STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID UHURN PAYNE a/k/a UHURN DAVID PAYNE,

Defendant-Appellant.

UNPUBLISHED
May 26, 1998

No. 196692
Kalamazoo Circuit Court
LC No. 95-000912 FC

Before: Hoekstra, P.J., and Murphy and Bandstra, JJ.

PER CURIAM.

Defendant's convictions arise out of the armed robbery and shooting deaths of two clerks at a video store, where codefendant was a former employee. Following a jury trial, defendant was convicted of two counts of first-degree felony murder, MCL 750.316; MSA 28.548, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to two concurrent terms of two years' imprisonment for the felony-firearm convictions, to be followed by two concurrent life terms in prison without parole for the first-degree murder convictions. He appeals as of right. We affirm.

I

First, defendant argues that the trial court should have granted his motion for a directed verdict because the prosecution did not establish that he intended to aid in the commission of the robbery, an essential element of the charged crime of first-degree murder. Accordingly, defendant asserts that this Court should reduce his conviction to second-degree murder. We disagree. When reviewing a trial court's ruling on a motion for directed verdict, this Court tests the validity of the motion by the same standard as the trial court. *People v Warren*, ___ Mich App ___; ___ NW2d ___ (Docket No. 190133, issued 2/27/98), slip op p 5. Thus, we must consider the evidence presented by the prosecutor in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Due process requires the trial court to direct a

verdict of acquittal where the evidence is insufficient to support a conviction. MCR 6.419(A), *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998).

To support a finding that defendant aided and abetted, the prosecutor was required to show the following elements: (1) the crime charged was committed by defendant or some other person; (2) defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *People v Sean Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993). Here, defendant argues that the prosecution presented insufficient evidence of the third element of intent. Specifically, defendant states that he did not know that codefendant intended to rob the store clerks because codefendant committed the robbery only as an "afterthought" to the shootings.

Defendant's argument is without merit because an aider and abettor's state of mind may be inferred from all the facts and circumstances. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). Here, the prosecution presented three pieces of circumstantial evidence that the trier of fact may properly consider. See *id.* at 569. First, the prosecution presented evidence that defendant and codefendant were best friends and roommates and that defendant was loyal to codefendant. The prosecution also presented evidence that defendant participated in the planning and execution of the armed robbery by providing codefendant with the one of the two guns used in the armed robbery, as well as the holster, ammunition and clips for the gun. Defendant also helped codefendant wipe the bullets clean of fingerprints before codefendant went inside the store. Last, the prosecution presented evidence that after waiting outside the video store where the robbery and murders took place, defendant participated in the flight from the location. The evidence included defendant's dismantling of the gun, throwing away the gun parts and money bag in a dumpster, destroying his clothes, and switching cars. Viewed in the light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that defendant intended the commission of the robbery or had knowledge that codefendant intended its commission at the time defendant gave aid and encouragement. Therefore, the trial court properly denied defendant's motion for a directed verdict.

II

Next, defendant argues that the trial court erred in refusing to give the jury instructions on the lesser offenses of involuntary manslaughter, MCL 750.321; MSA 28.553, and felonious assault, MCL 750.82; MSA 28.277. We disagree. A trial judge must instruct the jury as to the applicable law and fully and fairly present the case to the jury in an understandable manner. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). Thus, a judge must instruct on lesser included offenses when so requested and if supported by the evidence. *Id.* Cognate lesser included offenses are those that share some common elements with and are of the same class as the greater offense but also have elements not found in the greater offense. *People v Hendricks*, 446 Mich 435, 443; 521 NW2d 546 (1994). The parties do not dispute that defendant's requested instructions on involuntary manslaughter and felonious assault concern cognate lesser offenses.[1]

Before a court instructs on a cognate lesser offense, it must examine the specific evidence to determine whether it would support a conviction of the lesser offense. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). Our review of the record reveals that the trial court did not err in refusing to read the involuntary manslaughter instruction. A necessary element of the offense is gross negligence. *People v Clark*, 453 Mich 572, 578-579; 556 NW2d 820 (1996). Here, there was no evidence tending to show, or basis in the evidence for an inference, that the cause of the victims' deaths was an accident or negligence. Rather, the evidence presented of defendant's aiding and abetting in codefendant's criminal acts, which resulted in the gunshot wounds to various parts of the victims' bodies, suggested only the opposite.[2] "Where the evidence suggests only that the criminal act naturally tends to cause death or great bodily harm, an instruction on the lesser included offense of involuntary manslaughter is simply not justified." *People v Beach*, 429 Mich 450, 478; 418 NW2d 861 (1988).

Similarly, the trial court did not err in refusing to read the felonious assault instruction. Felonious assault is an assault upon another with a dangerous weapon, but without the intent to commit the crime of murder and without the intent to inflict great bodily harm less than the crime of murder. MCL 750.82; MSA 28.277. Our Supreme Court has stated that if a victim dies and the assailant's admitted act constitutes a legally cognizable cause of the death, then instructing the jury about merely assaultive offenses is logically precluded. *People v Bailey*, 451 Mich 657, 671-672; 549 NW2d 325 (1996). Again, the evidence at the trial in this case demonstrates that the gunshot wounds were the legally cognizable cause of the victims' deaths. Thus, there was no justification for instructing the jury on felonious assault. Indeed, as the trial court noted, giving the jury an instruction on a lesser offense that has no evidentiary basis detracts from the rationality and reliability of the fact-finding process. *Moore*, *supra* at 319.

Last, even if we had concluded that the evidence supported reading these instructions, we would nonetheless hold that reversal is not required on this basis because any error that occurred is harmless. See *Beach*, *supra* at 465-475; *People v Herbert Ross*, 73 Mich App 588, 592; 252 NW2d 526 (1977). Defendant argues that the harmless error analysis of *Beach* is inapplicable here because the jury rejected the charge of first-degree premeditated murder and instead convicted him of first-degree felony murder. However, defendant's argument is not persuasive because both premeditated murder and felony murder are first-degree murder charges. If the jury had doubts about defendant's guilt of the charged offense of murder, but believed him to be guilty of some wrongdoing, it could have found him guilty of second-degree murder, one of the lesser included offenses on which the jury was also instructed. Instead, the jury found defendant guilty of first-degree felony murder, and we must conclude that the omission of these instructions on the cognate lesser offenses was not prejudicial to defendant.

III

Next, defendant argues that he was denied a fair trial because of the many instances of misconduct by the prosecutor. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). A defendant's opportunity for a fair trial may be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rohn*, 98 Mich App 593, 596;

296 NW2d 315 (1980).

First, defendant argues that during closing argument, the prosecution improperly injected the issue of race by stating that defendant and codefendant changed vehicles in order to drive back to the store and see "where we murdered those two white kids." We must read prosecutorial comments as a whole. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Although we do not condone raising the issue of the victims' race where race had no bearing on the issues in the case, neither do we find that this single reference to race requires reversal. We are not persuaded that the sole reference caused the jury to convict "because of prejudice rather than the evidence." *People v Bahoda*, 448 Mich 261, 271-273; 531 NW2d 659 (1995). More important, defendant did not timely or specifically object to the prosecutor's remark; therefore, our review is precluded unless failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We find no miscarriage of justice because any prejudicial effect from the prosecutor's comment could have been cured by a timely instruction. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996).

Second, defendant argues that during closing argument, the prosecution improperly injected its opinion about the credibility of the detectives who testified at trial and bolstered the credibility of the detectives by characterizing them as "major crime detectives" in the "largest public safety office in the country." A prosecutor may not ask the jury to convict a defendant on the basis of the prosecutor's personal knowledge, or the prestige of the office, or that of the police. *People v Kulick*, 209 Mich App 258, 260; 530 NW2d 163, remanded 449 Mich 851; 535 NW2d 788 (1995). However, our review of the prosecution's closing argument reveals that the prosecution was not stating its personal opinion about the testimony, but merely reiterating the testimony of the detectives at trial. Similarly, we find that the prosecutor's reference to the position and size of the public safety department was a reiteration of the detectives' testimony in this case. In any event, defendant did not timely or specifically object to any of these allegedly improper remarks and any prejudicial effect from the prosecutor's comments could have been cured by a timely instruction. *Rivera, supra* at 651-652. Therefore, defendant's argument is without merit.

