STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENSON L. MARTIN,

Defendant-Appellant.

UNPUBLISHED
October 20, 1998

No. 198143
Oakland Circuit Court
LC No. 95-142365 FC

Before: Hoekstra, P.J., and Cavanagh and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), armed robbery, MCL 750.529; MSA 28.797, and conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1). The trial court sentenced defendant to life imprisonment without parole for felony murder, twenty to forty years' imprisonment for armed robbery, and twenty to forty years' imprisonment for conspiracy. Defendant appeals as of right. We affirm the convictions and sentences for felony murder and conspiracy, but vacate the conviction and sentence for armed robbery.

I.

Defendant argues that there was insufficient evidence to support his conviction for felony murder. When reviewing the sufficiency of evidence in a criminal case, this Court must examine the evidence of record in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the elements of the crime were proved beyond a reasonable doubt. See *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). The reviewing court should respect the jury's role in determining the credibility of witnesses and weighing the evidence. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992).

The elements of first-degree felony murder are 1) the killing of a human being, 2) with intent to kill, do great bodily harm, or 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, or attempting or assisting in the commission of, any of the felonies enumerated in the murder statute. *People v Thew*, 201 Mich App

78, 85; 506 NW2d 547 (1993). The enumerated felonies include robbery. MCL 750.316(1)(b); MSA 28.548(1)(b).

"[F]irst-degree felony murder requires an additional mens rea besides the intent to commit the underlying felony . . . ." *People v Jones*, 209 Mich App 212, 215; 530 NW2d 128 (1995). To convict an individual of aiding and abetting felony murder, the prosecutor must show that the individual 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." *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995), quoting *People v Flowers*, 191 Mich App 169, 178; 477 NW2d 473 (1991).

"Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." MCL 767.39; MSA 28.979. To convict a defendant of aiding and abetting in the commission of a crime, the prosecutor must prove that the alleged crime was committed by the defendant or some other person, that the defendant encouraged or otherwise assisted in the commission of the crime, and that the defendant intended to commit the crime or understood that the principal intended to commit the offense at the time that defendant provided aid and encouragement. *Turner, supra* at 568. The state of mind of the aider and abettor may be inferred from all the facts and circumstances. *Id*. When assessing an aider and abettor's state of mind, the trier of fact may consider the "close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime." *Id*. at 569.

Defendant argues that there was insufficient evidence to convict him of felony murder because he did not shoot the victim, there was no evidence that he intended to kill or that had any understanding that Logan intended to kill, there was no evidence that he intended to do great bodily harm or that he knowingly placed the victim at great risk of death or bodily harm, and there was no evidence that he committed the act that caused the victim's death. Defendant further asserts that there was insufficient evidence to find him guilty of felony murder as an accomplice. Although defendant concedes that there was evidence to suggest that defendant intended to steal a car, defendant insists that there was no evidence that he and his friends intended to kill the victim. Moreover, defendant contends that there was insufficient evidence to convict him of felony murder on an aiding and abetting theory on the ground that mere presence at the scene of a crime, even with knowledge, is insufficient to implicate a person in the crime. We disagree.

Evidence that defendant and his friends acted at least recklessly in pursuit of a common plan to commit an armed robbery is sufficient to implicate defendant in that robbery. With respect to the felony murder conviction, that leaves the question of whether there was sufficient evidence to support the conclusion that defendant acted with the required mens rea—that he participated in the robbery with at least a reckless indifference to the likelihood that his course of behavior would result in the death or great bodily harm of the victim. Evidence suggests that defendant knew that both Logan and Grandion had firearms when the group set out to "jack" a car. His knowledge that Logan and Grandion were armed during the commission of the armed robbery was sufficient to persuade a rational trier of fact that defendant participated in the crime, as an aider and abettor, with knowledge of that the victim may

suffer at least great bodily harm. See *Turner, supra* at 572. The evidence that defendant participated in a plan to threaten the life of the victim in the course of robbing him supports the jury's finding of malice on defendant's part. Because the prosecutor produced sufficient evidence to support the conclusion that defendant intended to participate in a robbery, and that he did so with malice sufficient to convict the actual killer, a rational jury could conclude beyond a reasonable doubt that defendant was guilty of felony murder.

II.

Next, defendant asserts that the trial court erred in denying his motion to suppress statements he made to the police during questioning. We disagree. In reviewing a trial court's finding that a confession was voluntarily offered, we examine the entire record and make an independent determination regarding voluntariness, while affording due deference to the trial court's superior ability to view the witnesses and other evidence. *People v Marshall* 204 Mich App 584, 587; 517 NW2d 554 (1994). "The test of voluntariness is whether, considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired." *People v Givans*, 227 Mich App 113, 121; 575 NW2d 84 (1997), citing *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997). Review of the totality of the circumstances to determine the admissibility of a juvenile's confession must include consideration of the following factors:

> (1) [W]hether the requirements of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), have been met and the defendant clearly understands and waives those rights, (2) the degree of police compliance with MCL 764.27; MSA 28.886 and the juvenile court rules, (3) the presence of an adult parent, custodian, or guardian, (4) the juvenile defendant's personal background, (5) the accused's age, education, and intelligence level, (6) the extent of the defendant's prior experience with the police, (7) the length of detention before the statement was made, (8) the repeated and prolonged nature of the questioning, and (9) whether the accused was injured, intoxicated, in ill health, physically abused or threatened with abuse, or deprived of food, sleep, or medical attention. [*Givans, supra* at 121, citing *People v Good*, 186 Mich App 180, 189; 463 NW2d 213 (1990).]

Defendant argues that the trial court should have deemed his confession involuntary because the police failed to abide by the requirements for processing an arrested juvenile as articulated by statute and court rule. Defendant asserts that because he was questioned for over four hours outside the presence of his mother, his confession should be suppressed. Further, defendant reports that he was tired, confused, and afraid while police questioned him upon his early-morning arrest. Defendant argues that police created an atmosphere of fear and intimidation his confessions should have been suppressed at trial as involuntary.

MCL 764.27; MSA 28.886 requires that police arresting a juvenile to take the juvenile "immediately before the family division of circuit court of the county where the offense is alleged to have

been committed . . . ." However, in the instant case there is no evidence that police delayed taking defendant before the probate court for the purpose of extracting a confession. Police testified at the *Walker*[1] hearing that defendant was arrested at approximately 1:00 a.m. because another suspect in the case had been arrested and they were afraid that the remaining suspects would flee once they heard of his arrest. Further, even if we were to view the officers' failure to bring defendant immediately before the probate court as a strategy for eliciting a confession, that impropriety would constitute only one factor to consider when evaluating the voluntariness of his confession under a totality of the circumstances. "Failure to take a juvenile defendant immediately before the juvenile division of the probate court does not per se require suppression of a statement made by the defendant during the period of delay." *People v Rode*, 196 Mich App 58, 69; 492 NW2d 483 (1992), rev'd on other grounds sub nom *People v Hana*, 447 Mich 325; 524 NW2d 682 (1994).

MCR 5.934(B)(2), covering the detention of juvenile suspects, includes the provision that "[i]n each county there must be a designated facility open at all times at which an officer may obtain the name of the person to be contacted for permission to detain the juvenile pending preliminary hearing." This rule affords defendant no basis for appellate relief. Defendant received *Miranda* warnings on a number of occasions while his mother was present, and both defendant and his mother signed a written waiver of those rights. Although defendant asserts that his confessions should be suppressed because his mother was not present at all times during police questioning, the case law does not support such a proposition. In fact, *Givans, supra*, implies only that a juvenile defendant should be given access to a parent or guardian upon request. At one point during his interview with police, defendant requested and was granted an opportunity to see his mother before writing his statement. This suggests that defendant understood that he could have spoken with his mother at any time during questioning.

In sum, there is no evidence to suggest that defendant was coerced, threatened, or tricked into giving a confession. Although defendant was arrested during the early morning hours, no evidence bolsters defendant's claim that he was tired or confused. Further, defendant's level of intelligence, considered along with defendant's earlier experiences with law enforcement officials, suggests that defendant understood the situation when he was questioned. Police questioning of a ninth-grade juvenile suspect for four hours does not in itself render a confession involuntary. *Givans, supra*. For these reasons, the trial court did not err in denying defendant's motion to suppress his statements.

III.

Next, defendant contends that he was denied effective assistance of counsel. Defendant asserts that defense counsel failed to object to irrelevant and prejudicial testimony, to jury instructions on aiding and abetting, and to the amount of court ordered restitution.

Effective assistance of counsel is presumed, and a defendant bears a heavy burden in proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). "To establish ineffective assistance of counsel, a defendant must show a very serious error, must overcome the presumption that the challenged action might be considered sound trial strategy, and must prove prejudice." *People v Jackson*, 203 Mich App 607, 613-614; 513 NW2d 206 (1994), citing *Thew, supra*, at 89. To prove ineffective assistance of counsel, a defendant must show that counsel's

performance fell below an objective standard of reasonableness, that that the

representation so prejudiced the defendant as to deprive him of a fair trial. *Strickland v Washington*, 466 US 668, 687-688, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The defendant must further show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

In the instant case, testimony concerning the state of the victim's body upon discovery was relevant to establish a time of death and to support the prosecution's theory that defendant and his friends drove around with the victim's body in the car for three days before they finally disposed of it. Had counsel objected to this evidence, the objection would have properly been overruled. "[T]rial counsel cannot be faulted for failing to raise an objection or motion that would have been futile." *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

With regard to the jury instructions, although the trial court did in one instance refer to the common unlawful activity of "first degree felony murder" when it should have referred to "robbery," despite this minor error, the instructions given, when considered as a whole, adequately presented the issues for trial and sufficiently protected defendant's rights. See *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997) (imperfect instructions do not require reversal if they fairly presented the issues to be tried and adequately protected the rights of the accused). In this instance, the jury, upon properly considering all instructions tendered together, could hardly have been confused or misled by the trial court's minor error. Thus, defense counsel's failure to correct that error was not sufficiently serious to support a claim of ineffective assistance of counsel.

Finally, although defense counsel failed to raise a valid objection to the trial court's order concerning the amount of restitution, under these circumstances that oversight did not drive counsel's performance below an objective standard of reasonableness. This failure to guard defendant's interests zealously as concerned all aspects of restitution was trivial in light of counsel's primary mission of trying to defend a juvenile facing capital charges.

Moreover, we reject defendant's contention that he was prejudiced by defense counsel's failure to raise certain objections. To find prejudice, a court must determine that there was "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Pickens, supra* at 312, citing *Strickland v Washington*, 466 US 668, 695; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Because there was overwhelming evidence of defendant's guilt, especially in the form of defendant's confessions to law enforcement officials, there is no reasonable prospect that, even if counsel had raised the objections in question, defendant as the result would have avoided his life sentence.[2]

IV.

Next, defendant argues that the trial court erred in admitting evidence relating to the title and registration histories of the victim's Chevrolet Blazer, which defendant was found driving, and of the Pontiac 6000, in which defendant had been a passenger. Defendant maintains that the testimony and exhibits concerning the title and registration histories of both vehicles were both irrelevant and more prejudicial than probative. We disagree.

This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *Koenig v South Haven*, 221 Mich App 711, 724; 562 NW2d 509 (1997). Generally, all relevant evidence is admissible. MRE 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. However, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. However, "unfair prejudice" does not mean merely "damaging"; rather, unfair prejudice exists where the jury may tend to give the evidence undue preemptive weight, or when it presentation of the evidence would otherwise be inequitable. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (citations omitted), modified 450 Mich 1212 (1995).

In the instant case, the title and registration histories of the two cars were relevant. The prosecutor, seeking to establish an element of armed robbery, used the registration and title of the Blazer to prove the victim's ownership of it in the course of showing that defendant intended permanently to deprive the victim of his car. Further, if there were any question of the propriety of that evidence, that issue would be waived on appeal because defense counsel expressly accepted admission of the evidence at trial without objection. See *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994) ("As a general rule, issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances."); *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995) (a party may not assign error on appeal to something this his own lawyer deemed proper at trial).

Regarding the title and registration history of the Pontiac 6000, which Grandion normally drove, the trial court properly admitted that evidence over defendant's objection. The registration was in the name of a resident of Bloomfield Hills and indicated a 1991 Bravada; the title listed a resident of Keego Harbor who had sold the car the year before, indicating that the purchaser had failed to change the title. Because neither the title nor registration reflected Grandion's ownership, the Pontiac 6000 would have been difficult to trace to the suspects in the instant crime. The prosecutor properly presented this evidence to show that there was a conspiracy to commit armed robbery.

According to a police expert who testified at trial, criminals typically use a second vehicle when attempting to steal a car, using one to transport them while searching for one to steal, then using the transport vehicle as a diversion in case police are nearby. The expert testified that typically three or more persons are involved in stealing a car, one to drive the stolen vehicle, another to drive the transport vehicle, and a third to act as "lookout." On cross-examination, the expert explained that car thieves sometimes use improper license plates to distract police and allow the driver of the stolen car to get away. Further, the consequences of being caught displaying improper plates are, of course, much less

serious than those for being caught in a stolen vehicle. Thus, the title and registration history of the Pontiac 6000 were properly offered to assist the jury in understanding and evaluating the prosecutor's theory of the case. Moreover, there is no indication that the jury afforded this evidence undue preemptive weight.

