STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROGER CAMERON,

Defendant-Appellant.

UNPUBLISHED
November 3, 1998

No. 197202
Recorder's Court
LC No. 95-013915

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSHUA D. PUCKETT,

Defendant-Appellant.

No. 197601
Recorder's Court
LC No. 96-000039

Before: Smolenski, P.J., and White and Markman, JJ.

PER CURIAM.

In docket number 197202, defendant Roger Cameron appeals as of right his jury convictions of first-degree murder, MCL 750.316(A); MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced Cameron to two years' imprisonment for the felony-firearm conviction, to be served consecutively to his sentence of life imprisonment without parole for the murder conviction. In docket number 197601, defendant Joshua D. Puckett also appeals as of right his jury convictions of first-degree murder, MCL 750.316(A); MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to two years' imprisonment for the felony-firearm conviction, to be served consecutively to his sentence of life imprisonment without parole for the murder conviction. The

above cases were tried together before separate juries and consolidated on appeal. We affirm in both cases.

On November 9, 1995, twelve-year old Angel Lawrence was shot in the head and killed, apparently by shots fired from a passing car. At the time, she was sitting in a car parked in front of her apartment with her mother and two siblings. Her mother testified that, as the family was about to exit the car, a gray or beige car drove up, blocking their exit. After it passed, she heard gunshots. She ducked her head and tried to pull Angel down, but when Angel raised her head to see what was happening, she was struck in the head and left arm by bullets. Although there was no evidence introduced at trial that Angel was the intended victim of any crime, there was evidence that both defendants Cameron and Puckett were involved in the killing in connection with a "drive-by" shooting of a rival gang.

Earlier in the day, Cameron and Puckett, members of two different friendly gangs, and several other friends (many of whom were also gang members) met at Cameron's house in Garden City. The group drank alcohol and smoked marijuana as Cameron and Puckett talked about driving to Detroit to "party" and do "a drive-by," which, according to one member of the group, means "driving the car and shooting somebody." When they decided to go to Detroit, Cameron brought out an SKS semi-automatic rifle from his house and handed it to Puckett, who put it in the trunk of his red convertible and then drove the car to Detroit.

Two cars, Puckett's red convertible and Daniel Broyles' black Cavalier, drove from Garden City and met at Hillary Rogers' house in southwest Detroit. Once they arrived, Puckett ordered the men to give Rogers a "V" or gang "violation" by punching her several times in the arms because she had lost a gun belonging to Cameron. The group, with Cameron and Puckett taking the lead, continued to smoke, drink and talk about committing a drive-by shooting against the Cash Flows, a rival gang to both Cameron's and Puckett's gangs. They planned the shooting and decided that Cameron would be the shooter. While there was evidence that the target of the shooting was only a building, several witnesses testified that the aim was to shoot Cash Flows. While the group was at Rogers' house, Puckett and Daniel Broyles went to another house in Detroit where Puckett procured a shotgun, and brought it back.

After Puckett and Broyles returned to Rogers' house, the group returned to their two cars in order to do the "drive-by." Broyles drove his car with Cameron in the front passenger seat with the SKS rifle, and three passengers, including Rogers, giving directions in the back seat with the gun that Puckett had obtained earlier. Puckett drove his car with the rest of the group and followed Broyles to an apartment building near the corner of Stair and Pitt Streets, where members of the Cash Flow gang were known to "hang out." The two cars drove around the block four times, passing the apartment several times because the group did not want passing cars to witness the shooting. Cameron told the police that they drove past a house on Stair Street four times and "we saw a few Cash Flow's outside hanging" when they drove by. On the fourth time past the apartment building, Cameron leaned out the window, pointed his SKS rifle at the front of the building and at the particular apartment in which the rival gang members were known to "hang out," and fired approximately ten times. There was nothing in Cameron's statement to indicate whether he saw people on the street or in the apartment while he was

firing. While Cameron was firing, a passenger in his car saw Puckett's car passing on Pitt Street. He also testified that he saw someone duck down by the car outside the apartment as Cameron fired. There appears to be no other clear evidence regarding the presence of people outside the building or inside the Cash Flows' apartment at the time of the shooting.

After the shooting, Broyles testified that he dropped off Rogers at her home with the guns. While no witnesses testified that they saw anyone other than Cameron shoot a gun at the scene, five of the people present in the cars during the shooting, including Cameron and Puckett, tested positive for gunshot residue on their hands. An expert in firearms also testified that spent shell casings and firearms recovered at the scene of the shooting and at Rogers' home provided evidence involving four different firearms.

At the close of the prosecutor's proofs, Cameron and Puckett moved for directed verdicts on the first-degree murder charge. The trial court denied their motions, finding that there was sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that each defendant was guilty of such crime. After the juries found defendants guilty of first-degree murder, the trial court also denied Puckett's motion for a new trial on the basis that the jury's verdict was against the great weight of the evidence.

Defendants Cameron and Puckett first argue that there was insufficient evidence introduced at trial to prove first-degree murder. A claim of insufficient evidence is reviewed by viewing the evidence in a light most favorable to the prosecution and determining whether a rational tier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Wolfe,* 440 Mich 508, 515; 489 NW2d 748, modified on other grounds 441 Mich 1201 (1992). "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Truong,* 218 Mich App 325, 337; 553 NW2d 692 (1996).

Although premeditation and deliberation are the crucial elements that distinguish firs-degree murder from second-degree murder, the prosecution must also show more than "mere conscious indifference to the likelihood of death as a result of a person's intentional act" in order to prove first-degree murder. *People v Burgess,* 96 Mich App 390, 395-6; 292 NW2d 209 (1980). To convict a defendant of first-degree murder, the prosecution is also required to prove beyond a reasonable doubt that the defendant intentionally killed the victim, in other words that he "acted with the purpose of causing death." *Id.* at 395. Premeditation and deliberation evidence has been found to fall into three basic categories: "evidence which shows that the defendant had been engaged in planning the killing, evidence establishing a motive for the killing, and evidence that the nature of the killing was such that the defendant must have intentionally killed according to a preconceived design." *People v Oster,* 67 Mich App 490, 497; 241 NW2d 260 (1976). In the cases at hand, the prosecution also theorized that defendants were aiders and abettors,[1] rather than the principal killer, and that the requisite intent to kill was 'transferred' to Angel Lawrence.[2] Accordingly, here the prosecutor was required to show that (1) each defendant had premeditated and deliberated the killing, or participated in the shooting knowing that a principal killer had premeditated and deliberated the killing; and (2) each defendant had an intent to kill *someone* at the time of the shooting, or participated in the shooting knowing that a principal killer

had an intent to kill *someone*. *People v Youngblood,* 165 Mich App 381, 387-8; 418 NW2d 472 (1988).

With regard to defendant Cameron, there was evidence that Cameron brought an SKS assault rifle with him to Detroit; that he planned the drive-by shooting against a rival gang and later admitted to Rogers that he had planned it; that the plan was to shoot the rival gang members themselves; and that Cameron planned to do the shooting. There was also evidence that Cameron pointed his rifle out of the car window at the apartment in which Cash Flows were known to "hang out," and started shooting when someone was present outside. This evidence shows that Cameron was engaged in planning the shooting and had a motive of killing rival gang members, satisfying the requirement of premeditation and deliberation. Testimony that Cameron planned to shoot Cash Flows and then pointed the gun and shot at the place where Cash Flows were known to "hang out" and a person was seen is evidence from which the jury could infer that he had an actual intent to kill Cash Flows, and not merely that he was indifferent to killing someone. See *People v Plummer,* __ Mich App __; __ NW2d __ (Docket No. 199770, issued 4/10/98); CJI2d 16.21. There was also evidence that the shooting at the apartment building began immediately after persons in Puckett's car exchanged gang signs with several members of the Cash Flows, who were outside a house near the apartment building, and that Cameron pointed his assault rifle at the apartment in which Cash Flows were known to hang out and where someone was seen outside and started shooting. Unfortunately, some of the bullets hit Angel Lawrence by mistake instead of their intended targets. This is a textbook example of transferred intent to kill. *Youngblood, supra* at 388. While it seems likely that the bullet that killed Angel Lawrence was from Cameron's gun, he was at least an aider and abettor since he helped to plan the shooting and helped in the shooting itself. Thus, viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence admitted at trial for the jury to find beyond a reasonable doubt that Cameron was guilty of first-degree murder.

Defendant Puckett disputes only the sufficiency of the evidence regarding intent to kill. He argues that the evidence only established an intent to shoot at the apartment building, not at particular people with an intent to kill. However, there was evidence at trial that Puckett planned to shoot the rival gang with Cameron, that he helped Cameron to bring the SKS rifle to Detroit and obtained another gun directly before the shooting. At the scene, while Puckett drove his car around the apartment looking out for witnesses and encouraging the action, in the second car Cameron pointed his rifle and shot at the apartment in which rival gang members were known to hang out and someone was seen outside. Puckett's planning, motive to shoot rival gang members, help with the rifle and support and encouragement at the shooting provide sufficient evidence of his premeditation and deliberation and are sufficient to show at least that Puckett knew of Cameron's intent to kill and aided him in accomplishing this intent. Therefore, the arguments of defendants have no merit.

Defendants next contend that the trial court improperly instructed the jury. Failure to object to jury instructions waives appellate review unless manifest injustice will result. *People v Van Dorsten,* 441 Mich 540, 544-5; 494 NW2d 737 (1993). "Manifest injustice occurs where the erroneous or omitted instructions pertain to a basic and controlling issue in the case." *People v Johnson,* 187 Mich App 621, 628; 468 NW2d 307 (1991). Even if preserved,

> [n]o judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury . . . unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. [MCL 769.26; MSA 28.1096.]

First, defendants contend that the court should have instructed the jury about the crime of involuntary manslaughter. Involuntary manslaughter is a cognate lesser included offense of first-degree murder, so it must be instructed upon only if evidence would support a conviction on the offense. *People v Heflin,* 434 Mich 482, 497, 504; 456 NW2d 10 (1990). In this case however, even assuming that defendants were entitled to an instruction relating to involuntary manslaughter-- and we do not decide here that they were-- the trial court's failure to give such an instruction was harmless error. *People v Beach,* 429 Mich 450, 481; 418 NW2d 861 (1988); MCR 2.613(A). If the juries had doubts about defendants' guilt on first-degree murder, they could have convicted one or both defendants of second-degree murder or intentionally discharging a firearm, on which they had been instructed. These lesser offenses were consistent with the theory that defendants' did not have an intent to kill or premeditate the killing. See *Beach, supra* at 492. Since the juries did not do so, we conclude that that they had no reasonable doubt regarding defendants' guilt of first-degree murder. See *People v Perry,* 218 Mich App 520, 536; 554 NW2d 362 (1996). Thus, the failure to instruct the juries regarding the cognate lesser offense of involuntary manslaughter, even if error, was not prejudicial to defendants.

Second, Cameron claims that a reckless discharge of a firearm instruction was also required by the evidence. As with the involuntary manslaughter instruction, any error would be harmless since the jury convicted Cameron of first-degree murder and not the two possible lesser charges on which it was also instructed. *Beach, supra* at 481.

Third, Cameron argues that the trial court improperly instructed the jury that he could be convicted of first-degree murder as an aider and abettor. In this case, while it appears most likely that Cameron was the principal who killed Angel Lawrence, there was also evidence of other guns and bullets at the scene and gunshot residue evidence showing that other passengers in the two cars could have fired a gun that killed the victim. Many of the people present at the shooting had taken part in the planning, knew the goal was to shoot rival gang members, participated in the drive-by, and could also have fired guns at the scene. Thus, in our judgment, the theory that Cameron was an aider and abettor of an unknown principal in the first-degree murder could be predicated upon this evidence.[3] See *Parks, supra* at 744.

Finally, Cameron claims that the court improperly failed to instruct the jury regarding the prosecution's nonproduction of two res gestae witnesses. However, after Cameron's attorney acknowledged that "there have been a great deal of efforts outlined here," the trial court determined that the prosecution had acted with due diligence in attempting to produce the two witnesses in question. Thus, the failure to produce the endorsed res gestae witnesses was excused, and no jury instruction was required. *People v Wolford,* 189 Mich App 478, 483; 473 NW2d 767 (1991). Consequently, we find no errors in the trial court's instruction of either jury.

Next, Cameron claims that he was denied effective assistance of counsel. To justify a reversal based on ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. *People v Pickens,* 446 Mich 298, 303; 521 NW2d 797 (1994). A defendant must also show that the deficiency was prejudicial, such that a reasonable probability exists that the

outcome of the proceedings would have been different in the absence of counsel's errors. *Id.* at 302-3. Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v Stanaway,* 446 Mich 643, 687; 521 NW2d 557 (1994).

First, Cameron contends that he was denied effective assistance of counsel when his attorney advised the jury during his opening statement that "[t]here's only one reason for an assault rifle, and that is to fight a war." Since this statement was part of an attempt to focus the jurors upon the facts at hand and not on their emotional responses to them, it was a legitimate trial strategy. Second, Cameron argues that his attorney told the jury that he failed to conduct discovery of the occupants of Puckett's vehicle, and he argues that such failure was error. However, Cameron's attorney made no such concession and, in any event, Cameron failed to demonstrate any prejudice, thus failing to overcome the presumption of effective assistance of counsel. Third, Cameron states that his attorney should have investigated the defenses of diminished capacity and intoxication. Once again, however, defendant has failed to present this Court with anything other than pure speculation regarding the effect of such evidence on the outcome of this case. Although many of the witnesses testified that there was drinking and marijuana use during the day before the shooting, there was no indication of the amount that Cameron consumed or any diminished capacity to act or form an intent on his part. We will not reverse a legitimate conviction based only on speculation.

Fourth, Cameron claims that his attorney was ineffective for failing to call either his client or other witnesses at the Walker hearing regarding the voluntariness of Cameron's confession. The decision whether to call witnesses is a matter of trial strategy that can constitute ineffective assistance of counsel only when the failure to do so deprives the defendant of a substantial defense. *People v Julian,* 171 Mich App 153, 159; 429 NW2d 615 (1988). Here, the interrogating officer testified that Cameron's statement was voluntary, and the prosecution produced documents showing Cameron's signature and initials acknowledging that he waived his rights and made the statement freely and voluntarily. Cameron failed to show that any witness would have given evidence disputing the officer's testimony. Thus, we do not find that the failure to call witnesses might have made a difference in the outcome of the trial. See *People v Kelly,* 186 Mich App 524, 526; 465 NW2d 569 (1990). Fifth, Cameron claims that his attorney also ineffectively failed to call two potentially exculpatory witnesses at trial. However, since this Court must rely upon facts adduced before the trial court, this claim is unsupported by any evidence in the existing record on appeal and we decline to address it. Sixth, Cameron claims that his attorney erred by failing to object to the reading of Cameron's statement into evidence where there was no preliminary finding that the officer on the stand had insufficient memory to testify about it. In our judgment, regardless of whether the officer testified regarding the contents of the statement, or testified that he had insufficient memory to recall the contents and proceeded to read the statement into evidence; the result is that the jury would have heard the contents of the statement. Thus, we do not find that a defense objection on this issue would have resulted in a different outcome of the proceedings. Finally, Cameron argues that his attorney was ineffective when he responded to the prosecutor's closing remarks by acknowledging that the description of Cameron as a "coward" was not far from the truth. As with the attorney's comments during opening remarks, this comment was a matter of trial strategy that did not compromise Cameron's defense. Consequently, we find that Cameron's trial attorney provided effective assistance of counsel.

Next, with regard only to defendant Puckett, we look to the claim that the trial court improperly admitted evidence. The decision to admit evidence is within the trial court's discretion and will not be disturbed on appeal absent an abuse of discretion. *People v Bahoda,* 448 Mich 261, 289; 531 NW2d 659 (1995). MRE 401 and MRE 402 provide that, generally, if evidence makes an issue "more probable or less probable than it would be without the evidence," it is relevant and admissible. *People v Hall*, 433 Mich 573, 583; 447 NW2d 580 (1989).

Here, although Puckett acknowledges that some evidence relating to gangs was inevitable at his trial because the motive of the shooting was alleged to be gang rivalry, he objects to the trial court's failure to limit the broad scope of the gang evidence or adequately caution the jury about its use. However, in our judgment, evidence regarding Puckett's leadership role in his gang and his involvement in the "violation" punching against Rogers was relevant, and indeed indispensable, to the issues in his case. His leadership role in his gang made it more probable that he was involved in the planning of the shooting of a rival gang and the "violation" evidence highlighted the relationship among the gang members and pointed out their biases that might interfere with truthful testimony. We also find that this evidence was not unfairly prejudicial because, after hearing days of testimony regarding the gang motive, plans of shooting rival gang members and graphic testimony of a drive-by shooting that resulted in a bystander being shot to death in the head, the jurors were unlikely to be emotionally swayed by Puckett's gang status or punches to someone's arm. In addition, we note that the trial court did caution the jury about the limited use of the gang evidence at the time the testimony was first introduced, and Puckett never objected to the instructions regarding this evidence. Although we feel that the trial court would have been better advised to again instruct the jury as to the limited use of gang testimony at the end of the trial, the instruction provided served to provide Puckett with a fair trial under the circumstances of this case. Thus, we find no abuse of discretion in the trial court's admission of gang evidence and no manifest injustice in the instructions given to the jury.

Lastly, Puckett contends that he was denied a fair trial due to improper argument by the prosecutor. Prosecutorial misconduct is reviewed on a case by case basis. *Johnson, supra* at 625. Appellate review is foreclosed where no objection was made to the arguments, as here, unless a failure to consider the issue would result in a miscarriage of justice," *People v Duncan,* 402 Mich 1, 15-6; 260 NW2d 58 (1977), or "a curative instruction could not have eliminated the prejudicial effect." *Stanaway, supra* at 687. In this case, Puckett points to the prosecutor's references to Puckett in closing arguments as "the instigator," "the manipulator," "cold," "callous" and as "pulling the strings" of the other participants in the crime; and to the prosecutor's rebuttal argument to the jury: "think about where a 13-year old, who would now be 13 years old in a week, Angel Lawrence. She'd be in school right now, maybe changing classes. Who pointed Mr. Cameron in the right way to stop that? The instigator." Contrary to Puckett's argument, in our judgment, these remarks were not improper. The prosecutor's descriptions of Puckett were relevant and reasonable inferences from the evidence in the case and were not deliberate attempts by the prosecutor to arouse prejudice against Puckett. See *People v Bahoda,* 448 Mich 261, 271; 531 NW2d 659 (1995). The Prosecutor's statement regarding the victim was not directly tied to the evidence of guilt or innocence in this case. However, it was an isolated remark that we do not believe resulted in a miscarriage of justice.

For these reasons, we affirm defendant Cameron's and defendant Puckett's convictions and judgments of sentence.

/s/ Michael R. Smolenski
/s/ Helene N. White
/s/ Stephen J. Markman

[1] "The phrase 'aiding and abetting' describes all forms of assistance rendered to the perpetrator of the crime and comprehends all words or deeds which may support, encourage or incite the commission of a crime." *People v Vicuna,* 141 Mich App 486, 495-6; 367 NW2d 887 (1985).

[2] The doctrine of transferred intent is explained as follows: "In the unintended-victim (or bad-aim) situation-- where A aims at B but misses, hitting C-- it is the view of the criminal law that A is just as guilty as if his aim had been accurate. Thus, where A aims at B with a murderous intent to kill, but because of a bad aim he hits and kills C, A is uniformly held guilty of the murder of C. *People v Youngblood,* 165 Mich App 381, 388; 418 NW2d 472 (1988), quoting LaFave and Scott, Handbook on Criminal Law, ch 3, § 35, pp 252-3.

[3] Cameron himself claims that the fatal bullet could not have come from his direction and that bullets matching the fatal bullet were found in the second car driven by Puckett.