

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME ANTHONY SMITH,

Defendant-Appellant.

UNPUBLISHED

January 19, 2006

No. 257983

Wayne Circuit Court

LC No. 04-001155-02

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUFUS GENE LANGO,

Defendant-Appellant.

No. 258096

Wayne Circuit Court

LC No. 04-001155-01

Before: Cavanagh, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant, Jerome Anthony Smith, appeals as of right his jury trial convictions of felony murder, MCL 750.316(1)(b), assault with intent to commit murder, MCL 750.83, and three counts of assault with intent to rob while armed, MCL 750.89. We affirm.

Defendant, Rufus Gene Lango, appeals as of right his jury trial convictions of felony murder, MCL 750.316(1)(b), assault with intent to commit murder, MCL 750.83, three counts of assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

Smith's first issue on appeal is that his convictions for felony murder and assault with intent to commit murder were not supported by sufficient evidence. After de novo review, considering the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt, we disagree. See *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

The elements of a felony murder include:

(1) the killing of a human being, (2) with 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, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated by statute. [MCL 750.316(1)(b); *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000).]

The elements of assault with intent to commit murder include:

(1) an assault; (2) committed with an actual intent to kill; and (3) if the assault had been successful, the killing would have been a murder. [*People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).]

To convict a defendant under an aiding and abetting theory the prosecutor must prove:

(1) the crime charged was committed by defendant or some other person, (2) defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that he gave aid and encouragement. [*People v Akins*, 259 Mich App 545, 554-555; 675 NW2d 863 (2003).]

“If an aider and abettor participates in a crime with knowledge of the principal’s intent to kill or to cause great bodily harm, the aider and abettor is acting with ‘wanton and willful disregard’ sufficient to support a finding of malice.” *People v Riley (After Remand)*, 468 Mich 135, 141; 659 NW2d 611 (2003). To be convicted pursuant to an aiding and abetting theory, the intent required is the same as that necessary to convict the principal. *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001). However, due to the inherent difficulty of proving an individual’s state of mind, minimal circumstantial evidence is deemed to be sufficient. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004). Reasonable inferences that arise from the evidence and circumstantial evidence comprise satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Here, sufficient evidence exists to sustain Smith’s convictions. Smith acknowledged to police that he was the driver of the vehicle involved in the killing of Z’Ante McDonald. Smith indicated that the same individual, alleged by Smith in his statement to police as the gunman in McDonald’s shooting, had told him previously of perpetrating robberies in which he shot the victims. In describing the events preceding the shooting of McDonald, although Smith stated that “[t]he robbery wasn’t planned,” he acknowledged that he was driving the vehicle knowing he and the passengers “were peeping the parking lot of the bar looking for a victim.” Smith waited in the vehicle until the gunman returned from shooting and then drove off, fleeing the scene. Smith reported to police that he had been involved in previous robberies with the individuals involved in McDonald’s murder, indicating his knowledge of the individuals being armed and engaging in a pattern of robberies that included shooting the victims. The statement of a subsequent witness to police further implicated Smith by indicating Smith had knowingly

participated in a robbery attempt. The witness reported having observed Smith with Lango on prior occasions, suggesting some level of relationship between these individuals.

Based on the above, a jury could reasonably infer that Smith willfully disregarded the potential or likelihood that his actions would result in great bodily harm being inflicted on the victims in this crime. Smith performed acts that assisted in the commission of the charged crimes, intended the commission of the crimes and had knowledge that the others involved intended to commit a criminal act at the time Smith rendered assistance. See *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004). It was for the trier of fact to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to those inferences. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). Further, it was the province of the jury to determine the credibility attributable to witnesses and the weight accorded to their testimony. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). In sum, viewed in a light most favorable to the prosecution, the evidence was sufficient for the jury to conclude beyond a reasonable doubt that Smith was guilty of felony murder and assault with intent to commit murder.

