STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 18, 2004
v	No. 245006 Wayne Circuit Court
STEVEN BROWN, Defendant-Appellant.	LC No. 99-010005

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

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, and was sentenced to a prison term of twenty-five to fifty years. He appeals as of right. We affirm.

Defendant's conviction arises from the September 1, 1999, fatal shooting of Glenn Pierce, who was shot while entering a parked car in a bank parking lot after obtaining more than $2,000 in cash for his employer. Chere Tutt, the only known eyewitness to the crime, saw two men approach Pierce from different directions. Tutt heard, but did not see, gunshots, and she saw the two men run across the street and behind a medical clinic. The police determined from the statements of various witnesses that the two men were defendant and Jerry Swims. Defendant was subsequently arrested and, while still in police custody two days later, signed a statement incriminating himself in the offense.[1] Defendant was later charged with first-degree felony-murder, MCL 750.316(1)(b), and possession of a firearm during the commission of a felony, MCL 750.227b. He was convicted of the lesser offense of second-degree murder and acquitted of felony-firearm.

I

Defendant argues that the evidence was insufficient to support his conviction of second-degree murder. When a defendant challenges the sufficiency of the evidence in a criminal case, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror to find guilt beyond a reasonable doubt. *People v Nowack*, 462

[1] Swims was never apprehended.

Mich 392, 399; 614 NW2d 78 (2000); *People v Sexton*, 250 Mich App 211, 222; 646 NW2d 875 (2002).

To prove second-degree murder, the evidence must establish the following elements: (1) a death, (2) caused by an act of the defendant, (3) while the defendant had the intent to kill, the intent to cause great bodily harm, or the intent to perform an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm, and (4) without justification or excuse. *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001). Here, defendant was also charged under an aiding and abetting theory. To support defendant's conviction pursuant to an aiding and abetting theory of guilt, the prosecutor was required to show that (1) defendant or some other person committed the crime charged, (2) defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) at the time that he gave aid and encouragement, defendant had (a) the requisite intent necessary to be convicted of the crime as a principal, *or* (b) knowledge that the principal intended its commission. *People v Barrera*, 451 Mich 261, 294; 547 NW2d 280 (1996); *People v Tanner*, 255 Mich App 369, 418-419; 660 NW2d 746 (2003), rev'd on other grounds 469 Mich 437 (2003).

Defendant indicated in his statement to Officer Simon that Swims shot Pierce, but defendant admitted that he aided and encouraged Swims by agreeing to the robbery and standing in back of Swims. The jury could also infer defendant's participation in the crime from evidence that defendant and Swims lingered around the party store where Pierce worked until Pierce left on his banking errand, that they then followed Pierce to the bank, and that they simultaneously approached Pierce from opposite sides of the parking lot after he completed the banking transaction.

Nonetheless, defendant argues that the evidence was insufficient to establish that he possessed the requisite intent for second-degree murder. He contends that there was no evidence showing that he knew Swims intended to shoot Pierce or knew that Swims was armed. We disagree.

The requisite level of malice for second-degree murder is the same as that for first-degree felony-murder. *People v Flowers*, 191 Mich App 169, 176; 477 NW2d 473 (1991). We therefore rely on this Court's remarks in *Flowers*, *supra* at 178, regarding proof that an aider and abettor possessed the requisite malice for felony-murder:

> In situations involving the vicarious liability of cofelons, the individual liability of each felon must be shown. It is fundamentally unfair and in violation of basic principles of individual criminal culpability to hold one felon liable for an unforeseen death that did not result from actions agreed upon by the participants. In cases where the felons are acting intentionally or recklessly in pursuit of a common plan, liability may be established on agency principles. [*People v*] *Aaron*, [409 Mich 672,] 731[; 299 NW2d 304 (1980)]. . . .
>
> In order to convict one charged as an aider and abettor of a first-degree felony murder, the prosecutor must show that the person charged had both the intent to commit the underlying felony and the same malice that is required to be shown to convict the principal perpetrator of the murder. Therefore, the

> prosecutor must show that the aider and abettor had the intent to commit not only the underlying felony, but also to kill or to cause great bodily harm, or had wantonly and wilfully disregarded the likelihood of the natural tendency of this behavior to cause death or great bodily harm. Further, if it can be shown that the aider and abettor participated in a crime with knowledge of his principal's intent to kill or to cause great bodily harm, he was acting with wanton and wilful disregard sufficient to support a finding of malice.

