

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAURICE D. BLACK,

Defendant-Appellant.

UNPUBLISHED

September 20, 2002

No. 233202

Wayne Circuit Court

LC No. 00-006576

Before: Smolenski, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of felony murder, MCL 750.316(1)(b). The trial court sentenced defendant to life in prison. We affirm.

Defendant first argues that the prosecutor failed to present sufficient evidence to support the felony murder conviction, specifically with regard to the element of malice. In reviewing a sufficiency claim, we must view the evidence in the light most favorable to the prosecutor and 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 Viaene*, 119 Mich App 690, 693-694; 326 NW2d 607 (1982).

A person who procures, counsels, aids, or abets in the commission of an offense may be convicted and punished as if the person directly committed the offense. MCL 767.39. The intent necessary to convict an aider and abettor is the same as that required for a principal. *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985). In this case, the prosecutor was therefore required to prove that defendant had an intent to kill, an intent to cause great bodily harm, or that defendant created a very high risk of death or great bodily harm with knowledge that death or great bodily harm would probably result. *Id.* Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime, *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996), including an aider and abettor's state of mind. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). Further, malice may be inferred "from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm." *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999).

Evidence presented at trial indicated that defendant threatened the victim on the day before the murder. Defendant also confessed, in a signed statement, that he offered another man

drugs, a gun, and over a thousand dollars, if he would rob and hurt the victim.¹ Further, police found gunshot residue on defendant's hand, face, and clothing, suggesting that defendant's role in the victim's death may have been even more direct than defendant's confession indicated. Reasonable inferences from this evidence support a conclusion that defendant acted with malice, as required for a felony murder conviction. At the very least, a reasonable jury could have found that defendant's conduct set events in motion that were likely to cause the victim great bodily harm or death.² We therefore find the prosecutor introduced sufficient evidence from which a rational jury could conclude that defendant committed felony murder.

Defendant next argues that his trial counsel rendered ineffective assistance when counsel advised defendant not to testify and when counsel failed to call defendant's mother as a witness. When no separate evidentiary hearing has been held with regard to an ineffective assistance claim, this Court's review is limited to the lower court record. *People v Shively*, 230 Mich App 626, 628, n 1; 584 NW2d 740 (1998). Whether a defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To justify reversal of an otherwise valid conviction based on the ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To find counsel's performance objectively unreasonable, counsel must have made "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *People v Mitchell*, 454 Mich 145, 164-165; 560 NW2d 600 (1997). To demonstrate prejudice, a defendant must show a reasonable probability that, but for the alleged error, the result of the proceedings would have been different. *Shively, supra* at 628.

Defendant argues that his trial counsel should have called his mother as a witness. However, a defense attorney is given great discretion regarding trial strategy and tactics. *Pickens, supra* at 330. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *Rockey, supra* at 76. We conclude that trial counsel's decision on this matter was a valid trial strategy. Calling defendant's mother as a witness would have subjected her to cross-examination and could have provided evidence contrary to the defense strategy that the police fabricated defendant's confession. Further, the testimony of defendant's mother would have been collateral to the crime because she was not present when it occurred. See *Mitchell, supra* at 165. Therefore, counsel's decision was appropriate trial strategy.

Defendant also argues that his trial counsel erroneously advised him not to testify on his own behalf. Again, we conclude that trial counsel's decision was appropriate trial strategy. Trial

¹ See *People v Flowers*, 191 Mich App 169, 179; 477 NW2d 473 (1991).

² See *People v Aaron*, 409 Mich 672, 728-729; 299 NW2d 304 (1980).

counsel heard defendant's testimony at the *Walker*³ hearing. The trial court stated that it found defendant's testimony at that hearing "absurd," "unworthy of belief," and incredible. Given this fact, it was reasonable for trial counsel to conclude that defendant's testimony would hurt, not help, his trial theory that police fabricated defendant's confession. We find that defendant was not deprived of effective assistance of counsel.

Defendant next argues that remarks made by the prosecutor during closing argument were improper because they raised a civic duty argument and expressed the prosecutor's personal belief in defendant's guilt. This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Further, because defendant did not object to the prosecutor's comments, we review this issue only for plain error affecting defendant's substantial rights. *Id.* Even if that standard is met, reversal is warranted only if the error resulted in the conviction of an actually innocent person or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Carines, supra* at 763.

We conclude that the prosecutor in this case did not make a civic duty argument by injecting issues into the trial that are broader than the defendant's guilt or innocence, or encouraging the jurors to suspend their own powers of judgment. *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). Instead, the prosecutor discussed justice in the context of the admitted evidence and the law, arguing that the evidence justified a guilty verdict. This argument neither injected an issue broader than defendant's guilt or innocence, nor asked the jury to suspend its powers of judgment.

Likewise, we conclude that the prosecutor did not express a personal belief in defendant's guilt. It is true that a prosecutor may not express a belief in the defendant's guilt without relating that belief to the evidence. *People v Humphreys*, 24 Mich App 411, 414, 418; 180 NW2d 328 (1970). However, in the present case, the prosecutor merely stressed the evidence and the law, arguing that defendant was guilty – an entirely appropriate argument for a prosecutor to make. We find that the prosecutor's remarks during closing argument were proper.

Finally, we note that defendant failed to raise a timely objection to the prosecutor's allegedly improper remarks. If an objection had been made and the trial court had found any of the remarks improper, a curative instruction to the jury could have eliminated any prejudicial effect. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Accordingly, defendant is not entitled to relief on this ground.

Affirmed.

/s/ Michael R. Smolenski
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder

³ *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).