STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 27, 2001
v MARVELL DAVIS, Defendant-Appellant.	No. 218901 Wayne Circuit Court Criminal Division LC No. 97-003389

Before: Smolenski, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

Defendant was charged with one count of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), two counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The charges arose from an incident wherein shots were fired at a residence in Detroit, killing a young woman and wounding two others. Defendant was tried jointly with two other codefendants, before separate juries. He was convicted on all charges and appeals as of right. We affirm.

I. Jury Instructions and Harmless Error

Defendant first argues that the trial court erroneously refused to instruct the jury regarding several lesser offenses, including manslaughter and offenses related to the reckless, wanton, negligent or careless discharge of a firearm. A trial court's failure to instruct a jury regarding lesser offenses, including both cognate lesser offenses and necessarily included offenses, is subject to harmless error analysis. *People v Mosko*, 441 Mich 496, 502-503; 495 NW2d 534 (1992); *People v Beach*, 429 Mich 450, 465-466; 418 NW2d 861 (1988). "'Judicial expediency allows courts to address issues according to their ease of resolution.'" *People v Whitehead*, 238 Mich App 1, 6; 604 NW2d 737 (1999), quoting *People v Graves*, 458 Mich 476, 479-480, n 2; 581 NW2d 229 (1998). Of the two issues raised by defendant's argument – whether the trial court erroneously instructed the jury and, if so, whether the error was harmless – we find the second issue easier to resolve. *Whitehead*, *supra* at 6. Accordingly, assuming without deciding

that the trial court erroneously failed to instruct the jury regarding lesser offenses, we consider whether that error was harmless. We conclude that it was.[1]

In *Beach, supra*, the trial court instructed the jury regarding conspiracy to commit armed robbery and conspiracy to commit unarmed robbery. The jury rejected the lesser charge and convicted the defendant of conspiracy to commit armed robbery. On appeal, defendant argued that the trial court erroneously failed to instruct the jury regarding the lesser charge of conspiracy to commit larceny in a building. Our Supreme Court applied the reasoning of *People v Ross*, 73 Mich App 588; 252 NW2d 526 (1977), and held that any error that the trial court might have committed was harmless:

> Beach was convicted of the greater charged offense of conspiracy to commit armed robbery. If the jury had doubts about her guilt of the charged offense or if it concluded that the defendant was not planning to use force, it could have and undoubtedly would have, found her guilty of the instructed lesser included offense of conspiracy to commit unarmed robbery, which would represent a lesser use of force. Because it did not do so, we can conclude that it had no reasonable doubt as to the defendant's guilt of conspiracy to commit armed robbery. We believe that the jury's decision is a reasonable indication that the failure to give an instruction on the lesser included offense of conspiracy to commit larceny in a building was not prejudicial to the defendant. We require a fair trial, not a perfect trial.
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> The existence of an intermediate charge that was rejected by the jury does not, of course, automatically result in an application of the *Ross* analysis. For it to apply, the intermediate charge rejected by the jury would necessarily have to indicate a lack of likelihood that the jury would have adopted the lesser requested charge. [*Beach, supra* at 490-491.]

Applying such a harmless error analysis in both *People v Sullivan*, 231 Mich App 510, 520; 586 NW2d 578 (1998), aff'd 609 NW2d 193 (2000); and *People v Raper*, 222 Mich App 475, 483; 563 NW2d 709 (1997), this Court held that where the jury convicted the defendant of first-degree murder, after rejecting the lesser included offense of second-degree murder, the trial court's failure to instruct the jury regarding manslaughter was harmless:

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[1] Defendant argues that any instructional error regarding lesser offenses could not have been harmless in the present case. To support that argument, defendant relies on *People v Rochowiak*, 416 Mich 235; 330 NW2d 669 (1982), and *People v Richardson*, 409 Mich 126; 293 NW2d 332 (1980), two cases that are not controlling and that do not reflect the current status of the law. In *Beach, supra*, our Supreme Court noted that the *Rochowiak* decision was of only limited precedential value because the decision reflected an equal division of justices with regard to substance and a concurrence in result only. See *Beach, supra* at 471. Further, the *Beach* Court noted that the *Rochowiak* analysis had never been affirmatively applied by the Court. *Id*. at 475. The *Beach* Court considered the harmless error doctrine in great detail and rejected the approaches taken in both *Rochowiak* and *Richardson*, deciding instead to apply the harmless error test that we apply in the present case. *Beach, supra* at 470, 490-491.

> The jury was instructed on first-degree murder and second-degree murder, and found defendant guilty of first-degree murder. The jury's rejection of second-degree murder in favor of first-degree murder reflected an unwillingness to convict on a lesser included offense such as manslaughter. [*Raper, supra* at 483.]

In the present case, the trial court's failure to instruct the jury regarding several lesser offenses, including manslaughter and offenses related to the reckless or negligent discharge of a firearm, was harmless because the jury rejected the intermediate charge of second-degree murder. The jury clearly found that the actions of defendant and his codefendants were premeditated, deliberate, and conducted with the intent to kill. The jury's rejection of the second-degree murder charge in this case shows that the jury would not have adopted any lesser requested charge, especially one relating to the reckless or negligent use of a firearm. If the jury had doubts about defendant's guilt on the charged offense of first-degree murder, at a minimum, it would have found him guilty of second-degree murder. It did not do so. Therefore, we must conclude that the trial court's failure to read instructions regarding lesser offenses, if error, was harmless.

II. Insufficient Evidence

Defendant next argues that the prosecutor presented insufficient evidence to support his first-degree murder conviction as an aider or abettor. We disagree. When reviewing the sufficiency of the evidence in a criminal case, we must "view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman,* 225 Mich App 103, 111; 570 NW2d 146 (1997), citing *People v Wolfe,* 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). When considering proofs in a light most favorable to the prosecution, we must "avoid weighing the proofs or determining what testimony to believe. Instead, we must resolve all conflicts in favor of the prosecution." *People v Terry,* 224 Mich App 447, 452; 569 NW2d 641 (1997) (citations omitted).

> In order to convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. Premeditation and deliberation require sufficient time to allow the defendant to take a second look. The elements of premeditation and deliberation may be inferred from circumstances surrounding the killing. [*People v Kelly,* 231 Mich App 627, 642; 588 NW2d 480 (1998) (citations omitted).]

In this case, the prosecution pursued the first-degree murder charge against defendant on the basis that he aided and abetted his codefendants, one of whom actually fired the fatal bullet. MCL 767.39; MSA 28.979 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.

In *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995), this Court set forth the elements of an aiding and abetting charge:

> 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.
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> To sustain an aiding and abetting charge, the guilt of the principal must be shown. However, the principal need not be convicted. Rather, the prosecutor need only introduce sufficient evidence that the crime was committed and that the defendant committed it or aided and abetted it. [Citations omitted.]

In the present case, we conclude that the prosecutor presented sufficient evidence to show that one of the codefendants committed first-degree murder, that defendant assisted and gave encouragement to the codefendant, and that defendant intended the commission of first-degree murder. First, it can be logically inferred from the substantial circumstantial evidence presented at trial that defendant and his codefendants all possessed the requisite intent to kill the victim and that the killing was premeditated and deliberate. There was testimony that defendant stated, "[w]e don't have to stand here and talk. Let's go handle our business." There was also testimony that defendant stated that he was going to get his Glock and "come back and shoot this b-i-t-c-h up." Defendant and the codefendants then ran from the area, splitting up and heading in two different directions. Approximately ten minutes later, they returned together. Witnesses saw the three codefendants climbing over a fence and passing guns over it. They subsequently lined up and took aim at the home, which they knew to be occupied by several people. One of the defendants fired a nine-millimeter bullet into the house, killing a young woman. This evidence supports the jury's determination that defendant and his codefendants intended to kill the occupants of the house.

Second, the evidence supports a finding that defendant assisted the commission of the crime. After the initial confrontation, defendant and his codefendants left. Later, they returned and assisted each other in climbing over the fence and passing weapons over it. After one codefendant, Anguan Milburn, moved forward to the driveway of the victims' home, either defendant or his other codefendant called to Anguan to move back to where they were standing. Thus, the codefendants moved Anguan to a place of safety, where he would be out of the line of fire. Defendant and his codefendants subsequently lined up and aimed directly at the occupied home. Defendant fired at least one shot, and police discovered gunpowder residue on his hands. This evidence supports a finding that defendant assisted and encouraged the shooter of the nine-millimeter bullet that killed one victim.

Third, the evidence indicates that defendant intended the commission of the crime. As previously noted, he said he would come back to the scene. He did so, arriving with his codefendants and weapons. The men aimed the firearms at and fired upon the occupied home. This circumstantial evidence was sufficient to prove defendant's state of mind to commit premeditated, deliberate murder. Therefore, we find sufficient evidence to convict defendant of first-degree murder as an aider and abettor.

To support his argument that the prosecutor presented insufficient evidence of the intent necessary to sustain a first-degree murder conviction, defendant also contends that the trial court erroneously instructed the jury regarding the issue of transferred intent. This issue is unpreserved because defendant did not object below to those instructions. Moreover, this issue is not properly before us because it was not raised in the statement of questions presented. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Nevertheless, we note that defendant's argument is without merit. Defendant argues that the transferred intent instruction read to the jury was erroneous because the prosecutor presented no evidence that defendant intended to kill anyone, let alone the victim who actually died. As set forth above, we believe that the prosecutor presented sufficient evidence regarding defendant's intent to convince the jury beyond a reasonable doubt that defendant committed first-degree murder as an aider and abettor.

III. Jury Reinstructions

Defendant next argues that the trial court improperly failed to reinstruct the jury on his theory of the case when reinstructing the jury on the charged offenses. This issue is not preserved because defendant failed to object when the trial court reread the instructions at the jury's request. This Court reviews unpreserved issues for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

After deliberations began, the jury asked the trial court to repeat the charges and the elements for each crime. The trial court told the jury that the verdict form contained a list of the charges. Then the court reinstructed the jury on the elements of each crime. On appeal, defendant argues that the trial court should have also reinstructed the jury that defendant's mere presence during the commission of a crime was insufficient to convict him as an aider and abettor. We disagree.

In *People v Darwall*, 82 Mich App 652, 663; 267 NW2d 472 (1978), this Court stated:

> There is no requirement that when a jury has asked for supplemental instruction on specific areas that the trial judge is obligated to give all of the instructions previously given. The trial judge need only give those instructions specifically asked.

In this case, the trial court gave the instructions that the jury specifically requested and it did so in an accurate fashion. The trial court was not required to go beyond that request. Further, we note that the trial court's reinstruction did not allow the jury to convict defendant as an aider and abettor if he was merely present at the scene of the crime. The aiding and abetting instructions, which were reread to the jury, required the jury to find that defendant engaged in some act of

assistance or encouragement in order to be held responsible as an aider and abettor. Therefore, we find no merit in defendant's argument regarding jury reinstructions.

IV. Probable Cause to Arrest Defendant

Defendant next argues that his warrantless arrest was illegal and the trial court therefore should have suppressed his confession. On appeal, defendant contests neither the trial court's finding that the police were in hot pursuit of the codefendants at the time of their arrest, nor the finding that exigent circumstances justified the warrantless arrest. Rather, defendant argues that the information that officers gathered from citizen-informants during the hot pursuit was not reliable and did not establish probable cause. Because defendant did not raise this objection in the trial court, we review it only for plain error. *Carines*, *supra* at 763-764.

Defendant's argument is based on his assertion that, in order for the police to rely upon information from an anonymous citizen-informant, the police must demonstrate both (1) that the informer was reliable or credible and (2) that the police were aware of the underlying circumstances upon which the informer based his conclusion. This is an incorrect statement of the law. In *People v Tooks*, 403 Mich 568; 271 NW2d 503 (1978), our Supreme Court distinguished between known criminal informants and citizens who provide police with accurate and detailed information that can be verified. In that case, an unidentified citizen approached two police officers and informed them that he had observed a man showing a gun to two other men. *Id.* at 573. The citizen provided detailed information to police about the three men involved, but refused to identify himself "because of fear of 'gangs in the area.'" *Id.* at 573-574. Four or five blocks from the location where the officers received the information, they encountered three men fitting the description given by the citizen. *Id.* at 574. One of the officers performed a pat-down search of defendant Tooks and discovered a .22-caliber pistol. *Id.* Police then arrested the defendant for carrying a concealed weapon. *Id.* In upholding the validity of the search, the Court held that citizen-informants reporting suspicious activities which they personally observed should be deemed inherently reliable "when the information is sufficiently detailed and corroborated within a reasonable period of time by the officers' own observations." *Id.* at 577.

Contrary to defendant's assertions, it was not necessary for the police in the present case to testify about the reliability and credibility of the citizen-informants or the basis of their knowledge. Police tracked defendants from the scene of the crime using detailed information from citizens who had observed the suspects and their movements. The information obtained was both detailed and specific, and police verified its accuracy within a reasonable time. The information was thus "of sufficient detail, accuracy, and reliability to give the officers a reasonable suspicion" that the suspects they pursued had engaged in the criminal activity at issue. *People v Armendarez*, 188 Mich App 61, 69; 468 NW2d 893 (1991). Because defendant's confession was not the product of an illegal arrest, the argument that his confession should have been suppressed as the fruit of the poisonous tree must fail.

V. Waiver of Jury Trial

Finally, defendant argues that the trial court erroneously denied his request for a waiver trial. We disagree. MCL 763.3; MSA 28.856 provides:

> In all criminal cases arising in the courts of this state the defendant may, *with the consent of the prosecutor and approval by the court*, waive a determination of the facts by a jury and elect to be tried before the court without a jury. Except in cases of minor offenses, the waiver and election by a defendant shall be in writing and signed by the defendant and filed in the case and made a part of the record. [Emphasis added.]

In *People v Kirby*, 440 Mich 485, 492-493; 487 NW2d 404 (1992), our Supreme Court rejected the argument that a criminal defendant possesses a constitutional right to waive a trial by jury. "While a defendant may be allowed to waive a right that he possesses, he may not demand an unconditional privilege to which he is not entitled." *Id*. In the present case, defendant did not possess an unconditional right to waive a jury trial in this case. By statute, such a waiver requires the prosecutor's consent and the trial court's approval. In this case, the prosecutor never consented to a waiver. In fact, the prosecutor clearly indicated that he could not agree to a bench trial because he had not discussed the matter with the victims' families. The prosecutor neither requested time to talk to the families nor indicated that waiver was a possibility. In order to receive a bench trial, defendant needed the consent of the prosecutor, which he did not receive.

Affirmed.

/s/ Michael R. Smolenski
/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald