564 NW2d 476 (1997). The findings were not clearly erroneous. *People v Adams*, 195 Mich App 267, 269; 489 NW2d 192 (1992), modified on other grounds 441 Mich 916; 497 NW2d 182 (1993).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Myron H. Wahls
/s/ Roman S. Gribbs