STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 12, 2004
v JOEL ANTHONY ALLEN, Defendant-Appellant.	No. 246419 Wayne Circuit Court LC No. 02-003922-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v WILLIE JAMES ROBINSON, Defendant-Appellant.	No. 246420 Wayne Circuit Court LC No. 02-003922

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

PER CURIAM.

Following a joint trial before separate juries, defendants were each convicted of first-degree murder, MCL 750.316(1)(a) and five counts of assault with intent to commit murder, MCL 750.83. Defendant Robinson was also convicted of possession of a firearm during the commission of a felony. MCL 750.227b. Defendants were each sentenced to concurrent terms of life imprisonment for the murder conviction and eighteen years and nine months' to forty years' imprisonment for the assault convictions, and defendant Robinson was additionally sentenced to a consecutive two-year term of imprisonment for the felony-firearm conviction. Both defendants appeal as of right. We affirm both defendants' convictions.

I

Defendants' convictions arise from a drive-by shooting in which a seven-year-old girl was killed and her mother and siblings were wounded. The injured victims were inside a parked car when they were shot. There was no dispute at trial that defendant Allen drove defendant Robinson's car while Robinson repeatedly fired an automatic carbine rifle. Robinson's theory at

trial was that he did not intend to kill anyone, and was shooting at the car in retaliation for an earlier confrontation in which his car was struck with a baseball bat. Allen's theory was that he did not know that Robinson was going to shoot at anyone.

The events that culminated in the shooting began with Donnell Brown's sale of a car stereo, either to Robinson or Robinson's friend, for $40, which allegedly was paid for with counterfeit money. Although the facts surrounding the sale and the ensuing confrontation over the counterfeit money were disputed, at some point, Anthony Niebrzydowski ("Blue") became involved, and either he or Brown threw a bat that struck Robinson's car. Allen was with Robinson during this argument, which was witnessed by Blue's sister, Aelizabeth Niebrzydowski ("Niebrzydowski"). Robinson left, but threatened retaliation.

Approximately thirty minutes later, Robinson and Allen returned. Niebrzydowski and her three daughters were in Blue's girlfriend's car to go shopping. The car was parked at an angle and was partially on the grass and partially on the driveway, with the back end of the car nearly in the street. The passenger door was open. The girls' brother, "B.J.," approached the car with Blue. Brown was sitting on the porch. Robinson's car came around the corner. Allen was driving, and Robinson was firing the gun. Brown ran inside the house. The car was showered with bullets. Niebrzydowski's left index finger was hit as it was on the steering wheel and a bullet also grazed her behind her ear on the right side. One daughter was killed by a gunshot to her head. Two of Niebrzydowski's other daughters and B.J. received nonfatal wounds.

Robinson admitted the shooting, but denied knowing that anyone was inside the car. In his statement to the police, Robinson said, "When we turned onto Dolphin I saw Blue standing next to a white car that was parked in the yard. When I saw Blue I began firing at the car." He claimed that he fired the weapon about eight times. When asked, "Did you see anyone inside the vehicle when you shot at [B]lue," Robinson responded, "No. Blue was standing on the outside by the passenger side. I was shooting at the car."

II

Defendant Allen first challenges the trial court's jury instructions on aiding and abetting. He contends that the instructions concerning the intent necessary to be convicted under an aiding and abetting theory were inaccurate and misleading insofar that they indicated that an aider and abettor's guilt could be predicated on knowledge that the principal intended "to do the act," or "something."

The trial court originally instructed the jury, in pertinent part:

> At the time of giving the assistance, the aider and abetter [sic] must either have the intent himself to kill the victim, or assault with intent to commit murder.
>
> He must either have that intent himself, or must aid and abet another person, knowing that that person intends to kill, or intends to do great bodily – intends to kill, or kills another person.
>
> In other words, the aider and abetter [sic] either intends himself, or he knows that the person that he is assisting *intends to do the act.*

* * *

> Also, again, the aider and abetter [sic] must either have the intent himself, or he aided and abetted another person, knowing that that person had the intent, and went ahead and aided the person anyway. [Emphasis added.]

