STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DELRICO SCOTT HENLEY,

Defendant-Appellant.

UNPUBLISHED
May 19, 1998

No. 198580
Detroit Recorder's Court
LC No. 95-011611

Before: Cavanagh, P.J., and White and Young, Jr., JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second-degree murder, MCL 750.317; MSA 28.549, armed robbery, MCL 750.529; MSA 28.797, and conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1). Defendant was sentenced to three concurrent ten- to twenty-five year prison terms. We affirm.

Defendant first argues that the trial court erred in denying his motion to suppress statements made to the police after his arrest. Specifically, defendant contends that the statements were involuntary because (1) he was subjected to custodial interrogation without having been advised of his *Miranda*[1] rights, (2) his statements were induced by promises, and (3) the police purposely delayed his arraignment in order to obtain more incriminating evidence against him. We disagree.

The voluntariness of a defendant's statement is a question for the trial court to determine by viewing the totality of the circumstances. *People v Godboldo*, 158 Mich App 603, 606; 405 NW2d 114 (1986). When reviewing a trial court's determination of voluntariness, this Court must examine the entire record and make an independent determination. *People v Robinson*, 386 Mich 551, 557; 194 NW2d 709 (1972). However, we give deference to the trial court's assessment of the weight of the evidence and the credibility of the witnesses, and the trial court's findings will not be reversed unless they are clearly erroneous. *People v Bordeau*, 206 Mich App 89, 92; 520 NW2d 374 (1994).

The trial court's finding that defendant's statements were voluntary was not clearly erroneous. After reporting the shooting to police, defendant and another witness were taken to the homicide section of the Detroit Police Department. Because defendant was not in custody when he gave his first

statement at 12:20 a.m. on September 23, 1995, there was no need for the police to advise him of his *Miranda* rights. *People v Hill*, 429 Mich 382, 384; 415 NW2d 193 (1987). In any event, that statement was exculpatory. Before giving his second and third statements, which were inculpatory, defendant was advised of his *Miranda* rights, which he read aloud, indicated that he understood, and waived both times. We acknowledge defendant's testimony that the police told him he could go home and that he would receive medical attention if he gave a statement. Defendant also claims that he requested an attorney but was told that he did not need one. However, the police officers who questioned defendant denied making any promises. The trial court found that defendant's testimony was not credible, and we give deference to that judgment. *Boreau*, *supra*.

We also acknowledge that there was an unexplained delay in accomplishing defendant's arraignment. However, the voluntariness of a confession is determined by the totality of the circumstances. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). A confession will not be excluded solely because of prearraignment delay. *People v Spinks*, 184 Mich App 559, 563; 458 NW2d 899 (1990). Importantly, the trial court specifically found that the police did not intentionally delay defendant's arraignment in order to extract a statement from him. There was also no evidence that defendant lacked the ability to understand his rights or that the police attempted to trick or deceive him. We conclude that the totality of the circumstances supports the trial court's finding that defendant's statements were freely given.

Defendant also contends that his statements should have been suppressed because his detention was unlawful. We disagree. The prosecution conceded at defendant's *Walker*[2] hearing that there was no probable cause to arrest defendant after he gave his first statement. However, based on the information they received from Vincent Valentine that defendant was involved in planning the robbery, the police did have probable cause to arrest defendant by the time he gave his second statement. See *People v Mitchell*, 138 Mich App 163, 167; 360 NW2d 158 (1984). Therefore, the fact that defendant was lawfully in custody at the time he gave his second statement was a sufficient intervening circumstance to attenuate the taint of defendant's initial unlawful detention. See *People v Washington*, 99 Mich App 330, 335-336; 297 NW2d 915 (1980).[3]

