STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 16, 1999
v	No. 201645 Recorder's Court
JOSEPH RICHMOND, Defendant-Appellant.	LC No. 96-004947

Before: McDonald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felony murder, MCL 750.316; MSA 28.548, armed robbery, MCL 750.529; MSA 28.797, and conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1). He was sentenced to life imprisonment without the possibility of parole for the felony murder conviction, ten to twenty years' imprisonment for the armed robbery conviction and to time served for the conspiracy conviction. Defendant appeals as of right. We vacate defendant's conviction for armed robbery, but otherwise affirm.

Defendant first argues he was denied a fair trial by several instances of prosecutorial misconduct. Because defendant failed to object to any of the alleged instances of prosecutorial misconduct, appellate review is precluded, unless failure to review the issue would result in a miscarriage of justice or if a cautionary instruction could not have cured the prejudicial effect. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). After reviewing the record, we do not believe that our failure to fully review the alleged instances of misconduct will produce a miscarriage of justice.

Defendant next argues he was denied the effective assistance of trial counsel. Because defendant did not move for a *Ginther*[1] hearing or a new trial based on ineffective assistance of counsel, this Court's review is limited to errors apparent on the record. *People v Stewart* (*On Remand*), 219 Mich App 38, 42; 555 NW2d 715 (1996). A defendant who claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceeding

would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *Stewart*, *supra* at 41.

A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that, but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *Stanaway*, *supra* at 687. Counsel is not required to argue a frivolous or meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant first claims that he was denied the effective assistance of trial counsel when his attorney failed to object to the prosecutor's questioning of Vern Lloyd during cross-examination because the prosecutor was attempting to introduce inadmissible hearsay regarding facts that had not been previously introduced. During his direct examination, Lloyd denied any involvement in the robbery and murder of John Scott. During cross-examination, the prosecutor essentially attempted to impeach Lloyd by questioning him regarding statements he allegedly made to Delrico Henley while they were in the Wayne County Jail.

We first note that evidence that Lloyd told Delrico Henley either he or Steven Eli gave defendant the guns after the robbery and murder was introduced during the cross-examination of Henley by defense counsel. Defense counsel was apparently attempting to elicit the inconsistencies in Henley's various statements to the police when he raised this issue. Because Henley had testified that Lloyd told him that he or Eli gave the guns to defendant after the crime, the prosecutor's question to Lloyd was proper as an attempt to impeach Lloyd. See MRE 607. If Lloyd answered affirmatively to the question whether he told Henley that he gave the guns to defendant after the crime, it would not have been hearsay because it presumably was not used to show the truth of the matter asserted, but to show that Lloyd was lying during his testimony. Therefore, an objection by trial counsel would have been overruled, and his failure to do so was not ineffective assistance of counsel.

However, trial counsel should have objected to the questions of the prosecutor regarding the statements Lloyd allegedly made to Henley that Lloyd and Eli drove the Bronco to an inner city substation and paid a crack addict money to burn it. That evidence had not previously been admitted at trial. Therefore, there was no basis upon which to impeach Lloyd of that statement. See *People v Figgures*, 451 Mich 390, 401; 547 NW2d 673 (1996); *People v Losey*, 413 Mich 346, 352; 320 NW2d 49 (1982). However, there is no reasonable probability that counsel's error affected the outcome of the proceedings. First, Lloyd denied that he made those statements to Henley. Further, the trial court instructed the jury that the attorney's questions were not evidence. Moreover, even if the jury considered the prosecutor's questions, it did not incriminate defendant in the crime. Hence, defendant was not denied the effective assistance of counsel by his attorney's failure to object to the prosecutor's questions during cross-examination.

Defendant also argues he was denied the effective assistance of counsel by counsel's failure to object to remarks made during the prosecutor's closing argument that defendant claims referred to facts not in evidence. The remarks referred to statements Lloyd allegedly made to Henley, which the prosecutor questioned Lloyd about during cross-examination. We believe the prosecutor's remarks

regarding Lloyd's alleged statement that he or Eli gave the guns to defendant after the crime were proper comments on the evidence. While the prosecutor did refer to facts not in evidence when he mentioned that Lloyd told Henley that he and Eli drove the Bronco to the inner city substation and paid someone to burn it, we do not believe counsel's failure to object to these remarks denied defendant the effective assistance of counsel. The trial court's instruction to the jury that arguments of attorneys are not evidence dispelled any prejudice. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Accordingly, counsel's failure to object did not affect the outcome of the trial.

Defendant next claims that his counsel was ineffective in failing to object to the prosecutor's alleged improper vouching for the credibility of Delrico Henley and Dennis Johnson during closing argument. However, we believe the prosecutor's comments were proper and did not suggest that he had some special knowledge concerning Henley's or Johnson's truthfulness. Thus, there was no basis upon which defense counsel could object to the prosecutor's comments, and even if he did, the result of the proceedings would have been the same.

Defendant next claims his attorney should have objected, pursuant to MRE 404(b), to the admission of evidence that defendant wanted to rob Scott because of a $10,000 debt owed to a drug source in California and that defendant was previously involved in dealing drugs. Henley testified that defendant told him he wanted to rob Scott because he owed $10,000 to a drug source in California and that two days before the robbery and murder, he and John Scott sold defendant an eighth of a kilogram of cocaine. Henley also testified that he purchased marijuana from defendant at the drug house on Crane Street on the day of the robbery and murder. In addition, Vern Lloyd testified that defendant had drug dealings with Henley and Scott.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. MRE 404(b)(1). However, evidence that is relevant to an issue other than a defendant's criminal propensity may be admitted if the danger of undue prejudice does not substantially outweigh its probative value. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). Specifically, evidence of other acts is admissible for other purposes, including to prove motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity or absence of mistake or accident. MRE 404(b)(1).

The only evidence implicating defendant in the armed robbery and murder of John Scott was the testimony of Delrico Henley that defendant planned the robbery and the testimony of Dennis Johnson that defendant asked him to participate. Henley also testified that defendant did not plan to conduct the robbery himself because Scott knew him from a drug deal they had two days earlier. Therefore, we believe that Henley's testimony that defendant wanted to rob Scott in order to pay a drug debt was relevant to show motive. Moreover, Henley's testimony that defendant did not plan to conduct the robbery himself because Scott knew him from a previous drug deal was also relevant to explain defendant's plan to have other people conduct the robbery. The probative value of the evidence of motive and the evidence explaining why defendant planned to have others carry out the robbery was high because without it the jury would not fully understand how and why defendant intended to rob Scott. While we acknowledge the evidence was also prejudicial, we do not believe its probative value

was substantially outweighed by the danger of unfair prejudice. Therefore, we find that the evidence was properly admitted and defense counsel's failure to object did not amount to ineffective assistance of counsel.

Moreover, while we believe trial counsel should have objected to Henley's testimony that he purchased marijuana from defendant on the day of the robbery and murder and Lloyd's testimony that defendant had drug dealings with Henley and Scott, we do not feel that the admission of that evidence affected the result of the proceedings. The jury already knew that defendant dealt drugs and the additional evidence regarding his drug dealing did not directly bear on his involvement in the robbery and murder of John Scott. Hence, we do not believe defendant was denied the effective assistance of counsel in this regard.

Finally, we do not believe that defense counsel's failure to challenge the addition of Dennis Johnson as a witness amounted to ineffective assistance of counsel. Defendant does not explain upon what basis his attorney should have objected to the addition of Johnson as a witness. MCL 767.40a; MSA 28.980(1) provides in pertinent part:

> (3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.
>
> (4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.

Since Johnson accepted a plea agreement immediately before trial, in which he apparently agreed to testify against defendant, we believe that, had defendant objected to his addition to the witness list, the trial court would have concluded that the prosecution had good cause for the late addition. This conclusion is supported by the fact that the trial court denied defense counsel's subsequent motion for a new trial on the issue. Accordingly, defendant was not denied the effective assistance of counsel.

Defendant next argues there was insufficient evidence to support his convictions of felony murder and armed robbery. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and 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 Medlyn*, 215 Mich App 338, 340; 544 NW2d 759 (1996).

The elements of first-degree felony murder are: (1) the killing of a human being, (2) 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(1)(b); MSA 28.548 (1)(b). *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995). The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the

victim's person or presence, and (3) the defendant must be armed with a weapon described in the statute. *People v Johnson*, 215 Mich App 658, 671; 547 NW2d 65 (1996).

Defendant was implicated in the robbery and death of John Scott as an aider and abettor pursuant to MCL 767.39; MSA 28.979 which provides:

> 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.

Aiding and abetting describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. *Turner, supra* at 568. An aider and abettor's state of mind may be inferred from all the facts and circumstances. *Id*. Factors that may be considered include a 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. To sustain an aiding and abetting charge, the guilt of the principal must be shown. *Id*.

Defendant first claims there was no evidence that he intended or knew that weapons would be used during the attempt to steal John Scott's automobile and drugs to support his conviction of armed robbery. We disagree.

We find there was sufficient evidence that defendant intended or knew that weapons would be used during robbery, from which the jury could determine beyond a reasonable doubt that he was guilty of armed robbery. Although Delrico Henley testified that defendant told him John Scott would not be hurt or shot during the robbery of his truck and drugs, he also told both Henley and Johnson that he did not like Scott and told Johnson that he would "f---- him up." Although there was no explanation as to what that statement meant, it could be inferred that defendant wished to harm Scott in some way. In addition, the fact that defendant stated that Scott would not be shot supports the inference that he knew guns would be involved. Moreover, Henley testified that defendant planned the robbery and told him that Eli and Lloyd would perform it. Henley also stated that after the murder and robbery, Eli and Lloyd returned the guns they used to defendant, who was waiting in a car on Field Street. This strongly indicates that defendant planned that Eli and Lloyd would use guns during the robbery.

Defendant also claims there was insufficient evidence to support his conviction of felony murder because there was no evidence that he knew guns would be used or that he intended to harm or kill John Scott. However, there was ample evidence to establish that defendant either intended or knew that guns would be used to accomplish the theft of Scott's truck and drugs. Again, although Henley testified that defendant told him Scott would not be hurt or killed, Johnson also testified that defendant stated he and his cousins would "f--- him up." Because defendant planned the robbery and Eli or Lloyd returned the guns to him after the robbery, the jury could reasonably infer that defendant either intended to do great bodily harm to Scott or kill him, or that he intended to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. It

may be inferred from the facts and circumstances that defendant either instructed Eli and Lloyd to use guns during the robbery or knew that they would do so. He apparently instructed Eli and Lloyd to make the robbery appear to be a carjacking. At the least, it may be inferred that defendant knew that his plan would create a high risk of death or great bodily harm, and that if Eli or Lloyd instigated any force, the probable result would be death or great bodily harm. Therefore, there was sufficient evidence from which rational jurors could conclude beyond a reasonable doubt that defendant aided and abetted Eli in killing John Scott during the planned robbery of his truck and drugs.

Defendant next argues that his convictions for both felony murder, based on the underlying felony of larceny, and armed robbery violated his right to be free from double jeopardy because larceny is a lesser included offense of armed robbery. The prosecution correctly concedes that defendant is entitled to relief on this issue. Accordingly, we vacate defendant's armed robbery conviction. *People v Harding*, 443 Mich 693, 714; 506 NW2d 482 (1993); *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995).

Defendant also argues that because the jury was improperly instructed that the underlying felony for the felony murder charge was larceny, the felony murder conviction should be vacated because it cannot be determined whether the jury would have convicted defendant of felony murder based on the predicate felony of armed robbery. However, the jury clearly convicted defendant of armed robbery. Therefore, there is no need to vacate defendant's felony murder conviction or remand for a new trial.

Finally, defendant argues the judgment of sentence should be amended to reflect the proper sentence imposed upon him for the conspiracy to commit armed robbery conviction. However, the judgment of sentence was amended after the parties submitted their briefs on appeal and it indicates that defendant's sentence for the conspiracy to commit armed robbery conviction is 191 days credit for time served. Therefore, this issue is moot.

We affirm defendant's convictions for felony murder and conspiracy to commit armed robbery, but vacate his armed robbery conviction.

/s/ Gary R. McDonald
/s/ Kathleen Jansen
/s/ Michael J. Talbot

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).