V.

Finally, defendant argues that the trial court committed error requiring reversal in sentencing him as an adult. Defendant asserts that most the trial court's factual findings concerning the factors to consider when deciding whether to sentence a juvenile as an adult were clearly erroneous. We disagree.

> Review of a trial court's decision to sentence a minor as a juvenile or as an adult is a bifurcated one. First, the trial court's factual findings supporting its determination regarding each factor enumerated in MCL 769.1(3); MSA 28.1072(3) are reviewed under the clearly erroneous standard. . . . Second, the ultimate decision whether to sentence the minor as a juvenile or as an adult is reviewed for an abuse of discretion. [*People v Launsburry*, 217 Mich App 358, 362; 551 NW2d 460 (1996) (citations omitted).]

The prosecutor has the burden of establishing by a preponderance of the evidence that the best interests of the public and the juvenile offender would be better served by sentencing the juvenile as an adult. MCR 6.931(E)(2). After considering the criteria set forth in MCL 769.1(3); MSA 28.1072(3) and MCR 6.931(E)(3), the sentencing court must articulate specific and detailed factual findings concerning the basis for its decision to sentence a juvenile offender as an adult. MCL 769.1(6); MSA 28.1072(6); MCR 6.931(E)(4). The sentencing court should exercise its discretion in attempting to balance the relevant factors in a meaningful way at the sentencing hearing. *People v Perry*, 218 Mich App 520, 542; 554 NW2d 362 (1996). The prosecutor must demonstrate more that the juvenile defendant is guilty of a serious offense. *Id*. at 543.

Following the juvenile hearing, the trial court sentenced defendant as an adult, outlining its findings in a written opinion. The court credited defendant with being above average in size and in physical and mental maturity, and observed that defendant had been admitted to three different schools in seventh grade, and to three different schools in eighth grade, because of his involvement in numerous fights. The court noted that the instant offense was "brutal, senseless violence that cost a young man his life," and that defendant showed no remorse for it. The court further concluded that defendant had involved himself with a stolen car one week before the crime at issue.

The trial court determined that defendant would be dangerous to the public if released at age 21, given the seriousness of his crimes and lack of remorse. After noting that it would be difficult to predict whether defendant would be disruptive to the treatment of others in a juvenile facility, the court expressed concern that defendant's size might be intimidating to smaller youth. According to the trial court, defendant would not benefit from the positive peer culture programs in the juvenile justice system because he refused to be held accountable for his actions. On the question of likelihood of

rehabilitation, the trial court stated that defendant would benefit from the more stringent adult programs and procedures. The court believed that, given the violent nature of the offense, "it would be in the best interests of the juvenile, public welfare and the protection of the public security if defendant were sentenced as an adult."

Having reviewed the record, we find no clear error with regard to the trial court's findings of fact. The court's statements indicate that the court carefully weighed the relevant factors outlined in MCL 769.1(3); MSA 28.1072(3) and MCR 6.931(E)(3) at the sentencing hearing. The trial court did not abuse its discretion in sentencing defendant as an adult.

VI.

Defendant was convicted for both felony murder and the predicate felony of armed robbery. This constitutes multiple convictions for the same crime, in violation of double jeopardy principles. *People v Harding*, 443 Mich 693, 714; 506 NW2d 482 (1993); *People v Wilder*, 411 Mich 328, 347; 308 NW2d 112 (1981); *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995). Although defendant did not raise this issue at trial or on appeal, we nonetheless take this opportunity to correct this error sua sponte. Where a defendant is convicted for both felony murder and the predicate felony, the remedy on appeal is to reverse and vacate the conviction for the predicate felony. *Minor*, *supra* at 690, citing *Harding*, *supra* at 714. Accordingly, we vacate defendant's conviction and sentence for armed robbery.

Convictions and sentences for felony murder and conspiracy to commit armed robbery affirmed; conviction and sentence for armed robbery vacated.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell

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

[2] Further, we note that all indications suggest that it is highly unlikely that defendant will ever be able to pay the restitution ordered, this underscoring the relative unimportance of this issue in light of what defendant had at stake in these proceedings, and further weakening defendant's contention that he suffered prejudice from defense counsel's performance.