Finally, defendant argues that the prosecution failed to provide sufficient evidence of malice to convict him of second-degree murder. When reviewing a challenge based on the sufficiency of the evidence, this Court views the evidence in a light most favorable to the prosecution to 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; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The elements of second-degree murder are "'(1) a death, (2) caused by an act of the defendant, (3) absent circumstances of justification, excuse, or mitigation, (4) done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm.'" *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996) (citation omitted). Malice may be inferred from the facts and circumstances of the crime, including evidence that a defendant "intentionally set in

motion a force likely to cause death or great bodily harm." *People v Lewis*, 168 Mich App 255, 270; 423 NW2d 637 (1988). In *People v Aaron*, 409 Mich 672, 729-730; 299 NW2d 304 (1980), the Supreme Court explained:

> [W]henever a killing occurs in the perpetration or attempted perpetration of an inherently dangerous felony . . . in order to establish malice the jury may consider the "nature of the underlying felony and the circumstances surrounding its commission[."] *People v Fountain*, 71 Mich App 491, 506; 248 NW2d 589 (1976).

In *People v Flowers*, 191 Mich App 169, 178-179; 477 NW2d 473 (1991), this Court explained the requirements for holding a defendant liable for a killing on an aiding and abetting theory:

> In situations involving the vicarious liability of co-felons, the individual liability of each felon must be shown. It is fundamentally unfair and in violation of basic principles of individual criminal culpability to hold one felon liable for an unforeseen death that did not result from actions agreed upon by the participants. In cases where the felons are acting intentionally or recklessly in pursuit of a common plan, liability may be established on agency principles. *Aaron, supra* at 731. If the homicide is not within the scope of the main purpose of the conspiracy, those not participating are not criminally liable. 40 Am Jur 2d, Homicide, § 34, p 326.
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> In order to convict one charged as an aider and abettor of a first-degree felony-murder, the prosecutor must show that the person charged had both the intent to commit the underlying felony and the same malice that is required to be shown to convict the principal perpetrator of the murder. Therefore, the prosecutor must show that the aider and abettor had the intent to commit not only the underlying felony, but also to kill or to cause great bodily harm, or had wantonly and wil[l]fully disregarded the likelihood of the natural tendency of this behavior to cause death or great bodily harm. Further, if it can be shown that the 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 wil[l]ful disregard sufficient to support a finding of malice. *People v Kelly*, 423 Mich 261; 378 NW2d 365 (1985).
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> Intent is a question of fact to be inferred from the circumstances by the trier of fact. It is likewise a factual issue whether a particular act or crime committed was fairly within the intended scope of the common criminal enterprise. [Some citations omitted.]

Defendant does not dispute that he helped plan and carry out the armed robbery. Rather, defendant argues that there was insufficient evidence to hold him criminally responsible for what he claims was the victim's unintended and unforeseen death. We disagree and conclude that the evidence supports a finding of the requisite mens rea. The evidence demonstrates that defendant told Valentine before the robbery to "be down for whatever goes down," explaining that "somebody" was going to "get" the victim. Especially important, defendant knew that two of his accomplices were armed in contemplation of and during the commission of the robbery. Indeed, it is apparent from defendant's

statement to police that he recognized the .380-caliber semiautomatic pistol that Stevie Eli possessed during the robbery and that he used to kill the victim. Based on this evidence and the reasonable inferences that may be drawn from it, a rational jury could find that defendant participated in the robbery with "wanton and willful disregard" sufficient to support a finding of malice. It was for the jury to determine whether the killing was fairly within the scope of the common enterprise. Viewed in a light most favorable to the prosecution, the evidence was sufficient to permit a rational jury to conclude beyond a reasonable doubt that defendant was guilty of aiding and abetting second-degree murder. See, e.g., *People v Turner*, 213 Mich App 558, 572-575, 577-578, 580-581; 540 NW2d 728 (1995); *People v Spearman*, 195 Mich App 434, 439-440; 491 NW2d 606 (1992), overruled in part on other grounds *People v Veling*, 443 Mich 23, 43 (1993); *People v Pitts*, 84 Mich App 656, 661-662; 270 NW2d 482 (1978); *People v Trudeau*, 51 Mich App 766, 772-773; 216 NW2d 450 (1974).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Helene N. White
/s/ Robert P. Young, Jr.

[1] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966).

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[3] We also note that there was testimony presented at trial that defendant was being held on an unrelated traffic warrant.