STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2002
v	No. 226749 Wayne Circuit Court
SHAWN LUNDY, Defendant-Appellant.	LC No. 99-006375

Before: Talbot, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendant was charged with first-degree murder under an aiding and abetting theory, MCL 750.316, and assault with intent to commit murder, MCL 750.83. He was convicted of the lesser charge of second-degree murder, MCL 750.317, and acquitted of assault. Defendant was sentenced to twelve to twenty-five years' imprisonment. He appeals as of right. We affirm.

Defendant's conviction arises from his involvement in the drive-by shooting of LaWranza Robertson. Defendant was a front-seat passenger in the car, codefendant Mario Peterson was the driver, and codefendant William Martin shot Robertson from the rear side window of the car.

The proofs against defendant consisted primarily of the testimony of Steven Brown and defendant's statement to the police. Brown testified that he was walking Robertson home from a barbecue shortly after midnight on June 6, 1999, when a station wagon approached and slowed down at an intersection. Although he did not recognize the car, Brown recognized its occupants as the three defendants. As the car slowed down, Martin leaned out the back window and started shooting with a black handgun. Robertson was struck in the chest and died later.

According to defendant's statement to the police, a man named Patrick Bryant shot at Peterson on June 5, so Peterson and Martin came over in a station wagon with the plan of riding around until they saw Bryant or any of his associates, including Steven Brown. Once they saw any of those men, Martin would get out of the car. The purpose for getting out of the car was not disclosed in defendant's statement and was the subject of inferences argued by each side. When they encountered Brown shortly after midnight, however, Martin did not follow the "plan" and instead shot at Brown (striking Robertson) from the back seat of the car.

The jury rejected defense arguments that Brown was shooting at the car and that Martin shot back in self-defense, finding defendant guilty of second-degree murder. Defendant raises two issues on appeal (a third issue was stricken pursuant to defendant's motion). He argues that the evidence was insufficient to sustain his conviction because there was no evidence that he supported or encouraged the shooting or shared Martin's intent. Defendant also argues that he was denied the effective assistance of counsel because his trial attorney failed to object to a police officer's testimony that he recognized defendant during the arrest, which defendant maintains was an indication to the jury that he had engaged in prior bad acts.

I. SUFFICIENCY OF THE EVIDENCE

This Court must determine whether, when the evidence is viewed in the light most favorable to the prosecutor, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

To establish aiding and abetting, a 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. [*People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995) (citations omitted).]

Defendant argues that the evidence established that he was "merely present" at the shooting and did not share Martin's intent, nor did he assist, encourage or support Martin. We disagree. Although there was no direct evidence that Lundy shared Martin's intent, shared intent can be inferred from the circumstances of the offense and defendant's statement to the police. Defendant told the police that "Ken [Martin] said we were going to ride until they saw Patrick [Bryant], Dwayne, Steve [Brown] or Little Mo. . . . There was a plan. Ken was to be let out of the vehicle once he saw any of them … ."

A motive for retaliatory violence was established by defendant's statement that Bryant had earlier shot at Peterson. Peterson and Martin came to defendant in a car apparently "rented" from a drug user even though all three defendants owned their own cars. The jury could infer that a car not associated with any of the defendants was used to avoid suspicion as they approached Brown, and to facilitate an anonymous getaway. The jury could further infer that Martin's plan was not simply to get out of the car when the previously-armed Bryant or his associates were located. It was unlikely that the plan was to merely drop Martin off, unarmed, in the street shortly after midnight to confront a potentially armed rival. Rather, the jury could infer from the testimony and circumstances that the plan involved retaliation in a form that could be executed by one person standing alone—namely, the use of deadly force.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to infer that defendant was part of the plan by serving as a front-seat lookout for Bryant or his associates and that he shared Martin's deadly intent.

II. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he was denied the effective assistance of counsel because counsel failed to object to the arresting officer's testimony that "[a] female opened the door. I saw and recognized Mr. Lundy inside. I entered and arrested him."

Unsolicited remarks in response to a proper question generally are not grounds for reversal unless the remark injects prejudicial matter into the proceeding. *People v Page*, 41 Mich App 99, 101; 199 NW2d 669 (1972) (reference to arrest in front of a "dope den"). For example, it can be reversible error to link a defendant to other crimes. *People v Deblauwe*, 60 Mich App 103; 230 NW2d 328 (1975) (status as parolee). Defendant argues that the police officer's unsolicited testimony that he "recognized" defendant allowed the jury to infer that he was tied to other bad acts because he was known to the police.

Because defendant did not move for a hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review of this issue is limited to the trial record. See *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987).

We disagree that defendant was prejudiced by the unsolicited remark or that it amounted to a reference to other criminal acts. Witness Steven Brown had earlier testified that the police knew him (Brown), but he had no criminal record. Officer Michael Jackson testified that he had seen Brown in the neighborhood before but did not know his name. Defendant has not shown that he was any different than Brown. It would have been reasonable for counsel to believe that the jury would conclude that, like Brown, defendant would be familiar on sight to police officers who patrolled that area. We will not assume that the potentially neutral statement was prejudicial.

Accordingly, we find that counsel was not ineffective for failing to object and draw further attention to the unsolicited remark. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald