

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON TERRELL SALTER,

Defendant-Appellant.

UNPUBLISHED

April 26, 2005

No. 253401

Wayne Circuit Court

LC No. 03-010860-01

Before: Griffin, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), two counts of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. In addition to the mandatory two-year term for his felony-firearm conviction, the trial court sentenced defendant to concurrent terms of life imprisonment without the possibility of parole for the murder conviction and twenty to forty years' for each of the assault convictions. Defendant appeals as of right. We affirm.

The instant case arose from allegations that defendant and another man attacked a group of people sitting on the porch of a Detroit home during the early morning hours of August 6, 2003. Several of the people in the group, including the decedent, were shot during the attack. On appeal, defendant argues that his trial counsel was ineffective for failing to seek exclusion of the in-court identification of defendant as the shooter by one of the victims, Jamar Luster. Defendant asserts that because investigators showed Luster only a single photograph, the pretrial identification procedure was improperly suggestive and, therefore, Luster's in-court identification of defendant should have been excluded.

Effective assistance of counsel is presumed and the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). In order to establish ineffective assistance of counsel, defendant must show that his counsel's performance was "objectively unreasonable in light of prevailing professional norms" and that, but for counsel's error, "a different outcome reasonably would have resulted." *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

The "exhibition of a single photograph is one of the most suggestive photographic identification procedures that can be used." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92

(1998), quoting Sobel, *Eyewitness Identification* (2d ed), § 5.3(f), p 5-42. If a trial court determines “that a pretrial procedure was impermissibly suggestive, testimony concerning that identification is inadmissible at trial.” *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). However, an “in-court identification by the same witness still may be allowed if an independent basis for in-court identification can be established that is untainted by the suggestive pretrial procedure.” *Id.* In determining whether an independent basis exists, a trial court must evaluate the validity of the victim’s in-court identification in light of the totality of the circumstances. *Gray, supra* at 115.

Given the highly suggestive nature of the pretrial identification procedure employed here, it is likely that the trial court would have excluded testimony concerning Luster’s pretrial identification of defendant had counsel so sought. See *id.* at 111. As noted by the prosecution, however, it is also likely that the trial court would have nonetheless allowed Luster’s in-court identification of defendant as having an independent basis. Indeed, Luster first identified defendant only a few hours after the shooting, and testified that he clearly observed defendant, whom he already knew from the neighborhood, during the shooting. Consequently, we find that defendant has failed to establish any prejudice resulting from his trial counsel’s failure to seek the exclusion of Luster’s identifications. *Harmon, supra*.

Moreover, the record shows that, rather than seeking to have the identification evidence excluded, defense counsel decidedly used the suggestive nature of the initial identification procedure to discredit Luster’s testimony identifying defendant as the shooter. When cross-examining the detective who interviewed Luster, counsel inquired as to why defendant’s picture had not been placed in a photographic array and repeatedly questioned the officer as to whether the identification procedure used was unduly suggestive. Further, during his closing statement, defense counsel argued that Luster’s identification of defendant was unreliable because of the photographic identification procedure employed.

Defense counsel’s decision to use the pretrial identification procedure to discredit Luster’s testimony rather than attempt to have it excluded constitutes a matter of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). The fact that a trial strategy was unsuccessful does not make its use ineffective assistance of counsel. *In re CR*, 250 Mich App 185, 199; 646 NW2d 506 (2002). Consequently, defendant has failed to overcome the presumption that his trial counsel was effective.

Defendant next asserts that the prosecution’s rebuttal arguments improperly questioned defense counsel’s veracity and accused counsel of intentionally trying to mislead the jury. Because defendant failed to preserve this issue through timely objection below, we review these assertions for plain error affecting his substantial rights. *People v Goodin*, 257 Mich App 425, 431-432; 668 NW2d 392 (2003).

