

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER ROBERT MITCHELL,

Defendant-Appellant.

UNPUBLISHED
November 2, 2001

No. 215179
Saginaw Circuit Court
LC No. 98-015395-FC

Before: K.F. Kelly, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant was charged with first-degree murder, MCL 750.316, and conspiracy to commit murder, MCL 750.157a. Following a jury trial, he was convicted of the lesser offenses of second-degree murder, MCL 750.317, and conspiracy to commit aggravated assault, MCL 750.157a and MCL 750.81a. The trial court sentenced defendant to concurrent terms of life imprisonment for the second-degree murder conviction and twelve months in jail for the conspiracy conviction. Defendant appeals as of right. We affirm.

I. Basic Facts and Procedural History

Defendant and codefendants Cooper, Jones and Sylvester were tried before a single jury for the beating death of a fellow inmate at the Saginaw County Jail. The testimony at trial indicated that on the day after the victim was transferred to the cell containing defendant and his codefendants, the victim was involved in a confrontation with one of the codefendants. Following the confrontation, the codefendants allegedly rolled dice to see who would start a fight with the victim. The apparent agreement was whoever rolled a “seven” first would initiate the assault. Cooper rolled a “seven” and in accord with the alleged agreement, Cooper hit the victim first. The other defendants thereafter rushed the victim and started punching him. Codefendant Jones jumped off of the bunk and landed on the victim’s head. There was further testimony that defendant was the last one to approach the victim and join in the assault. As a result of the attack, the victim was alive but severely beaten. In fact, the severity of the victim’s injuries required him to be maintained on life support for a few weeks. Nevertheless, as a result of blunt force trauma to the head, the victim expired on February 21, 1998.

At trial, Cooper was the only codefendant to testify. During cross-examination, the prosecutor introduced Cooper's transcribed statement to the police. Because the accuracy of the

transcript was questioned, an audio taped copy of Cooper's statement was played for the jury. In this statement, Cooper told the police that he rolled the dice with the other defendants to see who would "start it off," "to rock [the victim.]" At trial however, Cooper claimed that he only repeated what another inmate told him. Thereafter, the officer who took Cooper's statement was called as a rebuttal witness. The officer testified that after Cooper's statement was recorded, Cooper admitted he knew that the other codefendants were going to join in the attack after Cooper initially assaulted the victim.

At trial, all four defendants moved for severance arguing that during a joint trial each defendant would attempt to minimize his own involvement in the crime while maximizing the other defendants' culpability. The trial court denied the motions stating:

I just am not seeing a greatly different core defense among these defendants at this point. They all acknowledge they were in this game to decide who was going to have the privilege of instituting the assault. They all agreed they didn't intend to kill anyone. And I don't really find a lot of inconsistency there of the core defense.

After trial, defendant renewed his motion for a new trial as a result of his misjoinder with his codefendants, which the trial court denied. The jury convicted defendant of second-degree murder and conspiracy to commit aggravated assault.¹

II. Sufficiency of Evidence

First, defendant argues that the evidence was insufficient to submit the original charge of first-degree murder to the jury. We disagree. In reviewing the sufficiency of the evidence, we must view all of the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime proved beyond a reasonable doubt. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999).

To sustain a first-degree murder charge, the prosecution must prove that defendant intentionally killed the victim and that the killing was premeditated and deliberated. Premeditation and deliberation require sufficient time to allow a defendant to take a second look.

¹ Cooper was convicted of assault and battery, and acquitted on the conspiracy charge. Both Jones and Sylvester were convicted of second-degree murder and conspiracy to commit assault with intent to do great bodily harm less than murder. Codefendants Jones and Sylvester appealed their convictions and the appeals were consolidated. This Court affirmed the convictions in an unpublished per curiam opinion. See *People v Sylvester*, Unpublished per curiam opinion of the Court of Appeals, issued 02/22/00 (Docket No. 214172, 214187.) The Supreme Court denied leave to appeal in both cases. See *People v Jones*, 463 Mich 861; 617 NW2d 557 (2000); *People v Sylvester*, 463 Mich 862; 617 NW2d 559 (2000). It does not appear that Cooper appealed his conviction.

People v Anderson, 209 Mich App 527, 537; 531 NW2d 780 (1995). As this Court stated in *Anderson*, *supra* at 537:

The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. Premeditation may be established through evidence of the following factors: (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. (Citation omitted.)

Viewed in the light most favorable to the prosecution, the evidence showed that defendant participated in rolling the dice to see who would be the first to assault the victim. Trial testimony further established that defendant was actively involved in hitting or kicking the victim. This evidence, coupled with the evidence describing the nature of the beating, was sufficient to allow the jury to infer premeditation and deliberation with regard to the ensuing conduct and actions of defendant and the others. See *People v Berry (On Remand)*, 198 Mich App 123, 128; 497 NW2d 202 (1993) (for purposes of inferring premeditation, the circumstances of the killing may include consideration of the location of the wounds inflicted.) Further, considering the savage nature of the beating, the extent of the victim's injuries, and the fact that the most serious injuries were directed at the victim's head, there was sufficient evidence of intent to kill to submit the issue to the jury. Even if defendant did not inflict the most serious blow, the evidence was sufficient to support submitting the charge of first-degree murder on an aiding and abetting theory. Thus, we find no error.

III. Motion To Sever

Next, defendant argues that the trial court erred by denying his request to sever his trial from that of his codefendants. The decision whether to grant separate trials is within the discretion of the trial court and will not be reversed absent an abuse of that discretion. *People v Cadle (On Remand)*, 209 Mich App 467, 468; 531 NW2d 761 (1995) (citation omitted.) Pursuant to MCR 6.121(C), a trial court is required to grant a separate trial only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively and fully demonstrates that his substantial rights will be prejudiced by a joint trial and that severance is necessary to remedy the prejudice. *Cadle, supra* at 469. To warrant a separate trial, any defenses must not merely be inconsistent, but must be mutually exclusive or irreconcilable. *Id.* See also *People v Hana*, 447 Mich 325, 349; 524 NW2d 682 (1994).

Here, defendant and the three codefendants did not dispute that they were involved in assaulting the victim. The principal focus of the trial was the issue of intent and the degree of each defendant's involvement. There was some effort to place the blame for the victim's death on codefendant Jones because he allegedly jumped off of a bed onto the victim and, according to the medical experts, this appeared to result in the most serious blow to the victim; the one that eventually caused his death.

Nonetheless, even if the various defendants had inconsistent defenses, those defenses were not mutually exclusive or irreconcilable. The jury was asked to decide at what level each defendant participated in the assault. It was not irreconcilable for the jury to find that certain defendants were more active or intended greater harm than others. The jurors were not required

to believe one defendant at the expense of another. Mere incidental spillover prejudice as a result of the multi-defendant trial was not enough to support granting a separate trial. *Hana, supra* at 349. The trial court did not err in denying defendant's severance motion.

IV. Defendant's Prior Record

During trial, defendant attempted to offer evidence to show that he was incarcerated for a non-assaultive offense and, therefore, was a nonviolent person who had no reason to participate in the offense. The trial court excluded this proffered evidence. The decision on whether to admit or exclude evidence is within the trial court's discretion. *People v Smith*, 243 Mich App 657, 669; 625 NW2d 46 (2001). This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

We agree with the trial court that the proposed evidence is not admissible under MRE 404(b). Defendant was offering the evidence of his prior record to show that he acted in conformity therewith, which is prohibited by MRE 404(b). *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Furthermore, the proposed testimony did not logically prove the point that defendant wanted to establish, i.e., that he was not a violent person, and, therefore, the testimony was not relevant. MRE 401.

Furthermore, although initially ruling that the proffered evidence would not be admitted, the trial court later changed its ruling indicating that it would allow defendant to testify about his prior record if indeed defendant testified on his own behalf. The trial court believed that the evidence could be admitted as character evidence under MRE 404(a). Defendant elected not to testify. In light of this record, even if the trial court's initial ruling was erroneous, which we are not convinced it was, because defendant was ultimately given the opportunity to testify as he requested and declined to do so, reversal would not be required.

V. Proportionality of Defendant's Sentence

Finally defendant contends that his life sentence for second-degree murder is disproportionate. This Court reviews the trial court's sentencing decision for an abuse of discretion by applying the principle of proportionality and determining whether the sentence imposed is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

The sentencing guidelines scored for defendant resulted in a range of 180 to 360 months or life. However, at the time of sentencing, the trial court stated that the guidelines were 180 to 360 months. Although the court misstated the sentencing guidelines recommendation on the record, defendant's sentence was within the recommended range and, therefore, is presumptively proportionate. *People v Dukes*, 189 Mich App 262, 266; 471 NW2d 651 (1991). Only where there are unusual circumstances will this Court find that a sentence within the guidelines is not proportionate. *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992). (Citation omitted.)

The court found that defendant's participation in this crime could not be distinguished from that of his codefendants, thus justifying the same sentence as imposed for each of the codefendants who were also convicted of second-degree murder. Considering defendant's participation in this crime, the seriousness of the matter, and defendant's prior criminal record, we conclude that defendant has failed to show that the trial court abused its discretion.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald