

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff- Appellee,

v

DANIEL ALBERT NEWMAN,

Defendant-Appellant.

UNPUBLISHED

July 2, 1999

No. 165208

Livingston Circuit Court

LC No. 92-7032 FC

Before: Griffin, P.J., and McDonald and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and first-degree murder, MCL 750.316; MSA 28.548, for which he received consecutive sentences of two years and mandatory life imprisonment, respectively. Defendant appealed his convictions and sentences to this Court as of right. Defendant subsequently filed a motion to remand pursuant to MCR 7.211(C)(1)(b), based on a certification by the trial court that it would vacate the first-degree murder conviction and enter judgment on, and resentence defendant for, second-degree murder, MCL 750.317; MSA 28.549. This Court, while retaining jurisdiction, granted the motion. On remand, the trial court vacated the first-degree murder conviction and entered a judgment of conviction for second-degree murder, reaffirmed defendant's previous conviction and sentence for felony-firearm, and sentenced defendant on the second-degree murder conviction to a term of forty to eighty years' imprisonment. We now affirm defendant's convictions and sentences for second-degree murder and felony-firearm.

The evidence established that the victim, Harry Chappelle, died at his home on or about February 28, 1992, after receiving two shotgun wounds and eight other gunshot wounds to his head, chest, abdomen and arms. It was the prosecutor's theory at trial that Chappelle, a drug dealer, was shot and killed during a robbery of his home and that defendant participated in Chappelle's killing, either as a principal or an accomplice. Defendant presented an alibi defense.

Defendant first claims that the evidence was insufficient to establish beyond a reasonable doubt that he was present to cause the death of the victim or that he shared a preconceived intent to kill the victim. We note that while defendant's original brief was addressed to the first-degree murder conviction, his reply brief recognizes that the conviction was modified on remand and enumerates the elements of second-degree murder.

Viewing the evidence in a light most favorable to the prosecution, *People v Hampton*, 407 Mich 354, 358; 285 NW2d 284 (1979), we conclude that a rational trier of fact could have found beyond a reasonable doubt (1) that there was a death, (2) that defendant's acts were a contributory cause that were a substantial factor in producing the death, (3) that circumstances of justification, excuse, or mitigation did not exist, and (4) that defendant's acts were done with the intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the acts probably would cause death or great bodily harm. *People v Welch*, 226 Mich App 461, 462-463; 574 NW2d 682 (1997). See also *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996). The fact that no eyewitness were able to place defendant at the scene of the murder is not dispositive. Circumstantial evidence and reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

Here, there was evidence that one of the murder weapons belonged to defendant. While defendant asserts that this evidence is of little relevance because the gun was purchased five months before the murder, defendant was the last known purchaser of the gun, and a witness testified she saw a similar-looking gun at defendant's residence a week or two before the murder. Further, the gun was found in an abandoned gym bag that also contained a blue jean jacket, a sawed-off shotgun with tape on it, a ski mask, gloves, and a set of walkie-talkies. Hair found on the ski mask matched defendant's hair when microscopically compared, and hair similar to the hair of one of defendant's dogs was also found on the ski mask. Tape similar to the tape on the shotgun was found at defendant's residence, a substance found on the blue jean jacket appeared to contain the same elements as drywall compound used by defendant, who was a drywaller, and twine found on the gym bag was similar to twine found at defendant's residence. Further, there was testimony that defendant knew the victim and had been to the victim's home, that the victim had made a pass at defendant's girlfriend in defendant's presence, and that defendant was jealous and possessive. There was also evidence that defendant had repeatedly asked a friend for the names of any drug dealers he could rob for drugs or money. Lastly, it appeared that defendant's girlfriend may have been asking others to buttress defendant's alibi defense.

We conclude that when viewed in a light most favorable to the prosecution, the evidence could support an inference beyond an reasonable doubt that defendant either committed the murder himself or aided and abetted in its commission. Moreover, it was unnecessary for the prosecutor to negate every reasonable theory consistent with defendant's innocence. Rather, the prosecutor needed only to prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provided. *People v Daoust*, 228 Mich App 1, 16; 557 NW2d 179 (1998). The prosecutor sustained this burden.

Defendant next claims that he was entitled to a directed verdict of acquittal after the prosecutor's opening statement because the prosecutor neglected to refer to evidence that would be presented to establish defendant's presence and intent, and that trial counsel was ineffective for failing to move for dismissal. We disagree. Defendant's assertion that defense counsel could have moved for and been granted a directed verdict of acquittal at the end of the prosecutor's opening statement is without merit. First, a motion for directed verdict may not be brought until the prosecution has rested its case in chief. MCR 6.419. Second, the prosecution's opening statement was adequate when the prosecutor explained the general nature of the case and the ultimate facts it proposed to present that were essential to proving defendant's participation in the killing of the victim, either as a principal or as an aider and abettor. MCR 6.414(B).

III

In his initial brief on appeal, defendant's third argument was addressed to an alleged double jeopardy violation stemming from the trial court's reconsideration of its ruling on defendant's motion for directed verdict on the first-degree murder charge. On remand, the first-degree murder conviction was vacated and defendant was convicted of and sentence for second-degree murder. In his reply brief, defendant argues that the improper submission of the first-degree charge to the jury "unfocused their attention to the key element at issue: was [defendant] present to cause the death, or was [defendant] present and shared a preconceived intent to kill." Defendant argues that submission of the first-degree charge misled the jury as to the key elements in dispute. We disagree. Clearly, the question whether the physical evidence found in the bag and the other circumstantial evidence was sufficient to establish defendant's participation in the murder beyond a reasonable doubt was the key question for the jury regardless of the degree of murder considered. We do not agree that there is a reasonable probability that submission of the first-degree charge prejudiced defendant in that he would not have been convicted of second-degree murder had the greater charge not been submitted. Thus, defendant has already been accorded all appropriate relief for the alleged double jeopardy violation, and he is not entitled to retrial of the second-degree charge.

IV

Finally, defendant argues that he was denied a fair trial by various instances of prosecutorial misconduct, including claims relating to the charges on which he was bound over, the prosecutor's motion for immediate reconsideration of the trial court's initial ruling on the directed verdict motion, and the prosecutor's comments during closing argument regarding defendant's alibi defense. Because defendant failed to timely and specifically object below to the claimed misconduct now asserted on appeal, our review is precluded unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We are convinced that a miscarriage of justice will not result in this case, and our review of the record reveals no misconduct on the part of the prosecutor that denied defendant a fair trial. *People v Bahoda*, 448 Mich 261; 531 NW2d 659 (1995). We reject defendant's arguments that the prosecutor misled the court or the jury.

V

After the initial remand, defendant filed a motion to add issues and remand, which was denied by this Court “for failure to persuade of the need for remand at this time.” We have again reviewed defendant’s motion and we are satisfied that the motion raises no meritorious issues.

Defendant’s convictions and sentences for second-degree murder and felony-firearm are affirmed.

/s/ Richard A. Griffin
/s/ Gary R. McDonald
/s/ Helene N. White