STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 9, 2002
v	No. 227935 Wayne Circuit Court
RONNIE BANKS, Defendant-Appellant.	LC No. 98-013853

Before: White, P.J., and Whitbeck, C.J., and Holbrook, Jr., J.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316, assault with intent to do great bodily harm less than murder, MCL 750.84, two counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant's convictions stem from a fatal shooting that occurred at a residence located in the city of Detroit. Defendant was sentenced to concurrent terms of life imprisonment for the first-degree murder conviction, six years and eight months to ten years' imprisonment for the assault with intent to do great bodily harm less than murder conviction, and life imprisonment for each of the assault with intent to commit murder convictions. These sentences are to run consecutive to defendant's mandatory two-year term for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred in sua sponte instructing the jury on the law of aiding and abetting. Defendant asserts that the court erred because (1) the instruction was not supported by the facts adduced at trial, (2) the court did not advise defendant of its intention to give this instruction prior to defense counsel's closing argument, and (3) that the instruction given was erroneous. We disagree with all these contentions. This court reviews de novo claims of instructional error. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). Instructions are reviewed as a whole to determine if there was error requiring reversal. *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997). Even if somewhat imperfect, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried. *Id.*

Contrary to defendant's assertion, the evidence adduced at trial did support the giving of an aiding and abetting instruction. The evidence showed that defendant arrived at the site of the shooting with two other males, one identified as his minor cousin, the other as Charles

Williams.[1] The evidence also established that defendant had acted in concert with Williams during the moments when the shots were fired.

We also reject defendant's assertion that the court erred in giving the instruction without first informing defendant prior to defense counsel's closing argument. A trial court has a duty to instruct the jury on the applicable law of the case. MCL 769.29. This includes instructing the jury on matters not specifically raised or requested by counsel. As our Supreme Court observed in *People v Murray*, 72 Mich 10, 16; 40 NW 29 (1888):

> Without any requests from counsel it is the duty of the circuit judge to see to it that the case goes to the jury in a clear and intelligent manner, so that they may have a clear and correct understanding of what it is they are to decide, and he should state to them fully the law applicable to the facts. Especially is this his duty in a criminal case. . . . The court must do its duty in a criminal case, whether counsel do so or not.

See also 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 565 ("The court, of its own motion, may and should formulate instructions on issues in the case which were not covered by requests.").

In *People v Mann*, 395 Mich 472; 236 NW2d 509 (1975), our Supreme Court addressed this very issue. As in the case at hand, the jury in *Mann* had been instructed on the law of aiding and abetting even though neither side had requested the instruction. *Id*. at 475. On appeal, the defendant argued that the trial court had erred in giving the instruction without first informing him, thereby denying him the opportunity to address the issue in his closing argument. *Id.* The *Mann* Court specifically rejected this argument. *Id.* at 479.[2]

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[1] Williams was convicted in a separate trial of carrying a concealed weapon in a motor vehicle, MCL 750.227, and was sentenced to two to five years' imprisonment. Williams' conviction and sentence were affirmed by the court in an unpublished opinion issued earlier this year. *People v Williams*, unpublished opinion per curiam of the Court of Appeals, issued February 15, 2002 (Docket No. 226298).

[2] In a concurring opinion, Justice Williams disagreed with the majority on this point. Noting that CGR 1963, 516.1 stated that a trial court must inform counsel before closing arguments which requests for instructions would be granted or denied, Justice Williams concluded that

> [t]he logic behind this requirement . . . is equally applicable to *sua sponte* instructions. Thus, the trial court may and should formulate its own instructions where the requests do not adequately cover issues in the case. However, where
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> > these issues were raised prior to closing argument, these too should be reviewed with counsel "in order to argue the facts in light of the law as the court will charge the jury." [Quoting 2 Honigman, *supra* at 565.]

While we find Justice Williams' reasoning persuasive, we are nonetheless bound by the majority's holding on a matter directly raised, briefed, and addressed by the hightest court of this state.

As for defendant's assertion that the aiding and abetting instruction was flawed, defendant himself seems to concede on appeal that any flaw was timely cured by the court. Further, defendant advances no argument that despite this timely action by the court, he was nonetheless denied a fair trial. Accordingly, we find this argument to be without merit.

Next, defendant argues that the trial court erred in telling the jury that self-defense and defense of others instructions were not to be applied to the assault with intent to commit murder charges. The assault with intent to commit murder charges related to the shootings of Jacqueline Stokes, Stacey Ingram, and Jack Adams. Initially, the trial court instructed the jury that it should consider whether defendant acted in self-defense with respect to all of the charges. Then, after an apparent sidebar discussion with defense counsel, the court made the following correction: "I've been advised that the defendant did not claim that he acted in self-defense, as far as Jacqueline Stokes, Stacey Ingram and Jack Adams. He's saying he didn't do it." Defense counsel later objected. His argument was not that defendant was claiming self-defense with respect to these charges, but that the court should not have stated that defendant was arguing that "he didn't do it." Rather, defense counsel stated that defendant had "several different theories for each different shooting that occurred."

On appeal, defendant argues that the court erred when it stated that the self-defense instructions were not applicable to the assault charges. Defendant argues that in so doing, the court removed from the jury the possibility of concluding that defendant should not be held criminally responsible for misfired bullets discharged with respect to the two fatal shootings. We disagree. As instructed, the jury was free to determine that defendant had acted in self-defense with respect to the fatal shooting. If defendant had wanted the jury to also be instructed that the unintentional shooting of an innocent bystander could be justified if the shooter acted in proper self-defense, it could have done so. However, defendant cites to nothing in the record, nor have we been able to find anything in the record, that indicates that such an instruction was requested.

Assuming arguendo that the court's self-defense instruction was somewhat imperfect, we nonetheless conclude the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried. *Dumas, supra* at 396. In any event, the jury's rejection of defendant's self-defense argument with respect to the fatal shootings precludes a finding of prejudice with respect to the assault charges. If defendant did not act in self-defense when firing the fatal shots, then any misfired bullets could not have been the result of his acting in proper self-defense.

Defendant next argues that he was denied a fair trial where the trial court's comments in overruling an objection raised by defendant revealed a bias in favor of the state. We disagree. This issue was not preserved for appeal, and thus, we review for plain error. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. . . . The third requirement generally requires a showing of prejudice . . . ." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, if the three elements of the plain error rule are established, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error '"seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.'" *Id.*763,

quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

In response to defendant's objection that certain testimony was speculation, the trial court responded, "I don't believe so. Overruled." Defendant believes that this language communicates an improper prosecutorial bias. We believe the court was simply indicating its belief that the testimony objected to was not speculation. Accordingly, we find no plain error.

Next, defendant argues that the case should be remanded to the trial court for a hearing on his claim that he received ineffective assistance of counsel. Defendant asserts that counsel was ineffective for not pursuing four potential witnesses. The four are identified as defendant's cousin, Robert Reeves, Georgia Banks (defendant's sister), and James Powell. Defendant's motion to remand was denied by this court. *People v Banks*, unpublished order of the Court of Appeals, entered on May 23, 2001 (Docket No. 227935).

Defendant has not provided anything in his brief on appeal that persuades us of the need for a remand to create a testimonial record. The decision to call or not to call a witness to testify is a matter of trial strategy. *People v Rockney*, 237 Mich App 74, 77; 601 NW2d 887 (1999). The record shows that defense counsel was aware of defendant's cousin. This witness's own affidavit indicates that counsel was aware of his potential testimony and that the witness was present to testify if called. We will not substitute our judgment for that of counsel, who had the opportunity to hear and evaluate the testimony first-hand, on this clear matter of trial strategy. *Id.* As for Reeves, he indicates in his affidavit that he spoke with "a young lady" while both were incarcerated. However, he indicates that he did not know who she was at the time, and still did not know who she was when he drafted his affidavit. The same problem is found in Powell's affidavit. Powell indicates that he recalls seeing a conversation between "a fellow inmate and a female inmate." Neither the man nor the woman is identified, however.[3] Further, there is nothing in the Reeves or Powell affidavits that indicates that defense counsel was made aware of these potential witnesses. Finally, the affidavit of defendant's sister indicates that she was told by her brother that he, his cousin, and Williams "had been held hostage and robbed." She further indicates that Williams told her that he shot three people and showed her a gun. There is nothing in this potential evidence, nor that of the other three identified potential witnesses, that convinces us that a reasonable probability exists that the outcome of the proceedings would have been different had these three been called to testify. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Defendant also argues that he was denied a fair and impartial trial when the prosecutor "implicitly" requested an aiding and abetting instruction during his rebuttal closing. We disagree. As we discussed earlier, the court was within its discretion to give the aiding and

[3] There are some similarities between the Reeves and Powell affidavits that would lead to the conclusion that the woman spoken of in both is the same woman. However, this is pure speculation. Further, even assuming that she is the same woman, there is nothing to identify who she is and whom she is speaking about.

abetting instruction, and the evidence adduced at trial supported the giving of the instruction. We find nothing in the prosecutor's remarks that denied defendant a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

Finally, defendant argues that the prosecution erred in using defendant's prior inconsistent statement as substantive evidence during his closing argument. We disagree. This issue was not preserved for appeal, and thus, we review for plain error. *Carines, supra* at 763. The record shows that the trial court instructed the jury on the difference between impeachment and substantive evidence and how impeachment evidence is to be used. Moreover, there was no showing that the jury was misdirected by the prosecutor to consider the evidence as substantive evidence of defendant's guilt. Accordingly, we see no plain error.

Affirmed.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Donald E. Holbrook, Jr.