

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES E. WILSON,

Defendant-Appellant.

UNPUBLISHED

August 1, 1997

No. 195997

Recorder's Court

LC No. 95-008333-01

Before: Doctoroff, P.J., and MacKenzie and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to eight to twenty years in prison for the second-degree murder conviction, and two years for the felony-firearm conviction. The sentence for second-degree murder was vacated, and defendant's sentence was enhanced to ten to twenty-five years in prison pursuant to MCL 769.13; MSA 28.1085, the sentence to run consecutively to the felony-firearm sentence. We affirm.

Defendant first argues that there was insufficient evidence to support his conviction. We disagree. The trial court denied defendant's motion for directed verdict at the close of the prosecution's case. Although defendant contends to the contrary, the court applied the correct standard in ruling on defendant's motion. The same standard is used by this Court in reviewing the trial court's ruling, and was set forth in *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1991):

[T]he court must consider the evidence presented by the prosecutor, up to the time the motion was made, in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt.

The elements of second-degree murder were set forth in *People v Harris*, 190 Mich App 652, 659; 476 NW2d 767 (1991):

To establish second-degree murder, the prosecution was required to prove that defendant caused the death of the victim and that the killing was done with malice and without justification or excuse. [Citation omitted.] Malice is the intent to kill, the intent to do great bodily harm, or the intent to create a very high risk of death or great bodily harm with knowledge that such is the probable result. Malice may be inferred from the facts and circumstances of the killing.

Pursuant to MCL 767.39; MSA 28.979, a person who procures, counsels, aids, or abets in the commission of a crime may be punished as if that person had directly committed the offense. The aider or abettor is required to have the intent necessary to be convicted as a principal or, in this context, knowledge of the principal's intent to kill or do great bodily harm. *People v Kelly*, 423 Mich 261, 278-279; 378 NW2d 365 (1985).

Where there is sufficient evidence that the defendant either committed the offense or aided and abetted in its commission, the conviction should be upheld. See *People v Williams #2*, 45 Mich App 630, 641; 207 NW2d 180 (1973) (there was sufficient evidence that the defendant killed the decedent or aided and abetted in the commission of the crime where three or four bullets were fired from a car which was occupied by three men and which was similar to a car owned by the defendant); and *People v Dykes*, 37 Mich App 555, 558-559; 195 NW2d 14 (1972) (there was sufficient evidence of manslaughter where the defendant was engaged in a homicidal assault on the deceased with another person, and where it was not clear who struck the fatal blows, because the defendant could be liable for the actions of the person with whom he was acting in concert).

The prosecution presented the following evidence at trial: Before the fatal shooting, defendant was seen with a group of people who were yelling at each other, "come on, come on, man, let's go. Let's do this." The same group of people had been involved in a confrontation and shooting incident earlier that day. Defendant was also seen with a person named Rafael just before the shooting started. Following the shooting, police found two nine millimeter guns in Rafael's garage. One of the guns was the gun from which the fatal bullet was fired. Defendant was seen firing six shots from a nine millimeter gun, and then swearing when he apparently ran out of bullets. According to one of the witnesses, there was no return fire apparent when defendant was shooting.

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that defendant was engaged in a common goal with others to fire shots on a residential street. Since defendant was seen firing the type of weapon used to kill the victim, and was seen just before the shooting with the person in whose garage two such weapons, including the actual weapon used to fire the fatal bullet, were found, a rational trier of fact could find that defendant either fired the fatal bullet or aided and abetted the person who did. As in *Dykes, supra*, at 558-559, where it was not relevant who struck the fatal blow, the prosecution in this case was not required to show that defendant fired the fatal bullet. Even if defendant did not fire the fatal bullet, there is sufficient evidence that he aided and abetted the person who did. Malice could be inferred from defendant's use of a deadly weapon in a residential area. *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995). The evidence was therefore sufficient to support defendant's conviction for second-degree murder.

Defendant's second argument on appeal is that he was deprived of his right to a fair trial by prosecutorial misconduct. We disagree. We review alleged instances of misconduct in context to determine whether they denied the defendant a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Because defendant did not object at trial to the alleged instances of misconduct, review is precluded "unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Defendant contends that the prosecutor made assertions in her opening statement which were not borne out by the evidence presented at trial. Where a prosecutor states that evidence will be presented which in fact is not, reversal is not required unless the prosecutor did not act in good faith when making the statement. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). Here, despite defendant's assertions to the contrary, there is no indication that the prosecutor did not act in good faith, and reversal is not appropriate.

Defendant next complains of a comment made by the prosecutor when she was cross-examining defendant. No manifest injustice resulted from the comment because the trial court immediately told the prosecutor in front of the jury not to make such comments, and because the court instructed the jury that the lawyers' statements, arguments, and questions to witnesses are not evidence. *People v Ullah*, 216 Mich App 669, 683; 550 NW2d 568 (1996).

Defendant next complains about the prosecutor's statements concerning the state of the law. Our review of these statements in context does not indicate any error in what the prosecutor stated concerning the law, and in any event, the trial court instructed the jury to "take the law as I give it to you. If a lawyer says something different about the law follow what I say." Any prejudicial effect resulting from the prosecutor's comments were dispelled by these instructions, and no manifest injustice resulted.

Finally, defendant contends that several misstatements of fact were made by the prosecutor. We note that one of the misstatements was corrected by the prosecutor herself. Upon review of the prosecutor's remarks in context, we are persuaded that manifest injustice did not result, because any prejudicial effect was dispelled by the trial court's instructions to the jury that it may consider only the evidence when deciding the verdict and that the lawyers' statements and arguments are not evidence. *Ullah, supra*, at 683.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Barbara B. MacKenzie
/s/ Richard Allen Griffin