STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 15, 2007
v	No. 270990 St. Clair Circuit Court
JAMES DUANE CUNNINGHAM, Defendant-Appellant.	LC No. 05-002852-FC

Before: Wilder, P.J., and Cavanagh and Hood, JJ.

PER CURIAM.

A jury convicted defendant of first-degree felony murder, MCL 750.316(1)(b), kidnapping, MCL 750.349, and conspiracy to commit kidnapping, MCL 750.157a. The trial court sentenced defendant as a fourth-felony habitual offender, MCL 769.12, to life imprisonment for the murder and concurrent terms of 30 to 50 years' imprisonment for the kidnapping and conspiracy convictions. He appeals as of right. We vacate defendant's kidnapping conviction and sentence on double jeopardy grounds, but affirm his remaining convictions and sentences.

Defendant's convictions arise from the kidnapping and beating death of Ryan Rich at the hands of defendant and five codefendants, Michael Hills, Robert Hills, Stewart Ginnetti, Nicholas Dobson, and Michael Bowman. Defendant first argues that there was insufficient evidence of malice to support his felony-murder conviction. We disagree.

A sufficiency of the evidence claim is evaluated by reviewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). The resolution of credibility disputes is within the exclusive province of the trier of fact, which may also draw reasonable inferences from the evidence. *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991); *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

"The elements of first-degree felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [MCL 750.316(1)(b)]." *People v Smith*, 478 Mich 292,

318-319; 733 NW2d 351 (2007) (citations and internal quotations omitted). Kidnapping is an enumerated felony. See MCL 750.316(1)(b).

To be convicted of aiding and abetting felony murder, "[t]he requisite intent is that necessary to be convicted of the crime as a principal," that is, malice. *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985). "[I]t therefore must be shown that the aider and abettor had the intent to kill, the intent to cause great bodily harm or wantonly and wilfully disregarded the likelihood of the natural tendency of his behavior to cause death or great bodily harm." *Id.*; see also *People v Barrera*, 451 Mich 261, 294; 547 NW2d 280 (1996). "[I]f the aider and abettor participates in a crime with knowledge of his principal's intent to kill or to cause great bodily harm, he is acting with 'wanton and willful disregard' sufficient to support a finding of malice . . . ." *Kelly*, *supra* at 278-279 (citation omitted); see also *People v McKenzie*, 206 Mich App 425, 428-429; 522 NW2d 661 (1994).

This case is similar to *People v Robinson*, 475 Mich 1, 11; 715 NW2d 44 (2006). In *Robinson*, the defendant drove with his codefendant to the victim's house, knowing that the codefendant was very angry at the victim, for the express purpose of allowing the codefendant to assault the victim. The defendant initiated the attack, causing the victim to fall to the ground, following which the codefendant beat and kicked him, and finally shot him. *Id*. at 11-12. The defendant left the scene before the codefendant killed the victim, after telling the codefendant, "That's enough." *Id*. The Supreme Court noted that, having helped create the situation, the defendant did nothing to protect the victim or diffuse the codefendant's anger, and instead left the victim alone with the enraged codefendant. *Id*. at 12.

The evidence in this case shows that defendant knew in advance that Ginnetti was angry at the victim, and intended to tie him up and inflict a severe beating on him. There was evidence that Ginnetti told defendant that "we're going to kick this motherf--ker's ass . . . we're going to beat the f--king sh-t out of him" and that Ginnetti asked defendant to "grab him and f--king hold him, take him to the ground and we'll beat the sh-t out of him." After hearing this, on Ginnetti's signal, defendant was the first person to tackle the victim and also helped hold the victim down while Ginnetti tied him up. Defendant subsequently left, but did nothing to protect the victim or to diffuse the situation that he helped create. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant assisted in the crime, with knowledge that Ginnetti intended to inflict great bodily harm upon the victim, and therefore, acted with willful and wanton disregard of the natural and likely consequences of his actions, sufficient to support a finding of malice.

We reject defendant's argument that he could not be convicted of felony murder because he abandoned the criminal enterprise before the beating began.

"Abandonment is an affirmative defense, and the burden is on the defendant to establish by a preponderance of the evidence voluntary and complete abandonment of a criminal purpose." *People v Akins*, 259 Mich App 545, 555; 675 NW2d 863 (2003), quoting *People v Cross*, 187 Mich App 204, 206; 466 NW2d 368 (1991).

"Abandonment by the defendant is 'voluntary' when it is the result of repentance or a genuine change of heart." *Cross*, *supra* at 206, quoting Dressler, Understanding Criminal Law, § 27.08, p 356. Therefore, "[t]he abandonment defense is not available where 'the defendant fails

to complete the attempted crime because of unanticipated difficulties, unexpected resistance, or circumstances which increase the probability of detention [sic, detection?] or apprehension.'" *Cross*, *supra* at 206 (brackets in the original), quoting *People v Kimball*, 109 Mich App 273, 286-287; 311 NW2d 343 (1981), mod on other grounds 412 Mich 890 (1981).

In this case, there was evidence that defendant may have experienced a genuine change of heart after he assisted in apprehending and binding the victim. We agree with the prosecutor, however, that abandonment was not available as a defense, because the kidnapping (the predicate felony for the felony-murder conviction) had been completed before defendant desisted.

In *Kimball*, *supra* at 278-280, the defendant was charged with attempted unarmed robbery, and argued that he abandoned the offense by walking out of the store before the offense was completed. This Court noted that there was little authority, and no consensus, concerning the defense of "voluntary renunciation of criminal purpose after an overt act beyond preparation but before the completion of the attempted crime." *Id*. at 280. After evaluating conflicting positions of commentators on this issue, the Court chose to accept abandonment as an affirmative defense to a prosecution for criminal attempt. *Id*. at 286-287. However, the Court noted:

> The authorities do recognize a limitation on the defense of abandonment. If a defendant has taken the *last proximate step* toward the completion of the offense and is powerless to prevent its consummation, yet fails to commit the ultimate offense for other reasons, it may be too late to abandon the criminal purpose and avoid liability for the attempt. [*Id*. at 286.]

For example, if a defendant shoots at someone with intent to kill, but only wounds him, the abandonment defense is not available (once the shot has been fired), and the defendant is liable for attempted murder. *Id.*

As *Kimball* makes clear, it is impossible to abandon an offense once it has been completed, as in the example of the defendant who fires a gun but claims to abandon the crime before the bullet hits its target. In this case, the kidnapping, i.e., the forcible confinement of the victim by being tackled and tied up in the garage, was fully completed before defendant walked away.[1] See *People v Jaffray*, 445 Mich 287, 296-297; 519 NW2d 108 (1994) (listing six forms of kidnapping). Thus, even if defendant had a genuine change of heart after he realized what was likely to happen, it was too late for him to abandon the offense and avoid responsibility for the killing that followed.

In sum, there was sufficient evidence to enable the jury to find that defendant possessed the requisite intent for felony murder, when he assisted in the kidnapping of the victim, and the defense of abandonment is not available after completion of the crime.

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[1] Although defendant asserts that the deadly assault had not yet started, defendant was not charged with an assault.

Defendant next argues that the trial court erred in failing to instruct the jury on the affirmative defense of abandonment, and that defense counsel was ineffective for failing to request an abandonment instruction. In light of our conclusion that the defense of abandonment was not available under the facts of this case, we reject these claims of error. Because the evidence did not support an abandonment instruction, there was no error in failing to give it, *People v Hawthorne*, 474 Mich 174, 181; 713 NW2d 724 (2006), and defense counsel was not ineffective for failing to request it, *People v Lloyd*, 459 Mich 433, 447-451; 590 NW2d 738 (1999).

Defendant next argues that the prosecutor committed misconduct that deprived defendant of a fair trial, and that defense counsel was ineffective for failing to object to the prosecutor's conduct. We again disagree.

Claims of prosecutorial misconduct are generally reviewed on a case-by-case basis, and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 and nn 5-7; 531 NW2d 659 (1995). Here, however, defendant did not object to the prosecutor's conduct at trial. Therefore, "appellate review is precluded unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice." *Noble*, *supra* at 660. As with other unpreserved issues, defendant must show a plain error affecting his substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

As defendant argues, a prosecutor may not appeal to the jurors' sympathies and emotions. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). But the use of passionate language, by itself, is not improper, *People v Abraham*, 256 Mich App 265, 276-277; 662 NW2d 836 (2003), and a prosecutor need not phrase her argument blandly after all, she is an advocate, and has not only the right, but the duty, to advocate her case vigorously. *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005); *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989).

In this case, there was evidence that the victim questioned what was going on, and was told that he was going to be beaten for snitching. The prosecutor's statement that the victim was probably confused, and wished that he had a second chance, was a permissible comment on the evidence. Similarly, in asking the jury to be the victim's voice, to follow the law, and hold defendant responsible for his actions, the prosecutor was merely advocating her case. To the extent that any of the prosecutor's statements could be construed as an appeal for sympathy, the trial court's instruction that the attorneys' statements and arguments are not evidence, and that the jury may not allow sympathy to influence its decision, was sufficient to cure any potential prejudice. See *Abraham*, *supra* at 276. Jurors are presumed to follow instructions unless the contrary is clearly shown, which defendant has not done here. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994).

Defendant also correctly argues that "[a] prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *Watson*, *supra* at 592. "However, the prosecutor's comments must be considered in light of the defense counsel's comments," and "an

otherwise improper remark may not rise to error requiring reversal when the prosecutor is responding to the defense counsel's argument." *Id.* at 592-593 (citation omitted).

In stating that defense counsel's remarks concerning the victim's parents were offensive, the prosecutor was merely responding to defense counsel's argument, in which counsel accused the victim's parents of lying. The prosecutor's next comment—"doesn't that tell you how distorted just about everything you just heard was?"—was responsive to counsel's attempt to shift the jury's focus away from the crime. The prosecutor's use of emotional language was not, by itself, misconduct. See *Cox, supra* at 451. Similarly, the prosecutor's remarks concerning the burden of proof were a fair response to defense counsel's closing argument, in which he urged the jury to apply a standard of proof that was arguably higher than the applicable beyond a reasonable doubt standard.

Further, the jury was instructed that the attorneys' statements and arguments are not evidence, and to not be swayed by sympathy or prejudice. The trial court also instructed the jury to apply the law as stated by the court, not the lawyers, and the court accurately defined the applicable standard of proof. The court's instructions were sufficient to cure any potential prejudice. See *Abraham, supra* at 276.

In sum, defendant has failed to show that the prosecutor's conduct deprived him of a fair trial, or amounted to plain error resulting in prejudice. Accordingly, defense counsel was not ineffective for failing to make a futile objection to the prosecutor's conduct. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Lastly, defendant argues that his dual convictions for first-degree felony murder and the predicate felony, kidnapping, violate the double jeopardy protection against multiple punishments for the same offense. We agree, and accordingly, vacate defendant's conviction and sentence for kidnapping. *People v Harding*, 443 Mich 693, 710-712, 714; 506 NW2d 482 (1993); *People v Akins*, 259 Mich App 545, 567-568; 675 NW2d 863 (2003). Defendant's conspiracy and felony-murder convictions and sentences are unaffected.

Affirmed in part and vacated in part.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood