STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 26, 2002
v	No. 219348 Wayne Circuit Court Family Division
GREGORY PETTY, Defendant-Appellant.	LC No. 96-341045

Before: Saad, P.J., and Bandstra and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to serve mandatory consecutive terms of two years' imprisonment for the felony-firearm conviction, and life imprisonment without parole for his conviction of felony murder. We affirm, but remand for correction of the judgment of sentence[1] and for resentencing.

I

This case arises from the robbery and murder of fifty-five-year-old Calvin Lee Whitlow in the city of Detroit. Defendant, who was fifteen years old at the time these offenses were committed, was arrested and charged by petition, along with twelve-year-old McKinley Duane Moore, with first-degree premeditated murder, felony murder, armed robbery, and felony-firearm. The prosecutor designated defendant's case as a matter in which the juvenile was to be tried as an adult for his role in the events leading to Whitlow's death.[2] The prosecution's theory at the resulting trial was that defendant aided and abetted Moore, who was the shooter, in

[1] Both the original and amended judgments of sentence erroneously reflect that defendant was additionally convicted of first-degree premeditated murder, MCL 750.316(1)(a), a count that, although originally charged, was dismissed by the trial court. We note further that the amended judgment of sentence does not reflect any disposition regarding defendant's armed robbery conviction, i.e., imposition of sentence or vacation of the conviction. These oversights should be corrected on remand.

[2] See MCL 712A.2(a)(1)(A) and MCL 712A.2d(1).

robbing and killing Whitlow. Defendant argues, however, that the prosecution failed to present sufficient evidence to support his convictions under this theory. We disagree.

When reviewing challenges to 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 find that the essential elements of the crime were proven beyond a reasonable doubt." *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001). Circumstantial evidence and the reasonable inferences that arise therefrom can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

A person who aids or abets the commission of a crime may be convicted and punished as if that individual directly committed the offense. MCL 767.39; *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). To establish that a defendant aided and abetted the commission of a crime, the prosecutor must put forth evidence proving 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 principal in committing the crime, and (3) the defendant intended the commission of the crime or knew that the principal intended its commission at the time he gave aid or encouragement. [*People v Norris*, 236 Mich App 411, 419; 600 NW2d 658 (1999).]

In this case, defendant does not argue that the murder-robbery did not occur. Rather, he argues that the evidence was insufficient to permit a rational trier of fact to conclude that he participated in those crimes or that, if he did, he possessed the requisite intent to support a conviction for aiding and abetting those crimes.[3] We disagree.

With respect to the quantum of participation required to support a defendant's convictions under a theory of aiding and abetting, this Court has explained that aiding and abetting contemplates "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." *Turner*, *supra*. Here, despite defendant's claim that, although present, he did not participate in the events leading to Whitlow's death, Marcus Fitzgerald testified that he witnessed both Moore and defendant chasing Whitlow onto Woodward Avenue. According to Fitzgerald, as Moore continued the pursuit, defendant positioned himself inside a crosswalk where he appeared to be guarding Whitlow, as if he were guarding an opponent in a basketball game. Fitzgerald further testified that defendant's actions in this regard appeared to cause Whitlow to alter his course, after which defendant "galloped" to the sidewalk on the opposite side of the street while Moore continued the chase. When Whitlow began to break away from

[3] Although, in his statement of questions presented, defendant challenges the sufficiency of evidence with regard to each of his three convictions, he has restricted his argument to the evidence in support of the malice and participation required for a valid conviction of felony murder under a theory of aiding and abetting. Accordingly, we will not address the sufficiency of evidence to support the remainder of defendant's convictions. See *People v Anderson*, 209 Mich App 527, 538; 531 NW2d 780 (1995) (issues raised but not briefed on appeal are considered abandoned).

Moore, the boy raised a gun and shot Whitlow, who fell face down in the street. Moore then approached Whitlow, put down his gun, and went through Whitlow's pockets. As he did so, defendant stood at the corner on the opposite side of the street yelling "something"[4] to Moore, who, when finished rifling through Whitlow's pockets, picked up his gun and ran off. Fitzgerald then witnessed defendant himself run to Whitlow, where he went through a pocket, apparently missed by Moore, before fleeing in the same direction.

A search of defendant's home conducted shortly after the murder led to the discovery of a cellular telephone identified at trial as belonging to Whitlow. Telephone company records associated with that phone and also admitted at trial showed several calls made from that phone to defendant's home only moments after the killing. When viewed in the light most favorable to the prosecution, the foregoing evidence was sufficient to permit a rational trier of fact to conclude that defendant rendered the necessary assistance or encouragement to support his convictions under a theory of aiding and abetting.

The evidence at trial was also sufficient to support that defendant possessed the requisite intent at the time he rendered such assistance or encouragement. The intent necessary for conviction of a crime as an aider and abettor is "'that necessary to be convicted of the crime as a principal.'" *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001), quoting *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985). For purposes of felony murder, this requires a showing that the defendant acted with malice, i.e., with the specific intent to kill or do great bodily harm, or to set in motion a force likely to cause death or great bodily harm. *Turner*, *supra* at 566; see also *People v Aaron*, 409 Mich 672, 727-729; 299 NW2d 304 (1980). Here, videotape evidence obtained from a nearby gas station surveillance camera and played for the jury at trial, suggested that defendant personally selected and identified Whitlow as the target Moore was to rob. Given that it is unlikely that a twelve-year-old boy would attempt to rob a grown man while unarmed, the jury could reasonably conclude that, in directing Moore in this manner, defendant was aware that his accomplice possessed a gun. Accordingly, we find that when viewed in a light most favorable to the prosecution, the evidence is sufficient to support a rational trier of fact in concluding that defendant aided and abetted Moore in Whitlow's killing, and that he did so with malice, at least insofar as he set in motion a force likely to cause death or great bodily harm.

II

Defendant also argues that remand for resentencing is required because the trial court failed to make findings of fact regarding each of the six factors it was required to consider when determining whether to sentence him as a juvenile or adult offender. We agree.

Under Michigan law, a juvenile tried and convicted as an adult in a "designated" case may be immediately sentenced as either an adult or a juvenile, or may receive a delayed sentence. MCL 712A.18(1)(n). The delayed sentence option permits the family court to delay sentencing of a minor until the juvenile becomes an adult. While the juvenile is still a minor, the

[4] Testimony offered by Casey Durham indicated that the "something" Fitzgerald heard yelled by defendant to Moore was a directive to check Whitlow's pockets a second time before leaving.

court imposes probation, but may attach any term that could be imposed as a disposition. *Id*.; see also *People v Thenghkam*, 240 Mich App 29, 40 n 12; 610 NW2d 571 (2000), citing MCL 712A.18(1)(n). In determining which of these sentencing options are appropriate in a given case, the court must consider each of the following six factors:

> (i) The seriousness of the offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim.
>
> (ii) The juvenile's culpability in committing the offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines.
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> (iii) The juvenile's prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior.
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> (iv) The juvenile's programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming.
>
> (v) The adequacy of the punishment or programming available in the juvenile justice system.
>
> (vi) The dispositional options available for the juvenile. [MCL 712A.18(1)(n).]

The prosecution has the burden of establishing by a preponderance of the evidence that the best interests of the juvenile and the public would be served by imposing a sentence as though the juvenile were an adult offender. MCR 5.955(B). Here, after receiving extensive testimonial and documentary evidence, the trial court ruled at the sentencing hearing that defendant would be sentenced as an adult, and imposed the mandatory sentence for conviction of first-degree murder of life imprisonment without parole. In doing so, the court stated in toto:

> The thought of sentencing anyone to life in prison without the possibility of parole takes your breath away. But after you catch your breath it's very clear that we have guidelines. They're called laws. And we're required to follow the law. To that extent, this Court's responsibility, this Court's duty is to interpret not only the conviction of first-degree murder; not only the conviction for armed robbery; not only the conviction for felony firearm, but to look at how a sentence as an adult versus disposition as a juvenile will impact the community.
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> The Court has had a chance to hear quite eloquently from the family of the victim. They have been consistant [sic] in their appearances before the Court throughout this lengthy process. I don't believe there's any question, in fact it's not controverted, the jury found [defendant] guilty of first-degree murder. There is no more serious crime. The jury also found that even though he was not the actual

> person who fired the weapon that resulted in the death of Mr. Whitlow, that he was responsible for that.
>
> The record of [defendant], the juvenile record, certainly reflects a number of contacts. I was a little surprised at some of the testimony offered this morning.
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> I talked about the law a few moments ago. The law dictates whether people are innocent or guilty upon the presentation of evidence and a ruling either by a Court or by a judge or by a jury. To read a report that says there was a dismissal or there was – there's insufficient evidence does not begin to tell the whole story. What I have though based on that information that's in the file, based on these reports is there has been consistant [sic] contact with this Court that has resulted in not one, but now two convictions. One for carrying a concealed weapon and now this one, which includes – actually three convictions for various felonies including murder one.
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> [Counsel for defendant] argued that there is sufficient juvenile programming available to assist [defendant]. I don't really think that's controverted. The question is did the witnesses come forward with ambiguous recommendations about – Judge, I think that he ought to be in a juvenile system, but I think he probably needs to be their [sic] longer than the law allows. That is the crux isn't it? It's what the law will allow. And if you're saying that he needs to be in there longer than what the law will allow for a juvenile then you are saying to this Court that the only option we have available is the adult sentence. He's not been successful in the programming requirements relative to this matter.
>
> At the hearing involving Mr. Moore, the Court talked about penalizing the mother if the law would allow. Now perhaps that was a little unfair. The mother, the father, family, school, court, you name it, I think that there's plenty of blame to go around. But the reality is that when you get finished assessing blame it still gets us back to what the law demands. If the juvenile disposition will not be sufficient then from where I sit there is no alternative. As such I will sentence [defendant] as an adult. The law requires a mandatory life sentence without parole. That's all.

This Court's review of a trial court's determination to sentence a minor as a juvenile or an adult is bifurcated. *Thenghkam*, supra at 41-42; MCL 712A.18(1)(n). The Court must first review the factual findings supporting the court's determination regarding each statutory factor for clear error, focusing on whether the court made a required finding of fact and whether the record supports that relevant finding. *Thenghkam*, *supra* at 41. Second, this Court must review the ultimate decision whether to sentence the minor as a juvenile or as an adult for an abuse of discretion. This second part of the analysis scrutinizes how the court weighed its factual findings to come to the ultimate sentencing decision. *Id*. at 42.

With respect to the first part of this analysis, defendant asserts that the trial court failed to make findings of fact regarding each of the factors outlined in MCL 712A.18(n), and that, therefore, remand for resentencing is required. See *id*. ("the absence of a required finding of fact or a factual finding without support constitutes clear error"). The prosecutor responds that the

statute does not expressly require the sentencing court to make findings on each factor, but merely to "consider" those factors when determining disposition. The prosecutor nonetheless acknowledges that the "factual findings" requirement has been a recognized and required part of this Court's review for nearly a decade. See e.g., *People v Passeno*, 195 Mich App 91, 103; 489 NW2d 152 (1992), overruled on other grounds by *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998); *People v Miller*, 199 Mich App 609, 612; 503 NW2d 89 (1993). To that end, the prosecutor argues that, although the trial court did not specifically set forth findings with respect to each of the required factors, it is apparent that it made the relevant considerations and that this Court should therefore affirm the trial court's sentencing decision. We disagree.

Although a fair reading of the trial court's remarks at sentencing arguably establishes that it made the relevant considerations, the sentencing court was required to "sort the logical, reasonable, and believable evidence on the record from the incredible or irrelevant," *Thenghkam, supra* at 67, and then, based on those findings, "consider and balance all the factors to decide whether to sentence a defendant as a juvenile or adult." *Id*. citing *People v Cheeks*, 216 Mich App 470, 478-479; 549 NW2d 584 (1996). Without the required findings of fact, it cannot be said that the sentencing court effectively fulfilled its duty in this regard. As this Court stated in *Thenghkam, supra* at 48:

> [A]s with all judicial decisions that do not rest solely on the law, a trial court deciding whether to sentence a defendant as an adult or a juvenile must point to the requisite facts to justify its decision. Consequently, and aside from the question of clear error, if the trial court fails to make findings of fact, it cannot fully exercise its discretion by giving proper weight to the various factors it must consider to make its decision under the sentencing statute. [(Citations omitted).]

The prosecutor argues, nonetheless, that should this Court determine that the trial court's failure to articulate its findings of fact requires remand, remand should be limited to requiring that the trial court place its findings of fact on the record, much like the situation where a sentencing court fails to articulate its reasons for exceeding the sentencing guidelines' recommended range. See *People v Triplett*, 432 Mich 568, 573; 442 NW2d 622 (1989); *People v Johnson*, 187 Mich App 621, 630-631; 468 NW2d 307 (1991). However, given that the trial court "cannot fully exercise its discretion" without first establishing the facts upon which it will balance the statutory factors, *Thenghkam, supra*, the matter must be remanded for a full resentencing.[5]

Because the trial court's failure to render its findings of fact requires remand for resentencing, we do not address defendant's claim that, in light of the "overwhelming" evidence in favor of a juvenile sentence, the trial court abused its discretion in sentencing him as an adult. As noted above, review of the trial court's ultimate sentencing decision requires that this Court "scrutinize[] how the court weighed its factual findings." *Id*. at 42. Accordingly, without the required findings of fact, any meaningful review of the trial court decision is not possible.

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[5] However, see note 8, *infra*.

III

Additionally, defendant argues that imposition of a nonparolable life sentence upon a fifteen-year-old convicted of aiding and abetting a felony murder violates our state's constitutional prohibition against cruel or unusual punishment. See Const 1963, art 1, § 16. Although we have concluded that remand for resentencing is required as a result of the trial court's failure to articulate its findings of fact in connection with imposing this sentence, we nonetheless address this matter, as the trial court may decide to impose the same sentence on remand.

This Court reviews constitutional questions de novo. *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999). In deciding whether a punishment is cruel or unusual, this Court must look to the gravity of the offense and the harshness of the penalty; compare the penalty to those imposed for other crimes in this state as well as the penalty imposed by other states for the instant offense; and consider the goal of rehabilitation. *People v Launsburry*, 217 Mich App 358, 363; 551 NW2d 460 (1996). Here, an analysis of the aforementioned factors leads us to conclude that a nonparolable life sentence does not constitute cruel or unusual punishment when imposed upon a fifteen-year-old convicted of felony murder convicted under a theory of aiding and abetting.

First, our courts have held that, given the seriousness of the offense, a mandatory life sentence without the possibility of parole is not an unduly harsh sentence for felony-murder, *People v Hall*, 396 Mich 650, 657-658; 242 NW2d 377 (1976), though applied to a minor, *Launsburry*, *supra* at 363-364. Second, as noted in *Launsburry*, *supra*, our state imposes mandatory, nonparolable life sentences for a myriad of other offenses. Third, defendant acknowledges that a number of other states allow the imposition of mandatory, nonparolable life sentences on minors. Finally, in the context of a mandatory life sentence, our Supreme Court has noted that rehabilitation and release are still possible because a defendant has available the possibility of being pardoned. *Hall*, *supra* at 658. Accordingly, because our Legislature has made a policy decision that conviction under a theory of aiding and abetting warrants punishment as if the defendant directly committed the offense, MCL 767.39, we find that imposition of a nonparolable life sentence on remand would not constitute cruel or unusual punishment.

IV

Defendant further argues that he is entitled to be resentenced because his sentence was based on inaccurate information. We disagree.

A defendant has the right to be sentenced on the basis of accurate information. *People v McAllister*, 241 Mich App 466, 473; 616 NW2d 203 (2000). Accordingly, a sentence based on inaccurate information is invalid. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). Here, defendant asserts that the trial court was uninformed that the "psychosexual conflicts" testified to by social worker Anthony Keeling at defendant's sentencing hearing. Mr. Keeling testified that the source of defendant's "acting out" during his pretrial incarceration were the result of defendant's sexual exploitation by a juvenile detention worker. Defendant also says

that his attorney was similarly not aware of such information at the time of sentencing and thus could not effectively cross-examine Keeling as to the ramifications of such exploitation.[6] As a result, defendant argues, the information presented to the trial court was substantially inaccurate because the court was not in a position to fully understand defendant's behavior. We agree with the prosecution that defendant has waived this issue.

A criminal defendant may forfeit a right by failing to timely assert it. See *Carines*, *supra* at 763. Although a forfeited right may still be reviewed for plain error, the intentional relinquishment of a known right constitutes a waiver that extinguishes the error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Here, the record reflects that defendant voluntarily abandoned an earlier challenge, proffered on these same grounds, to the accuracy of the information relied upon by the trial court at sentencing. Having affirmatively relieved the trial court of having to rule on this question, defendant has waived this issue on appeal. *Id*. at 214 ("'[a] defendant may not waive objection to an issue before the trial court and then raise it as an error' on appeal"), quoting *People v Fetterley*, 229 Mich App 511, 518-519, 583 NW2d 199 (1998).

In any event, this issue is moot to the extent that remand for resentencing is required under Part II of our opinion, *supra*. However, because defendant waived the error only insofar as this appeal is concerned, see *Carter*, *supra* at 214-216, he is not foreclosed from developing the substance of his claimed exploitation on remand.

Defendant also argues that he is entitled to resentencing because he was not afforded his right to allocution before the trial court announced its sentencing decision. Although this issue is similarly moot in light of the need for remand, we address the matter for purposes of guiding the trial court's treatment of this matter on remand.

MCR 5.955(C) provides that, once it is decided that a juvenile will be sentenced as an adult, the sentencing procedures outline in MCR 6.425 apply. MCR 6.425(D)(2)(c) provides that the trial court must, before imposing sentence, give the defendant a reasonable opportunity to advise the court of any circumstances the defendant believes the court should consider when imposing sentence. Where the trial court fails to comply with this rule, resentencing is required. *People v Jones (On Rehearing)*, 201 Mich App 449, 453; 506 NW2d 542 (1993).

The prosecution contends that, once the determination was made to sentence defendant as an adult, the sentence was established by statute, i.e., mandatory life without the possibility of parole, and that, therefore, allocution would have been meaningless. While we do not dispute the logic of the prosecution's argument, our Supreme Court has long mandated strict compliance with the rule of allocution and has required that the trial court separately ask the defendant whether he wishes to address the court before sentencing. See *People v Berry*, 409 Mich 774, 780-781; 298 NW2d 434 (1980). Moreover, where, as here, the only true discretion afforded the sentencing court is whether to impose a juvenile or adult sentence, it would seem that a

[6] Defendant also argues that the juvenile detention worker, as a state actor, deprived him of his Sixth Amendment right to counsel at a critical stage of trial by interfering in his relationship with defense counsel. However, this issue is not preserved because it was not raised in defendant's statement of questions involved on appeal as required by MCR 7.212(C)(5).

defendant should be permitted his right to allocute before such decision is rendered, as this might be the only effective chance he will have to make a statement that could impact the sentence imposed. Accordingly, the trial court should ensure that defendant is afforded his right to allocute on remand, prior to resentencing and before the decision to sentence defendant as a juvenile or adult is made.

V

Also, defendant argues that he was denied a fair trial as a result of improper statements by the prosecutor during opening and closing arguments. We disagree.

In challenging the prosecutor's opening statements to the jury, defendant argues that, although there was no evidence to support his remarks, the prosecutor referred to defendant as Moore's "lieutenant," and characterized the robbery-homicide as a "training session," wherein defendant counseled Moore "from the sidelines." Because defendant failed to preserve this issue by objecting to these allegedly improper statements at trial, *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), this Court's review is for plain error that affected his substantial rights, *People v Wyngaard*, 462 Mich 659, 668; 614 NW2d 143 (2000).

Contrary to defendant's assertion, the prosecutor's statements were not improper as unsupported by the evidence. "Opening argument is the appropriate time to state the facts to be proven at trial." *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). Although a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, *Shutte*, *supra* at 721, a review of the prosecutor's remarks reveals that the prosecutor was merely summarizing the facts it planned to place in evidence during trial and encouraging the jury to draw reasonable inferences from those facts. This was not improper. As noted in the discussion under Part I of this opinion, evidence presented at trial showed that defendant selected Whitlow as a target for Moore and then aided him in containing Whitlow within the boundaries of the street. Evidence that, after Whitlow had been shot, defendant offered Moore direction while standing on the side of the street was also admitted at trial. Given Moore's young age, it was not unreasonable for the prosecutor to argue that in conducting himself in this manner defendant was "training" or "counseling" Moore in the manner of conducting of a robbery. A prosecutor need not confine his argument to the "blandest of all possible terms," but has wide latitude and may argue the evidence and all reasonable inferences from it. *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989); *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Because the prosecutor's remarks were not improper, defendant has failed to show plain error affecting his substantial rights. *Wyngaard, supra*.

Defendant further argues, however, that the prosecutor continued to mischaracterize evidence during closing argument when he stated that defendant had been outside the delicatessen "waiting to rob and kill" Whitlow, that defendant had been heard yelling directions to Moore from across the street, and that Fitzgerald had "consistently" testified that Whitlow was chased into the street by two people. We again find nothing improper in the challenged statements.

In his statement to police, defendant acknowledged that he had seen Whitlow inside the delicatessen prior to the robbery and knew that he had money. Moreover, both Durham and Fitzgerald testified that, following the shooting, defendant yelled to Moore from his position

across the street. Although Fitzgerald was unable to decipher what was yelled, Durham specifically testified that defendant ordered Moore back to Whitlow's body for a second check of the victim's pockets. Moreover, contrary to defendant's assertion, the prosecutor's reference to Fitzgerald's testimony as "consistent" was not a mischaracterization of the evidence. Defendant's argument in this regard is premised upon a claim that Fitzgerald testified at the preliminary examination that only one person was involved in the chase that led Whitlow onto Woodward Avenue. However, a review of the transcripts provided to this Court on appeal reveals the following testimony offered by Fitzgerald at the preliminary examination:

> There was a second gentleman, too, because when they first went out into the street there were two gentlemen chasing, but the second gentleman went across the street in front of the gas station, ...

Accordingly, defendant has failed to show that the prosecutor's comments in this regard were erroneous.

Finally, defendant claims he was denied his right to a fair trial when the prosecutor attempted to evoke the sympathy of the jurors by arguing that it could have been any one of them who was targeted that night. Although prosecutors should not resort to arguments that appeal to the fears and prejudices of jurors, such comments during closing argument will be reviewed in context to determine whether they constitute errors requiring reversal. *Bahoda, supra*. Having reviewed the remarks in context, we do not conclude that the challenged remarks denied defendant a fair and impartial trial. The comments occurred at the end of a lengthy discussion of the evidence and were followed by further comments on the evidence. Moreover, the remarks were isolated, and, as noted above, the prosecutor's argument was otherwise proper.[7] See *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). Further, the trial court instructed the jury to not be influenced by sympathy or prejudice. Under these circumstances, defendant was not prejudiced by the prosecutor's remarks, and reversal is accordingly not required.

We affirm defendant's convictions but remand for correction of the judgment of sentence and for resentencing.[8] We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ Michael R. Smolenski

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[7] Because the remainder of the prosecutor's argument was proper, we reject defendant's claim that, even if each individual act of alleged misconduct does not alone require reversal, reversal is required on the basis of their cumulative effect.

[8] In remanding for resentencing, we express no opinion as to the propriety of the sentence initially imposed or whether, upon proper consideration of the factors set forth in MCL 712A.18(1)(n), defendant should be sentenced as a juvenile or adult.