STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 2, 2010
v	No. 293070 Oakland Circuit Court
JEAN CARLOS CINTRON, Defendant-Appellant.	LC No. 2008-223667-FC

Before: WILDER, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), second-degree murder, MCL 750.317, first-degree home invasion, MCL 750.110a(2), and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to life imprisonment for the felony murder conviction, 30 to 60 years' imprisonment for the second-degree murder conviction, 7 to 20 years' imprisonment for the first-degree home invasion conviction, and two years' imprisonment for each felony-firearm conviction. Defendant appeals as of right. We affirm defendant's convictions and sentences for felony murder, first-degree home invasion, and two counts of felony-firearm, but we vacate the second-degree murder conviction and the accompanying felony-firearm conviction.

Defendant's convictions stem from the shooting death of Laval Crawford outside of Crawford's home on September 13, 2008. Defendant was tried along with codefendants Bryan Valentin, Diego Galvan and Raul Galvan. Defendant, Valentin and Diego Galvan were convicted for Crawford's murder, while Raul Galvan was acquitted of the murder, but convicted of a charge of carrying a concealed weapon, stemming from his arrest.

First, defendant claims that there was insufficient evidence to convict him of felony murder. We disagree. When reviewing a claim of insufficient evidence, this Court reviews the record de novo. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). This Court reviews the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id*.

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) [here, first-degree home invasion under MCL 750.110a(2)[1]]. *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007). The prosecutor sought to prove the felony murder charge under two theories: (1) defendant actually shot Crawford himself, and/or (2) defendant aided and abetted Crawford's killing. To prove felony murder on 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 Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003). To satisfy the malice requirement, 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. *Id.* at 140-141. Further, if an aider and abettor participates in a crime with knowledge of the principal's intent to kill or cause great bodily harm, the aider and abettor is acting with "wanton and willful disregard" sufficient to support a finding of malice. *Id.* at 141.

Crawford died as a result of sustaining multiple gunshot wounds, and the manner of his death was a homicide. Beatrice McCray, Crawford's girlfriend, testified that defendant and three others forced their way into Crawford's home. The men were carrying guns and were, at times, masked. One of the men directed McCray to call Crawford and advise him to come home. Once Crawford arrived outside, the men went out the front door and began firing their guns. Teisha Johnson testified that she observed Crawford getting shot in the leg, but did not see who fired the shot. This testimony was impeached by her prior inconsistent statement from the preliminary examination, where she testified that she observed defendant shoot Crawford in the leg. Johnson further testified at trial that Diego approached Crawford as he was crawling in the grass and shot him at close range. Ava Searight, Crawford's next door neighbor, also confirmed that the armed men came out of Crawford's front door firing shots, and as the masked men ran away, she heard the names "Diego" and "Carlos" (defendant's middle name) being mentioned. The jury was entitled to accept Johnson's preliminary examination testimony as evidence that defendant himself was responsible for one of the gunshots that hit Crawford. See *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005) (stating that it is the province of the jury to assess witness credibility); MRE 801(d)(1)(A) (stating that a prior inconsistent statement is not hearsay if it meets certain requirements).

[1] A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first-degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists: (a) the person is armed with a dangerous weapon or (b) another person is lawfully present in the dwelling. MCL 750.110a(2).

Even assuming that there was insufficient evidence that defendant himself shot Crawford, there was enough evidence upon which to conclude that defendant aided and abetted in Crawford's killing. Defendant was one of the masked, armed men who forced his way into Crawford's home. Defendant was also with the men who came out of Crawford's home firing their guns in Crawford's vicinity. Crawford was shot at least twice. The fact that defendant accompanied the shooter(s), and he was armed as he charged out of the home toward Crawford, constitutes the performance of an act and/or the giving of encouragement that assisted the commission of the killing.

With regard to the intent element, the jury was free to infer the shooter's malice from his use of a deadly weapon. *People v Jones*, 95 Mich App 390, 394-395; 290 NW2d 154 (1980). Additionally, a rational jury could infer that defendant participated in the crime with knowledge of the shooter's intent to kill or to cause great bodily harm. Again, defendant was among the armed men who forced their way into Crawford's home. Defendant knew that his accomplice, Valentin, was intent on finding Crawford because, according to the testimony of Antoine Hurner, Crawford had robbed defendant of $5,000. Defendant accompanied the three other men as they ran out of Crawford's home toward Crawford, shooting their guns. A rational trier of fact could find that the elements of felony-murder were proven, either under an aiding and abetting theory, or under a theory that defendant himself shot and killed Crawford. Accordingly, defendant's sufficiency of the evidence claim fails.

Next, defendant claims that the court erred in admitting testimony concerning the photographic lineup where police should have arranged for a live lineup. This Court reviews defendant's unpreserved claim of error for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, a defendant must establish that: (1) an error occurred; (2) the error was plain; (3) and the plain error affected the defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *Id.*

McCray and Johnson were separately shown a photographic lineup containing defendant's photograph. Each selected defendant as one of the men who forced his way into Crawford's house with a gun. As the prosecution correctly points out, defendant does not allege, nor is there any evidence to support a finding, that the photographic lineup was unduly suggestive or otherwise defective in some respect. A photographic lineup is generally improper where the suspect is in custody or otherwise available to appear in a corporeal lineup. *People v Kurylczyk*, 443 Mich 289, 298 n 8; 505 NW2d 528 (1993). A photographic lineup is permissible in place of a corporeal lineup however if, among other things, it is not possible to arrange a proper corporeal lineup. *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973), overruled in part on other grounds *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004).

