STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALDO OLLIE,

Defendant-Appellant.

UNPUBLISHED
January 10, 2008

No. 272247
Wayne Circuit Court
LC No. 06-003879-01

Before: Jansen, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted of first-degree murder, MCL 750.316,[1] arson of a dwelling house, MCL 750.72, first-degree home invasion, MCL 750.110a(2), and assault with intent to murder, MCL 750.83. He was sentenced to life imprisonment without parole for the first-degree murder conviction, 10 to 20 years' imprisonment for the arson conviction, 10 to 20 years' imprisonment for the home invasion conviction, and 15 to 30 years' imprisonment for the assault with intent to murder conviction. Defendant appeals as of right. We affirm defendant's convictions and sentences for first-degree murder, first-degree home invasion, and assault with intent to murder, but vacate his conviction and sentence for arson of a dwelling.

Defendant argues that the evidence was insufficient to support his convictions of first-degree premeditated murder, felony murder, arson of a dwelling, and assault with intent to murder, as either the principal or as an aider and abettor.[2] We disagree. This Court reviews claims of insufficient evidence de novo, viewing the evidence in the light most favorable to the prosecution, to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

[1] Defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a) and first-degree felony murder, MCL 750.316(1)(b), but these two convictions were merged into one first-degree murder conviction.

[2] Defendant does not challenge the sufficiency of the evidence with regard to his conviction for home invasion.

This Court applies the clearly erroneous standard to the trier of fact's assessment of credibility. *People v McCray*, 245 Mich App 631, 640; 630 NW2d 633 (2001). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Circumstantial evidence and reasonable inferences that arise from it can establish elements of a crime beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

The elements necessary to convict a defendant as an aider and abettor are "(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement." *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (Brackets in original). Additionally, "a defendant is liable for the crime the defendant intends to aid or abet as well as the natural and probable consequences of that crime." *Id.* at 14-15 (Footnote omitted).

To establish first-degree premeditated murder, the prosecution must show that the defendant intended to kill the victim and the killing was accompanied by premeditation and deliberation. *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007). Premeditation and deliberation can be established with evidence of "(1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). Premeditation and deliberation, for purposes of a first-degree murder conviction, require "sufficient time to allow the defendant to take a second look." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). To establish first-degree premeditated murder under an aiding and abetting theory, the prosecution must show that defendant either had the premeditated or deliberated intent to kill Lornette Lee or gave aid knowing that the principal had such intent. *People v Usher*, 196 Mich App 228, 232-233; 492 NW2d 786 (1992), overruled on other grounds *People v Perry*, 460 Mich 55; 594 NW2d 477 (1999).

Defendant contends that the prosecution did not present evidence that defendant personally bound Lee, doused her and her house with gasoline and set her and her house on fire, or that he gave aid and assistance to the principal with either an intent to commit the murder or knowledge that the principal intended to commit a murder. However, the prosecution did not need to show that defendant personally engaged in any of the crimes, but rather, only needed to show that defendant aided the principal. We hold that the prosecution did present evidence that would allow a jury to find that defendant aided the principal. Lillie Triggs testified that defendant aided the group by forcing his way past Lee and into Lee's home. She was positive in her identification of him and stated that he was the first one in the door at Lee's house.

Evidence was also presented that the fire was intentionally started with gasoline. A jury could infer from the evidence that the group brought the gasoline with them since Triggs testified that the house did not smell like gasoline before the group arrived. Furthermore, defendant would presumably be aware that the group had gasoline with them, and therefore, would have had knowledge that the principal intended to commit the arson. Detroit Police Officer Roger McGee testified that his accelerant-sniffing dog alerted to accelerants throughout Lee's

residence. Captain El Don Parham of the Detroit Arson Department testified that there were "flash" indications around the perimeter of the dining room, there was no connection or trail between the downstairs and upstairs fires, and there were trail patterns in the downstairs area between the front foyer, living room and dining room, which all indicate that an accelerant was used. Both McGee and Parham smelled gasoline in Lee's house.

The circumstances of the killing establish a premeditated and deliberate intent to kill Lee. Officers arriving on the scene testified that Lee had duct tape around her head and she smelled like gasoline or kerosene. Therefore, a jury could find that someone in the group wanted to prevent Lee from escaping the fire and poured an accelerant directly on her. The time it took to restrain Lee and douse her with an accelerant would provide the killer sufficient time to "take a second look," allowing the jury to conclude that the intent to kill was premeditated and deliberate. Because defendant aided his comrades by forcing his way into Lee's house, and because a jury could infer that defendant did not simply leave after forcing his way into the house, it could reasonably find that defendant aided and abetted the crime. Consequently, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that defendant was guilty of aiding and abetting the first-degree premeditated killing of Lee.

