STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HENRY JAMES JACKSON,

Defendant-Appellant.

UNPUBLISHED
March 17, 1998

No. 193481
Kalamazoo Circuit Court
LC No. 95-000609-FC

Before: Markman, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of first-degree felony murder, MCL 750.316; MSA 28.548, which he was sentenced to life imprisonment without parole.[1] We affirm.

This case stems from the stabbing death of Angela Taylor, a prostitute in Kalamazoo. The prosecutor's theory of the case was that defendant and James Edwards, both cross-dressing prostitutes, were angry with Taylor for revealing to potential customers that they were men. The two men confronted Taylor, defendant roughed her up and stole money from her, and Edwards stabbed her to death. The defense maintained that defendant never planned to kill Taylor, and that Edwards was solely responsible for her death.

I

Defendant argues that the evidence presented by the prosecution was insufficient to sustain the jury's verdict that he was guilty of first-degree felony murder. We disagree.

The elements of felony murder are: (1) the killing of a human being, (2) with malice; that is, 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; MSA 28.548, including larceny from a person. *People v Turner*, 213 Mich App 558, 566; 540 N.W.2d 728 (1995). Defendant's challenge on appeal is that the prosecution failed to establish the element of malice.

As defendant correctly notes, malice may not be presumed merely from the intent to commit the underlying felony. *People v Datema*, 448 Mich 585, 601; 533 NW2d 272 (1995). The jury may, however, infer malice from the facts and circumstances of the defendant's involvement in the underlying felony. *People v Dumas*, 454 Mich 390, 398; 563 NW2d 31 (1997). Indeed, "if it can be shown that an 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." *People v Flowers*, 191 Mich App 169, 178; 477 NW2d 473 (1991). Moreover, a jury can properly infer malice from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm. *Id.* at 177.

The evidence in the present case, viewed in a light most favorable to the prosecution, establishes that defendant knew that Edwards was armed with a knife when the two confronted Taylor about her interference in their prostitution. Defendant was well aware that Edwards had a violent temper and that he would not hesitate to use the weapon in an argument. During the confrontation, defendant pushed Taylor down, grabbed money from her bra, and went through her purse, while Edwards stabbed Taylor. We find that when presented with this evidence, a rational trier of fact could have found that the essential elements of first degree felony murder, including malice, were proved beyond a reasonable doubt. *Turner*, *supra*, at 572.

II

Defendant next argues that he was denied a fair trial because evidence regarding certain bad acts by defendant was admitted into evidence. We disagree.

A

Defendant did not object to most of the evidence he now challenges on appeal, and thus appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Mayfield*, 221 Mich App 656, 661; 562 NW2d 272 (1997). We have carefully reviewed the record and find that the evidence now challenged on appeal was either not indicative of bad acts or was properly admitted pursuant to MRE 404(b) and its res gestae exception. See *People v Robinso*n, 128 Mich App 338, 340; 340 NW2d 303 (1983). Manifest injustice will not result in our failure to review these claims further.

We also reject defendant's contention that by failing to preserve these matters for appeal, defense counsel was ineffective. To establish such a claim, defendant must show that (1) the performance of his counsel was below an objective standard of reasonableness under the prevailing professional norms, and (2) that a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). Defendant must also overcome the presumption that the challenged action or inaction was a matter of trial strategy. *Id*.

In the present case, defense counsel chose not to attempt to hide certain aspects of defendants' life which were inextricably linked to the facts surrounding the charged offenses. We will not second-guess such matters of strategy. *People v Sawyer*, 222 Mich App 1, 3; 414 NW2d 378 (1997).

B

Defendant also argues that he was denied a fair trial because the jury learned that he had taken, and apparently failed, a polygraph examination. Contrary to defendant' assertion on appeal it appears that the references to a polygraph examination were redacted from the preliminary examination testimony read into the record at defendant's trial. Consequently, we find no error here.

Although a police officer testified that his second interview with defendant occurred in the "same place that the polygraph exam took place, in that area," defendant did not contemporaneously object, thus failing to preserve this issue for review. *Mayfield*, *supra* at 661. Nonetheless, we find that the mere mention of the word "polygraph" does not give rise to error requiring reversal. See *People v Rocha*, 110 Mich App 1, 8-9; 312 NW2d 657 (1981).

C

Defendant also argues that he was denied a fair trial because the jury overheard a conversation between counsel and the trial court regarding whether evidence of defendant's prior prostitution convictions should be admitted. Ultimately, the trial court ruled the evidence inadmissible. Insofar as this evidence was excluded and the jury was expressly instructed that it was not to consider matters that were not admitted into evidence, we find no error requiring reversal.

III

Defendant next challenges the admission of numerous portions of testimony he characterizes as "hearsay." Specifically, defendant argues that it was improper for certain police officers to incorporate statements of other people in their description of the investigation of Taylor's murder. Again, we disagree.

Contrary to defendant's argument on appeal, the statements of others were not offered to prove the truth of the matters asserted, and thus was not hearsay. MRE 801(c). To the contrary, this evidence helped the jury understand the steps taken by the police in their lengthy investigation of Taylor's murder as they focused first on Edwards, and eventually on defendant as well. See *City of Westland v Okopski*, 208 Mich App 66, 77; 527 NW2d 780 (1994); *People v Knowlton*, 86 Mich App 424, 429; 272 NW2d 669 (1978). The trial court repeatedly advised the jurors regarding the proper use of this testimony, and admonished them that this testimony was not to be used as substantive evidence of defendant's guilt. The jury is presumed to have followed these instructions. *People v Torres*, 222 Mich App 411, 423; 564 NW2d 149 (1997).

We further note that even if the evidence were improperly admitted as hearsay, any error would be harmless because the substance of the challenged testimony was presented by the declarants themselves, whom defendant subjected to rigorous cross-examination. See *People v Lewis*, 168 Mich

App 225, 268; 423 NW2d 637 (1988). Also, defendant's own statements were cumulative to much of the evidence at issue. We find no error here.

IV

Defendant's final issue is that the trial court erred in quashing a subpoena duces tecum which sought numerous police reports involving attacks on other area prostitutes by a white or Hispanic male john. We disagree.

The subpoena was quite extensive, and it is unclear whether the Department of Public Safety had the ability to locate the requested reports. Defendant admitted that he knew the names of the prostitutes involved in these other attacks, but was having trouble locating most of them. Further, defendant presented evidence regarding his theory of defense, including the testimony of the investigating officers and one of these other victims.[2] After a careful review of the record, we find that the trial court's decision to quash the subpoena duces tecum was not an abuse of discretion. *People v Valeck*, 223 Mich App 48, 50; 556 NW2d 26 (1997).

Affirmed.

/s/ Stephen J. Markman
/s/ William B. Murphy
/s/ Janet T. Neff

[1] Defendant was also convicted of larceny from a person, MCL 750.357; MSA 28.589. However, the court vacated this count to avoid any double jeopardy violation. See *People v Minor*, 213 Mich App 682, 690; 541 NW2d 581 (1995).

[2] Accordingly, we find defendant's claim that his counsel failed to present a valid defense, and thus rendered ineffective assistance of counsel, to be without merit.