At the time of the lineup, the 16-year old defendant was in custody of the Children's Village, a youth detention center. The police sought to arrange a live lineup, but were prevented from doing so because the Children's Village would not permit other juveniles in the facility to participate in the lineup without a guardian's approval and possible appointment of counsel. The detective who sought to conduct the live lineup was informed by a Children's Village representative that the live lineup "was not going to happen," and the detective further testified that "Children's Village said they do not do it. They won't allow it." Though it was possible in theory for the police to transport defendant to a jail for the lineup, this, also, would not have been

a viable option given that the others recruited for the lineup would be adults while defendant was only 16 at the time. Considering these circumstances, we are persuaded that a legitimate reason existed for police to employ a photographic lineup rather than a live lineup. Defendant cannot demonstrate that he was deprived of a fair trial or prejudiced in some way on account of the photographic lineup.

Next, defendant contends that a certain statement of witness Shewana Hopkins, as relayed by Officer Chris Miracle, was inadmissible hearsay. We disagree. Defendant's unpreserved claim of evidentiary error is reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 762-763.

Officer Chris Miracle testified that when he interviewed Hopkins upon arriving at the scene after the shooting, Hopkins informed him that the men in the house "made a comment that they were – they were going to kill and they used a racial slur." On appeal, defendant argues that this statement is hearsay and does not qualify as an excited utterance.

Hearsay is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801(c). The excited utterance exception to the rule against hearsay provides that a statement is admissible if it relates "to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." MRE 803(2). The two primary requirements for excited utterances are: (1) that there is a startling event and (2) that the resulting statement is made while under the excitement caused by the event. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). The crux of the second requirement is whether the statement was made before there was time to contrive and misrepresent, and whether it related to the circumstances of the startling occasion. *Id.* at 550-551.

The challenged testimony satisfies the requirements of an excited utterance. First, Hopkins witnessed a startling event just prior to making the challenged statement. She was in Crawford's home as the armed men forced their way in. She also observed them storm out of the house upon Crawford's arrival. She heard multiple gunshots, and then saw Crawford lying on the ground. Officers arrived very shortly thereafter and took Hopkins's statement. Second, it appears that Hopkins was still under the stress of the startling event when she made the challenged statement to the officer, and the statement related to the startling event. Officer Miracle described Hopkins as being "very nervous, very, very shaken up. . . . very very shaken by the whole experience." Given the nature of what Hopkins had observed, an excited and startled state of mind would not be unusual. We opine that Hopkins's statement qualified as an excited utterance, and defendant cannot demonstrate plain error in the statement's admission.

Next, defendant argues that the prosecutor committed misconduct by knowingly eliciting inadmissible testimony. We disagree. Defendant's unpreserved claim is reviewed for plain error affecting his substantial rights. *Carines*, 460 Mich at 762-763.

At the preliminary examination, Johnson testified that she observed defendant shoot Crawford. At trial, the prosecutor referenced Johnson's preliminary examination testimony on this point, then asked Johnson whether it was true that, presently, she did not remember whether she saw defendant shoot Crawford. Johnson responded that she did not remember. Defendant

claims that the prosecutor engaged in misconduct by referencing Johnson's preliminary examination testimony, which the prosecutor knew was not admissible.

MRE 801(d)(1)(A) provides that a statement is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding. Inconsistency includes not only diametrically opposed answers, but also evasive answers, inability to recall, silence, or changes of position. *People v Chavies*, 234 Mich App 274, 282; 593 NW2d 655 (1999), overruled on other grounds *People v Williams*, 475 Mich 245 (2006). If a prior inconsistent statement of a witness satisfies the requirements of MRE 801(d)(1)(A), then it can be used at trial for both impeachment purposes and as substantive evidence. *Id.* at 288-289.

Johnson's preliminary examination testimony meets all the requirements of admission under MRE 801(d)(1)(A). In light of the fact that the challenged testimony was admissible, defendant cannot support his claim that the prosecutor engaged in misconduct by referencing the testimony.

Finally, defendant argues that his convictions for felony murder and second-degree murder violate the double jeopardy clause. We agree. A double jeopardy issue constitutes a question of law that this Court reviews de novo. *People v Artman*, 218 Mich App 236, 244; 553 NW2d 673 (1996).

Both federal and Michigan double jeopardy provisions afford protection against multiple punishments for the same offense. *People v Ford*, 262 Mich App 443, 447; 687 NW2d 119 (2004). The purpose of the double jeopardy protection against multiple punishments for the same offense is to protect the defendant from having more punishment imposed than the Legislature intended. *Id.* at 447-448. The *Blockburger*[2] "same elements" test sets forth the proper test to determine when multiple punishments are barred on double jeopardy grounds. *Smith*, 478 Mich at 296. Pursuant to the "same elements" test, offenses are not the "same offense" if each requires proof of an element that the other does not. *Id*. at 300.

Defendant is correct that his convictions for felony murder and second-degree murder violate the double jeopardy clause. Both pre- and post-*Smith*[3] case law provide that multiple murder convictions arising from the death of a single victim violate double jeopardy principles. See *People v McCauley*, 287 Mich App 158, 167 n 3; 782 NW2d 520 (2010); *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000). The remedy for such a double jeopardy violation is to vacate the defendant's second-degree murder conviction. *Id*. at 429-430. Consequently, defendant's second-degree murder conviction is vacated. Additionally, the accompanying felony-firearm conviction is also vacated. We remand to the trial court for correction of the presentence report and the judgment of sentence to reflect this Court's decision vacating the convictions set forth above.

[2] *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

[3] *Smith*, 478 Mich at 296, 300.

Affirmed in part, vacated in part, and remanded. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro