STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDRICK L. TERRY,

Defendant-Appellant.

UNPUBLISHED
March 28, 2000

No. 210718
Wayne Circuit Court
Criminal Division
LC No. 97-000790

Before: Neff, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for two counts of first-degree felony murder, MCL 750.316; MSA 28.548, and one count of armed robbery, MCL 750.529; MSA 28.797. Defendant was sentenced to two natural life terms for the first-degree felony murder convictions and ten to twenty years' imprisonment for the armed robbery conviction. We affirm defendant's convictions and sentences as to the two counts of first-degree felony murder, but vacate defendant's conviction and sentence as to the armed robbery count.

Defendant first argues that the trial court should have suppressed statements he made to police because they were involuntary and obtained in violation of his constitutional right against self-incrimination. See US Const, Am V; Const 1963, art 1, § 17; *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). We disagree. Because deference is given to the trial court's assessment of the weight of evidence and credibility of the witnesses, this Court will not disturb a trial court's ruling on a motion to suppress a statement unless the ruling is clearly erroneous. *People v Cheatham,* 453 Mich 1, 29-30; 551 NW2d 355 (1996).

With regard to defendant's first statement to Officer Williams, we believe that the statement was volunteered and not the result of custodial interrogation. While it is true that defendant was in custody, he was not being interrogated. "[I]nterrogation refers to express questioning and to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect." *People v Anderson,* 209 Mich App 527, 532-533; 531 NW2d 780 (1995). The Fifth Amendment does not bar the admission of volunteered statements. *Id.* at 532. Williams testified that defendant's statement was volunteered and not prompted by questioning.

Accordingly, *Miranda* warnings were not necessary and defendant's Fifth Amendment rights were not violated.

As to defendant's second statement, it is undisputed that defendant was read his *Miranda* rights prior to questioning. Defendant claims that the first statement was obtained in violation of his Fifth Amendment right to remain silent and that there was no intervening circumstance which could have "purged the taint" thereby rendering the second statement equally inadmissible. However, we have already concluded that the first statement was volunteered and admissible. Defendant then focuses upon the fact that Officer Williams placed him under duress by telling him that Coleman had already made a statement and that Coleman placed all of the blame on defendant. However, standing alone, Officer Williams' statement, whether true or false, was not sufficient to make defendant's subsequent admission involuntary. *People v Hicks*, 185 Mich App 107, 113; 460 NW2d 569 (1990). Defendant was read his rights prior to the second statement. He had previous experience with interrogations and could comprehend the meaning of waiving his rights to make a statement. While defendant did suffer superficial injuries from the accident, there was no indication that he was otherwise injured, intoxicated or drugged. Defendant does not claim that he was deprived of food. In fact, defendant was given an opportunity to sleep before Williams interrogated him. Under the totality of the circumstances, we conclude that defendant's waiver was knowing, intelligent and voluntary. *Cheatham, supra,* 453 Mich 27. There was simply no evidence presented which would lead to the conclusion that defendant's waiver was tainted.

Defendant next argues that the trial court abused its discretion in allowing the prosecution to use defendant's prior bad acts as evidence. We disagree. Admissibility of bad acts evidence is generally a matter within the discretion of the trial court. *People v Catanzarite,* 211 Mich App 573, 579; 536 NW2d 570 (1995).

Even evidence that is relevant may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice. *People v Mills,* 450 Mich 61, 67-68; 537 NW2d 909, modified on other grounds 450 Mich 1212 (1995). For example, use of prior bad acts as evidence that a defendant acted in conformity therewith are excluded, with certain exceptions. MRE 404(b). Knowledge and intent are two such exceptions. Character evidence and evidence of bad acts are admissible if the evidence is offered for a proper purpose, is relevant, and its probative value is not substantially outweighed by its potential for unfair prejudice. *People v VanderVliet,* 444 Mich 52, 72; 408 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the crime charged. *Id.* at 74. Thus, the evidence cannot be offered for the sole purpose to show that the defendant has a criminal propensity, but must be offered to demonstrate some relevant, noncharacter theory. *People v Gimotty,* 216 Mich App 254, 259; 549 NW2d 39 (1996).

The evidence that defendant had been involved in an armed robbery and subsequent high-speed chase with Coleman on a previous occasion was not used, as defendant argues, for the purpose of establishing defendant's poor character; rather, the evidence was relevant to the prosecution's theory of the case. It went toward defendant's knowledge and intent. In order to convict defendant of first-degree felony murder, the prosecution had to show that defendant had "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." *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995). Defendant's prior act demonstrates his intent in the present case. Because he had been involved in a similar situation, defendant could not claim that he did not realize the probable result of his behavior. Additionally, we would note that the court twice cautioned the jury as to the limited use of the evidence. Therefore, because the evidence was introduced for a proper, noncharacter purpose and because the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice, the trial court did not abuse its discretion in allowing the prosecution to introduce the evidence.

Defendant next argues that the trial court erred in failing to instruct the jury that intoxication was a defense to the armed robbery count without also instructing the jury that if it found that the specific intent necessary to commit the armed robbery was absent due to intoxication, then the verdict must be not guilty of the two counts of felony murder. We disagree. Defendant has failed to preserve the issue for appeal by failing to request a specific instruction and failing to object to the court's failure to give the instruction. MCL 768.29; MSA 28.1052; *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). We do not believe that failure to consider the issue would result in manifest injustice.

Finally, defendant argues that there was insufficient evidence presented at trial to support his convictions. We disagree. The standard for deciding a sufficiency of the evidence issue is whether a rational trier of fact, viewing the evidence in a light most favorable to the prosecution, could find the elements of the crime to have been proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Beard*, 171 Mich App 538, 541; 431 NW2d 232 (1988).

Defendant was not a principal in either the robbery or the chase that followed. This Court has held that

> [i]n order to convict one charged as an aider and abettor of a first-degree felony murder, the prosecutor must show that the person charged had both the intent to commit the underlying felony and the same malice that is required to be shown to convict the principal perpetrator of the murder. Therefore, the prosecutor must show that the aider and abettor had the intent to commit not only the underlying felony, but also to kill or to cause great bodily harm, or had wantonly and wilfully disregarded the likelihood of the natural tendency of this behavior to cause death or great bodily harm. [*People v Flowers*, 191 Mich App 169, 178; 477 NW2d 473 (1991).]

The elements of an armed robbery are "(1) an assault and (2) a felonious taking of property from the victim's person or presence while (3) the defendant is armed with a weapon described in the statute." *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). If the prosecution is unable to establish that a defendant, in fact, was armed, it is sufficient to show that the defendant used or fashioned an article in such a way as to lead a reasonable person to believe that it was a dangerous weapon at the time of the robbery. *Jolly*, *supra*, 442 Mich 465.

There was sufficient evidence to convict defendant of the underlying felony of armed robbery. Meixner testified that the man who robbed her came into the store, told her he had a gun, and kept his left hand out of sight under the counter. Meixner did not have a duty to demand to see the weapon and it was reasonable for her to believe that Coleman was, in fact, armed. Additionally, defendant admitted his role in the robbery – he was to be Coleman's look-out.

There was also sufficient evidence presented to convict defendant of both counts of first-degree felony murder. Defendant had the intent to commit the underlying felony and also showed a wanton and wilfull disregard for the natural consequences of the high-speed chase which followed. Defendant clings to the fact that he had no idea that Coleman would try to out-race police. He indicates that he wanted to get out of the car and actually encouraged Coleman to slow down. However, defendant's prior robbery with Coleman in 1996 demonstrates otherwise. It shows that defendant's intent may not have been so innocent and that he may have encouraged Coleman to elude police and also demonstrates defendant's knowledge of a possible chase. Taking the evidence in a light most favorable to the prosecution, there was sufficient evidence to convict defendant of the crimes charged.

Although defendant does not raise the issue on appeal, we vacate his conviction and sentence for the underlying felony of armed robbery for the reason that it violates defendant's right against double jeopardy. *Gimotty, supra*, 216 Mich App 259.

Affirmed in part and vacated in part.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ Henry W. Saad