STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEENAN ROBERT MEEKS,

Defendant-Appellant.

UNPUBLISHED
March 18, 1997

No. 187087
Macomb Circuit Court
LC No. 94-000597

Before: Taylor, P.J., and McDonald and C. J. Sindt,* JJ.

PER CURIAM.

Defendant appeals as of right his convictions following a jury trial of second-degree murder, MCL 750.317; MSA 28.549, assault with intent to rob, MCL 750.89; MSA 28.284, conspiracy to commit armed robbery, MCL 750.529; MSA 28.797; MCL 750.157a; MSA 28.354(1), and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to concurrent terms of 210 to 315 months' imprisonment for the second-degree murder conviction, the conspiracy to commit armed robbery conviction, and the assault with intent to rob conviction. These sentences are to be served concurrently with each other but consecutive to the mandatory two year prison sentences defendant received for each felony-firearm conviction. We affirm in part and reverse in part.

Defendant first argues that the trial court improperly instructed the jury on the concept of reasonable doubt and failed to instruct the jury on all of the elements of second-degree murder. Because defendant did not object to the instructions as given, and manifest injustice will not result, this Court need not review this issue. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995); MCL 768.29; MSA 28.1052.

Next, defendant argues that there was insufficient evidence to support his convictions of second-degree murder, assault with intent to rob, conspiracy to commit armed robbery and two counts of felony-firearm. When reviewing a challenge to a conviction based on insufficient evidence, this Court

* Circuit judge, sitting on the Court of Appeals by assignment.

must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201-1202 (1992).

Defendant argues that because there was no evidence that he knew that his cohort, Bright, was going to kill Brenda Howitt, and, because he was merely present when Bright shot Howitt, there was insufficient evidence to support his conviction of second-degree murder. We disagree.

Defendant planned with Smiley, another coconspirator, and Bright, to commit an armed robbery. Defendant saw Bright get out of the car with the gun and order Howitt to give him her purse. Although defendant did not necessarily know that Bright was planning on shooting Howitt, all three acted with a willful disregard of the likelihood that their behavior would cause death or great bodily harm. *People v Neal*, 201 Mich App 650, 654; 506 NW2d 618 (1993). The group's use of a gun to commit the attempted robbery is sufficient to infer malice. *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1996). Thus, although defendant may not have been a lookout as the prosecution contends, he was more than merely present during the killing of Howitt. *People v Moldenhauer*, 210 Mich App 158, 160; 533 NW2d 9 (1996). See also *People v Feldman*, 181 Mich App 523, 534; 449 NW2d 692 (1989). Therefore, when viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to support this conviction.

Next, defendant maintains that the prosecutor failed to present any evidence that defendant intended to commit a robbery. However, in a conviction as an aider and abettor, the focus is on the principal's intent to commit the act and on the aider's intent to assist him. *People v Jones*, 201 Mich App 449, 451; 506 NW2d 542 (1993). This state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Turner*, *supra* at 569. Where there was evidence that defendant knew of Smiley's and Bright's intent to rob, had asked to be included in the commission of the robbery, agreed to share in one third of the proceeds of their crimes, sat in the car while Smiley and Bright selected a victim, waited while Bright assaulted Howitt and asked her for her purse, and then drove away with them after the commission of the attempted robbery, there was sufficient evidence to support defendant's conviction of assault with intent to commit armed robbery. *People v Smith*, 152 Mich App 756, 761; 394 NW2d 94 (1986).

Defendant also contends that the prosecution did not present any evidence that he had agreed with Smiley or Bright to commit an armed robbery or that he had acted to further the agreement and, thus, there was insufficient evidence to support his conviction of conspiracy to commit armed robbery. We disagree.

The evidence shows that Bright told Smiley that defendant wanted to join in with them for the robberies and that, on the drive to Macomb County, Smiley, Bright, and defendant agreed to spilt any ill-gotten gains three ways. The crime was complete upon Smiley, Bright, and defendant agreeing with each other to rob someone. No overt act needed to be taken in order to further the conspiracy in order to convict defendant of conspiracy. *Turner*, *supra* at 570; *People v Buck*, 197 Mich App 404, 412;

496 NW2d 321 (1992). Thus, there was sufficient evidence to support this conviction. *Turner*, *supra* at 570.

Defendant argues that, because there was no evidence that he aided his codefendant in procuring or retaining possession of the weapon used to kill the decedent, there was insufficient evidence to support his two felony-firearm convictions. *People v Johnson*, 411 Mich 50, 54; 303 NW2d 442 (1981). The prosecution concedes this issue, and therefore we reverse these two convictions.