After the jury was excused, but before it began deliberations, counsel for defendant Allen objected to the above instruction and the court agreed to clarify the specific intent necessary to convict under an aiding and abetting theory. The court then reinstructed the jury as follows:

> The specific intent in the first count of Murder in the First Degree, is that the perpetrator specifically intended to kill the victim. And that the aider and abetter [sic] knew that the perpetrator specifically intended to kill the victim.
>
> As to Murder in the Second Degree, which is an alternative in Count 1, in Murder in the Second Degree, you can either intend to kill, or intend to do great bodily harm, or just create a dangerous situation, knowingly create a dangerous situation, in total disregard that the likelihood would be to cause death or bodily harm.
>
> So, that's not—you don't have to specifically intend to kill anybody. All right?
>
> And as to the other counts of Assault with Intent to Commit Murder, it's also a specific intent to kill the victim. Specific intent to kill the victim.
>
> Either the perpetrator – the perpetrator had the specific intent. The aider and abetter [sic] either had that intent, also, or he knew that the other person *intended to [sic] something*.
>
> On the Felonious Assault the intent is to put the victim in fear, and not to cause the death of the person. [Emphasis added.]

During deliberations, the jury requested a definition of aiding and abetting. The trial court's response to the request redefined aiding and abetting. The reinstruction did not address the requisite intent, but when the court asked if that helped, the jurors responded, "Yes."

A

Generally, this Court reviews claims of instructional error de novo. *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). Jury instructions must be read as a whole rather than extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* Generally, jurors are presumed to have followed the instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Yet, if both a correct and an incorrect instruction are given, this Court will presume that the jury followed the incorrect charge. *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995).

Although Allen objected to the court's initial instruction, the court agreed to reinstruct the jury to cure the deficiency. Allen did not object following the curative instruction. This issue is therefore unpreserved, and as Allen notes, the applicable standard of review is plain error.

Defendant must show plain error that affected his substantial rights, i.e., the error was outcome determinative. *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000), citing *People v Carines*, 460 Mich 750, 761-764, 774; 597 NW2d 130 (1999). A reviewing court should reverse only if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763-764, 774; *People v Rodriguez*, 251 Mich App 10, 24; 650 NW2d 96c (2002).

B

The elements of aiding and abetting are set forth in *People v Norris*, 236 Mich App 411, 419; 600 NW2d 658 (1999):

> To establish that a defendant aided and abetted a crime, the prosecutor must prove 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 the principal intended its commission at the time he gave aid or encouragement.

Thus, conviction of first-degree premeditated murder under an aiding and abetting theory requires that the defendant either had the premeditated and deliberate intent to kill or that the defendant knew that the principal possessed this specific intent when the defendant gave aid or encouragement. *People v Youngblood*, 165 Mich App 381, 386-387; 418 NW2d 472 (1988).

Allen concedes that in this case, upon reinstruction, the court correctly instructed the jury with regard to the intent necessary for conviction on an aiding and abetting theory, but argues that at the conclusion of the reinstruction, the court gave a contradictory instruction. He argues that the court's instruction that Allen could be convicted if he knew that the other person intended "to something" was error requiring reversal. We disagree.

Allen objected to the initial instructions on the ground that the court made an erroneous statement concerning specific intent by referring to specific intent to "do the act" because the aider and abettor had to have the specific intent "to kill" or must have known that the other person had the specific intent to kill. On reinstruction, the court properly instructed the jury with regard to first-degree murder, stating that the jury must find that the perpetrator specifically intended to kill the victim and that the aider and abettor knew that the perpetrator specifically intended to kill the victim. The alleged misstatement occurred between the assault with intent to commit murder instruction and the felonious assault instruction, after the first-degree murder instruction, which Allen does not challenge as incorrect. The misstatement arguably did not pertain to first-degree murder, of which defendant was convicted, and any error therefore could not have affected Allen's substantial rights because the jury found that Allen had the requisite intent for first-degree murder.

In any event, any misstatement by the court was minor in light of the lengthy and repetitive instructions concerning the specific intent requirement. The court instructed the jury that first-degree murder is a specific intent crime and that "the person must specifically intend to kill someone" and that "there must be an intent to kill, premeditation, and deliberation." The court distinguished between first-degree murder and second-degree murder. The court also repeatedly instructed that assault with intent to commit murder required the specific intent to kill, such that if the person had died it would be murder in the first degree:

> Any person who shall assault another person and intend to commit the crime of murder, if the person had died then the crime would be Murder in the First Degree.

The court repeatedly stated that first-degree murder and assault with intent to commit murder were specific intent crimes, and at the time of giving assistance, the aider and abettor must either have had the intent himself to kill the victim or to assault with intent to commit murder or must have aided and abetted another person knowing that that person specifically intended to kill the victim. Even if somewhat imperfect, we conclude that the instructions on the whole fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Carines, supra* at 770-772; *Aldrich, supra* at 124. Defendant has failed to show that any error affected his substantial rights.