In *People v Turner*, 213 Mich App 558; 540 NW2d 728 (1995), this Court applied these principles in reviewing the convictions of three defendants, Turner, Ingram, and McDonald, who were convicted of first-degree felony-murder under aiding and abetting theories. Turner, Ingram, McDonald, and a fourth codefendant, Johnson, jointly robbed several persons, and Johnson fatally shot one victim. *Id.* at 563. This Court concluded that there was sufficient evidence to sustain the felony-murder convictions of Turner, Ingram, and McDonald, because they knew that Johnson had a gun when they set out to commit the robberies. This Court held that "knowledge that Johnson was armed during the commission of the armed robbery is enough for a rational trier of fact to find that Turner, as an aider and abettor, participated in the crime with knowledge of Johnson's intent to cause great bodily harm." *Id.* at 572. The Court stated that a rational trier of fact could find that Turner was acting with the requisite "wanton and willful disregard" sufficient to support a finding of malice. *Id.* at 572-573. The Court applied this reasoning in upholding the convictions of Ingram and McDonald as well. *Id.* at 574, 580-581.

Here, although there was no direct evidence that defendant was aware that Swims was armed, or that defendant himself was armed, there was sufficient circumstantial evidence for the jury to infer that defendant and Swims jointly planned to commit an armed robbery. There was evidence that the robbery was carefully planned in advance. It occurred on a day of the month when the store kept large reserves of money on hand in order to cash customers' government checks. Swims and defendant were observed lingering around the store for at least two hours, and they then followed Pierce when he left to go to the bank. They coordinated their movements so that they both approached Pierce from different directions at the same time. Their behavior afterward also suggested that they had formulated a plan to park their car away from the bank, and to entail the aid of Glenda Lewis in getting back to their car without going past the bank. The jury could infer from this careful planning that Swims' use of the gun was not an unforeseen circumstance. Furthermore, although defendant denied in his statement planning to kill Pierce, he did not deny knowing that Swims would be armed with a gun during the robbery.

Defendant also argues that the trial court erred in denying his motion for a directed verdict on the felony-murder charge. "When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *Aldrich*, *supra* at 122.

To prove felony murder under an aiding and abetting theory, the prosecution must show that the defendant (1) performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the

probable result, (3) while committing, attempting to commit, or assisting in the commission of the predicate felony. *People v Carines*, 460 Mich 750, 755; 597 NW2d 130 (1999). To satisfy the malice standard for aiding and abetting felony-murder, the prosecution must show that the aider and abettor either intended to kill, intended to cause great bodily harm, or wantonly and willfully disregarded the likelihood that the natural tendency of his behavior was to cause death or great bodily harm. *People v Riley*, 468 Mich 135, 140-141; 659 NW2d 611 (2003). Here, the same evidence that supports the second-degree murder conviction also supports the felony-murder charge. Evidence that a defendant participated in a robbery knowing that his co-felon was armed is sufficient to establish that the defendant acted "in wanton and wilful disregard of the possibility that death or great bodily harm would result," and, therefore, is sufficient to establish a felony-murder conviction. *Carines, supra* at 760.

II

Defendant argues that the trial court erred in denying his motion to suppress his custodial statement. Defendant raises a three-part argument regarding the statement. First, he claims that the police coerced the statement by detaining him in a squalid cell while he was seriously ill and by delaying his arraignment for five days. Second, he claims that the police violated his rights by ignoring his requests to consult an attorney. Third, he contends that his statement was the fruit of an unlawful arrest without probable cause.

