

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARSHALL JOHNSON,

Defendant-Appellant.

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UNPUBLISHED

November 25, 2008

No. 272750

Wayne Circuit Court

LC No. 01-010804-01

Before: Wilder, P.J., and Borrello and Beckering, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), possession of a firearm during the commission of a felony, MCL 750.227b, and possession of a firearm by a felon, MCL 750.224f. He was sentenced to life imprisonment for the murder conviction, and 23 to 60 months' imprisonment for the felon-in-possession conviction, with those sentences to be served concurrently, but consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first argues that the evidence was insufficient to support his murder conviction, or alternatively, that his murder conviction is against the great weight of the evidence.

In reviewing a sufficiency of the evidence issue, this Court reviews the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000).

A new trial may be granted on any ground that would support appellate reversal of a conviction, MCR 6.431(B), including that a conviction is against the great weight of the evidence. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). We review the trial court's decision denying defendant's motion for a new trial on this ground for an abuse of discretion. *Id.* An abuse of discretion will be found only where the denial of the motion was "manifestly against the great weight of the evidence." *Id.* (citation omitted). Conflicting testimony and questions of witness credibility are insufficient grounds for granting a new trial. *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998). "Unless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value

or that the jury could not believe it' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id.* at 645-646 (citations omitted).

To establish first-degree premeditated murder, the prosecutor must prove that the defendant intentionally killed the victim with premeditation and deliberation. *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007), lv pending. Defendant argues that the evidence failed to prove that he killed the decedent. We disagree.

Defendant was convicted for his involvement in the shooting death of Richard Morris. The evidence at trial showed that defendant was driving a Jeep with three other passengers when he observed Morris on the street. Defendant asked the passengers in the Jeep if they wanted to "get" Morris, and then pulled the Jeep alongside Morris. According to the passengers in the Jeep, defendant produced a gun and attempted to fire shots at Morris, but the gun did not immediately fire. Defendant then tried firing again and was able to fire several shots. Another passenger in the Jeep also had a gun and fired shots at Morris. Although Morris was shot several times, only one bullet was recovered from Morris's body, from inside his chest. The police determined that the bullet was fired from the same gun that defendant had in his possession at the time of his arrest. After he was arrested, defendant gave a statement to the police in which he admitted that he shot Morris for revenge, intending to kill him.

Defendant argues that the evidence showed that Morris died from a gunshot wound to his neck, which was inflicted before he fired any shots at Morris and, therefore, he did not cause Morris's death. However, codefendant Smith testified that defendant was the first person to shoot Morris. The credibility of Smith's testimony was for the jury to resolve. *Abraham, supra* at 270. Further, the pathologist opined that the shot to the neck may not have been the first one, because it would have caused Morris to fall and it appeared that Morris received his other wounds while he was in an upright position. But regardless of whether defendant was the first or second shooter, and regardless of whether defendant fired the fatal shot, the evidence supported his conviction under an aiding and abetting theory.

To support a finding that a defendant aided and abetted a crime, the prosecutor must show that (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 he gave aid and encouragement. An aider and abettor's state of mind may be inferred from all the facts and circumstances. *People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999).

The evidence established that it was defendant who first suggested to the other passengers in his car that they "get" Morris. Defendant also was the first person to produce a gun and defendant pulled his vehicle alongside Morris, enabling a clear shot at Morris. Defendant also admitted to the police that he intended to kill Morris. Even if one of the other passengers in the car fired the actual shot that killed Morris, the evidence showed that it was defendant who initiated the incident and assisted in its commission by pulling his vehicle alongside Morris. Further, defendant's statement that he intended to kill Morris shows that he intended the commission of the crime. Thus, viewed in a light most favorable to the prosecution, the evidence was sufficient to support defendant's conviction for first-degree murder.

Additionally, defendant's conviction is not against the great weight of the evidence and, therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Next, defendant argues that his dual convictions for possession of a firearm during the commission of a felony, and possession of a firearm by a person convicted of a felony, violate the double jeopardy protection against multiple punishments for the same offense. But as defendant concedes, our Supreme Court expressly considered and rejected this argument in *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003). *Calloway* concluded that the Legislature intended to provide an additional penalty and sentence for possession of a firearm during commission of a felony, even when a defendant is convicted of being a felon in possession of a firearm. We are not at liberty to reject *Calloway*. Accordingly, we reject this claim of error.

