

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WYVONE VERSER, JR.,

Defendant-Appellant.

UNPUBLISHED

February 25, 2000

No. 209950

Ingham Circuit Court

LC No. 97-072375-FC

Before: McDonald, P.J., and Doctoroff and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of statutory involuntary manslaughter, MCL 750.329; MSA 28.561, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to consecutive terms of five to fifteen years' imprisonment for the involuntary manslaughter conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

I

This case arises from the shooting death of Albert Howell in Lansing following a drug transaction on the morning of June 10, 1997, in which Howell obtained a rock of crack cocaine on credit from Gregory White. White later located Howell in a nearby home and shot him for failing to pay the money owed from the transaction. White admitted shooting Howell, but implicated defendant as an accomplice in the shooting, testifying that defendant supplied the gun and willingly participated. Defendant denied complicity in the shooting. According to defendant, he was only present at the shooting because he was trying to prevent it. Although defendant admitted that he owned the gun used in the shooting, he asserted that White took the gun without permission.

White and defendant were each charged with open murder, MCL 750.316; MSA 28.548, and felony-firearm, MCL 750.227b; MSA 28.424(2). Defendant's charges were based on a theory of aiding and abetting. White accepted a plea bargain, pleading guilty to second-degree murder in exchange for dismissal of a first-degree murder charge and his testimony against defendant. Defendant proceeded to trial.

II

Defendant first claims that the trial court erred in denying him permission to cross-examine White, the prosecution's key witness, regarding the sentencing considerations of his plea bargain. Although we agree that the trial court improperly limited defendant's cross-examination of his former codefendant, the error does not require reversal of defendant's conviction.

A

This Court reviews a trial court's limitation of cross-examination for an abuse of discretion. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995). Where an error that violates the federal constitution does not equate to a structural defect in the trial mechanism, automatic reversal is not required, and the error is subject to the harmless error analysis. *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994).

The standard of review for preserved constitutional error is whether the beneficiary of the error has proved that the error is harmless beyond a reasonable doubt. *Anderson, supra* at 406. An error is harmless beyond a reasonable doubt if there is no reasonable probability that the error had an effect on the verdict, i.e., contributed to the defendant's conviction. *Id.* at 406-407; *Minor, supra* at 685. Relevant factors include the importance of the witness' testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the witness' testimony, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. *People v Kelly*, 231 Mich App 627, 644-645; 588 NW2d 480 (1998).

B

At trial, the court denied defense counsel's request to cross-examine White about the sentencing consequences of his plea bargain, i.e., that he avoided a mandatory life sentence by plea-bargaining to second-degree murder in exchange for dismissal of the first-degree murder charge. Observing that the jury may not consider penalty, the court concluded that the question would inform the jury of the penalty for first-degree murder, one of the charges against defendant.

This Court has previously examined whether a limitation on cross-examination violates a defendant's constitutional right of confrontation in this situation. In *People v Bell*, 88 Mich App 345, 347-348, 350; 276 NW2d 605 (1979), this Court reversed the defendant's conviction of armed robbery where the trial court barred cross-examination of an accomplice concerning the sentencing implications of pleading to a reduced charge, i.e., that armed robbery was a nonprobationable offense, whereas the reduced charge of assault with intent to rob while armed was probationable. The *Bell* Court stated:

[A] limitation on cross-examination which prevents a person charged with a crime from placing before the jury facts from which bias, prejudice or lack of credibility of a prosecution witness might be inferred constitutes denial of the right of confrontation

guaranteed by the Sixth Amendment. [*Id.* at 348, quoting *United States v Garrett*, 542 F2d 23, 25 (CA 6, 1976); citations omitted.]

The *Bell* Court concluded that the importance of the distinction between a probationable and a nonprobationable offense was a fact which could have motivated the witness in testifying against the defendant, and this fact was essential for the jury to determine the reliability of the witness' testimony. *Bell*, *supra* at 350.