Defendant also asserts that (a) several of the prosecutor's remarks in his opening statement went beyond the scope of an opening statement, (b) the prosecutor improperly vouched for Smiley's credibility by twice stating that Smiley was not testifying in exchange for a more lenient sentence and that Smiley was not lying, (c) the prosecutor made an improper plea for the jurors' sympathy when it asked them to put themselves in Howitt's shoes, (d) the prosecutor's comments in his rebuttal on the status of Smiley's sentencing was improper because they were beyond the scope of the evidence presented at trial, and (e) the prosecutor's reference to defendant as an "outsider" amounted to a racial slur. Defendant argues that these instances of misconduct denied him his right to a fair trial. We disagree.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v McElhany*, 215 Mich App 269, 283; 545 NW2d 18 (1996). The propriety of a prosecutor's remarks depends on all the facts of the case and the comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992).

A review of the pertinent comments made in his opening statement indicates that the prosecutor was merely telling the jury what type of evidence they would encounter during the trial, including both direct and circumstantial evidence. This was a proper observation and did not go beyond the scope of a proper opening statement. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). See also *People v Swartz*, 171 Mich App 364, 370; 429 NW2d 905 (1988). The prosecutor's comments on aiding and abetting were also proper, as informing the jury that defendant's liability would spring from his role as an aider and abettor and, thus, was within the scope of a proper opening statement. *Id.; People v Lee*, 258 Mich 618, 621; 242 NW 787 (1932).

Defendant also argues that the prosecutor, in his closing argument, told the jury that Smiley was not lying so as to get a more lenient sentence and that he was not lying at all, thus improperly vouching for Smiley's credibility. A review of the record indicates that the prosecutor's remarks were clearly made in response to defense counsel's constant implications that Smiley was lying in order to receive favorable treatment at his sentencing. Thus, even though the prosecutor may have arguably vouched for Smiley's credibility when he stated that Smiley was not lying, because the remarks clearly addressed issues raised by defense counsel, reversal is not warranted. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989).

Defendant also claims that the prosecutor requested that the jurors put themselves in Howitt's shoes thereby making an improper plea for their sympathy. The complained of remarks were clearly made in response to defense counsel's argument that the jurors were not defendant's peers because they could not know what it was like to be a young black man. *Duncan*, *supra* at 16; *Simon*, *supra* at 655. More importantly, the prosecutor actually told the jurors they were not to put themselves in defendant's shoes or the victim's shoes.

Defendant also claims the prosecutor intentionally misrepresented the reasons for Smiley's sentencing delay. We disagree.

The prosecutor acknowledged that Smiley's sentencing date was dependent upon the outcome of defendant's trial. Characterizing this delay as a scheduling conflict, however, was merely argument on behalf of the prosecutor. Because a prosecutor is free to relate the facts adduced at trial to his theory of the case and to argue the evidence and all reasonable inferences arising from it to the jury, *People v Sharbnow*, 174 Mich App 94, 100; 435 NW2d 772 (1989), and need not state the inferences in the blandest possible terms, *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996), reversal is not warranted.

Finally, defendant argues that the prosecutor's reference to defendant as an "outsider" who had come into Macomb County to commit crimes, painted him as a young black male from Detroit who had come to a predominantly white county with the intent to rob and that such racial implications denied him his right to a fair trial. Although the injection of racial or ethnic remarks into a trial may arouse the prejudice of the jurors against the defendant and deny him his right to a fair trial, *People v Bahoda*, 448 Mich 261, 266; 531 NW2d 659 (1995), the prosecutor's remark in this instance was relatively innocuous and was also in response to an argument made by defense counsel. *Duncan*, *supra* at 16; *Simon*, *supra* at 655. Thus, reversal in not warranted.

Affirmed in part and reversed in part.

/s/ Clifford W. Taylor
/s/ Gary R. McDonald
/s/ Conrad J. Sindt