STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ANTHONY WEST,

Defendant-Appellant.

UNPUBLISHED
December 7, 2001

No. 222686
Wayne Circuit Court
LC No. 98-011795

Before: K.F. Kelly, P.J., and Hood and Zahra, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317, as an aider and abettor. Defendant was sentenced to sixteen to twenty five years' imprisonment as a third habitual offender, MCL 769.11. He appeals as of right. We affirm.

Defendant first argues that because the trial court confused his statement to police with codefendant Herman Coleman's statement, it impermissibly relied upon Coleman's statement in determining defendant's guilt. Thus, defendant asserts if the trial court properly excluded Coleman's statement, there was insufficient evidence remaining to sustain defendant's conviction. We agree with defendant that Coleman's statement was inadmissible against defendant. See *People v Schutte*, 240 Mich App 713, 717; 613 NW2d 370 (2000), citing *People v Poole*, 444 Mich 141, 161; 506 NW2d 505 (1993). We also agree with defendant that portions of the court's findings could only be attributed to assertions made in Coleman's statement—not defendant's. Therefore, we must determine whether there was sufficient evidence to support defendant's conviction without using Coleman's statement directly against the defendant.

In reviewing the sufficiency of the evidence, this Court views the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Defendant was convicted on an aider and abettor theory, which means "[o]ne who procures, counsels, aids, or abets in the commission of an offense may be convicted and punished as if he directly committed the offense." *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). The offense of second-degree murder consists of elements of (1) death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *People v*

Mayhew, 236 Mich App 112, 125; 600 NW2d 370 (1999). The "malice" element of second-degree murder is defined as a defendant's wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm. *People v Stiller*, 242 Mich App 38, 43; 617 NW2d 697 (2000). Additionally, "[m]alice can be inferred from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm." *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998). The prosecutor must introduce sufficient evidence to establish the crime was committed and that defendant committed it or aided and abetted it. *Turner, supra.*

In this case, the house burned was located in a residential area. Steel bars were visible on the windows of the entire first floor of the house. The home also had security doors. These would prevent or at least hinder a person from escaping in the event of a fire. The crime was committed in the early morning hours, a time that anyone in the house would likely be sleeping. According to defendant's statement, he was asked to act as a lookout for Coleman on the way to the house. He was aware that Coleman was going to burn down the house, in fact he watched while Coleman committed the crime. He observed Coleman light the rag and throw the glass jar into the small hallway of the house, He then "took off running" down the street. When the fire was finally contained, the victim was discovered by firefighters. The cause of death was smoke inhalation and severe body burns.

After a careful review of the record, we conclude that the evidence established that death or great bodily harm was the natural tendency of Coleman's act and defendant's assistance constituted aiding and abetting. *Turner, supra* at 568. Thus, we find a rational trier of fact could find that the essential elements of the crime, aiding and abetting in second-degree murder, were proven beyond a reasonable doubt[1].

Next, defendant argues that the court erred by failing to suppress defendant's statement to police. We disagree.

A trial court's ruling on a motion to suppress evidence will not be reversed unless that decision is clearly erroneous. *People v Stevens*, 460 Mich 626, 630; 597 NW2d 53 (1999). A decision is said to be clearly erroneous where, after a review of the record, this Court is left with a definite and firm conviction that a mistake had been made. *People v Armendarez*, 188 Mich App 61, 65-66; 468 NW2d 893 (1991).

Defendant argues that the police failed to "scrupulously honor" his assertion of the right to remain silent. In *People v Slocum (On Rem)*, 219 Mich App 695, 702-703; 558 NW2d 4 (1996), this Court explained that two highly relevant considerations in determining whether renewed questioning after assertion of the privilege is constitutional are whether a significant period of time had elapsed since the defendant invoked his right to remain silent and whether the

[1] Alternatively defendant argues that his conviction was against the great weight of the evidence. A review of the record however, belies defendant's contention. Based on the foregoing, we find defendant's argument that the conviction contravened the great weight of the evidence to be without merit.

defendant was readvised of his *Miranda* rights. *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

In this case, defendant was interrogated on two occasions. Defendant's entire argument is based on his contention that a significant period of time did not pass before the second attempt at questioning defendant was made. Specifically, defendant asserts that the first questioning was at 5:10 a.m., and the second questioning was at 5:55 a.m. However, the record reflects that this is not accurate.

Instead, the record reveals that the second questioning actually took place at 5:55 p.m. Therefore, the period of time that passed between interviews was actually about twelve hours, not forty-five minutes. Furthermore, it is undisputed that defendant was readvised of his *Miranda* rights before the second interview. Given the fact that almost twelve hours passed between interviews, and given the fact that "defendant had no reason to believe that they would not honor the privilege if [he] against asserted it," *Slocum (On Rem), supra*, 705, it cannot be said that the police were "'persisting in repeated efforts to wear [his] resistance and make [him] change [his] mind.'" *Id*., quoting *Michigan v Mosley*, 423 US 96, 105-106; 96 S Ct 321; 46 L Ed 2d 313 (1975), after remand 72 Mich App 289 (1976). Defendant does not otherwise attempt to show that his waiver was not made voluntarily, knowingly, and intelligently. See *People v Abraham*, 234 Mich App 640, 645-655; 599 NW2d 736 (1999). Therefore, the court's denial of defendant's motion to suppress was not clear error.

Finally, defendant argues that he did not knowingly and understandingly waive his right to jury trial. We disagree.

There is no constitutional right to waive a jury trial. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). Neither is there any requirement that a trial court give the in-depth explanation of waiver of the right to trial by jury that defendant claims was necessary. MCR 6.402(B) provides:

> Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceedings.

A review of the hearing where defendant's waiver took place indicates the court complied with these requirements. Defendant received an adequate explanation of his waiver and the waiver was made knowingly, voluntarily, and understandingly. We note that the defendant did not demonstrate any concern about waiving his right to jury trial at any time after the waiver hearing or during trial. Defendant signed a written waiver form indicating that he knowingly waived his right to jury. Therefore, the court's determination that defendant validly waived his right to a jury trial was not error.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Harold Hood
/s/ Brian K. Zahra