This Court reviews de novo the entire record when reviewing a trial court's decision regarding a defendant's motion to suppress an incriminating statement. *People v Adams*, 245 Mich App 226, 230; 627 NW2d 623 (2001). A trial court's underlying factual findings, however, are reviewed for clear error. *Id.*

A. Coercion and Prearraignment Delay

The Due Process Clause of the Fourteenth Amendment prohibits use of an involuntary statement coerced by police conduct. US Const, Am XIV; *People v Wells*, 238 Mich App 383, 386; 605 NW2d 374 (1999). The question of whether a statement was made voluntarily is generally determined by an examination of police conduct. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). When this Court reviews a trial court's determination of voluntariness, it is required to examine the entire record and make an independent determination of the issue as a question of law. *Wells, supra* at 386. However, this Court will affirm the trial court's decision unless it is left with a definite and firm conviction that the trial court erred. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). If the question of voluntariness rests on a disputed factual question that turns on the credibility of witnesses or the weight of the evidence, this Court will defer to the trial court, given its superior opportunity to evaluate these matters. *Id.*

In evaluating police conduct, the factors the trial court should consider include

> [t]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a

> magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Sexton, supra* at 753.]

The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. *Id.*

Defendant argues that the totality of the circumstances, including the delay in his arraignment, his sickness, the allegedly abhorrent conditions in his cell, and inducements of leniency and medical treatment, demonstrate that his custodial statement was improperly coerced. As the trial court noted in its opinion, several of these matters turn on the question of witness credibility. The trial court found that although defendant was indeed ill, his illness was not serious, did not manifest its worst symptoms until the morning after his confession, and did not require any treatment other than time. The trial court gave credence to the officers' testimony that defendant did not appear to be sick. We do not find any of these findings to be clearly erroneous. *Sexton, supra* at 752. The trial court did not err in finding that the police did not take advantage of defendant's illness to force him to sign the statement.

We also find no clear error in the trial court's finding that the delay in defendant's arraignment was not, in itself, a basis for suppressing defendant's statement. See *People v Manning*, 243 Mich App 615, 620; 624 NW2d 746 (2000), holding that delay in arraignment is only one factor to be considered among the totality of the circumstances for determining whether a confession was made voluntarily. *Id.* at 644-645. Although defendant was not arraigned until five days after he was taken into custody, the confession that he sought to suppress was given after he had been in custody for fifty-one hours, just three hours past the forty-eight-hour target. *Id*.

Defendant argues that Simon induced his confession with a false promise of leniency. The trial court found defendant's testimony unconvincing, given his eleventh-grade education and his prior experience with the criminal justice system. We cannot say that the trial court's finding rose to the level of clear error and, in any event, a promise of leniency is just one factor to be considered in the evaluation of the voluntariness of a defendant's statements. *People v Shipley*, 256 Mich App 367, 373; 662 NW2d 856 (2003).

Here, the totality of the circumstances surrounding defendant's statement does not indicate that the police improperly coerced the statement.

B. *Miranda* rights

Defendant also argued below that his statement should be suppressed because the police continued to interrogate him despite his repeated demands for an attorney. When a defendant claims that his statement should have been suppressed because the police did not honor his request for counsel, this Court reviews the record de novo, but reviews the trial court's factual findings under the clearly erroneous standard. *Adams*, *supra* at 230, 235.

Both the United States and Michigan Constitutions guarantee the right against compelled self-incrimination. US Const Am V; Const 1963, art 1, § 17. This right encompasses an accused person's right to cease a custodial police interrogation by asserting his right to counsel. *Adams, supra* at 230-231. When an accused invokes the right to have counsel present during a custodial interrogation, the accused cannot be subjected to further police questioning until counsel has been made available, unless the accused initiates further communication. *Id.* at 237, citing *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981).

Although defendant testified that he requested an attorney several times and that he was told that consulting an attorney would be a waste of time and money, the trial court did not find this testimony credible. Giving deference to the trial court's credibility determination, we find no clear error with respect to this finding. Therefore, defendant is not entitled to relief on his claim that his statement was taken in contravention of his constitutional right to counsel.

C

Defendant lastly contends that the police arrested him without probable cause, and that his statement should be suppressed as the fruit of the poisonous tree. We disagree.