When reviewing a claim of prosecutorial misconduct, we examine the pertinent portion of the lower court record and evaluate the alleged misconduct in context to determine “whether the defendant was denied a fair and impartial trial.” *Id.* at 432. Prosecutors are free to argue the evidence and all reasonable inferences arising therefrom as it relates to their theory of the case.” *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Moreover, under the doctrine of

fair response, “a party is entitled to fairly respond to issues raised by the other party.” *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003). With respect to such response by the prosecution in a criminal trial, our Supreme Court has explained that:

[t]he nature and type of comment allowed is dictated by the defense asserted, and the defendant’s decision regarding whether to testify. When a defense makes an issue legally relevant, the prosecutor is not prohibited from commenting on the improbability of the defendant’s theory or evidence. [*People v Fields*, 450 Mich 94, 116; 538 NW2d 356 (1995).]

In the first statement challenged by defendant, the prosecution asserted that defense counsel was attempting to manipulate the evidence. Generally, prosecutors may not suggest that counsel for the defense is intentionally attempting to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). However, an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is merely responding to the argument of defense counsel. *Id.* at 593. In the instant case, noting that there had been no photograph depicting the presence of a streetlight admitted into evidence, defense counsel accused the prosecution of falsely arguing that the scene of the shooting was illuminated by a streetlight. In response to this argument the prosecution cautioned the jurors against manipulation of the evidence by the defense and reminded them that a diagram of the scene, prepared by a police evidence technician and depicting the placement of two streetlights at the scene, had been admitted into evidence. Given the responsive nature of the prosecutor’s comments, we find no error, plain or otherwise, requiring relief.

In the second statement challenged by defendant, the prosecutor referred to the fact that counsel for defendant had argued that defendant was not present at the scene of the shooting and that, even if he was, the prosecution had not shown that defendant acted with the requisite intent. The prosecution argued that in asserting these inconsistent theories, defense counsel was “talkin’ out both sides of [his] neck.” It is well established that defendants in criminal matters may advance inconsistent claims and defenses. *People v Cross*, 187 Mich App 204, 205-206; 466 NW2d 368 (1991). Defendant’s right in this regard, however, does not prohibit the prosecution from making a fair response or commenting on the improbability of the inconsistent theories. *Jones, supra*. Because the prosecutor’s comment constituted a fair comment on defense counsel’s argument rather than a personal attack on his veracity, we again find no plain error requiring relief.

Finally, defendant argues that the trial court’s instructions concerning the intent necessary for conviction as an aider and abettor were insufficient and that, therefore, his convictions must be reversed. We do not agree.

Initially, we note that because defendant failed to object to the instruction at issue, and in fact expressed satisfaction with the instructions as a whole, he has waived any challenge to the jury instructions on appeal. See *People v Carter*, 462 Mich 206, 215-216, 219; 612 NW2d 144 (2000). In any event, we find defendant’s claim of instructional error warranting reversal to be without merit.

When reviewing a claim of instructional error, this Court must examine the instructions “in their entirety to determine whether the trial court committed error requiring reversal.”

People v Canales, 243 Mich App 571, 574; 624 NW2d 439 (2000). Even if the instructions contain some imperfections, “there is no basis for reversal if the instructions adequately protected the defendant’s rights by fairly presenting to the jury the issues to be tried.” *People v Grayer*, 252 Mich App 349, 352; 651 NW2d 818 (2002).

Defendant correctly argues that one can be convicted of a specific intent crime under an aiding and abetting theory only if they possessed the specific intent required of the principal or knew that the principal possessed that intent. *People v King*, 210 Mich App 425, 431; 534 NW2d 534 (1995). In order to establish either first-degree premeditated murder or assault with intent to murder, the prosecution must prove that the defendant possessed the actual intent to kill. *People v Marsack*, 231 Mich App 364, 370-371; 586 NW2d 234 (1998); *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). When examined in their entirety, it is apparent that instructions given here correctly explained the intent necessary for conviction of the charged offenses as an aider and abettor. After informing the jury that defendant must have either intended the underlying crimes or known that the principal had such an intent, the trial court emphasized the specific intent necessary to commit first-degree premeditated murder and assault with intent to murder. Taken together, these instructions correctly stated the law as expressed in *King, supra*. Consequently, the instructions given adequately protected the defendant’s rights by fairly presenting the issues to be tried and, therefore, provide no basis for reversal.

Affirmed.

/s/ Richard Allen Griffin

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra