

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DUJUAN LATRELLE BOYLSTON,

Defendant-Appellant.

UNPUBLISHED

August 18, 2000

No. 210865

Genesee Circuit Court

LC No. 97-001289-FC

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

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent prison terms of twenty to forty years for the second-degree murder conviction and two to four years for the felonious assault conviction, and to a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant claims that there was insufficient evidence to support his second-degree murder and felonious assault convictions. We disagree. In determining whether sufficient evidence has been presented to sustain a conviction, this Court views the evidence in a light most favorable to the prosecution to 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 Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

The elements of second-degree murder are 1) a death, 2) caused by the defendant, 3) with malice, and 4) without justification or excuse. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act with wanton and willful disregard of the likelihood that the natural tendency of the act is to cause death or great bodily harm. *Id.* at 464. The elements of felonious assault are 1) an assault, 2) with a dangerous weapon, 3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

In this case, the victim's brother identified defendant as the shooter. Although defendant argues that the prosecutor failed to present sufficient evidence of malice, malice can be inferred from the use of a deadly weapon. *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999); *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995). The evidence that defendant fired at least four shots in the victims' direction, striking one of the victims in the chest, was sufficient to justify a finding of malice in the instant case. Such evidence was also sufficient to support a finding that defendant intended to injure or place the victim in apprehension of an immediate battery for the purpose of the felonious assault conviction. While defendant contends that much of the testimony was unreliable, it was up to the jury to weigh the evidence and determine the credibility of the witnesses. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). We therefore conclude that the prosecutor presented sufficient evidence to support findings that defendant was guilty beyond a reasonable doubt of second-degree murder and felonious assault.

Next, defendant argues that the trial court erred in instructing the jury regarding aiding and abetting. He contends that the aiding and abetting instruction, coupled with the prosecutor's mischaracterization of defendant's testimony that he was trying to help Clarence Moore, who he claims was the actual shooter, operated to deprive him of a fair trial. We disagree. In reviewing issues related to jury instructions, this Court reviews the instructions in their entirety to determine if error requiring reversal occurred. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories if there is evidence to support them. *Id.* Questions of misconduct by the prosecutor are decided case by case. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). On review, this Court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context in order to determine whether the defendant was denied a fair and impartial trial. *Id.* at 82-83.

An instruction on aiding and abetting is proper where there is evidence that (1) more than one person was involved in the commission of the crime, and (2) the defendant's role in the crime may have been less than direct participation in the wrongdoing. *People v Head*, 211 Mich App 205, 211; 535 NW2d 563 (1995). Here, there was evidence that defendant carried the firearm and accompanied Moore, who he claims actually fired the gun at the victims, knowing that Moore had expressed an intent to harm one of the victims. After the offense, defendant fled the area and hid the weapon. In light of such evidence, the trial court properly instructed the jury on aiding and abetting. Moreover, contrary to defendant's argument that the prosecutor mischaracterized his testimony in her closing arguments, the prosecutor merely argued the evidence and reasonable inferences arising therefrom as it related to her theory of the case. Such argument is not improper. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Further, on cross-examination, the prosecutor was attempting to clarify defendant's testimony to establish the extent of defendant's involvement. Thus, we find no error.

Next, defendant argues that he was deprived of his constitutional right to present a defense when the court limited his cross-examination of a witness. We disagree. The scope of cross-examination is within the discretion of the trial court. *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). Cross-examination may be denied with respect to irrelevant issues. *Id.*

Defense counsel questioned Dorian Grady with respect to whether he had spoken to Clarence Moore since he and Moore ceased living together in October, 1997. The trial court excluded Grady's response as irrelevant. Generally, relevant evidence is admissible and evidence that is not relevant is not admissible. MRE 402. Relevant evidence is any evidence having a tendency to make the existence of any fact that is of consequence to the determination of an action more probable or less probable than it would be without the evidence. MRE 401. In this case, the proffered testimony did not make it more or less probable that someone other than defendant was the actual shooter. There was no indication that Dorian Grady would have testified that Clarence Moore confessed to being the shooter. Therefore, the court did not abuse its discretion in limiting defense counsel's cross-examination of Grady on the ground that the testimony regarding whether Grady had spoken to Moore since October, 1997, was irrelevant.

Defendant next claims that the trial court abused its discretion in admitting the rebuttal testimony of Sergeant Scott Harris regarding the lighting conditions on the night of the shooting and the videotape taken by defendant's mother. Defendant asserts that Harris' testimony was inadmissible because Harris was not qualified to testify as an expert. We disagree.

Defense counsel failed to object to Harris' testimony regarding his observation of the lighting conditions on the night of the shooting and his experience with videotapes. Therefore, our review of these issues is limited to determining whether defendant has demonstrated a plain error that affected his substantial rights. *Carines, supra* at 763. Defendant did object to Harris' testimony regarding the differences between the sky in August and October. Therefore, we review the trial court's decision to admit that testimony for an abuse of discretion. *People v Cain*, 238 Mich App 95, 122; 605 NW2d 28 (1999).

Harris testified that the lighting on the night of the shooting was better than it appeared on the videotape taken by defendant's mother two months after the shooting. Harris further testified that he had previously made videotapes and had noticed that the lighting conditions in the videotapes were not as clear as the actual scene. In addition, Harris testified that the sky in August, when the incident happened, is different from the sky in October, when the videotape was made. Harris did not testify as an expert witness with respect to these subjects. Rather, he testified about his physical observations and opinions formed as a result of them. MRE 701; *People v Grisham*, 125 Mich App 280, 286; 335 NW2d 680 (1983). Thus, defendant failed to demonstrate a plain error that affected his substantial rights with respect to Harris' testimony regarding his observations of the lighting conditions at the time of the shooting and his experience with videotapes. Furthermore, defendant failed to show that the trial court abused its discretion in admitting Harris' testimony regarding the differences between the sky in August and October.

Having found no error with regard to the foregoing issues, we also reject defendant's claim that the cumulative effect of several errors deprived him of a fair trial. *People v Wilson*, 196 Mich App 604, 610; 493 NW2d 471 (1992).

Finally, we disagree with defendant's contention that the trial court abused its discretion by imposing a sentence of twenty to forty years' imprisonment for the second-degree murder conviction.

We review sentencing decisions under the abuse of discretion standard. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990); *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993).

Defendant's sentence is within the recommended sentencing guidelines range and, therefore, is presumed to be proportionate. *People v Rivera*, 216 Mich App 648, 652; 550 NW2d 593 (1996). Defendant has not identified any unusual circumstances to overcome this presumption of proportionality. *Milbourn, supra* at 661; *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992). Thus, we conclude that defendant's sentence does not constitute an abuse of discretion.

Affirmed.

/s/ Helene N. White

/s/ Martin M. Doctoroff

/s/ Peter D. O'Connell