STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 1999
v	No. 205544 Recorder's Court
MICHAEL T. SMALL, Defendant-Appellant.	LC No. 96-002612

Before: Smolenski, P.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

A jury convicted defendant Michael T. Small of second-degree murder, MCL 750.317; MSA 28.549, under an aiding and abetting theory, and possession of a firearm while committing a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced Small to ten to twenty years' imprisonment for the second-degree murder conviction, to run consecutively to the two-year statutory sentence for the felony-firearm conviction, with credit for 454 days served. Small appeals as of right. We affirm.

I. Basic Facts And Procedural History

This case arises from a drive-by shooting during which William "Eddie" Caliman sustained fatal gunshot wounds. At trial, the prosecution's theory was that Small, age seventeen at the time of the incident, aided and abetted in a first-degree premeditated murder. The defense theory was that there would be no evidence Small knew what the shooter, Jermaine Gulley, was going to do with the gun.

At trial, the prosecution presented evidence that on March 12, 1996, at approximately 1:15 p.m., Caliman was shot while in the driver's seat of a Chevrolet Suburban in the vicinity of Norfolk and Freeland streets in Detroit. According to an assistant medical examiner, Caliman was shot seven times, sustaining four gunshots to his right leg, one to his left knee and one to his head, which grazed his left ear before entering his scalp, and a grazing wound to his left shoulder. The assistant medical examiner testified that the cause of death was multiple gunshot wounds and that manner of death was homicide.

Prosecution witness Sam Webber testified that he heard five or six shots fired at the intersection of Norfolk and Ardmore and saw a "blue Chrysler Plymouth" car at that next intersection, Norfolk and Freeland, pull up beside the passenger side of a Suburban and stop. Webber stated that he then heard shots in rapid succession from the driver's side of the blue Chrysler. Webber testified that he could only see one person in the blue Chrysler and could not see anyone in the Suburban.

The prosecution presented testimony that, after the police arrived and the scene was secured, an evidence technician found bullet holes throughout the passenger side of the Suburban, several windows were broken, some bullets had passed through the passenger side door and then through the driver's side door, the driver's side rear tire was shot out, and the rear door had bullet holes; the bullet pattern showed that the vehicle was shot from behind. This testimony also indicated that the driver's side door was open, blood was in the vehicle and on the ground and twenty-one spent shell casings, typical of those fired from an AK-47, were found on the passenger's side, approximately one or two feet to eight feet from the Suburban. At Ardmore and Norfolk, the evidence technician found five more of the same type of spent casings in the roadway.

Officer Keith Terry, of the Detroit Police Department, testified that he arrested Small at his home at 19703 Hartwell. According to Officer Terry, Small answered the door. Officer Terry then arrested him and asked him for the weapon that Jermaine Gulley used to kill William Caliman. In response, Small took Officer Terry to the bedroom and pointed to the bed. Officer Terry found and secured an AK-47 assault rifle located under the bed and, from the headboard, a gun magazine containing twenty-eight bullets. Officer Terry stated that when he asked Small where or how he got the weapon, Small replied, "Jermaine [Gulley] came over telling me about a guy who shot up his house and his father's car. Jermaine asked me for a gun so he can get the guy. I gave him the gun and he left. He came back to the side door later giving me the gun. That's when I found out he killed someone." Police analysis later determined that the AK-47 Officer Terry found at Small's house was not the weapon used to kill Caliman.

Detroit Police Officer Monica Childs, the officer in charge of the investigation, testified that she saw a connection between the shooting at Norfolk and a shooting at Hartwell. She structured her investigation around the theory of a revenge shooting. Officer Childs testified that, after advising Small of his rights, she interviewed him for the first time on March 16, 1996, and because some information was omitted from his first statement, a second interview occurred the next day, March 17.

In the first statement, Small said that on March 12, 1996, "Jermaine Gulley called me and said they just shot up my house[,] grab the heater [gun.]" Small recalled that, about two minutes later, Gulley knocked on his side door and he saw Gulley's brother, Cain, parked on St. Martin in an olive Grand Cherokee. Small said that he "knew he was going to confront Ricky, Randy or Eddie," so he got into the dark blue Chrysler Lebaron with Gulley and they followed Cain. According to Small, when they arrived at Ardmore, Gulley passed Cain when they saw Caliman's truck on Norfolk. Gulley then caught up to Caliman's truck and started shooting at Caliman; thereafter, according to Small, Gulley drove off saying "don't mess with me." Gulley took Small back to his house and Small took the gun inside. Small reported that he did not shoot at Caliman, but Gulley did, using an AK-47 he obtained from Small's house; it was not Small's gun and Small was just keeping it at his house for Gulley. Small

agreed that he made it possible for Gulley to get the AK-47 used to fatally wound Caliman, but he "thought he was just going to confront them." Small stated that after the shooting, two of Gulley's friends retrieved the gun used in the shooting.

Small said that he agreed to give a second statement because "I didn't admit that the gun Jermaine [Gulley] used when he shot Eddie was my gun." According to Small's second statement, Gulley called him and said "to get the heater because I'm getting ready to do these niggers." Small "knew at the time he meant he was going to shoot Ricky, Randy, and Eddie, but I didn't think he would really shoot them, I thought he was just talking because he was mad." When asked why he gave Gulley the AK-47 when he knew he was mad, Small responded, "I wasn't thinking." Small said that he rode with Gulley to look for Ricky, Randy and Eddie and "if he [Gulley] had gotten into a fist fight with them I would have helped Jermaine [Gulley]." Before firing shots, Small heard Gulley say "I'm if [sic] getting ready to do this nigga." Small explained that the AK-47 that he gave to Officer Terry was not the gun that Gulley used to shoot Caliman, but rather was Small's father's gun. In his own handwriting, Small added to the statement "If I thought he was going to really shoot anyone I wouldn't have given him the gun."

The prosecution also presented testimony from Rene Harston, Caliman's seventeen-year-old cousin and friend, who testified that he, Small and Jermaine Gulley had been friends at one time, but the friendship had soured. According to Harston, Small hung out with Gulley. Harston testified that his brother, Ryan Harston, had engaged in a fist-fight with Gulley and after that, it was just words. On the morning of the shooting, Harston was in front of his grandmother's house on Ardmore street near Chippewa in Detroit with some friends, including his brother and Caliman, when Gulley, driving a Cherokee, sped down the street and onto the grass, trying unsuccessfully to hit them. That afternoon, at around 1:15 p.m., Harston saw Caliman alone in a red 1979 Suburban at the corner of Norfolk and Ardmore and along with Gulley's blue Lebaron with two people in it and Carlton Cain's Jeep Cherokee. The vehicles sped down Ardmore, turning left on Norfolk, that he then heard gunshots so he went into his grandmother's house and, where he heard a second volley of about twenty-five to thirty shots. After the shooting ceased, Harston went to the scene and saw the vehicle (apparently Caliman's Suburban) with the windows broken out and bullet holes in the car.

Detroit Police Officer Raphael Davis testified that on March 12, 1996, he was at a house at 18953 Hartwell in Detroit, responding to a report that shots were fired in a malicious destruction of property incident involving multiple bullet holes in the door, windows and inside walls of the residence, consistent with someone firing at the house from outside. According to Officer Davis, there was a red Cherokee with damage to the rear window as if someone had fired a gun through it and a blue Lebaron in the driveway, which left while he was still at the scene. Officer Davis spoke with Gulley, whom he believed was living at the residence at that time, and that Gulley left the location. Officer Davis stated that he had received information that the house shooting was in retaliation for a previous incident. Officer Davis testified that while investigating the scene, he received information about a shooting that occurred approximately one-half mile away at Norfolk and Freeland, less than one-half hour after Gulley left, and that he then went to that location to assist other responding units.

After the prosecution rested its case, the defense rested without providing any testimony Thereafter, the judge instructed the jury, which returned with a guilty verdict of second-degree murder under the aiding and abetting theory, and of felony-firearm.

II. Sufficiency Of The Evidence

A. Standard Of Review

Small argues that there is insufficient evidence to sustain his conviction of aiding and abetting second-degree murder, claiming that the prosecution failed to prove beyond a reasonable doubt that defendant possessed the requisite intent. When reviewing the sufficiency of the evidence, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found evidence sufficient to prove the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748, amended 441 Mich 1201 (1992).

B. Second Degree Murder Under An Aiding And Abetting Theory

One of the elements of second degree murder is an intent to kill, inflict great bodily harm, or create a very high risk of death knowing that the act probably will cause death or great bodily harm. *People v Johnson*, 208 Mich App 137; 526 NW2d 617 (1994). Here, the prosecution relied on the aiding and abetting theory, the elements of which this Court recently summarized in *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999):

> One who procures, counsels, aids, or abets in the commission of an offense may be convicted and punished as if he committed the offense directly. MCL 767.39; MSA 28.979; *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). To establish that a defendant aided and abetted a crime, the prosecutor must prove that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the principal in committing the crime, and (3) the defendant intended the commission of the crime or knew the principal intended its commission at the time he gave aid or encouragement. *Turner, supra.* Mere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to establish that a defendant aided or assisted in the commission of the crime. *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992). [See also *People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999).]

The state of mind of an aider and abettor may be inferred from all facts and circumstances, including close association between the defendant and principal, the defendant's participation in planning or executing the crime, and evidence of flight after the crime. *Carines, supra* at 758; *Turner, supra* at 568-569.

Here, there was evidence that the killer, Jermaine Gulley, called Small and told him to get the gun. Gulley arrived at Small's house and Small provided him a gun, accompanied him in Gulley's car to

seek out certain individuals, knowing that Gulley intended to shoot Caliman, and witnessed the fatal drive-by shooting from the passenger seat of the car. Thereafter, Small placed the weapon used in his house until the Gulley's friends retrieved it. From these facts, a jury could infer that Gulley had the requisite intent to commit second-degree murder and that Small knew of Gulley's intent. Viewing this evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could conclude that sufficient evidence existed to support Small's conviction of second-degree murder as an aider and abettor.

III. Jury Instruction On Mere Presence

Small argues that the trial court erred by failing to instruct the jury on mere presence sua sponte. We need not address this issue because the trial court did, in fact, provide such an instruction.

IV. Motion To Quash

A. Standard Of Review

Small argues that the trial court erred in denying his motion to quash the charge of first-degree premeditated murder because the district court abused its discretion in binding him over. Small asserts that there was a lack of evidence of premeditation and deliberation. We review de novo a circuit court's decision to grant or deny a motion to quash a felony information to determine whether the district court abused its discretion in ordering bindover. *People v Grayer*, 235 Mich App 737, 739; 599 NW2d 527 (1999).

B. *Abraham*

Recently, in *People v Abraham*, 234 Mich App 640, 655-657; 599 NW2d 736 (1999), we addressed the circumstances when a defendant must be bound over for trial as well as the required proof for first-degree murder:

> A defendant must be bound over for trial if, at the conclusion of the preliminary examination, probable cause exists to believe that the defendant committed the crime. *People v Orzame*, 224 Mich App 551, 558; 570 NW2d 118 (1997). "Probable cause exists where the court finds a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person to believe that the accused is guilty of the offense charged." *Id*., citing MCL 766.13; MSA 28.931; MCR 6.110(E). While guilt need not be established beyond a reasonable doubt, there must be evidence of each element of the crime charged, or evidence from which the elements may be inferred. *People v Flowers*, 191 Mich App 169, 179; 477 NW2d 473 (1991).
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> First-degree premeditated murder requires proof that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v*

> *Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *Id*. Premeditation and deliberation may be established by 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.* "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Proof of motive is not essential. *People v Wells*, 102 Mich App 122, 128; 302 NW2d 196 (1980). [Footnote omitted.]

In *Abraham*, we concluded that the magistrate properly bound the defendant over for trial on the first-degree murder charge based on the testimony of three of the defendant's friends concerning the defendant's statements the day before the shooting that "[t]hese people keep messing with me I'm going to shoot them," and the day after stated, "I shot that nigga" and "I got him," because the evidence indicated that the defendant acted with premeditation and deliberation in shooting the victim. *Id*. at 657. Although there was some conflicting evidence, "where the evidence is conflicting, or otherwise raises a reasonable doubt with respect to the defendant's guilt, the defendant should be bound over for trial for resolution of the issue by the trier of fact." *Id.*, citing *People v Goecke*, 457 Mich 442, 469-470; 579 NW2d 868 (1998), and *People v Selwa*, 214 Mich App 451, 457; 543 NW2d 321 (1995).

Similarly in this case, Small gave statements indicating that Gulley made comments about what he intended to do, including "they just shot up my house, grab the heater [gun]," and "get the heater 'cause I'm getting ready to do these niggers." Two minutes later Gulley arrived at Small's house and they left to look for Caliman. After the shooting, Gulley stated "[d]on't mess with [me]." This evidence indicates that Gulley acted with premeditation and deliberation. Because the prosecution argued Small's guilt under an aiding and abetting theory, it had to establish, among other things, that Small "intended the commission of the crime or knew the principal intended its commission at the time he gave aid or encouragement." *Carines, supra* at 757-758; *Norris, supra*. Based on the evidence presented, we conclude that even a cautious person could believe that Small was guilty of the charged offense. Although conflicting evidence was also presented, such that it might may raise a reasonable doubt with respect to Small's guilt, "the defendant should be bound over for trial for resolution of the issue by the trier of fact." *Abraham, supra* at 657. Thus, we conclude that the trial court did not err in ruling that the district court did not abuse its discretion in binding over Small on the first-degree murder charge.

V. Motion To Suppress

A. Standard Of Review

Small argues that the trial court erred in denying his motion to suppress his second statement because it was involuntary. Specifically, Small claims that his first statement provided probable cause to charge and arraign him and that his second statement was taken in a situation where arraignment was unnecessarily delayed, which, under the totality of circumstances, rendered the statement involuntary. The argument also focuses on Small's youth, his lack of prior experience with the justice system, and his

belief that he could be charged as an accessory, at most, and therefore did not call his parents nor seek counsel.

When reviewing a trial court's findings in a *Walker* hearing,[1] we examine the entire record, making an independent determination on the issue of voluntariness. *Abraham, supra* at 644-646. We will not reverse a trial court's findings unless they are clearly erroneous. *People v Kvam*, 160 Mich App 189, 196; 408 NW2d 71 (1987). A finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *Id.*

B. Delay In Arraignment

Delay in arraignment alone is not a controlling factor rendering a statement given during the delay inadmissible, but one of several factors to be considered in judging the voluntariness of a confession. *People v Cipriano*, 431 Mich 315, 335; 429 NW2d 781 (1988). As summarized by the Michigan Supreme Court:

> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.
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> The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. Unnecessary delay is one factor to consider in reaching this conclusion, the focus being not just on the length of delay, but rather on what occurred during the delay and its effect on the accused. [*Id.* at 334-335 (citations omitted); see also *Kvam, supra* at 196.]

Here, Small was advised of his constitutional rights, read his rights aloud and initialed by each right to indicate that he understood. There was nothing unusual about Small's appearance, demeanor or manner, nor any reason to believe that defendant had been deprived of food, sleep or medication, nor was injured, intoxicated, drugged, or ill. Further, Officer Childs testified that there was no force, coercion or threats used and that she made no promises with regard to possible charges, having told Small not to give another statement thinking that he would only be charged with accessory, because she did not know with which crimes he would be charged. Nothing in this testimony or on the record indicates that something occurred during the alleged delay that affected Small's ability to give a voluntary

statement. Based on independent examination of the record, we conclude that the trial court did not clearly err in denying Small's motion to suppress his second statement.

Affirmed.

/s/ Michael R. Smolenski
/s/ William C. Whitbeck
/s/ Brian K. Zahra

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