Third, defendant argues that at several times during the trial, the prosecutor improperly raised evidence of defendant's other bad acts. Defendant argues that the prosecution at two points in its opening statement improperly referred to defendant's use of alcohol after the crimes were committed. We find no error in these comments because opening statement is the appropriate time to state a fact that will be proven at trial, and this fact was later presented by the prosecution through the admission of defendant's statement as an exhibit. See *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). Defendant argues that the prosecutor improperly questioned one of the detectives about a prior assault incident between defendant and his spouse. We find no error in this question because the incident was relevant to the manner in which police identified defendant as a suspect in this case. Specifically, the ammunition recovered at the scene of the assault was similar to that recovered at the store where these murders occurred. Defendant argues that the prosecutor improperly questioned defendant about owning a third gun. However, defendant objected, and the prosecution withdrew the question; therefore, this unanswered question did not deny defendant a fair trial. Defendant argues that

the prosecution improperly questioned defendant about a permit to carry a concealed weapon. Defendant did not object to this question, and we find no miscarriage of justice will result from our failure to review it. Last, defendant argues that during closing argument, the prosecutor improperly characterized the ski mask, ammunition and holster found in defendant's apartment as "trophies" defendant was saving from the crimes. However, we find no error in the prosecutor's statements because the prosecution is free to argue the evidence and all reasonable inferences arising from it as they relate to its theory of the case. *Bahoda, supra* at 282.

Last, defendant argues that during rebuttal argument, the prosecution improperly urged the jury to consider the sentencing consequences of convicting defendant as an accessory after the fact, a lesser included offense. We disagree. The prosecutor merely stated that finding defendant guilty as an accessory after the fact was a "significantly lesser crime" than murder and explained the elements of each crime. The prosecutor did not inform the jury of the penalty that defendant would face under either conviction. Prosecutorial arguments are also considered in light of defense arguments. *Lawton, supra* at 353. During closing argument, defense counsel stated that this "whole case turns on" defendant acting as an accessory after the fact. Therefore, even if the prosecution's statement was otherwise improper, the statement does not require reversal because it responded to issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

Therefore, we conclude that defendant was not denied his right to a fair and impartial trial by these alleged instances of prosecutorial misconduct. Accordingly, we find no merit in defendant's related argument that he was denied effective assistance of counsel by his trial attorney's failure to object to these alleged instances of prosecutorial misconduct. Defendant has not shown that absent his counsel's alleged errors, there is a reasonable probability that the result of the proceeding would have been different and that the result of the proceeding was fundamentally unfair or unreliable. See *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996).

IV

Next, defendant asserts that this Court should reverse his conviction because his indictment was invalidly obtained by a multicounty citizens' grand jury. We disagree. We review de novo this question of statutory interpretation, *People v Seeburger*, 225 Mich App 385, 391; 571 NW2d 724 (1997), although we review the findings of fact by the trial court for clear error, MCR 2.613(C), *People v Mitchell*, 428 Mich 364, 369; 408 NW2d 798 (1987).

After conducting an in camera review of the grand jury petition, the trial court found that a petition was filed in this Court in November 1994 that requested authority to investigate drug activities, a homicide that occurred in Kalamazoo County, and related crimes. The trial court concluded that the grand jury had been convened in compliance with the statutory requirements and therefore held that defendant's indictment was proper. Defendant argues that the multicounty grand jury is authorized by statute to investigate only crimes committed in two or more counties within the multicounty area, whereas he was charged with crimes that occurred only in one county. Defendant's argument is premised on the statement that the petition to convene a grand jury must show "probable cause to believe that a crime, or a portion of that crime, has been committed in two or more specified counties."