III

Defendant Allen raises several other issues on appeal. We find no error requiring reversal of his convictions.

A

Allen argues that his conviction must be reversed because the court's instructions failed to distinguish between aiding and abetting and accessory after the fact. Although the court did not specifically instruct that an aider and abettor's assistance must be rendered before or during the commission of the crime, see CJI2d 8.1(3)(b), the court instructed the jury that the aider and abettor "must do some act which assists, encourages, or aids and abets another party *in the commission* of an offense." (Emphasis added). The court's instruction was sufficient to convey that assistance after the commission of an offense will not suffice to establish guilt under an aiding and abetting theory.

B

Allen additionally argues that the prosecutor was erroneously allowed to introduce hearsay statements by Robinson: (1) that he was going to "f*** up" Blue and Brown; (2) "I'll be back"; and (3) "You keep messing with me, I'm going to have to take care of you." These statements were not hearsay because they were not offered for the truth of the matters asserted. MRE 801(c). Further, to the extent they were hearsay, they were admissible under MRE 803(3) as statements of Robinson's intent. Testimony that Robinson said or indicated that he had just come back from "hollering at somebody" was not inadmissible hearsay because, in this case, the evidence was not used to prove that Robinson "hollered at" or attacked somebody, but instead to show Allen's knowledge of Robinson's intent. Because the statement was not offered for the

truth of the matter asserted, it was not hearsay. MRE 801(c); *People v Moorer*, 262 Mich App 64, 70-71; 683 NW2d 736 (2004). Even if error occurred with regard to the admission of these statements, we find no basis for reversal of defendant's convictions on this ground. We cannot conclude that it is more probable than not that any error was outcome determinative. *Carines, supra* at 763-764; *Moorer, supra* at 74-75.

Similarly, any error in the admission, against Allen, of a witness' testimony that Robinson said a carbine was in the bag was harmless. *People v Whittaker,* 465 Mich 422, 427-428; 635 NW2d 687 (2001); *Moorer, supra* at 74-75. Robinson's possession of a weapon was not a disputed point at trial and this evidence was cumulative.

Moreover, we reject Allen's unpreserved claims that the admission of these statements violated his constitutional right of confrontation because the statements were not "testimonial evidence" under *Crawford v United States,* 541 US ___; 124 S Ct 1354; 158 L Ed 2d 177 (2004), and, therefore, are not barred by the Confrontation Clause. *People v Geno,* 261 Mich App 624, 631; 683 NW2d 687 (2004).

C

Allen argues that he was denied his constitutional right to present a defense and to confront the witnesses because the trial court abruptly terminated his cross-examination of a prosecution witness and refused to order that the witness remain sequestered. We disagree.

Allen failed to preserve these constitutional claims by raising them before the trial court. This Court reviews unpreserved, constitutional claims for plain error that affected substantial rights, i.e., was outcome determinative. *Carines, supra* at 763-764. Reversal of a conviction is warranted only when the plain error results in a conviction of an innocent defendant or seriously affects the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Id*. at 763.

The trial court abruptly ended Allen's recross-examination of Jason Pollard when Allen's counsel was inquiring about conversations that Pollard had with Allen and Robinson after the shooting. We find no error requiring reversal.

The right to cross-examine witnesses is a primary interest secured by the Confrontation Clause. *People v Adamski,* 198 Mich App 133, 138; 497 NW2d 546 (1993); US Const, Am VI; Const 1963, art 1, § 20. But the right does not include a right to cross-examine on irrelevant issues. *Adamski, supra.* Trial courts have broad discretion to impose reasonable limits on cross-examination "'based on concerns about, among other things, harassment . . . or interrogation that is repetitive or only marginally relevant."' *Id*., quoting *Delaware v Van Arsdall,* 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1986). "Cross-examination may be denied with respect to collateral matters bearing only on general credibility, as well as on irrelevant issues." *People v Canter,* 197 Mich App 550, 564; 496 NW2d 336 (1992) (citations omitted). But "[a] limitation on cross-examination that prevents a defendant from placing before the jury facts from which bias, prejudice or lack of credibility of a prosecution witness may be inferred constitutes a denial of the constitutional right of confrontation." *People v Kelly,* 231 Mich App 627, 644; 588 NW2d 480 (1998).

Defense counsel did not make an offer of proof, and there is no basis for a finding that the court's ruling unreasonably limited Allen's cross-examination and interfered with the presentation of relevant evidence, rather than merely prevented inquiry concerning collateral or cumulative matters. Further, Allen did not call Pollard as a defense witness, which suggests that counsel was satisfied that he had an adequate opportunity to cross-examine the witness. A party may not claim error when it contributes to the alleged error by plan or negligence. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999). In any event, given the nature of the inquiry on recross, we find no basis for a finding that absent the limitation, the outcome would have been different. *Carines, supra* at 763.

With regard to Allen's claim that the trial court's refusal to keep Pollard sequestered violated Allen's constitutional rights, he has presented no authority that links sequestration of witnesses and the constitutional rights to confrontation and to present a defense. This issue is abandoned. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Further, as with the limitation on cross-examination, we find no basis for a finding that sequestration would have resulted in a different outcome. *Carines, supra* at 763.

D

Defendant argues that he was denied his right to due process and a fair trial by Judge Townsend's prejudicial conduct during trial. We find no error requiring reversal.

Defendant failed to preserve this issue by raising it before the trial court. We therefore review this claim for plain error affecting substantial rights. *Carines, supra* at 763-764. Generally, "[t]he appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments 'were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial.'" *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988) (citation omitted); see also *People v Paquette*, 214 Mich App 336, 340-341; 543 NW2d 342 (1995). "In the absence of objection, this Court may review the matter if manifest injustice results from the failure to review." *Id*. at 340.

Allen complains that Judge Townsend "repeatedly interjected himself into Defendant's trial," and cites four instances in the record. Our review of the record does not indicate that the court disparaged Allen's counsel, that the court excessively interfered in the examination of witnesses, or that the court displayed an attitude of partisanship against Allen. *People v Conyers*, 194 Mich App 395, 404-406; 487 NW2d 787 (1992).

Allen also claims that the court engaged in "lengthy diatribes" with Robinson's lawyer and cites more than twenty instances of alleged misconduct. Allen asserts, "Whether or not Barnett [Robinson's counsel] provoked the judge, both juries were repeatedly subjected to listening to Judge Townsend's battle with Barnett, and the atmosphere created destroyed Defendant's right to a fair trial."

The record demonstrates that the court was irritated by some of the tactics and comments of Robinson's counsel. However, in our view, the court's expressions of irritation at the conduct of Robinson's counsel did not prejudice Allen. See *People v Romano*, 181 Mich App 204, 221; 448 NW2d 795 (1989) (rejecting claim of alleged judicial misconduct involving the

codefendant's counsel because it "could not have reflected badly" upon the defendant). Allen has failed to show plain error affecting his substantial rights with respect to this unpreserved issue, nor will manifest injustice result from this Court's failure to review this issue. *Carines, supra* at 763; *Paquette, supra.*

E

Allen argues that he was denied the effective assistance of counsel on two grounds. First, counsel was ineffective for pursuing a strategy of persuading the jury that Allen was guilty of only felonious assault, when a reasonably competent attorney would also have argued in the alternative that Allen was guilty of only second-degree murder. Second, counsel was ineffective for failing to object to the erroneous instruction on aiding and abetting. We find no error requiring reversal.

To establish ineffective assistance of counsel, defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness, and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma,* 462 Mich 281, 302-303; 613 NW2d 694 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id*. at 302; *People v Rockey,* 237 Mich App 74, 76; 601 NW2d 887 (1999). Because defendant did not raise this issue in an appropriate motion in the trial court, this Court's review is limited to the facts contained on the record. *Rodriguez, supra* at 38.

Trial counsel made a strategic decision to argue for acquittal as well as to attack the proof of intent for first-degree murder. Allen essentially claims that trial counsel was deficient for also seeking an acquittal on the basis that Allen lacked the intent necessary for second-degree murder. Decisions concerning whether to pursue a complete acquittal rather than conviction of a lesser offense are matters of trial strategy. *People v LaVearn,* 448 Mich 207, 216; 528 NW2d 721 (1995). Just as this Court has held that it was legitimate trial strategy to forego instructions on lesser offenses to force the jury into an "all or nothing" decision, *People v Nickson,* 120 Mich App 681, 687; 327 NW2d 333 (1982), here it was a legitimate trial strategy to argue for acquittal rather than second-degree murder. This Court will not second-guess matters of trial strategy. *People v Rice (On Remand),* 235 Mich App 429, 445; 597 NW2d 843 (1999). The fact that the strategy that counsel pursued was unsuccessful does not mean he was ineffective. *People v Williams,* 240 Mich App 316, 332; 614 NW2d 647 (2000).

IV

Defendant Robinson argues that the trial court directed a verdict of guilt in its instructions. We agree that the court's initial instruction concerning a "not guilty" verdict was improper. However, after Robinson objected, the trial court revised its instruction, and the revised instruction was not improper in the context of the evidence and Robinson's arguments.

After the court explained the elements of first- and second-degree murder, the court summarized the choices that the jury could make with respect to count I:

> So, in this case, if you find in Count 1 that the defendant, after deliberation and premeditation, did kill the victim in this case, and that at the time he intended to kill someone, and that because of his actions someone is killed, that would be Murder in the First Degree.
>
> Murder in the Second Degree is that if the defendant kill [sic] someone in this case, and that he either intended to kill, or intended to do great bodily harm, or knowingly created a hazardous situation and did an act in total disregard that the likelihood of that act would be to cause death or bodily harm.
>
> *If you find in this case that the defendant did not fire a weapon, then find him not guilty.* That's Count 1. [Emphasis added.]

We agree that the above instruction was confusing and improper because it was undisputed that Robinson fired a weapon, and in this context, the court's instruction makes no sense. Any error was cured, however, when the court reinstructed the jury, stating that it should find Robinson not guilty if it found that Robinson did not fire a weapon *at anybody*:

> Now, again ladies and gentlemen, the issue in this case, you find from the evidence in this case, if you find that the defendant discharged a weapon at a car, and that he intended to kill someone and that he did it with deliberation and premeditation – thought about it beforehand.
>
> If he intended to kill anybody, and somebody was killed, those would be the elements, if you find that is the case, the elements of Murder in the First Degree.
>
> If you find, on the other hand, that the defendant did in fact fire a weapon, and if you consider that to be, and you may consider it, was that creating a hazardous situation. You may consider that, whether that was the case.
>
> If he created a hazardous situation, either intended to kill, or intended to do great bodily harm, or did a dangerous act knowingly and without – total disregard of the likelihood that the consequences would be to cause death or bodily harm, that would be Murder in the Second Degree.
>
> If you find in this case that the defendant *did not fire a weapon at anybody*, then find him not guilty. [Emphasis added.]

This latter instruction was not improper in the context of this case.

The defense theory was that Robinson did not intend to kill anyone and was shooting only at the car in retaliation for the earlier confrontation with Brown and Blue. The evidence and closing arguments focused on Robinson's intent when he shot the gun. Defense counsel stated that Robinson's statement to the police "indicates that he shot into that car and did not intend to

kill anybody." Counsel argued that if the jury believed Robinson's statement, he was "not guilty." The court interrupted and disagreed with counsel's statement regarding the "not guilty" conclusion, stating that it was an incorrect legal conclusion.[1]

Later in his closing argument, defense counsel again stated that Robinson's statement "says he didn't intend to shoot at anybody; didn't intend to kill anybody" and therefore the shooting was not murder. Again the court interrupted, stating that defense counsel's statement of the law was "totally incorrect."

The trial court thereafter gave the jury instructions, explaining in detail the elements of first-degree murder, second-degree murder, and assault with intent to commit murder. After repeating these instructions in various forms, the court summarized the possible verdicts, stating that the jury should find Robinson "not guilty" if it found that Robinson *did not fire a weapon*.

Following these instructions, the court informed the jury that before it began deliberations, the jury would be excused while the court conferenced with counsel, and as a result, there might be some additions or corrections to the jury instructions before the jury could begin deliberation. After the jury was excused, defense counsel objected, among other things, to the court's statement regarding the "not guilty" verdict. Counsel argued that it was improper to instruct the jury that it could not find Robinson not guilty unless it found that Robinson did not use a weapon when "everybody knew" that Robinson did use a weapon.

In response, the court maintained that its instructions were proper. The court did not directly address Robinson's objection to the "not guilty" instruction. Nonetheless, the court called the jury in and briefly reinstructed the jury on the possible verdicts. This additional instruction informed the jury that it should find Robinson "not guilty" if it found that Robinson did not fire a weapon *at anybody*. Because the key dispute was whether Robinson merely shot at the car, or whether he shot at the men involved in the dispute, one of whom was on the porch of the house and the other of whom was near or in the car, we conclude that the court's additional instruction was not improper in the context of this case and Robinson's theory of defense.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Jane E. Markey

[1] The court's concern stemmed from the possibility the jury could find Robinson guilty of second-degree murder on the basis that he acted in total disregard that the likelihood would be to cause death.