STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT EARL LEE,

Defendant-Appellant.

UNPUBLISHED
January 28, 2000

No. 207543
Calhoun Circuit Court
LC No. 97-2079 FC

Before: Doctoroff, P.J., and O'Connell and Wilder, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83; MSA 28.278, assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, intentional discharge of a firearm from a vehicle, MCL 750.234a; MSA 28.431(1), and intentional discharge of a firearm at a building, MCL 750.234b; MSA 28.431(2). Defendant was sentenced to twenty to forty years in prison for the assault with intent to commit murder conviction, a concurrent term of five to ten years in prison for the assault with intent to commit great bodily harm less than murder conviction, and two concurrent terms of thirty-two to forty-eight months in prison for the intentional discharge of a firearm from a vehicle conviction and the intentional discharge of a firearm at a building conviction. He appeals as of right. We affirm.

Defendant's convictions arose from a drive-by shooting that occurred in Battle Creek on March 27, 1997, in which the gunman shot into a group of people at a barbecue. One witness identified George Reed as the person firing the weapon. Certain witnesses told the police that defendant was the driver. A short time after the shooting, the police spotted a car that matched the description of the car involved. Four people were in the car, including George Reed. Defendant was driving the car. Officer William Bohannon searched the inside of the car and found a box of ammunition for an assault rifle in the glove compartment, two live shells in the passenger seat, and one spent casing underneath the seats. The day after the shooting, the assault rifle that apparently was used in the shooting was found on the ground a short distance from where the shooting occurred.

On appeal, defendant first contends that the prosecutor misstated the law with respect to the intent required for aiding and abetting, and that the misstatement denied him a fair trial. We disagree.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). When reviewing a claim of prosecutorial misconduct, this Court must examine the pertinent portions of the record and evaluate the prosecutor's remarks in context. *Id.* Here, defendant did not object to the challenged remarks of the prosecutor. While review of allegedly improper prosecutorial remarks generally is precluded absent an objection, an exception exists if a curative instruction could not have eliminated the prejudicial effect or if failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

To convict a defendant of assault with intent to commit murder, the prosecution must prove (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). To prove aiding and abetting a specific intent crime, the prosecution must show that defendant intended the commission of the crime or had knowledge that the principal had the intent to commit the crime. *People v King*, 210 Mich App 425, 431; 534 NW2d 534 (1995).

Defendant argues that certain statements made by the prosecutor implied that defendant's mere presence or defendant's failure to stop the shooting was sufficient to prove the intent required for conviction on an aiding and abetting theory. First, defendant claims that the prosecutor's statement, "If he drove the car, that's enough," misstated the intent required. However, when taken in context, the remark did not misstate the law. Two sentences earlier, the prosecutor told the jury that defendant "has to have the intent to kill or he had to have assisted, knowing that George Reed intended this crime." When read in context, it is clear that the prosecutor was arguing that, if defendant drove the car with the intent to kill or with knowledge that the shooter intended to kill, the fact that he was not the shooter, but merely drove the car, did not mean that he was not guilty of assault with intent to commit murder.

Defendant also argues that the prosecutor misstated the intent required when he commented that the gun was placed across defendant's chest, pointing out the window, because the statement indicated that defendant's failure to stop the shooting was sufficient to find him guilty as an aider and abettor. However, after having reviewed the remarks, we find no error. The statement was made while the prosecutor was summarizing the facts that supported a conclusion that defendant intended, and knew that Reed intended, to commit murder: defendant drove the car down the street at two to five miles per hour, the shooter leaned across defendant's seat to point the semi-automatic rifle out the window, and ammunition for the assault rifle was found in the glove compartment. The prosecutor's argument simply explained to the jury how it could infer that defendant either intended that the murders be committed or knew that Reed intended to commit murder. Thus, we find no error.

Finally, defendant contends that the prosecutor implied that knowledge of Reed's intent was not required when she said, "What did he know after the shooting that he didn't know before?" This statement was made in the prosecutor's rebuttal argument, after defense counsel had argued that, at most, defendant was guilty only as an accessory after the fact. The prosecutor's statement did not misstate the knowledge required, but rather, was part of the prosecutor's summary of the evidence supporting an inference that defendant knew Reed had the intent to kill. Defendant has not shown that he was denied a fair and impartial trial by the prosecutor's remarks.

Defendant next argues that the jury instructions misstated the intent required to prove aiding and abetting. We disagree. A trial court is required to instruct the jury concerning the law applicable to the case and to fully and fairly present the case to the jury in an understandable manner. MCL 768.29; MSA 1052; *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995); *People v Daoust*, 228 Mich App 1, 14; 577 NW2d 179 (1998). Jury instructions should be considered as a whole rather than extracted piecemeal to establish error. *Daoust, supra* at 14. Even if the instructions were somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* Because defendant failed to object to the jury instructions at trial, he has waived any error unless relief is necessary to avoid manifest injustice. *People v Swint*, 225 Mich App 353, 376; 572 NW2d 666 (1997).

Here, the court instructed the jury that it had to find that defendant "gave his encouragement or assistance intending to help another commit that crime." It later instructed the jury regarding the elements of aiding and abetting, including the following instruction regarding the knowledge required:

> And third, the defendant must have intended the commission of the crime alleged or must have known that the other person intended its commission at the time of giving the assistance.

The quoted instruction is an accurate statement of the intent required for an aiding and abetting conviction. See *King, supra* at 431. Reading the instructions as a whole, we cannot say that the jury was misled with respect to the intent required for an aiding and abetting conviction. Thus, we find no manifest injustice.

Next, defendant argues that he was denied the ineffective assistance of counsel. We disagree. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation prejudiced the defendant to the extent that it denied him a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Stanaway, supra* at 687-688. Defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *Id.* at 687. Because defendant did not move for a new trial or a *Ginther*[1] hearing, our review is limited to mistakes apparent from the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

First, defendant contends that he was denied the effective assistance of counsel because defense counsel argued that if the jury believed Nelson's testimony, then it should find defendant guilty. However, when read in context, defense counsel's argument was not improper:

> If you believe Antonio Nelson, who lied under oath, who lied at a prior hearing and who gave a false statement to the police six months ago, then my client's guilty as charged. There's no doubt about it.
>
> Her whole theory rests on whether you believe a little liar on the stand. That's it.

* * *

> The whole crux is if you believe Antonio he [defendant] then had a reason or knew about the shooting. Antonio is nothing but a liar, and there is no other evidence to say my client knew what was gonna [sic] happen. That's the argument.

It is clear from the record that defense counsel's argument did not concede defendant's guilt. Although defense counsel stated that if the jury believed Nelson's testimony, it should find defendant guilty, defense counsel also argued that Nelson's testimony should not be believed for numerous reasons. Defense counsel's argument was trial strategy, which we will not second-guess. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant also argues that counsel was ineffective for failing to object to the court's instructions regarding the intent required for aiding and abetting. However, we have already concluded that these instructions were correct. Defense counsel was not required to make meritless objections. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Next, defendant asserts that he was denied the effective assistance of counsel because defense counsel failed to introduce evidence of Nelson's juvenile record to impeach him. However, the decision not to impeach a witness, or to impeach by one means as opposed to another, is trial strategy. We decline to second-guess defense counsel's strategy, which apparently was to cross-examine Nelson with respect to his inconsistent prior statements, instead of introducing juvenile adjudications. *Rice, supra*. Furthermore, defendant has not demonstrated that the juvenile adjudications would have been admissible under MRE 609(e) or that he was prejudiced by the alleged error.

Defendant next argues that defense counsel was ineffective for failing to object to statements by the prosecutor characterizing the offense as one taking place between gangs. However, a prosecutor may argue the evidence and make reasonable inferences from that evidence. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998). The prosecutor presented testimony that there were gang-related problems in the area, that the car involved in the shooting belonged to a gang, and that there were some people at the party affiliated with a rival gang. The prosecutor's argument that defendant was connected in some way with a gang that was involved in the shooting was a reasonable inference from the evidence and was not improper. Thus, defense counsel was not ineffective for failing to object to this argument.

In a related argument, defendant contends that counsel was ineffective for failing to object to Nelson's testimony that people in "these groups" carry assault rifles and to the prosecutor's argument that "George Reed was there to settle a score," and that Reed "was gonna kill 'em. That's what they do." Defendant asserts that Nelson's testimony was inadmissible under MRE 404(b), which governs the admission of evidence of other crimes, wrongs, or acts. However, Nelson's testimony was introduced in the context of Nelson explaining why, when he had only seen the barrel of the weapon, he concluded that it was an assault rifle. Furthermore, there was evidence connecting defendant with a gang. Evidence of gang membership and misconduct by the gang may be admitted to show intent or knowledge. MRE 404(b)(1); *People v Turner*, 213 Mich App 558, 585; 540 NW2d 728 (1995).

Here, the evidence was admissible and the prosecutor's comments were proper inferences from the evidence. *Turner, supra.*; *Kelly, supra*. Defendant has failed to show that he was denied the effective assistance of counsel.

Defendant next argues that he is entitled to resentencing because the court failed to resolve his challenges to the presentence report. We disagree. Whether the trial court properly resolved defendant's challenges to his presentence report is a question of law, which we review de novo. *People v Connor,* 209 Mich App 419, 423; 531 NW2d 734 (1995).

The use of inaccurate information at sentencing may violate a defendant's constitutional right to due process. US Const, Am XIV; Const 1963, art 1, § 17; *People v Hoyt*, 185 Mich App 531, 533-534; 462 NW2d 793 (1990). A defendant may challenge the accuracy of the information contained in the presentence report at the time of sentencing. MCL 771.14(6); MSA 28.1144(6); *Hoyt, supra*.

Here, the trial court considered defendant's challenges to the presentence report, but determined that the report was accurate. The presentence report contained information that defendant had seven juvenile adjudications, including three that resulted in periods of confinement, and eleven misdemeanor convictions as an adult. During the sentencing hearing, defendant objected to the statement in the presentence report that he had been committed five times as a juvenile, saying that he was confined "about once." We first note that, although the presentence report indicates that several of the juvenile adjudications resulted in commitments to the juvenile home, the report also indicates that certain commitments were suspended. Furthermore, the court commented that the periods of confinement indicated that several of the periods were served concurrently and that defendant might recall the concurrent periods as one period of detention. Thus, we find no error in the sentencing court's conclusion that the presentence report was accurate with respect to defendant's juvenile record. Similarly, defendant stated that he did not recall a number of the misdemeanor convictions. However, we agree with the sentencing court's conclusion that defendant did not made a sufficient objection to cause the court to change the report.

Finally, defendant claims that he is entitled to resentencing because the trial court sentenced him on the basis of a desire to send a message to the community rather than imposing an individualized sentence. We disagree. This court reviews sentencing challenges for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 653; 461 NW2d 1 (1991).

Defendant's sentence for the assault with intent to commit murder conviction was within the guidelines. Thus, the sentence is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant's contention that the court was trying to send a message to the community rather than impose an individualized sentence is based on the last two sentences of the court's statement before it imposed sentence and ignores the fact that the court went on at length about defendant's extensive criminal history, the fact that he was on probation at the time he participated in the instant offenses, and the fact that he was an active participant in the assaults. We conclude that defendant's sentence was based on proper factors and find no abuse its discretion.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder

[1] *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).