# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TORONTO GARDETTE,

Defendant-Appellant.

UNPUBLISHED
September 11, 1998

No. 193519
Washtenaw Circuit Court
LC No. 95-004256 FC

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES EARL ADRIAN,

Defendant-Appellant.

No. 193520
Washtenaw Circuit Court
LC No. 95-004095 FC

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Before: Holbrook, Jr., P.J., and Gribbs and R.J. Danhof*, JJ.

PER CURIAM.

Following a joint jury trial, defendants Toronto Gardette and James Adrian were both convicted of first-degree premeditated murder (hereinafter "premeditated-murder"), MCL 750.316(a); MSA 28.548(a), first-degree felony-murder (hereinafter "felony-murder"), MCL 750.316(b); MSA 28.548(b), and possession of a firearm during the commission of a felony (hereinafter "felony-firearm"), MCL 750.227b; MSA 28.424(2). Defendants were sentenced to serve consecutive terms of life in prison for the felony-murder convictions and two years' imprisonment for the felony-firearm convictions. Defendants' premeditated-murder convictions were vacated by the trial court. Defendants now appeal as of right. We affirm.

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

I

Gardette first claims that the trial court erred in denying his motion for severance. He contends that severance was required because he and Adrian asserted antagonistic defenses. He further argues that he was prejudiced by the admission of a statement made by Adrian to the police that allegedly implicated him.[1] We disagree.

The decision on whether to severe or join defendants lies within the sound discretion of the trial court. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994).

> Severance is mandated . . . only when a defendant . . . affirmatively, and fully demonstrates [to the trial court] that his substantial rights will be prejudiced and that severance is the necessary means of rectifying potential prejudice. The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred . . . , will preclude reversal of a joinder decision. [*Id.*]

Simply asserting that defendants' defenses are antagonistic is not sufficient to establish that prejudice is likely to, or has occurred. "[R]ather, the defenses must be 'mutually exclusive' or 'irreconcilable.'" *Id.* at 349. That is, "[t]he 'tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other.'" *Id.*, quoting *United States v Yefsky*, 994 F2d 885, 897 (CA 1, 1993).

In the case at bar, Gardette asserted a defense of mistaken identity—he denied being present at the scene of the charged crime. Adrian stated that he agreed to assist in a robbery, but claimed he had nothing to do with the murder. We do not find these defenses to be mutually exclusive or irreconcilable. Therefore, the trial court did not err in denying Gardette's motion for severance.

We also find that the trial court did not err in concluding that Gardette would not be prejudiced by the admission into evidence of a properly redacted version of the challenged statement by Adrian. Our review of the redacted statement, all the evidence admitted at trial, the cautionary instructions given and the closing arguments leads us to conclude that "there was not a substantial risk that the jury utilized" the statement in deciding Gardette's guilt. *People v Frazier (After Remand)*, 446 Mich 539, 564-565; 521 NW2d 291 (1994); *People v Banks*, 438 Mich App 408, 420-421; 475 NW2d 769 (1991).

II

Next, Gardette claims that the trial court improperly and inadequately inquired, and restricted defense counsel from inquiring, into the racial attitudes of the jury. This claim is without merit. The record indicates that the trial court did not conduct voir dire to the exclusion of counsel. All parties participated, and there is nothing in the record to suggest that defense counsel was in any way prevented from inquiring into the potential jurors' racial attitudes. We also reject Gardette's assertion that he was

improperly denied his right to a jury made up of a representative cross-section of the community because no African-Americans were on the panel. Gardette has failed to establish that African-Americans were systematically excluded in the selection process. *People v Guy*, 121 Mich App 592, 599; 329 NW2d 435 (1983).

III

Next, Gardette claims that the trial court erred in denying his pre-trial motion to suppress identification evidence offered by an eyewitness to the killing. We disagree. Gardette presents three challenges to the admission of this identification evidence. First, he argues that he had a right to be represented by counsel during the second of two photographic lineups presented to the eyewitness. Second, he argues that the procedure followed during this photographic lineup was impermissibly suggestive. Third, he asserts that the in court identification by the eyewitness, should have been suppressed.

Gardette argues that he was entitled to the assistance of counsel during the second photographic lineup because, at the time, he was the focus of the investigation. This argument was specifically rejected by the Michigan Supreme Court in *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1994). In *Kurylczyk*, the Supreme Court held that in most cases, "the right of counsel attaches with custody." *Id.* A suspect may, however, have the right to counsel during a precustodial photographic lineup if "the circumstances underlying the investigation and the lineup are 'unusual.'" *People v McKenzie*, 205 Mich App 466, 472; 517 NW2d 791 (1994). With respect to the photographic lineup at issue, Gardette was neither in custody at the time, nor were there any unusual circumstances that would trigger his Sixth Amendment[2] right to Counsel.

"A photographic identification procedure violates a defendant's right to due process of law[3] when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). Although a page with Gardette's photograph on it was moved toward the front of a photograph binder, this did not create a situation where there was a substantial likelihood that Gardette would be misidentified. The entire page on which Gardette's photograph appeared among other photographs was moved to the second or third page of the binder. Further, the binder contained approximately one hundred total photographs. Under these circumstances, we do not believe that the placement of Gardette's photograph in any way served to single out Gardette.

Gardette also argues that the eyewitness's in-court identification of him should have been suppressed given the alleged problems with the photographic lineup. Because we have rejected Gardette's assertions of error with respect to the procedure followed in conducting the challenged photographic lineup, we necessarily conclude that those discredited assertions do not undermine the validity of the in-court identification. We also reject Gardette's assertion that the in-court identification should have been suppressed because the police were unable to produce the precise photograph binder that was used during the photographic lineup. The binder used was one of several that were constantly being modified and updated. Gardette has presented no evidence of bad faith, or evidence that the book as composed at the time of the identification would have been exculpatory. See *People v*

*Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1995); *People v Eddington*, 53 Mich App 200, 201-205; 218 NW2d 831 (1974). Furthermore, we conclude that the eyewitness had an independent basis for her in-court identification of Gardette. *Gray, supra* at 115.

IV

Next, Gardette claims that he was denied a fair trial by the prosecutor's statement in front of the jury that he believed a witness was lying to protect Gardette. However, the statement at issue was made while the jury was absent. Thus, Gardette could not have been denied a fair trial by the remark. See *People v Guenther*, 188 Mich App 174, 184; 469 NW2d 59 (1991).

V

Gardette also argues that he was denied a fair trial because a police officer, at the instigation of the prosecutor, improperly bolstered the credibility of the aforementioned eyewitness. See discussion *supra* part III. Once again, however, Gardette's assertions are not supported by the record. Initially, we note that Gardette failed to properly preserve the matter of appeal by raising a timely and specific objection to any of the challenged testimony. MRE 103(a)(1). Furthermore, none of the allegedly improper passages cited by Gardette came in response to questions asked by the prosecutor. Rather, the remarks were made in direct response to questions asked by Gardette's and Adrian's attorneys. As a result, there was no improper bolstering by the prosecutor. See *People v Kiczenski*, 118 Mich App 341, 347; 324 NW2d 614 (1982).

VI

Additionally, Gardette claims that the trial court erred in denying his motion for a directed verdict where the eyewitness's identification of Gardette was allegedly not credible. We disagree. Because credibility is a matter for the trier of fact to ascertain, it would have been improper for the trial court to consider the credibly of the eyewitness when ruling on Gardette's directed verdict motion. *People v Peña*, 224 Mich App 650, 659; 569 NW2d 871 (1997). Therefore, we see no error in the trial court's denial of the motion.

VII

Finally, Gardette asserts that he was denied a fair trial because a juror and the prosecutor failed to disclose that the juror was the prosecutor's mail carrier. Gardette argues that because of this relationship, the juror was not and could not have been impartial.

> [W]hen information potentially affecting a juror's ability to act impartially is discovered after the jury is sworn, the defendant is entitled to relief only if he can establish (1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause. [*People v Daoust*, 228 Mich App 1, 9; 577 NW2d 179 (1998).]

We conclude that Gardette is not entitled to relief on this issue because he has failed to establish either prong of the *Daoust* test. Gardette's claim of prejudice is completely unsupported. Additionally, he fails to offer any proof that the juror could have been properly dismissed for cause based on the existence of this limited relationship. See *People v Hannum*, 362 Mich 660, 666-667; 107 NW2d 894 (1961); *People v Walker*, 162 Mich App 60, 65; 412 NW2d 244 (1987). Furthermore, Gardette's offers no proof that either the juror or the prosecutor knew and withheld from the court the existence of this relationship. As for Gardette's assertion that he would have used a preemptory challenge to remove the juror had he known of this relationship, the *Daoust* Court stated that such an argument does not state a basis on which relief can be granted. *Daoust, supra* at 8-9.

*People v Adrian*: Docket No. 193520

I

Adrian first claims that the trial court improperly instructed the jury by failing to: (1) instruct the jury on his theory of the case; and (2) adequately instruct on the issue of intent when instructing the jury on aiding and abetting. This Court reviews jury instructions in their entirety to see if they "adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried." *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997).

Adrian claims that the failure of the trial court to instruct the jury on his theory of the case is error requring reversal. Adrian argues that the court should have instructed the jury that if it found that Adrian only agreed to participate in a robbery, then he should be found not guilty of felony-murder. We find this argument to be without merit. Initially, we note that Adrian never requested that the court instruct the jury on his theory of the case. MCR 2.516(B)(3). Further, the failure to raise a specific and timely objection to the instructions given precludes our granting relief unless to do so would result in manifest injustice. *People v Kelly*, 423 Mich 261, 272; 378 NW2d 365 (1985).

We see no such injustice in this case. The essence of Adrian's defense was that although he had the intent to commit an unarmed robbery, he had not formed the requisite intent to be convicted of murder. Our review of the instructions reveals that the trial court clearly set forth the necessary elements for premeditated-murder, felony-murder and second-degree murder, including the requisite intent for each crime. We believe that by properly instructing the jury on the issue of intent, the instructions were "responsive to the defendant's actual theory of the case." *Guider v Smith*, 431 Mich 559, 562; 431 NW2d 810 (1988).

Adrian also did not object to the aiding and abetting instructions given, the relevant portion of which is as follows:

> In this case the Defendants are charged with committing First Degree Felony Murder, First Degree Premeditated Murder and Felony Firearm or intentionally assisting someone else in committing it.

> Anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of a crime as an Aider and Abettor.
>
> To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First, that the alleged crime was actually committed by either the Defendant or someone else. It does not matter whether anyone else has been convicted of the crime.
>
> Second, that before or during the crime the Defendant did something to assist in the commission of the crime.
>
> Third, that when the Defendant gave his assistance, he intended to have someone else commit the crime.
>
> ***
>
> As to Count I involving First Degree Felony Murder, it is not enough for you to find the defendants agreed to commit the crime of Robbery. Instead, you must determine as to each defendant separately whether he intended to kill, whether he intended to do great bodily harm or whether he created a very high risk of death or great bodily harm knowing that death or such harm was the probable result of what he did.

Preliminarily, we note that because the verdict form does not so specify, there is no way for this Court to know if the jury convicted Adrian as a principal or as an aider and abettor. If the jury verdict was based on a finding that Adrian was principally involved, then the issue of whether the adding and abetting instructions were erroneous would be irrelevant. We note that there is sufficient evidence in the record to support the finding that Adrian had acted as a principal in the killing. We choose to address the instructional issue, however, because of the lack of certainty on which theory underlies Adrian's murder convictions.

The first six paragraphs of the above quoted instruction are consistent with the version of CJI2d 8.1 current at the time of trial.[4] While we believe that the intent element found in the sixth paragraph ("intended to have someone else commit the crime") articulated a higher standard than that required by law, we conclude that this instructional error was harmless beyond a reasonable doubt given that the jury convicted Adrian of both premeditated-murder and felony-murder under the instructions given.

This Court has consistently held that aiders and abettors can be convicted of a specific intent crime such as premeditated-murder "if they possess the specific intent required of the principal *or* if they know that the principal has that intent." *People v King*, 210 Mich App 425, 431; 534 NW2d 534 (1995) (emphasis added). Accord *People v Buck*, 197 Mich App 404, 410; 496 NW2d 321 (1992), mod on other grounds, 444 Mich 853; 508 NW2d 502 (1993) (observing that "[t]o be convicted of aiding and abetting first-degree [premeditated] murder, the defendant must have had the intent to kill or

have given the aid knowing the principal possessed the intent to kill"). Although it may not be so with regard to some felonies committed under particular circumstances,[5] in the case of premeditated-murder, if a defendant "intended to have someone else commit" the killing, then it is reasonable and probable to infer that the defendant must have intended for the killing to take place. Such a defendant would thus posses the requisite state of mind for premeditated-murder. Furthermore, we conclude that an outcome more favorable to Adrian would not have occurred even if the instructions had informed the jury that they could have also concluded that Adrian possessed the requisite intent from his knowledge that the principal intended to kill It is simply logically inconsistent to conclude that the inclusion of the less stringent "knowledge" standard would have led to a better result for Adrian.

As for felony-murder, the final paragraph of the above excerpted instruction properly informed the jury that in order to convict Adrian as an aider and abettor to this crime, it would have to find specifically that Adrian acted with the requisite malice. *Kelly, supra* at 278-279; *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995). This admonition immediately followed the general aiding and abetting instruction given by the court.

II

Next, defendant Adrian claims that the trial court erred in allowing the premeditated-murder charge to go to the jury when there was no evidence of premeditation or deliberation. "In reviewing the sufficiency of the evidence in a criminal case, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Graves*, 224 Mich App 676, 677; 569 NW2d 911 (1997). Premeditation and deliberation are essential elements of premeditated-murder. *Id.* at 678. "Premeditation and deliberation require sufficient time to allow the defendant to take a second look. The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing." *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992) (citation omitted).

After reviewing the record, we conclude that there was sufficient evidence presented on the elements of premeditation and deliberation. There was evidence presented placing Adrian at the scene of the murder.[6] The eyewitness testified that Gardette and one other unidentified robber were armed with handguns. That two guns were involved was also supported by evidence that shell casings from a gun different from that which fired the fatal shot were found at the scene. Further, the eyewitness testified that as the deceased was attempting to flee, all three robbers extended their arms and pointed in the direction of the deceased as the shots were being fired. Viewing this evidence in a light most favorable to the prosecution, we believe a reasonable factfinder could conclude that Adrian possessed the requisite premeditation and deliberation to support his conviction for premeditated-murder (as either a principal or aider and abettor).

III

Next, Adrian claims that the trial court abused its discretion in admitting his statement that he had shot someone. We disagree. A fact of consequence in this case was whether Adrian shot the

victim, and his statement that he had shot someone made this fact more probable. Therefore, the statement was relevant. MRE 401. However, because there is no context in which to place statement, there is the potential for unfair prejudice. The question then becomes whether the probative value of the statements is "substantially outweighed" by the danger of unfair prejudice. MRE 403. While a close question, we cannot conclude that the trial court abused its discretion. See *People v Bahoda*, 448 Mich 261, 289, 291; 531 NW2d 659 (1995).

Adrian also claims that it was error warranting reversal for the court reporter not to transcribe a sidebar conference during which, allegedly, the admission of the statement was discussed. However, Adrian offers no evidence, only suppositions and unfounded allegations, as to how he was actually prejudiced by the failure to transcribe the sidebar. Because this claim deals with a matter of procedure, we must not reverse absent an affirmative showing of a miscarriage of justice. MCL 769.26; MSA 28.1096. Adrian had failed to make such a showing.

IV

Next, Adrian claims he was denied the effective assistance of counsel. We have reviewed his claims, and conclude that he has failed to meet his burden under *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1991). Adrian's claims are either factually incorrect, involve matters of trial of strategy which we will not second guess, or are not so clear from the record that we are convinced that there is a reasonable probability that if defense counsel acted otherwise the outcome would have been different. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

V

Last, Adrian claims that he was denied a fair trial because a juror failed to disclose that he was the prosecutor's mail carrier. As with his codefendant, we find this argument to be without merit. See discussion *supra*, Docket No. 193519 part VII.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Roman S. Gribbs
/s/ Robert J. Danhof

[1] Adrian made three separate statements to the police. All three were entered into evidence via the testimony of the police officer who took the statements. Gardette's challenge is limited to the third statement.

[2] "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." US Const, Am VI.

[3] US Const, Am XIV; Const 1963, art 1, § 17.

[4] Other instructions tracking the language of CJI2d 8.4 and 8.5 were also given. They have not been repeated here because they are not essential to the resolution of this issue.

[5] For example, if an individual feigns support for another in a burglary "in order to obtain incriminating evidence against the primary party," then that individual would arguably not possess the criminal intent required for conviction as an aider and abettor. Dressler, Understanding Criminal Law, § 30.05[B][1], p 421.

[6] Although not evidence, we note that Adrian's theory of the case placed him at the scene.