More recently, in *People v Mumford*, 183 Mich App 149, 150, 154; 455 NW2d 51 (1990), this Court reiterated the precepts in *Bell*, *supra*, finding that the trial court abused its discretion in denying the defendant's request to cross-examine the former codefendant "on all of the details of the plea bargain, including the sentencing consideration [the codefendant witness] received in return for his testimony." In so holding, the Court directly addressed the countervailing rules that (1) the jury should not be informed of the possible punishment, although (2) a defendant has a right to introduce evidence of all relevant facts bearing upon the credibility of witnesses against him:

The sentencing consideration received in return for testimony is undeniably a fact which is relevant to a witness' credibility, because it is "[t]he crux of the plea agreement." *People v Manning*, 434 Mich 1, 55-56, 450 NW2d 534 (1990), Levin, J, dissenting. Thus, strict adherence to the rule against informing the jury of defendant's possible punishment upon conviction deprives defendant in this case of the opportunity to present to the jury the most important fact of [the witness'] plea bargain. Application of the rule in this case not only deprives defendant of his constitutional right to confrontation but also leaves the matter to jury speculation. Neither of these results is acceptable. [*Mumford*, *supra* at 153-154 (citations omitted).]

In light of this precedent, we conclude that the trial court abused its discretion in denying defendant the opportunity to cross-examine White as to the sentencing consideration received in exchange for his testimony. Further, this is an error of constitutional dimension. See *Mumford*, *supra* at 153 (cross-examination is so critical to a defendant's defense that it is viewed as the primary interest secured by the confrontation clause, US Const, Am VI; Const 1963, art 1, § 20). However, the error was harmless beyond a reasonable doubt, given the extent of cross-examination, White's admission of prior false statements, corroborating testimony, other evidence against defendant, and defendant's own testimony.

On cross-examination, defendant elicited that White accepted a plea bargain in which he pleaded guilty to the lesser charge of second-degree murder in exchange for the dismissal of the first-degree murder charge, the same charge that defendant faced. Counsel also elicited that after White received the police statements, laboratory reports, and the preliminary examination transcript, he changed his original statement to the police and agreed to testify against defendant. Defense counsel argued these facts to the jury as bearing on White's credibility. The jury was well-aware that defendant received consideration in the form of a plea bargain, which may have motivated his statement and testimony against defendant.

Further, there was ample evidence, aside from White's testimony, to support a conviction on a theory of aiding and abetting. Defendant owned the gun used to murder Howell. Although defendant testified that he was only present at the shooting in an attempt to prevent it, his testimony was inconsistent with other testimony and the physical evidence. Taken as a whole, the prosecution's case against defendant was substantial.

Most importantly, defendant was acquitted of the murder charges. It can be inferred that the jury did not find credible White's testimony implicating defendant as a joint and voluntary participant in the shooting.

III

Defendant next claims that the trial court erred in instructing the jury on the lesser included offense of statutory involuntary manslaughter because the evidence did not support the charge. We disagree. There was sufficient evidence for the trial court to instruct on the charge of statutory involuntary manslaughter.

A

Statutory involuntary manslaughter, MCL 750.329; MSA 28.561, is a cognate lesser included offense of murder. *People v Heflin*, 434 Mich 482, 497; 456 NW2d 10 (1990). A court may instruct on a lesser offense over defendant's objection if (1) the evidence would warrant a conviction on the lesser charge, and (2) the charging document gave defendant fair notice that he might be charged with the lesser offense. *People v Triplett*, 163 Mich App 339, 344-345; 413 NW2d 791 (1987), mod 432 Mich 568; 442 NW2d 622 (1989). Defendant does not contend that he lacked adequate notice of the lesser included offense, but only that the evidence did not support an instruction on the charge.

B

MCL 750.329; MSA 28.561, firearm pointed intentionally, but without malice, (statutory involuntary manslaughter) provides:

Any person who shall wound, maim or injure any other person by the discharge of any firearm, pointed or aimed, intentionally but without malice, at any such person, shall, if death ensue from such wounding, maiming or injury, be deemed guilty of the crime of manslaughter.

The elements of statutory involuntary manslaughter are:

- (1) That the defendant caused the death of the deceased;
- (2) That the death resulted from the discharge of a firearm;
- (3) That at the time of such discharge, the defendant was pointing or aiming the firearm at the deceased; and
- (4) That at the time of such discharge, the defendant intended to point or aim the firearm at the deceased. CJI2d 16.11.

At issue is element (4). Defendant, in effect, argues that the evidence clearly established malice on the part of White in shooting Howell, and, therefore, the evidence could not establish statutory involuntary manslaughter.

Absence of malice is not an element of manslaughter which the prosecution must prove. *Heflin*, *supra* at 498-499; *People v Doss*, 406 Mich 90, 99; 276 NW2d 9 (1979). Further, an aider and abettor may be convicted of a lesser offense than the principal. *People v Buck*, 197 Mich App 404, 421; 496 NW2d (1992), *rev'd in part on other grds sub nom People v Holcomb*, 444 Mich 853 (1993).

White's testimony raised questions as to his intent. Although he testified that he told defendant he would shoot Howell if he did not have the money, he further testified that once inside the house, he set the gun down to talk like gentlemen. He stated that he planned to shoot Howell to wound him, but not to kill him. In his statement to police, White had indicated that defendant was the shooter and that White did not know Howell was actually shot. At trial, White explained that, even though he was the shooter, he did not know if he was actually shooting Howell because Howell was behind a chair.

White testified that defendant was a willing accomplice in the shooting. At the other extreme, defendant testified that he had no prior knowledge of White's intent to shoot Howell, did not give White the gun, did not participate in the shooting in any way, that White, in fact, threatened defendant, and that he stayed with White after the shooting because he could not get to his father's home. However, these details were contradicted in part by other testimony and evidence.

Even though White pleaded guilty to second-degree murder, the evidence in this case left open the question whether White killed Howell with malice, and whether defendant was an accomplice. Whether the evidence established that defendant was guilty of murder or statutory involuntary manslaughter was a matter for the jury to decide. A trier of fact is free to believe, or disbelieve, in whole or in part, any of the evidence presented. *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999); *People v Fuller*, 395 Mich 451, 453; 236 NW2d 58 (1975).

IV

Defendant also claims that there was insufficient evidence for a conviction of statutory involuntary manslaughter. We disagree.

A

In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Warren*, 228 Mich App 336, 343; 578 NW2d 692 (1998), *lv gtd in part* 460 Mich 851 (1999); *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could conclude that the essential elements of the crime were proven beyond a

reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748, amended 441 Mich 1201 (1992); *Warren*, *supra* at 343.

B

As noted, *supra*, for a conviction of statutory involuntary manslaughter, the prosecution must prove beyond a reasonable doubt that at the time the firearm discharged, the defendant intended to point or aim the firearm at the deceased. MCL 750.329; MSA 28.561; CJI2d 16.11; *Heflin, supra* at 497.

Defendant was charged with aiding and abetting White, who caused Howell's death:

"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.... To support a finding that a defendant aided and abetted a crime, the prosecutor must show 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 commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. An aider and abettor's state of mind may be inferred from all the facts and circumstances. 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. [*People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999), quoting *People v Turner*, 213 Mich App 558, 568-569, 540 NW2d 728 (1995) (citations omitted).]

There was sufficient evidence from which a rational trier of fact could conclude that defendant aided and abetted White. Defendant owned the weapon, had a close association with White, was with White at the time of the shooting, did not contact the police after the shooting, fled the scene, and spent the remainder of the afternoon moving from house to house with White and their companions. Further, both defendant and another witness, Eugene Ryan, testified that they were outside the home where Howell was murdered when White came to collect his money. Defendant testified that Ryan told White not to shoot Howell for \$10, which is when defendant knew that White had the gun. Both defendant and Ryan testified that, when White went toward the house anyway, defendant shrugged his shoulders. Then, defendant entered the house. The jury could reasonably infer the requisite state of mind, i.e., that defendant knew that White intended to point the gun at Howell.

It is undisputed that White intentionally pointed the gun at Howell, and that the gun discharged, which caused Howell's death. There was sufficient evidence from which a rational trier of fact could conclude that White, the principal, was guilty of statutory involuntary manslaughter.

Defendant's argument that the jury reached a compromise verdict is without merit. Defendant has presented no evidence indicating that his conviction resulted from jury

compromise. The automatic reversal rule cited by defendant was overruled in *People v Graves*, 458 Mich 476, 481, 488; 581 NW2d 229 (1998).

Affirmed.

/s/ Gary R. McDonald
/s/ Martin M. Doctoroff
/s/ Janet T. Neff