MCL 767.7b(3)(c); MSA 28.947(2)(3)(c). See also MCL 767.7d(a); MSA 28.947(4)(a). The showing required in MCL 767.7b(3)(c); MSA 28.947(2)(3)(c) is one in a list of items that the petitioning party must include in its petition to convene a multicounty grand jury.

Defendant's argument is without merit because although a petition must show probable cause that a crime, or a portion of the crime, occurred in two or more counties, a subsequent indictment may charge a defendant with a crime that occurred in only one county. This result does not render the indictment improper. Indeed, a subsequent provision specifically contemplates this result:

> A grand jury convened under section 7c may indict a person for an offense committed in any county over which the grand jury has jurisdiction. If the grand jury indicts a person under this subsection, the grand jury shall specify in the indictment the county or counties in which the offense took place. [MCL 767.23a; MSA 28.963(1).]

Our reading of MCL 767.7b(3)(c); MSA 28.947(2)(3)(c) in conjunction with MCL 767.23a; MSA 28.963(1) reconciles the seeming inconsistency that defendant raises. Therefore, we agree with the trial court that defendant has not shown that his indictment was improperly issued.

V

Last, defendant argues that he is entitled to a new trial because a juror failed to disclose during voir dire that she had spoken about the murders with a coworker. The coworker, who also worked part time at the video store where the crimes occurred, was not a witness at trial. We disagree with defendant's argument.

The parties learned of the alleged misconduct after the jury had begun deliberating, and the trial court immediately held a hearing on the matter. At the hearing, the coworker testified that on the day of the murders, the juror, a janitor in the building, asked her whether she heard about the murders, to which the coworker responded by crying and leaving the room. The coworker testified that that was the extent of the conversation and that no other conversation subsequently occurred. Defendant motioned the trial court to exclude the juror from deliberations and thereby reduce the number of jurors from twelve to eleven pursuant to MCR 6.410(A). See, e.g., *People v Champion*, 442 Mich 874; 500 NW2d 470 (1993). Although defendant stated that he would have challenged the juror during voir dire had he possessed the information then, defendant nonetheless conceded that "the necessary predicate" had not been reached to demonstrate juror misconduct. The prosecution refused to stipulate to reducing the number of jurors. The trial court found that the contact between the coworker and the juror understandably occurred in light of the media coverage of the event. The court also found from its review of the questions during voir dire that the juror had not intentionally withheld the information. Therefore, the trial court declined to further investigate the matter because defendant had not established juror misconduct.

Even assuming that defendant's statement to the lower court did not waive this issue for appellate review, our review of the proceeding indicates no abuse of the trial court's discretion. Jurors are presumed to be competent and impartial, and the burden of proving otherwise is on the party

seeking disqualification. *People v Walker*, 162 Mich App 60, 63; 412 NW2d 244 (1987).

Here, as defendant conceded, he had not overcome the presumption that the juror was impartial and competent.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William B. Murphy
/s/ Richard A. Bandstra

[1] The elements of 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, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548. *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995), CJI2d 16.4. In comparison, involuntary manslaughter is the killing of another without malice and unintentionally but (1) in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or (2) in negligently doing some act lawful in itself, or (3) by the negligent omission to perform a legal duty. *People v Lardie,* 452 Mich 231, 243, n 14; 551 NW2d 656 (1996), CJI2d 16.10. The elements of felonious assault are: (1) an assault, (2) with a dangerous weapon, (3) with the specific intent to injure or put the victim in reasonable fear or apprehension of an immediate battery. *People v Crook,* 162 Mich App 106, 107; 412 NW2d 661 (1987), CJI2d 17.9.

[2] On appeal, defendant invokes the misdemeanor manslaughter rule and argues that the jury could have found defendant guilty of involuntary manslaughter because he was admittedly guilty of negligently lending his gun and ammunition to codefendant despite his lack of intent to kill the victims. See MCL 750.223; MSA 28.420, MCL 750.222(e); MSA 28.419(e). However, defendant did not make this argument before the trial court and therefore has not preserved it for our review. MCL 769.26; MSA 28.1096, MCR 2.516(C), *People v Grant,* 445 Mich 535; 520 NW2d 123 (1994).