Defendant next argues that the trial court erred by denying his request to instruct the jury in accordance with CJI2d 16.15. This Court reviews jury instructions as a whole to determine if there is error requiring reversal. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). Jury instructions must include all elements of the charged crimes and must not exclude material issues, defenses, and theories if the evidence supports them. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Defendant argues that because there was evidence that another passenger in his car may have fired the shot that killed Morris, the trial court should have given CJI2d 16.15, which provides that there may be more than one cause for a decedent's death and that in order for the jury to find that the defendant caused the decedent's death, it must find that the decedent's death was the natural or necessary result of the defendant's act. We disagree.

As previously explained, even if another passenger in defendant's vehicle fired the fatal shot, defendant properly could be convicted under an aiding and abetting theory because he intended and facilitated the commission of the crime by suggesting that they "get" Morris, pulled his vehicle alongside Morris, and produced a gun which he aimed at and attempted to shoot Morris, eventually succeeding in doing so. The use notes for CJI2d 16.15 specifically provide that the instruction is not to be used in cases, as here, involving aiding and abetting or concert of action. While the use notes to the jury instructions are not binding authority (indeed, the standard criminal jury instructions themselves are not binding authority, *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985)), here we find the notes persuasive, and adopt them as our rule of decision on this issue. Thus, the trial court properly denied defendant's requested instruction.

Defendant next argues that his police statement should have been suppressed because he was too intoxicated to knowingly waive his rights and voluntarily give a statement. We disagree.

A statement obtained from a defendant during a custodial interview is admissible only if the defendant knowingly and intelligently waived the privilege against self-incrimination protected by the Fifth Amendment. *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). Whether a suspect has knowingly and intelligently waived his Fifth Amendment privilege depends on the totality of the circumstances, including the defendant's intelligence and capacity to understand the warnings given. *People v Daoud*, 462 Mich 629, 636; 614 NW2d 152 (2000). A trial court's findings concerning the circumstances surrounding the giving of a statement are factual findings that are reviewed for clear error. *People v Coomer*, 245 Mich App 206, 218-219; 627 NW2d 612 (2001).

Although defendant argues that he did not knowingly and intelligently waive his Fifth Amendment privilege because he was under the influence of alcohol and drugs, the interrogating police officer testified that defendant did not have any difficulty talking, did not slur his speech or words in any way, answered questions in a coherent fashion, appeared in control of his faculties, and did not exhibit any signs of being under the influence of alcohol or the effects of narcotics. The trial court found that the quantity of drugs and alcohol that defendant claimed he consumed was not credible, especially because defendant had an “exceedingly clear recall of everything that occurred.” The totality of the circumstances supports the trial court’s conclusion that defendant knowingly and intelligently waived his Fifth Amendment privilege. Accordingly, defendant’s motion to suppress properly was denied.

Finally, defendant asserts that he was deprived of his constitutional right to counsel, because his appointed defense counsel was ineffective, by failing to object to the trial court’s jury instructions. We disagree.

We begin, naturally, with the constitutional texts. The United States Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.” US Const, Am VI. Similarly, the Michigan Constitution provides: “In every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his or her defense . . . .” Const 1963, art 1, § 20. It is well established that these provisions not only protect the right of an accused to hire counsel, but affirmatively require the government to provide counsel for the defense of an indigent accused. In addition, these provisions have been interpreted, under the common law of the constitution, to require that the attorney provided by the government must provide “effective” assistance. E.g., *Strickland v Washington*, 466 US 668; 104 S Ct 2052, 80 L Ed 2d 674 (1984); *Schriro v Landrigan*, 550 US 465; 127 S Ct 1933, 1939; 167 L Ed 2d 836 (2007).

A constitutional claim of ineffective assistance of counsel is reviewed under the standard established in *Strickland*, which requires the defendant to show that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney guaranteed under the Sixth Amendment. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). The right to counsel under the Michigan Constitution does not impose a more restrictive standard than *Strickland*. *People v Pickens*, 446 Mich 298, 318-319; 521 NW2d 797 (1994).

Effective assistance of counsel is presumed and defendant bears the burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To succeed on a claim of ineffective assistance of counsel, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). The defendant bears a “heavy burden” on these points. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). “This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” *Garza, supra*, at 255.

Viewed in context, the trial court did not instruct the jury that defendant caused Morris's death or that Morris died as a result of gunshot wounds. Rather, the trial court's instructions conveyed that these were issues that the prosecutor was required to prove beyond a reasonable doubt. Because the instructions were not improper, defense counsel was not ineffective for failing to object. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Affirmed.

/s/ Kurtis T. Wilder  
/s/ Stephen J. Borrello  
/s/ Jane M. Beckering