The required elements to convict under first-degree felony murder, MCL 750.316, are (1) the killing of a human being, (2) with malice, (3) while committing, attempting to commit, or assisting in the commission of specified felonies. *Carines, supra* at 758-759. Having malice is having 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. *Id.*

The prosecution must prove the elements of the underlying felony in order to prove the corresponding felony murder. In this case, the underlying felony is arson of a dwelling. To prove arson of a dwelling, the prosecution must show that the defendant willfully or maliciously burned a dwelling house, its contents, or any building within its curtilage. *People v Barber*, 255 Mich App 288, 294-295; 659 NW2d 674 (2003); MCL 750.72. Arson is usually proven through circumstantial evidence since it is rare to have eyewitnesses to the crime. *People v Nowack*, 462 Mich 392, 402-403 n 2; 614 NW2d 78 (2000). Thus, to convict defendant of felony murder on an aiding and abetting theory, the prosecution had to show that defendant (1) performed acts or gave encouragement that assisted in the willful or malicious burning of Lee's house, (2) with the intent to kill Lee, to do great bodily harm to her, or to create a high risk of death or great bodily harm to her with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the willful or malicious burning of Lee's house. See *Carines, supra* at 758-759.

The evidence was sufficient for a jury to find that defendant either committed or aided and abetted the intentional burning of Lee's residence. The prosecution can establish the mens rea of felony murder by showing that either the aider and abettor or the principal had the intent to create a high risk of death or great bodily harm to the victim with knowledge that death or great bodily harm was the probable result. In the instant case, defendant would have known that the intent of the principal was to set fire to Lee's house and that Lee was in the house since she answered the door. Thus, defendant would have had knowledge that setting Lee's house on fire while occupied by Lee would cause death or great bodily harm to her. Viewing the evidence in the light most favorable to the prosecution, *Tombs, supra*, a rational trier of fact could find

beyond a reasonable doubt that defendant was guilty of the felony murder of Lee and the arson of Lee's house.

Assault with intent to murder, MCL 750.83, requires a showing of an assault, with an actual intent to kill, which, if successful, would make the killing murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Elements of the crime, including intent, can be proven beyond a reasonable doubt using circumstantial evidence and reasonable inferences. *Id*.

Defendant was convicted of assault with intent to murder Triggs under the transferred intent doctrine, which holds that a defendant can be convicted of an offense against a person where the defendant's actual intent was to commit an offense against a different person. *People v Lovett*, 90 Mich App 169, 171; 283 NW2d 357 (1979). Defendant contends that there is no evidence that he was involved in the commission of arson or that he possessed or shared any intent to assault Lee that could be transferred to Triggs. However, there was sufficient evidence to show that defendant aided and abetted in the arson and the murder of Lee. Combining the doctrine of transferred intent with aiding and abetting principles, defendant can be convicted of an offense against an unintended victim where defendant aided and abetted the offense against the intended victim. See *People v Lawton*, 196 Mich App 341, 350-351; 492 NW2d 810 (1992) (the defendant could properly be convicted of assaulting an individual he was unaware of and did not specifically intend to harm regardless of whether he is also convicted of an offense against his intended victim.) Thus, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that defendant assaulted Triggs with the intent to murder her under the theory of transferred intent.

Defendant next argues that the trial court erred by refusing to adjourn the trial until defense witness Lynton Hurt arrived. We disagree. This Court reviews a trial court's decision to grant or deny an adjournment for an abuse of discretion. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000).

A party must show good cause to invoke a trial court's discretion to grant an adjournment. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002); MCR 2.503(B)(1). Pursuant to MCR 2.503(C)(2), "An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence." *Id*. at 276-277; *People v Coy*, 258 Mich App 1, 18; 669 NW2d 831 (2003).

The trial court attempted to determine the materiality of Hurt's testimony by questioning defense counsel in detail regarding the proposed testimony but did not see how Hurt's testimony would help defendant. The court waited until 1:00 p.m. on the last day of trial for the witness to arrive. We agree with the trial court that Hurt's testimony that defendant was not "Fat Cat" would not be material to any issue at trial given that Triggs identified defendant in a photograph. Furthermore, Hurt's testimony regarding what Triggs knew about codefendant Deshon Stokes's involvement in the crime would not be material to any issue at trial because, as stated by the trial court, Stokes was not on trial.[3] Additionally, Hurt's testimony that Triggs said she did not know

[3] Stokes was convicted in a separate trial of first-degree premeditated murder, felony murder, (continued…)

Stokes was involved in the fire corroborates Triggs's testimony that she told everyone that she did not know who was involved in the fire. Thus, the trial court did not abuse its discretion by refusing to delay the trial until Hurt was located.