Smith and Lango both assert the trial court erred in permitting the admission into evidence of prior bad acts in violation of MRE 404(b). Specifically, they argue that the admission of their statements to police detailing their involvement in other criminal events was improper. A trial court has discretion to determine whether evidence is admissible, and the decision of the trial court should be reversed only if it is demonstrated that the trial court clearly abused its discretion. *People v Smith*, 243 Mich App 657, 669; 625 NW2d 46 (2000).

MRE 404(b) prohibits the use of other acts evidence to prove the character of a person but permits the admission of such evidence when it is (1) offered for a proper purpose, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403. *People v Starr*, 457 Mich 490, 496-498; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). When a court determines that 404(b) evidence may be admitted “the trial court, upon request, may provide a limiting instruction.” *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). However, MRE 404(b) is a rule of inclusion that contains a nonexclusive list of “noncharacter” grounds on which such evidence may be admitted. *Starr*, *supra* at 496.

Here, the evidence was admitted for the proper purpose of showing “the same type of scheme” and that the uncharged crimes were of a “similar nature.” See *People v Knox*, 469 Mich 502, 509-510; 674 NW2d 366 (2004). Importantly, although two of Smith’s statements to police identify Lango as being involved in similar robberies, when Smith discussed McDonald’s murder, his statement is exculpatory with regard to Lango. Smith identifies a different gunman in the shooting of McDonald and Lango is not mentioned either directly or by inference. In the two statements by Smith to police that involved Lango, he was not identified as a gunman in either enterprise. Smith has little to complain of regarding the admission of statements by Lango to police. Lango did not identify or implicate Smith in any criminal activity or enterprise. Predominantly, the prior bad acts evidence admitted was through each defendant’s acknowledgement of their own culpability in other criminal events of a similar nature to the charged crimes.

Further, evidence of the prior robberies was logically relevant to demonstrate that the charged act occurred, and that defendants committed the charged offense, because the uncharged misconduct and the charged offense were sufficiently similar to support an inference that they were manifestations of a common plan, scheme or system. See *Sabin (After Remand)*, *supra* at 63. Both Smith and Lango acknowledged their own involvement in uncharged robberies that followed the same plan as the incident that resulted in McDonald's death. Their statements demonstrated that both were knowledgeable regarding what would transpire and that each possessed the necessary mens rea. When other acts evidence is offered to demonstrate intent, logical relevance dictates only that the charged crime and the proffered other acts "are of the same general category." *Vandervliet*, *supra* at 79-80. As such, a review of the record indicates that the prior bad acts evidence of the uncharged robberies was relevant and offered for the proper purpose of showing motive, opportunity and identity.

Smith also contends the trial court's determination to admit the prior bad acts evidence was error based on its failure to indicate on the record how it balanced the prejudicial effect of the evidence against its probative value, effectively denying him due process. Impliedly, the trial court did indicate a balancing of these factors by noting it determined the uncharged acts to be probative of a "scheme or plan," while also denoting it would require redaction of certain information in an effort to diminish any prejudice inherent in the evidence. In any event, Smith's claim is without merit because the Supreme Court has never required the trial courts to make this determination on the record. *Smith*, *supra* at 675, quoting *People v Vesnaugh*, 128 Mich App 440, 448; 340 NW2d 651 (1983). The trial court also provided a limiting instruction to the jury, cautioning them not to infer bad character or that either Smith or Lango acted in conformity with that bad character to determine whether they committed the charged offenses.

Furthermore, the admission of the prior bad acts evidence was of little consequence. Smith's statement to police directly implicated him in the events surrounding McDonald's murder. Lango was clearly identified as the gunman by one of the robbery victims. Based on these facts, in addition to the other admissible evidence and the limiting instruction provided by the trial court, Lango cannot prevail on his assertion that he was deprived of effective assistance of counsel because his counsel failed to object to the prior bad acts evidence. Contrary to his representations, Lango's counsel did object to the admissibility of the prior bad acts evidence. Even if Lango's trial counsel had failed to object, Lango is unable to demonstrate a reasonable probability that the outcome of trial would have been different given his identification as the gunman by an eyewitness to the event. See *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Lango next contends he was deprived of due process and a fair trial because the police failed to videotape his interviews. Although Lango raised this issue in his motion for new trial, the issue is unpreserved because he did not object at trial to the admission of his statement to police on this ground. See *People v Geno*, 261 Mich App 624, 626; 683 NW2d 687 (2004). Therefore, our review is for plain error affecting his substantial rights. *Carines*, *supra* at 763, 773.

Although Lango cites cases from other jurisdictions, he ignores the fact that *People v Fike*, 228 Mich App 178, 186; 577 NW2d 903 (1998), constitutes binding precedent in Michigan with regard to the admissibility of unrecorded custodial statements to police by a defendant. In accordance with Michigan law, the mere failure to electronically record an interrogation by

police, even if such recording is feasible, is not a constitutional violation of a defendant's right to due process. *Id.* at 183-185.

Lango also argues that the trial court erred in excluding as evidence a statement by a nontestifying witness that was made to police regarding her observations shortly after the shooting. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001).

During trial Smith sought admission of a statement by the bartender, that was made after the shooting, which indicated that she observed two white males kicking McDonald. The two white males were not identified and there existed no other testimony or evidence substantiating the bartender's observation. The prosecutor objected to introduction of the statement as inadmissible hearsay, and the trial court sustained the objection. Lango now contends that this testimony was admissible as either a present sense impression or excited utterance, and was relevant because it was potentially exculpatory, providing an alternative version of how events occurred that resulted in McDonald's death.

The evidence was not relevant. Relevant evidence is defined as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). In this instance, no testimony or evidence was presented regarding the identity of the individuals allegedly observed by the bartender. Although Lango implies that the individuals observed were two of the robbery victims, no testimony existed to support this assertion or to demonstrate that, even if the alleged acts had occurred, that it altered the cause of death. The bartender indicated she observed two unidentified males kicking McDonald. Both Lango and Smith failed to inquire, at trial, of any witness whether they engaged in the asserted physical contact with McDonald. Hence, the statement was not admissible for an impeachment purpose in accordance with MRE 608(b) or MRE 613(b).

Further, neither Lango nor Smith demonstrated that the bartender's statement was admissible as a present sense impression, i.e., "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." MRE 803(1). The prosecutor asserts that admission of the statement would constitute improper bootstrapping of evidence pursuant to *People v Hendrickson*, 459 Mich 229, 235; 586 NW2d 906 (1998). In accordance with the prosecutor's argument, it would be improper to use the statement to substantiate the occurrence of an event, which required independent proof, either through direct or circumstantial evidence, that the underlying event actually occurred. *Id.* at 238. Based on the failure of Lango or Smith to independently substantiate the occurrence of the alleged event, there was no basis to introduce the statement as a present sense impression.

Lango also contends the trial court erred in failing to admit the statement into evidence as an excited utterance, i.e., "a statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition." MRE 803(2). But, even if the statement was admissible under this exception, its exclusion, at most, would constitute harmless error. There is no dispute regarding McDonald's cause of death or the mechanism that resulted in his death. Lango is attempting here to raise an issue regarding the

manner of McDonald's cause of death and the identity of the perpetrator. However, the bartender's alleged observation of two white males kicking McDonald, after the shooting, while on the ground, does not serve to contradict eyewitness testimony and the coroner's report regarding the manner of McDonald's death or the identity of the gunman. Thus, Lango has failed to demonstrate that the failure to admit this statement was outcome determinative. See *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001).

Finally, Lango contends the trial court erred in the manner used for redaction of his name from statements presented into evidence, rendering the redaction ineffectual. The issue regarding ineffectual redaction is waived based on counsel for Lango affirmatively concurring with the form of the redacted statement for trial. "A defendant may not waive objection to an issue before the trial court and then raise the issue as an error on appeal." *Aldrich, supra* at 111.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Joel P. Hoekstra

/s/ Jane E. Markey