In *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998), this Court summarized how the fruit of the poisonous tree doctrine applies to custodial statements following an improper arrest:

> A police officer may arrest an individual without a warrant if a felony has been committed and the officer has probable cause to believe that the individual committed the felony. MCL 764.15(c); *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). In reviewing a challenged finding of probable cause, an appellate court must determine whether the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected individual has committed the felony. *People v Oliver*, 417 Mich 366, 374; 338 NW2d 167 (1983); *People v Russo*, 439 Mich 584, 603-604; 487 NW2d 698 (1992); *People v Sloan*, 450 Mich 160, 168; 538 NW2d 380 (1995).

The Court in *Kelly* further explained that "[t]he mere fact of an illegal arrest 'does not per se require the suppression of a subsequent confession.'" *Id.* at 634, quoting *People v Washington*, 99 Mich App 330, 334; 297 NW2d 915 (1980).

The police may not detain a suspect for questioning when there is insufficient probable cause for arrest. *Brown v Illinois*, 422 US 590, 605; 95 S Ct 2254; 45 L Ed 2d 416 (1975); *Kelly, supra* at 633-634. However, an officer's characterization of an arrest is not determinative of its legality. *Id.* at 633.

Reviewing the record as a whole, we conclude that the police had amassed sufficient information to establish probable cause for arrest as of September 8, 1999. Tutt informed the police that Pierce's two assailants ran behind the Motor City Medical Clinic after Pierce was shot. This corresponded with the statement of Jeffrey Moore that he saw two men, Swims and a man he did not know, run from the alley behind the medical clinic and into the home of Glenda

Lewis. Lewis and her daughter told the police that Swims and another man, whom Lewis had seen before, came to their house and asked for a ride. When the police showed Lewis a photograph of Swims and defendant, Lewis identified defendant as the man who came to her house with Swims. Furthermore, Lewis told the police that Swims directed her to drive to a location near the bank, but by using a circuitous route that avoided the bank. Additionally, two of defendant's neighbors saw him and Swims get out of a car and remove their shirts. This was sufficient information "to justify a fair-minded person of average intelligence in believing that the suspected individual has committed the felony." *Kelly, supra* at 631.

In sum, the trial court did not err in finding that the police had sufficient probable cause to arrest defendant, and that his statement was therefore not the product of an unlawful arrest. The trial court also did not err in finding that defendant's allegations of coercion and denial of his requests for an attorney were not credible. Accordingly, the trial court properly denied defendant's motion to suppress his statement.

III

Defendant contends that he was denied a fair trial by several instances of prosecutorial misconduct. This Court reviews preserved 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 Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002).

Defendant claims that the prosecutor made misleading comments during jury voir dire and falsely suggested to the jury that aiding and abetting a robbery in itself is sufficient to establish murder if the victim is killed. We have reviewed the prosecutor's comments, and do not agree that the prosecutor made such insinuations. Moreover, during this exchange, the trial court twice instructed the jurors that it alone had the authority to instruct the jurors on the law.

Defendant also claims that the prosecutor made improper appeals to the jurors' fears and sense of civic duty in his rebuttal argument. Defendant's arguments are based on remarks taken out of context. The prosecutor's comments about Moore having "no place to hide" were not intended to urge the jurors to convict defendant to protect Moore's safety, but rather to cast doubt on Moore's professed inability to identify defendant. The prosecutor's advice to "be careful" did not suggest that the jurors were at risk from defendant; rather, viewed in context, the prosecutor was urging the jurors to be careful in analyzing the evidence. Consequently, there was no improper civic duty argument.

We also reject defendant's claim that the prosecutor improperly denigrated defense counsel during rebuttal argument. Defendant correctly argues that a prosecutor may not personally attack defense counsel. *People v Phillips*, 217 Mich App 489, 498; 552 NW2d 487 (1996). However, we believe it is an exaggeration to claim that the prosecutor here personally attacked defense counsel, or attempted to inflame the jurors, by using expressions such as "tricks" or "straw men." Defense counsel had attempted to undermine the prosecution's case by calling the jury's attention to various discrepancies in the witnesses' testimony. The prosecutor was entitled to argue that these discrepancies were too insignificant to detract from the important evidence, and he was not restricted to the "blandest of all possible terms" in making his argument. *Aldrich*, *supra* at 112.

We also reject defendant's claim that the prosecutor improperly shifted the burden of proof by commenting on defense counsel's failure to explain "Spud." The prosecutor was not shifting the burden of proof, but commenting on a weakness in defendant's claim that the police fabricated his confession. The prosecutor pointed out that the confession included a statement that defendant solicited someone called "Spud" to commit a robbery, and that this portion of the statement was corroborated by witnesses who testified that defendant approached them about committing a robbery. The prosecutor did not ask defense counsel to prove defendant's innocence, but rather to resolve a discrepancy in defendant's own claim of fabrication.

Defendant claims that the prosecutor slipped in inadmissible, prejudicial evidence of his criminal history through the testimony of Officer Fisher and State Trooper Oswald-Debottis. We disagree. Fisher's reference to defendant's history was in response to a question by defense counsel, not the prosecutor. Accordingly, there is no basis for a prosecutorial misconduct claim here. Contrary to defendant's suggestion, Oswald-Debottis did not give any testimony that was prejudicial to defendant. She merely referred to a 1991 traffic stop involving defendant, and, while this was of questionable relevance, it was not prejudicial.

We agree that the prosecutor erroneously read from a medical reference book during rebuttal, but this error did not prejudice defendant. In defining the term "syncope," the prosecutor merely confirmed that defendant told ER personnel that he had collapsed in his cell. It did not strengthen the prosecutor's position, nor did it weaken defendant's position. The prosecutor also explained that the medical records showed that defendant acknowledged that he was not experiencing the more serious symptoms of blood in his stool and vomit. Defendant never claimed that his symptoms were this serious, so again, the prosecutor's improper citations to a medical text did not weaken or strengthen either party's position.

Finally, defendant claims that the prosecutor failed to provide discovery regarding res gestae witnesses. MCL 767.40a(1) requires the prosecutor to notify the defendant of all known res gestae witnesses. *People v Burwick*, 450 Mich 281, 288-289, 292; 537 NW2d 813 (1995). Here, the record does not factually support defendant's implied argument that the prosecutor failed to notify defendant of known res gestae witnesses. There is no indication that the prosecution knew of any person other than Tutt who was present in the parking lot when Pierce was shot. Defendant complains that the prosecutor did not provide certain information concerning potential res gestae witness Sylvia Glenn, who was with Moore when he saw the men running from behind the medical clinic, but he does not claim that the prosecution violated any requirement of the statute with respect to Glenn.

If there had been evidence of a violation of MCL 676.40a(1), the remedy would be a remand for an evidentiary hearing pursuant to *People v Pearson*, 404 Mich 698; 273 NW2d 856 (1979). *People v Calhoun*, 178 Mich App 517, 521-522; 444 NW2d 232 (1989). Although the *Pearson* hearing originated before MCL 676.40a(1) was amended,[2] this Court held in *Calhoun* that the hearing was still valid to determine whether an unlisted witness could have been located and produced, and whether the witness' absence at trial was prejudicial to the defendant. *Id.* at

[2] Before the amendment, the statute required the prosecutor to produce res gestae witnesses.

522-523. Here, defendant has not requested a *Pearson* hearing, and we find no basis to remand for one. Accordingly, there is no merit to defendant's claim of prosecutorial misconduct based on discovery violations.

IV

Defendant argues that he was denied a fair trial by the cumulative effect of several errors. This Court reviews this issue to determine if the combination of alleged errors denied defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not. *Id.* at 387-388. Reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial. *Id.* at 388. Here, we have found only two minor errors: the irrelevant, but innocuous testimony of Trooper Oswald-Debottis, and the prosecutor's reference to a medical dictionary in closing argument. These errors, even when combined, did not deny defendant a fair trial.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kathleen Jansen
/s/ Michael J. Talbot