Defendant next argues that he was denied his right to present a defense where the trial court failed to compel Hurt to testify and the prosecutor failed to reasonably assist defendant in locating Hurt. We disagree. This Court reviews an unpreserved claim for plain error affecting a defendant's substantial rights. *Carines*, *supra* at 763-764.

Pursuant to MCL 767.40a(5), the prosecutor must provide reasonable assistance to locate and produce witnesses that the defense requests. See *People v Long*, 246 Mich App 582, 585-586; 633 NW2d 843 (2001). The prosecutor was informed of Hurt's absence on the same day that Hurt was scheduled to testify. Defense counsel had sent people out to Hurt's residence but they were told that Hurt was not there. The prosecutor offered to assist in locating Hurt. The prosecutor made several phone calls to law enforcement and to Hurt's residence in attempts to locate him. A woman at Hurt's residence said Hurt would not be coming to court. As the prosecutor stated, law enforcement officers would not be able to do anything more than defense counsel's people did, which was knock at the door and ask for Hurt, except police officers could state that they had a bench warrant for Hurt's arrest. Under these circumstances, the prosecutor's efforts were reasonable.

Defendant also claims that his right to compulsory process was violated because the trial court failed to require the prosecutor to assist defendant in locating Hurt. "The Compulsory Process Clause of the Sixth Amendment guarantees every criminal defendant the right to present witnesses in their defense." *People v McFall*, 224 Mich App 403, 407; 569 NW2d 828 (1997). A trial court must compel the attendance of a witness upon a defendant's showing that the witness's testimony is both material and favorable to the defense. *Id*. at 408-409.

We conclude that defendant was not denied his right to compulsory process. First, Hurt's testimony was not material and would not necessarily benefit defendant. Second, defendant did not notify the court that Hurt was not present until the day Hurt was supposed to testify. Third, the trial court issued a bench warrant for Hurt. Defendant does not state what more, other than issuing a bench warrant, the trial court could have done to bring Hurt to court.[4]

Defendant next argues that his conviction and sentence for arson must be vacated because arson was the underlying felony of his felony murder conviction. We agree. A conviction and sentence for first-degree felony murder as well as the underlying felony violates the state

(…continued)

arson, first-degree home invasion, and assault with intent to murder.

[4] Defendant further states that when Hurt eventually appeared at court during closing arguments, he "was ejected for attempting to notify the court of his arrival." However, defendant mischaracterizes Hurt's actions. Review of the record reveals that the court officer removed Hurt from the courtroom because he was disruptive. The trial court noted that Hurt appeared to be "whacked out" and questioned whether he was competent to testify in light of his condition. Under the circumstances, defendant is not entitled to relief based on this issue.

constitutional prohibition against double jeopardy. *People v Wilder*, 411 Mich 328, 342; 308 NW2d 112 (1981). Consequently, a defendant cannot be convicted of both felony murder and the predicate felony. We vacate defendant's conviction and sentence for the predicate felony of arson. See *People v Herron*, 464 Mich 593, 609; 628 NW2d 528 (2001) ("[I]t is an appropriate remedy in a multiple punishment double jeopardy violation to affirm the conviction of the higher charge and to vacate the lower conviction.").

Defendant next argues that he cannot be convicted of assault with intent to murder Triggs under the theory of transferred intent because he was already convicted of the murder of Lee. We disagree. This Court reviews an unpreserved claim for plain error affecting a defendant's substantial rights. *Carines*, *supra* at 763-764. Questions of law are reviewed de novo. *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007).

The doctrine of transferred intent holds:

> 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 guilty of the murder of C. [*Lovett*, *supra* at 171.]

Furthermore, in cases where A aims at and hits B but also accidentally hits C, A is guilty of offenses against both B and C. See *Lawton*, *supra* at 350-351; *Lovett*, *supra* at 169.[5] In other words, ignorance of the presence of individuals other than the intended victim does not preclude the defendant's conviction for the crime against both the intended victim and the unintended victims. *Id.* Thus, for a defendant to be convicted of assault with intent to murder, he need only have the intention to cause great bodily harm to "someone." *Id*. at 351. "It is only necessary that the state of mind exist, not that it be directed at a particular person." *Id*.

Defendant claims that he had no knowledge that Triggs was in the house, and therefore, he cannot be convicted of assault with the intent to murder Triggs because he did not intend to kill her, and he was already convicted of the intentional killing of Lee, his intended victim. However, *Lawton*, *supra* at 351, 356, holds that a defendant can be convicted of assaulting an individual he was unaware of and did not specifically intend to harm regardless of whether he is also convicted of an offense against his intended victim. Thus, defendant was properly convicted of assault with intent to murder Triggs even though he may have been unaware of her presence and she was not his intended victim.

Defendant next argues that he was denied a fair trial because the prosecutor improperly vouched for Triggs and appealed to the civic duty of the jury. We disagree. Unpreserved claims

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[5] Defendant argues that the holdings in *Lawton* and *Lovett* should not be followed because they fail to follow the holding of the Supreme Court in *People v Ochotski*, 115 Mich 601, 610; 73 NW 889 (1898). However, the facts of *Ochotski* do not involve transferred intent, but rather, involve a purposeful assault against two people where the defendant attempted to argue that he could not be tried twice for the same transaction. Thus, *Ochotski* is distinguishable from the instant case.

of prosecutorial misconduct are reviewed for plain error that affected defendant's substantial rights. *Carines, supra* at 774. The test of prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct claims are decided case by case, and the prosecutor's remarks are evaluated in context. *Id*.

Defendant complains that the prosecutor improperly vouched for Triggs's credibility when the prosecutor remarked in her opening statement, "She's going to be honest with you." However, defendant takes the remark out of context. The prosecutor's entire comment was that Triggs "used cocaine and marijuana, but she wasn't over at [Lee's] house for that reason, but she's going to be honest with you and tell you that she used to do [drugs] back then." Read in context, the remark did not vouch for Triggs's credibility, but rather, indicated that Triggs did drugs in the past and would be honest with the jury about that fact.

Defendant claims that the prosecutor vouched for the credibility of Detective Derryck Thomas and paramedic Dwayne Dixon in her rebuttal to defendant's closing argument by stating, "[T]hese officers didn't make a mistake," and "Dwayne Dixon wasn't lying to you." A prosecutor may state an opinion regarding whether a witness is worthy of belief, as long as the prosecutor relates that opinion to the evidence of the case and does not invoke the authority of executive offices. *People v Bahoda*, 448 Mich 261, 286-287; 531 NW2d 659 (1995). Furthermore, otherwise improper comments of the prosecutor may not require reversal if they address issues raised by the defendant. *People v Jones*, 468 Mich 345, 353-354; 662 NW2d 376 (2003). Here, defense counsel's closing argument contained comments about the possibility that officers made mistakes in identifying Triggs as the person with duct tape around her wrists. Consequently, the prosecutor's comments about the officers' alleged mistakes and whether Dixon was lying were proper in that they did not reference the prosecutor's office and they addressed issues brought up by defendant in closing argument.

Next, defendant claims that the prosecutor made an improper civic duty appeal to the jury in her closing argument by stating, "You all know he did that and you need to come back with a guilty verdict to make him accountable for his behavior," and Triggs is "entitled to it." "Prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jury members . . . ." *Bahoda, supra* at 282. Civic duty arguments may improperly cause a jury to debate issues that are broader than the guilt or innocence of the accused. *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005). Comments of the prosecutor based on inferences drawn from evidence are permissible. *Bahoda, supra* at 282.

Regarding the jury's need to return a guilty verdict, defendant takes the prosecutor's comments out of context. Read in context, the prosecutor was making a proper inference from the evidence and relating it to defendant. The prosecutor did not appeal to any issues broader than defendant's guilt and did not specify any social problems that the jury would be helping to eliminate as part of their civic duty by convicting defendant.

Regarding the prosecutor's comment that Triggs is "entitled to it," again defendant takes the remark out of context. The prosecutor stated, in full, "And those pictures aren't to promote sympathy, because this is not just a case number and not only are you entitled to know that these – that was a real human being, she's entitled to it." The prosecutor's comment was in response to defense counsel's closing argument, where defense counsel remarked that the jury was shown

pictures of Lee and Triggs to "promote sympathy." Therefore, we hold that the prosecutor's comment did not improperly appeal to the jury's civic duty.

Finally, defendant argues that he was denied the effective assistance of counsel because his counsel failed to object to Triggs's identification of him in a photographic lineup when he allegedly was in custody. We disagree. When reviewing an unpreserved claim of ineffective assistance of counsel, this Court's review is limited to mistakes apparent on the record. *Rodriguez*, *supra* at 38. Defense counsel is not required to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Defendant contends that he was in custody at the time Triggs identified him in a photographic lineup, and therefore, an in-person identification should have occurred for which counsel should have been present. However, there is no indication that Triggs had personal knowledge of the date of defendant's apprehension. Moreover, police testified that defendant was taken into custody after the date asserted by Triggs. Review of the lower court record reveals that defendant was not in custody on the date of the identification by Triggs. Accordingly, defendant was not denied the effective assistance of counsel.

We affirm defendant's convictions and sentences for first-degree murder, first-degree home invasion, and assault with intent to murder, but vacate his conviction and sentence for arson.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood