

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD JAMAL ISOM,

Defendant-Appellant.

UNPUBLISHED

April 8, 2010

No. 284857

Saginaw Circuit Court

LC No. 07-028598-FC

Before: Jansen, P.J., and Fort Hood and Gleicher, JJ.

PER CURIAM.

Defendant appeals by right from his convictions of second-degree murder, MCL 750.317, conspiracy to commit armed robbery, MCL 750.157a; MCL 750.529, attempted armed robbery, MCL 750.92; MCL 750.529, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and four counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 60 to 90 years in prison for the second-degree murder and conspiracy convictions, five to ten years' imprisonment for the attempted armed robbery, felon in possession, and CCW convictions, and two years' imprisonment for each felony-firearm conviction. We affirm.

Defendant's convictions arose out of the attempted robbery of Raychan Williams and the shooting death of Darnell Eiland. The evidence at trial indicated that on the night of the crimes, defendant and Prophet Phillips were driving around with Doretha Ransom. The men went together to Williams's apartment, where Phillips tried to convince Williams to open the door by stating that he wanted to buy drugs. When Williams refused to open the door, defendant pointed a gun at him. Williams jumped away, and defendant and Phillips returned to the car. Shortly thereafter, the three drove to another home, ostensibly to buy drugs. Defendant and Phillips went to the house while Ransom waited in the car. Ransom heard gunshots, and then defendant and Phillips returned to the car. Defendant had been shot in the hand. Defendant gave Phillips a gun, and then Phillips left. Ransom took defendant to the hospital. While defendant was being treated, Eiland's body was found. When the police came to the hospital to investigate defendant's gunshot wound and to determine if the Eiland death was related, defendant fled, but was apprehended shortly thereafter.

Defendant first argues that his constitutional right to equal protection was violated when the plaintiff used peremptory challenges to excuse two African-American jury panel members. See *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). The trial court found

that defendant failed to make a prima facie showing of discriminatory use of peremptory challenges, and further found that plaintiff had demonstrated a race-neutral reason for the challenges. We review for clear error the trial court's factual finding concerning the prima facie showing. *People v Knight*, 473 Mich 324, 345; 701 NW2d 715 (2005) (Opinion by Corrigan, J.).

The purpose of *Batson* is to prevent discriminatory exclusions of veniremembers on the basis of race or gender. *Knight*, 473 Mich at 351. A defendant is not entitled to a jury of a particular racial composition provided that no racial group is systematically and intentionally excluded. *Id.*

To make a prima facie showing of a *Batson* violation, a defendant must establish three factors:

(1) he is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool; and (3) all the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race. [*Knight*, 473 Mich at 336, citing *Batson*, 476 US at 96.]

The trial court must consider all relevant circumstances to determine whether a prima facie showing has been established. *People v Bell*, 473 Mich 275, 283; 702 NW2d 128, mod 474 Mich 1201 (2005) (Opinion by Corrigan, J).

Once the opponent of the challenge makes a prima facie showing, the burden shifts to the challenging party to come forward with a neutral explanation for the challenge. The neutral explanation must be related to the particular case being tried and must provide more than a general assertion in order to rebut the prima facie showing. If the challenging party fails to come forward with a neutral explanation, the challenge will be denied.

Finally, the trial court must decide whether the non-challenging party has carried the burden of establishing purposeful discrimination. Since *Batson*, the Supreme Court has commented that the establishment of purposeful discrimination "comes down to whether the trial court finds the ... race-neutral explanations to be credible." The Court further stated, "Credibility can be measured by, among other factors, the ... [challenger's] demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy. If the trial court finds that the reasons proffered were a pretext, the peremptory challenge will be denied. [*Id.* (internal citations omitted.)]

The trial court held that defendant failed to make a prima facie showing. However, for purposes of completeness, the prosecutor explained that his dismissal of the jurors in question involved their understanding of legal principles and education level, and the trial court found that the explanation was valid. The prosecutor further stated that his officer-in-charge, also an African-American male, requested the dismissal of one of the jurors based on his answers to questions. The factual circumstances do not support defendant's claim of discrimination. It is the province

of the trial court to make determinations of credibility and demeanor regarding the basis of the strike of a jury by the prosecutor, and we must defer to the trial court's resolution of these issues. *Snyder v Louisiana*, 552 US 472, 477; 128 S Ct 1203; 170 L Ed 2d 175 (2008). Therefore, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous. *Id.* Based on the record, we cannot conclude that the trial court's rulings were clearly erroneous.

Defendant next contends that the evidence was insufficient to convict him of conspiracy to commit armed robbery of the murder victim. A challenge to the sufficiency of the evidence is reviewed de novo. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). When reviewing a claim of insufficient evidence, this Court reviews the record in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *In re Contempt of Henry*, 282 Mich App 656, 677; 765 NW2d 44 (2009). Appellate review of a challenge to the sufficiency of the evidence is deferential. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The reviewing court must draw all reasonable inferences and examine credibility issues that support the jury verdict. *Id.* When assessing a challenge to the sufficiency of evidence, the trier of fact, not the appellate court, determines what inferences may be fairly drawn from the evidence and the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). This Court must not interfere with the jury's role as the sole judge of the facts when reviewing the evidence. *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). "Circumstantial evidence and reasonable inferences arising therefrom may constitute satisfactory proof of the elements of the offense." *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991). When challenging the sufficiency of the evidence, the focus is on whether the evidence justifies submitting the case to the jury or requires judgment as a matter of law. *Id.*

Defendant contends that evidence of a conspiracy to rob the murder victim was virtually non-existent because witness Ransom was unable to testify regarding any agreement to rob. Furthermore, the attempt to rob Williams before the murder should have been excluded from trial because the prosecutor did not file a motion to admit similar acts evidence pursuant to MRE 404(b).¹ Therefore, the only evidence, that the men fired their weapons at the scene of the murder, is insufficient to prove a conspiracy. We disagree. To establish a conspiracy, the prosecutor had the burden of establishing that defendant intended to combine with Phillips to accomplish an illegal objective. See *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). Although defendant claims that the prosecutor was required to establish that defendant and Phillips conspired specifically to commit an armed robbery at the home of the murder victim, the record substantiates the prosecutor's theory of the case that the men engaged in a conspiracy to rob local drug dealers on the night in question. Defendant's attempt to exclude the evidence surrounding the attempt to rob Williams is without merit. A jury is entitled to hear the "complete story" surrounding the matter in issue. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). Evidence of other criminal events are admissible when so blended or connected to

¹ Defendant also contends that the counts involving Williams should have been severed from this trial. As discussed in this opinion, that issue is also without merit.

another crime of which the defendant is accused such that proof of one incidentally involves or explains the circumstances of the other. *Id.* There was sufficient circumstantial evidence to support the conspiracy conviction.

Defendant also alleges that the evidence was insufficient to convict him of second-degree murder.² We disagree. A defendant may be guilty of second-degree murder if the defendant aids or abets a principal in the commission of a murder with knowledge of the principal's intent. See *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006). The *Robinson* Court held:

[A] defendant must possess the criminal intent to aid, abet, procure, or counsel the commission of an offense. A defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet. Therefore, the prosecutor must prove beyond a reasonable doubt that the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense. [*Id.*]

The elements of second-degree murder are: “(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death.” *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007), citing *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). “‘Malice’ is defined as an act done ‘with either an intent to kill, an intent to commit great bodily harm, or an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result.’” *People v Gillis*, 474 Mich 105, 138; 712 NW 2d 419 (2006), quoting *People v Mendoza*, 468 Mich 527, 540; 664 NW2d 685 (2003). In other words, an intent to commit second-degree murder can be established through evidence of “intent to do an act in obvious disregard of life-endangering consequences.” *Goecke*, 457 Mich at 466. The mens rea for second-degree murder does not require a finding of specific intent to harm or kill. *Id.*

Viewing the evidence in the light most favorable to the prosecution, the evidence was sufficient to allow a reasonable juror to find that defendant and Phillips intended to act in obvious disregard of life-endangering consequences. Williams testified that he woke up because individuals had knocked on his door in the early morning. The men purportedly came to the door to purchase drugs, but when Williams asked to see the money Phillips turned to defendant. Defendant pointed a gun at Williams, and that the gun appeared to be .40 caliber semiautomatic handgun. Williams did not open the door, jumped back, and heard the sound of a gun firing.

² The statement of this issue asserts that there was insufficient evidence to convict defendant of felony-murder. Defendant was not convicted of felony-murder. Despite the statement of the issue, we will address the sufficiency of the evidence to support the second-degree murder conviction.

Unable to obtain drugs or money from Williams, the two men went to another home nearby where Phillips had purchased drugs in the past. The forensic evidence established that .40 caliber bullets were found in this home and that defendant's blood was spattered on the wall of the house. The jury could thus infer that either defendant or Phillips fired a .40 caliber bullet that killed Eiland. Either inference, combined with the evidence that the men had attempted to rob Williams and that they were armed when they approached the house, was sufficient to support the conviction for second-degree murder.

Next, defendant contends that the prosecutor's references during closing argument to his silence violated his Fifth Amendment rights.³ Defendant did not object to the references at trial.⁴ An unpreserved challenge to use of pre-*Miranda*⁵ silence does not require reversal when the evidence concerning the silence did not affect the outcome of the trial. *People v McNally*, 470 Mich 1, 8; 679 NW2d 301 (2004). Moreover, the Fifth Amendment does not preclude use of a defendant's pre-arrest, pre-*Miranda* silence. *People v Schollaert*, 194 Mich App 158, 164-165; 486 NW2d 312 (1992). A party may not harbor error as an appellate parachute. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). That is, a defendant may not waive objection to an issue before the trial court and raise it as an error on appeal. *Id.* Evidence of flight is admissible to support an inference of consciousness of guilt. *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008). Evidence of flight is probative of a defendant's guilty state of mind. *People v McGhee*, 268 Mich App 600, 639; 709 NW2d 595 (2005).

Review of the record reveals that the prosecutor did not improperly comment on defendant's pre-*Miranda* silence. Rather, defendant attempted to assert that his flight from the hospital occurred because he learned that someone was trying to kill him. The prosecutor's comment was designed to address the absurdity of the defense theory because defendant could have requested police assistance or protection at the hospital. Moreover, review of the closing argument by defense counsel reveals that the failure to object to the comments regarding silence at the hospital was purposeful. Specifically, defense counsel acknowledged that defendant was nonresponsive to questions, but he was admitted to the hospital under his real name, not an alias. Further, defense counsel noted that any flight and failure to respond to questions regarding his injury may have occurred because defendant had a prior felony conviction and he was concerned about police contact. Under the circumstances, this challenge as raised by defendant is not substantiated by a review of the record.

Defendant next submits that the trial court erred by failing to sever the charges that occurred at 313 North 9th Street from the events that occurred at 1111 Federal Avenue. We disagree. A trial court's ultimate ruling regarding a motion to sever is reviewed for an abuse of

³ US Const, Am V.

⁴ We note that the statement of the question presented alleges that defendant was deprived of a fair trial because both a police witness and the prosecutor commented on his silence. However, defendant does not name the police witness or cite to the location in the record. An appellant may not leave it to this Court to search for the factual basis to support or reject his claim. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990).

⁵ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

discretion. *People v Girard*, 269 Mich App 15, 17; 709 NW2d 229 (2005). However, in the present case, there is no indication that defendant filed a motion to sever the charges that occurred at two different locations.⁶ Consequently, the trial court's failure to sever the charges on its own motion do not present a basis for setting aside the convictions unless the refusal to take this action is inconsistent with substantial justice. *People v Williams*, 483 Mich 226, 231-232; 769 NW2d 605 (2009).

A defendant has a right of severance for unrelated offenses. MCR 6.120(C). The issue of the propriety of joinder and severance may be raised by motion of the parties, stipulation by the parties, or on the court's own initiative. MCR 6.120(B). Joinder is appropriate when the offenses are related. MCR 6.120(B)(1). Offenses are related if they are based on: (a) the same conduct or transaction; (b) a series of connected events; or (c) a series of acts involving parts of a single plan or scheme. MCR 6.120(B)(1)(a)-(c). The court may consider other relevant factors, including: (1) the promotion of fairness to the parties; (2) the assurance of a fair determination regarding the guilt or innocence of the accused for each offense; (3) the timeliness of the request; (4) the drain on the parties' resources; (5) the potential for confusion or prejudice arising from the number of charges, the complexity of the case, or the nature of the evidence; (6) the harassment potential; (7) the convenience of the witnesses; and (8) the readiness for trial. MCR 6.120(B), (B)(2). The plain language of the unambiguous court rule provides that offenses are related when they comprise either the same conduct or a series of connected acts. *Williams*, 483 Mich at 232-233.

In the present case, it was the prosecution's theory of the case that defendant and his associate, Prophet Phillips, engaged in a "mission [] to rob drug dealers." In the first attempt, the drug dealer refused to open the door. Within a short time and within a few blocks of the first attempt, a drug dealer was killed. Under the circumstances, the offenses were related because a series of connected acts occurred in accordance with defendant's plan. *Williams*, 483 Mich at 233; MCR 6.120(B)(1)(b), (c). This challenge does not provide defendant with appellate relief. *Williams*, 483 Mich at 231-232; MCR 2.613(A).

Lastly, defendant contends that his sentences for conspiracy, attempted armed robbery, felon in possession, and CCW convictions exceed the guidelines, and the trial court failed to offer a basis for the upward departure from the guidelines. We disagree. When multiple concurrent convictions are at issue, a presentence investigation report is prepared for the highest crime class felony conviction only. See *People v Mack*, 265 Mich App 122; 695 NW2d 342 (2005); MCL 771.14(2)(e). Accordingly, there was no sentencing error.⁷

⁶ Review of the lower court records reveals that trial counsel filed a motion to sever the trial with regard to a codefendant. There is no indication that defendant requested severance of charges.

⁷ We note that Michigan Supreme Court Justices Markman and Corrigan have noted an apparent split in authority between *Mack* and *People v Johnigan*, 265 Mich App 463; 696 NW2d 724 (2005) on whether the legislative sentencing guidelines must be scored for all felonies for which a defendant stands convicted. See *People v Getscher*, 478 Mich 887, 887-888; 731 NW2d 768 (2007) and *People v Smith*, 475 Mich 891, 891-892; 716 NW2d 273 (2006). However, because this Court found no conflict between *Mack* and *Johnigan*, we are bound by *Mack*. MCR

(continued...)

Affirmed.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood

(...continued)

7.215(J).