STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEROME NORFLEET,

Defendant-Appellant.

UNPUBLISHED
June 20, 1997

No. 183438
Recorder's Court
LC No. 94-004573

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO BOSTON,

Defendant-Appellant.

No. 183441
Recorder's Court
LC No. 94-004573

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES COON,

Defendant-Appellant.

No. 185851
Recorder's Court
LC No. 94-004573

Before: Holbrook, Jr., P.J., and White and A. T. Davis, Jr.*, JJ.

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

PER CURIAM.

Following a joint trial before separate juries on charges arising out of the robbery of a furniture store during which the store manager was shot and killed, defendant Norfleet was convicted of first-degree murder, MCL 750.316; MSA 28.548, armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and defendant Boston was convicted of second-degree murder, MCL 750.317; MSA 28.797, and armed robbery. Defendant Norfleet was sentenced to serve concurrent prison terms of life imprisonment for murder and twenty to sixty years for armed robbery, consecutive to a two-year term for felony-firearm. Defendant Boston was sentenced to serve two concurrent prison terms of fifty to seventy-five years for his murder and armed robbery convictions. Following a separate jury trial, defendant Coon was convicted of armed robbery for his role in the offense, and was sentenced to serve twenty to thirty years in prison. Defendants' respective appeals of right were consolidated by this Court.

In the late afternoon of April 1, 1994, Mohammed "Mike" Berri was shot and killed during the robbery of the furniture store that he managed in Detroit. Although there were no eyewitnesses to the murder, witnesses testified that defendants were in the store that afternoon and were seen walking back toward the store shortly before the murder. On the basis of information provided by an unnamed informant, police officers arrested defendants Norfleet and Boston four days after the robbery. Defendant Coon was arrested at his home later that night. After questioning by officers, defendants signed written statements implicating themselves in the robbery and murder.

No. 183438

Defendant Norfleet first contends that the trial court abused its discretion by permitting Sergeant Danny Maynard to testify regarding the substance of a tip provided by an unnamed informant. Defendant argues that the evidence was inadmissible hearsay. We disagree. The trial court's decision to admit evidence will not be interfered with on appeal absent an abuse of discretion. *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996). The trial court did not abuse its discretion in admitting the evidence in this case because, contrary to defendant's assertion, the evidence was not hearsay because it was not offered to prove the truth of the matter asserted, but rather demonstrated Sergeant Maynard's state of mind by explaining why he took actions that led to defendant's arrest. See *People v Lewis*, 168 Mich App 255, 267; 423 NW2d 637 (1988).

Defendant Norfleet next contends that the trial court abused its discretion in admitting evidence regarding his involvement in another robbery. Over defendant's objection, Alburene Grays testified that the pager found at the crime scene and registered to her was stolen at gunpoint by Norfleet a month before the murder. Although this evidence may have been logically relevant under MRE 404(b) inasmuch as it connected defendant to the scene, *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), we agree with defendant that the trial court abused its discretion in admitting the evidence given that its slight probative value was substantially outweighed by its highly prejudicial nature. In balancing prejudicial effect against probative value under MRE 403, the trial court should consider whether presentation of the evidence is necessary to satisfy an element of the prosecution's case or whether it will merely be cumulative. *Id.* at 75. Here, defendant's presence at the crime scene was

established through the testimony of other witnesses as well as defendant's own police statement. Thus, the probative value of the evidence was practically nil. Nonetheless, viewing the admission of this evidence in the context of the other evidence of defendant's guilt, and the limiting instructions given by the trial court, in accordance with *VanderVliet, supra,* we conclude that any error was harmless.

Defendant Norfleet next argues that the trial court erred in failing to suppress his inculpatory statement on the grounds that it was the product of physical abuse and made in violation of his right to counsel. We disagree. Although the determination of whether a defendant's confession is voluntary is a question of law, we give ample deference to the trial court's findings due to its superior position in viewing the evidence. *People v Mack,* 190 Mich App 7, 17; 475 NW2d 830 (1991). Upon review of the totality of the circumstances surrounding the confession, we find that the statement was freely and voluntarily made. *People v Cipriano,* 431 Mich 315, 334; 429 NW2d 781 (1988). Other than the conflicting testimony of defendant and two police officers, there was no evidence presented with regard to defendant's contention that he was physically abused. Giving deference to the trial court's finding that the alleged abuse by one officer did not create a coercive atmosphere which prompted defendant to sign a written statement during later questioning by another officer, we find that the trial court did not err in determining that the statement was voluntarily made. *Mack, supra* at 17. With respect to defendant's alternate ground for suppression, we decline to address it because the issue is not preserved for appellate review. *People v Lino (After Remand),* 213 Mich App 89, 94; 539 NW2d 545 (1995).

Defendant Norfleet next contends that he was denied a fair trial by the prosecutor's questioning of witness Alexander Murphy. Because defendant failed to preserve this issue by objecting at trial or requesting a curative instruction, review is foreclosed unless manifest injustice would result from the failure to review or the error was so egregious that a curative instruction could not have removed the resulting prejudice. *People v Paquette,* 214 Mich App 336, 343; 543 NW2d 342 (1995). No manifest injustice would result from our failure to review because the prosecutor did not use Murphy's testimony as a springboard to introduce substantive evidence under the guise of rebutting the witness' denial of a prior inconsistent statement. *People v Stanaway,* 446 Mich 643, 693; 521 NW2d 557 (1994). No extrinsic evidence was introduced in this case. Rather, the prosecutor properly used Murphy's prior written statement to refresh his recollection and impeach the witness. MRE 612; *People v Malone,* 180 Mich App 347, 359; 447 NW2d 157 (1989). Any prejudice arising out of the prosecutor's recitation of the content of the statement was eliminated by the trial court's instruction to the jury that attorney questions are not evidence.

Defendant Norfleet next argues that the trial court improperly instructed the jury with regard to both the concept of "reasonable doubt" and the inference that may be drawn from the use of a dangerous weapon. Because defendant failed to preserve these issues by objecting below, we will grant relief only if necessary to avoid manifest injustice. *People v Van Dorsten,* 441 Mich 540, 545; 494 NW2d 737 (1993). No manifest injustice would result from our failure to review because the trial court's instructions accurately presented both the concept of reasonable doubt, *People v Hubbard,* 217 Mich App 459, 482-483; 552 NW2d 493 (1996), and the principle that the jurors could infer malice from the use of a deadly weapon. *People v Martin,* 392 Mich 553, 561; 221 NW2d 336 (1974).

With respect to defendant Norfleet's final contention, we agree that his conviction of both first-degree felony murder and armed robbery violate his right against double jeopardy under Const 1963, art 1, § 15. *People v Wilder*, 411 Mich 328, 347; 308 NW2d 112 (1981). We therefore vacate defendant's conviction and sentence for armed robbery. *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996).

No. 183441

Defendant Boston first argues that he is entitled to a new trial because the trial court erred in refusing his challenge for cause to a prospective juror, forcing him to exercise a peremptory challenge to excuse the juror. A four part test is used in determining whether an error in refusing a challenge for cause necessitates reversal of a defendant's conviction.

> There must be a clear and independent showing on the record that (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable. [*People v Lee*, 212 Mich App 228, 248-249; 537 NW2d 233 (1995).]

Here, the record does not reflect that defense counsel desired to excuse another juror after she exhausted all available peremptory challenges. Accordingly, error requiring reversal of defendant's otherwise valid conviction did not occur.

Defendant Boston next argues that the trial court erred in failing to suppress his inculpatory statement on the grounds that it was the byproduct of an illegal arrest and was involuntarily made. We disagree. A confession that stems from an illegal arrest is not admissible. *People v Richardson*, 204 Mich App 71, 78; 514 NW2d 503 (1994). A police officer may make a warrantless arrest "[w]hen a felony in fact has been committed and the peace officer has reasonable cause to believe that the person has committed it." MCL 764.15(1)(c); MSA 28.874(1)(c). When, as occurred here, the information forming the basis of probable cause is obtained from an informant, it "must be comprised of sufficient facts to permit an independent determination that the person supplying the information is reliable and that the information is based on something more than casual rumor." *People v Oliver*, 417 Mich 366, 374; 338 NW2d 167 (1983). Here, the informant's knowledge of details of the crime that were not divulged to the public demonstrates that he was reliable and that his information was based on more than casual rumor. Giving deference to the trial court's ability to judge Sergeant Maynard's credibility when he testified that defendant was named by the informant as being involved in the crime, we find that the informant's tip established the probable cause necessary to support the arrest. Accordingly, the trial court properly denied the portion of defendant's motion premised on this ground.

