STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAURICE GRANISON,

Defendant-Appellant.

UNPUBLISHED
December 19, 1997

No. 197361
Oakland Circuit Court
LC No. 95-139527-FC

Before: McDonald, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

The jury convicted defendant of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279. Defendant subsequently pleaded guilty to being an habitual offender, third offense, MCL 769.11; MSA 28.1083. He now appeals as of right, and we affirm.

I

Defendant first argues that the prosecutor failed to submit sufficient evidence to establish his guilt of aiding and abetting an assault with intent to do great bodily harm less than murder. We disagree. In a criminal case, due process requires that the prosecutor introduce sufficient evidence that could justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). In reviewing the sufficiency of the evidence, this Court must view the evidence in a 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 Reeves*, 222 Mich App 32, 34; 564 NW2d 476 (1997).

In order to establish that defendant aided and abetted in the commission of the crime, the prosecutor must prove beyond a reasonable doubt: (1) the crime was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement which assisted in the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time the defendant gave aid or encouragement. *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993). Generally, an aider and abettor must possess the same requisite intent as that required of a principal. *People v Barrera*, 451

Mich 261, 294; 547 NW2d 280, cert denied, *Michigan v Barrera*, ___US___; 117 S Ct 333; 136 L Ed2d 246 (1996).

To convict on the assault with intent to commit great bodily harm charge, the jury was required to conclude that defendant, at the time of committing the assault, had the requisite "intent to do great bodily harm less than murder." The state of mind of the aider and abettor may be inferred from all of the circumstances and facts. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). Factors which may be considered include a close association between the defendant and the principal, defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Id.* at 569.

Defendant disputes whether the prosecutor presented sufficient evidence to prove elements two and three of aiding and abetting. However, the evidence shows that defendant and Morris Johnson, longstanding friends, went to the home where the victim was visiting to discuss an alleged sexual assault on Johnson's girlfriend. Defendant and Johnson physically attacked the victim on the front lawn. Defendant admitted that he held the victim while Johnson hit him. The victim was then shot five times. Most of the witnesses testified that Johnson shot the victim. Defendant fled the scene with Johnson and Johnson's girlfriend. Viewed in a light most favorable to the prosecution, this evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt, that defendant assisted Johnson in assaulting the victim and with the intent to commit great bodily harm less than murder.

II

Defendant next argues that the trial court clearly erred in admitting an incriminating statement he made where the statement was provoked by a police officer while defendant was being transported in a police car, four hours after he was given *Miranda* warnings. The right against self-incrimination protects an accused from being compelled to testify against himself or from being compelled to provide evidence of a testimonial or communicative nature. *People v Burhans*, 166 Mich App 758, 761-762; 421 NW2d 285 (1988). Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694, reh den 385 US 890; 87 S Ct 11; 17 L Ed 2d 121 (1966). Interrogation refers to express questioning and to any words or actions on the part of police that the police should know is reasonably likely to elicit an incriminating response from the subject. *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997). Voluntary statements made by an accused in custody do not fall within the purview of *Miranda*. *Id.*

After a careful review of the lower court record, we are not left with a definite and firm conviction that the trial court erred in finding that defendant's incriminating statement was made voluntarily. Defendant's incriminating statement was not made in response to interrogation and thus, he was not deprived of his *Miranda* rights. The officer told defendant that he did poorly on the polygraph test that defendant had just taken. He told defendant that he had missed two questions regarding the murder case. Defendant responded by claiming that the polygraph tests were unreliable and then made the incriminating response that his brother had taken a polygraph test three times for a shooting that defendant had committed. Defendant then continued discussing additional details which related to the

incriminating response to this case. Accordingly, as in *Raper*, defendant was not subject to police conduct which the police knew or reasonably should have known was likely to invoke an incriminating response. *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995). Defendant's incriminating statement was voluntarily made in response to information the police officer gave him.

III

Next, defendant argues that the trial court clearly erred in concluding that the prosecution exercised due diligence in attempting to locate Melanie Smith for trial (thus allowing the prosecutor to read a transcript of her preliminary examination testimony at trial). We disagree. Under the res gestae witness statute, MCL 767.40a; MSA 28.980(1), a prosecutor is obliged to exercise due diligence to obtain a listed witness' presence at trial. *People v Wolford*, 189 Mich App 478, 483-484; 473 NW2d 767 (1991). Due diligence is the attempt to do everything reasonable, not everything possible to obtain the presence of a witness. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). A trial court's determination of due diligence is a factual finding that will not be set aside unless clearly erroneous. *Wolford, supra* at 484.

Reviewing the transcript of the trial court's due diligence hearing, we are not left with the definite and firm conviction that the trial court erred in finding that the prosecutor exercised due diligence to obtain Smith's presence at trial. The evidence showed that the police attempted to contact Smith at her mother's house and was advised that Smith did not live there, that she did not intend to testify and that her life and that of her family had been threatened if she testified. In light of these facts, it was safe to assume that Smith was intentionally hiding. Smith was subpoenaed, but she ignored the summons. Therefore, we decline to reverse the trial court's due diligence determination.

IV

Finally, defendant contends that he was denied a fair trial because the trial court erred in finding that the prosecution exercised due diligence in seeking Morris Johnson's presence at trial. However, because defendant failed to object to the prosecution's failure to produce Johnson at trial and because defendant was not prejudiced, we decline to review this issue.

Affirmed.

/s/ Gary R. McDonald
/s/ Henry William Saad
/s/ Michael R. Smolenski