With respect to defendant Boston's contention that his statement was not voluntarily made, we find that the trial court did not err in denying the motion to suppress. Although the determination of whether a defendant's confession is voluntary is a question of law, we give ample deference to the trial court's findings due to its superior position in viewing the evidence. *Mack, supra* at 17. Upon review

of the totality of the circumstances surrounding the confession and giving deference to the trial court's ability to judge defendant's credibility, we find that defendant was not coerced into signing the statement. Considering defendant's age and his understanding of both his rights and the nature of the questioning, his assertion that a threat of life imprisonment prompted him to sign the statement is not credible. Accordingly, the trial court did not err in declining to suppress the statement because it was voluntarily made. *Cipriano, supra* at 334. We decline to address defendant's remaining argument that the statement was made in violation of his right to counsel because the issue is not preserved for appellate review. *Lino, supra* at 94.

Defendant Boston next contends that the trial court abused its discretion by permitting Sergeant Danny Maynard to testify regarding the substance of a tip provided by an unnamed informant. We disagree. The trial court's decision to admit evidence will not be interfered with on appeal absent an abuse of discretion. *McElhaney, supra* at 280. As discussed previously, the trial court did not abuse its discretion in admitting the evidence in this case because, contrary to defendant's assertion in the lower court and on appeal, the evidence was not hearsay because it was not offered to prove the truth of the matter asserted. See *Lewis, supra* at 267. For the first time on appeal, defendant Boston argues that the evidence was inadmissible because it was irrelevant and, even if relevant, the danger of prejudice far outweighed its probative value. Because defendant did not assert these bases for exclusion at trial, the arguments are not preserved for appeal. *Lino, supra* at 94. Absent manifest injustice, we will not review unpreserved evidentiary issues. *People v Turner,* 213 Mich App 558, 583; 540 NW2d 728 (1995). No manifest injustice would result from the failure to review in this case because the evidence was not decisive to the outcome. *Lee, supra* at 241.

Defendant Boston next argues that the trial court erred when it failed to examine defense witness Dedrich O'Neal in order to determine whether he validly invoked his testimonial privilege against self-incrimination. We find no error. Defendant failed to preserve this issue because he did not object below or in any way assert that the witness invalidly invoked his privilege. A plain, unpreserved error may not be considered for the first time on appeal unless it could have been decisive to the outcome of the case, or falls within a category of cases where prejudice is presumed or reversal is automatic. *Lee, supra* at 241. Here, the trial court properly excused the witness, defendant's Boston's brother, without further interrogation because he had been named in the police statements of codefendants Norfleet and Coon as the driver of the car used in the robbery. Any statement during questioning might have incriminated the witness. *People v Lawton,* 196 Mich App 341, 346-347; 492 NW2d 810 (1992).

Defendant Boston next contends that he was denied the effective assistance of counsel by trial counsel's failure to impeach the testimony of a witness and inadequately arguing his motion to suppress. Upon review of the record, we conclude that, even if counsel's performance fell below an objective standard of reasonableness, defendant has failed to show that but for counsel's performance the outcome of the trial would have been different. *People v Pickens,* 446 Mich 298, 338; 521 NW2d 797 (1994). Accordingly, defendant is not entitled to appellate relief on this issue.

Defendant Boston's final arguments on appeal relate to his sentencing. Defendant initially contends that the trial court improperly scored Offense Variable (OV) 3 for purposes of

calculating the sentencing guidelines range. In light of *People v Mitchell*, 454 Mich 145, 176; ___ NW2d ___ (1997), in which the Michigan Supreme Court held that errors regarding guidelines calculation do not present a reviewable issue on appeal, we decline to address this issue.

Next, we agree with defendant's contention that the trial court improperly considered his refusal to admit guilt in fashioning the sentence. Although a defendant's lack of remorse and low potential for rehabilitation are legitimate sentencing considerations, a defendant's refusal to admit guilt is not. *People v Houston*, 448 Mich 312, 323 (Boyle, J.), 326 (Brickley, C.J.); 532 NW2d 508 (1995); *People v Wesley*, 428 Mich 708, 713, 725; 411 NW2d 159 (1987). Here, when explaining his sentencing decision, the trial judge repeatedly referred to defendant's assertion of his innocence, at one point stating that he was "incensed" by defendant's decision to assert his innocence at the hearing. Given this clear indication that an improper factor was considered, resentencing is appropriate. *People v Hicks*, 149 Mich App 737, 748; 386 NW2d 657 (1986).

Upon review of the trial court's remarks, we disagree with defendant Boston's contentions that the trial court improperly made an independent finding of guilt with respect to felony murder and improperly imposed a harsh sentence in order to send a message to the community. The trial court did not make an independent finding of guilt, but rather permissibly considered that the evidence was sufficient to convict defendant of the higher offense of which he was acquitted. *People v Shavers*, 448 Mich 389, 393-394; 531 NW2d 165 (1995). The trial court also properly considered the protection of society and the deterrence of others from committing like offenses when it sentenced defendant. *People v Johnson*, 173 Mich App 706, 709; 434 NW2d 218 (1988). In light of our determination that defendant must be resentenced, we express no opinion on whether the sentence imposed was proportionate.

No. 185851

Defendant Coon first asserts that the prosecutor failed to present sufficient evidence to convict him of armed robbery. When determining whether sufficient evidence was presented, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find the essential elements of the offense proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, modified 441 Mich 1201 (1992). The elements of the offense of armed robbery are: (1) an assault; and (2) a felonious taking of property from the victim's person or presence (3) while the defendant is armed with a dangerous weapon or an article used or fashioned to appear to be a dangerous weapon. MCL 750.529; MSA 28.797; *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). A defendant may be charged as a principal but convicted as an aider and abettor. *Turner, supra* at 568.

Defendant argues that the evidence established as a matter of law that he voluntarily abandoned any attempt to commit the offense when, as stated in his second statement to the police, he fled the store after defendants Norfleet and Boston drew their handguns. Voluntary abandonment is an affirmative defense to a charge of criminal attempt. *People v Kimball*, 109 Mich App 273, 286; 311 NW2d 343, modified 412 Mich 890 (1981). See also *People v Shafou*, 416 Mich 113, 123; 330 NW2d 647 (1982) (opinion of Ritzgerald, C.J.). Because defendant was charged with armed robbery, not an

attempt, the defense is inapplicable to this case. Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that defendant aided and abetted an armed robbery by preparing for the crime and then joining his codefendants in the store with the intent to rob it.

Defendant Coon next contends that the trial court erroneously denied his motion to suppress his second written statement on the ground that he did not knowingly and intelligently waive his *Miranda* rights. Although a reviewing court engages in a de novo review of the entire record, we will not disturb a trial court's factual findings regarding a knowing and intelligent waiver unless they are clearly erroneous. *People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1996). The prosecutor must prove by a preponderance of the evidence that, under the totality of the circumstances surrounding the interrogation, a suspect properly waived his *Miranda* rights. *Id.* at 27. "To establish a valid waiver, the state must present evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him." *Id.* at 29. Upon review of the totality of the circumstances surrounding the waiver in this case, we find that the trial court did not clearly err in determining that defendant understood his rights. Defendant's signing of a written waiver is strong evidence that the waiver was valid. *Id.* at 31. There is no evidence on the record even remotely suggesting that defendant, who was twenty years-old at the time of the questioning, did not have the mental ability to comprehend his rights. Given the interrogating officer's uncontradicted testimony that there was no indication that defendant was unable to understand his rights when they were read to him, the trial court did not err in denying the motion to suppress.

Lastly, defendant Coon argues that his twenty- to thirty-year sentence is disproportionate. A sentence must be proportionate to the seriousness of the offense and the offender. *People v Milbourn*, 435 Mich 630, 650; 461 NW2d 1 (1990). Because the sentence imposed was within the eight to twenty year guidelines range calculated for defendant's offense, it is presumptively proportionate. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Upon review of the offense and the offender, defendant has failed to demonstrate the existence of "unusual circumstances" necessary to rebut the presumption. *People v Piotrowski*, 211 Mich App 527, 532; 536 NW2d 293 (1995). While defendant may not have pulled the trigger or taken money from the store, he willingly participated in the planning and carrying out of a robbery that resulted in a death. Accordingly, we find that he trial court did not abuse its discretion in sentencing defendant. *People v Odendahl*, 200 Mich App 539, 541; 505 NW2d 16 (1993).

Defendant Norfleet's conviction and sentence for armed robbery is vacated. Defendants' other convictions are affirmed, but remanded for resentencing in No. 183441. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Alton T. Davis, Jr.