

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
July 28, 2011

v

PHILLIP JAMES YOKLEY,
Defendant-Appellant.

No. 295665
Wayne Circuit Court
LC No. 09-017094-FC

Before: K.F. KELLY, P.J., and BORRELLO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder (predicated on larceny), MCL 750.316(1)(b), and delivery of Xanax, MCL 333.7401(2)(c).¹ Defendant was sentenced to life imprisonment for the felony murder conviction and two to four years' imprisonment for the delivery of Xanax conviction. For the reasons set forth in this opinion, we affirm.

The jury convicted defendant of aiding and abetting felony murder predicated on larceny. Defendant argues that there was insufficient evidence to find him guilty of felony murder. When reviewing a claim of insufficient evidence, we review the record de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). We review the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Circumstantial evidence, and reasonable inferences therefrom, may constitute satisfactory proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Where intent is at issue, minimal circumstantial evidence is sufficient because of the difficulty of proving an actor's state of mind. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

¹ The jury acquitted defendant of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.

Defendant first argues that there was insufficient evidence of malice to support his conviction of felony murder on an aiding and abetting theory. The elements of felony murder are (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. MCL 750.316; see also *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007); *People v Kelly*, 231 Mich App 627, 642-643; 588 NW2d 480 (1998). The murder need not be contemporaneous with the enumerated felony, but the defendant must have intended to commit the underlying felony when the homicide occurred. *Kelly*, 231 Mich App at 643.

In order to prove felony murder on an aiding and abetting theory, the prosecutor must show that the accused: (1) performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a 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 in MCL 750.316(1)(b). *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003); *People v Bulls*, 262 Mich App 618, 624; 687 NW2d 159 (2004). The prosecution must also prove that one who aids and abets felony murder possessed the requisite malice to be convicted of felony murder, and the aider and abettor need not share the same malice as the principal. *People v Robinson*, 475 Mich 1, 14; 715 NW2d 44 (2006); *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985). “A defendant’s malice, sometimes described as acting in wanton and willful [sic] disregard of the possibility that death or great bodily harm would result, can be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm.” *Bulls*, 262 Mich App at 626.

Here, there was evidence that defendant performed acts or gave encouragement that assisted the commission of the killing of Matthew Soto. Specifically, the prosecutor presented evidence that defendant met Soto at the Greektown Casino parking garage. While defendant and Soto discussed a drug transaction, Christopher Parker sat in defendant’s Jeep. Defendant then suggested that they complete the drug transaction at a local gas station because there were too many security cameras in the parking garage. They all drove to the gas station, and Soto subsequently climbed into the back seat of the Jeep. Parker was still sitting in the passenger seat of defendant’s Jeep. Defendant then drove his Jeep around the corner of the gas station into a dark alley, where Soto was subsequently shot and killed. Additionally, after the crime was committed, defendant drove away from the scene with Parker, and deserted his Jeep in an abandoned lot. This evidence is sufficient to support a finding that defendant performed acts or gave encouragement that assisted Parker in killing Soto.

There is also sufficient evidence for a reasonable trier of fact to infer that defendant had the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. Specifically, defendant’s instigation of the criminal transaction (i.e., meeting with Soto, encouraging the change of location to conduct the drug transaction, and driving Soto into a dark alley) could lead a reasonable trier of fact to conclude that this series of events, set in force by defendant, was likely to cause death or great bodily harm. Accordingly, there was sufficient evidence of malice.

Because there was sufficient evidence of malice, defendant's argument that he was deprived of due process based on the lack of sufficient evidence of malice is also without merit.

Defendant next argues that there was insufficient evidence of a larceny to sustain his conviction for felony murder predicated on larceny. Larceny is one of the predicate felonies enumerated in the felony murder statute. See MCL 750.316(1)(b). Larceny is generally defined as "the taking and carrying away of the property of another, done with felonious intent and without the owner's consent." *People v Gimotty*, 216 Mich App 254, 257-258; 549 NW2d 39 (1996). "Felonious intent" in this context does not describe the intent to commit a felony, but rather, the lack of a good faith belief that one is entitled to possession of the property, as is contemplated by the term "stealing." See *People v Pohl*, 202 Mich App 203, 205-206; 507 NW2d 819 (1993).

The prosecutor presented evidence that Soto's body was found lying face up in the middle of the alley. The wallet that he habitually carried, and that he had been carrying an hour or so earlier, was missing. The prosecutor also presented evidence that defendant gave Soto \$300 in exchange for drugs; however, the \$300 were not found on or near Soto's body. It was reasonable for a rational trier of fact to conclude that when Soto was shot, defendant took his wallet and the \$300. When viewed in the light most favorable to the prosecution, the evidence was sufficient to support a finding that defendant intended to commit larceny when Soto was killed.

In a related argument, defendant also argues that the trial court erred in denying defendant's motion for directed verdict based on the lack of evidence that the victim's death occurred during the commission of a larceny. According to defendant, there was no credible evidence that a larceny was committed because Stefan Gilman provided the only evidence that the victim had a wallet, and Gilman's testimony was incredible because he lied to the police. It is improper to determine the credibility of witnesses in deciding a motion for directed verdict of acquittal. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). Rather, it is "the fact-finder's responsibility to determine the credibility and weight of the testimony." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003). Thus, defendant's claim of error is without merit. Furthermore, because there was sufficient evidence that the victim's death occurred during the commission of a larceny, defendant's contention that he was deprived of due process because he was found guilty without sufficient evidence is also without merit.

Defendant raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. None of these issues have merit.

Defendant argues that prosecutorial misconduct denied him due process and a fair trial. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context, and in light of defendant's arguments. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor's statements is determined from an evaluation of the statements in light of the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

Defendant's allegations of prosecutorial misconduct are somewhat unclear, but they involve the prosecutor's conduct regarding prosecution witness Stefan Gilman. At different times at trial, the prosecutor asked Gilman if he had lied to the police about certain facts, and Gilman admitted that he had been untruthful to the police. Defendant construes the prosecutor's questions as evidence that the prosecutor knowingly presented perjured testimony. This argument is nonsensical; if anything, the prosecutor's questions of the witness revealed to the court that the witness admitted that he had lied to the police. The fact that the prosecutor knew that Gilman had lied to the police, while not under oath in a court of law, does not equate to the prosecutor allowing the witness to perjure himself under oath. Our review of the record does not reveal any misconduct on the part of the prosecutor in this regard. There is no evidence that the prosecutor was knowingly using false testimony to obtain a conviction. See *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998).

Defendant also argues that the prosecutor improperly vouched for Gilman's credibility. Although defendant is correct that it is improper for a prosecutor to vouch for the credibility of a witness in order to imply that the prosecutor is privy to special knowledge concerning the witness' truthfulness, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), the questions and comments cited by defendant do not amount to improper credibility vouching and did not imply that the prosecutor had special knowledge. A prosecutor does not vouch for the credibility of a witness by arguing that the witness is truthful or even asking the witness if he or she is telling the truth if the prosecutor's questions or comments do not imply that the prosecutor had special knowledge. *People v Launsburrg*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Defendant makes other claims of prosecutorial misconduct, none of which have merit.

Defendant next argues that the prosecutor abused her discretion in charging defendant with a delivery offense when the evidence established that he was a mere purchaser or possessor. A prosecutor has broad discretion to bring any charge that is supported by the evidence. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). Our review of the record reveals that there was sufficient evidence to support charging defendant under MCL 333.7401(2)(c). Thus, the prosecutor did not abuse her discretion in charging defendant under the statute.

Defendant also argues that judicial bias and lack of impartiality deprived him of a fair trial. According to defendant, the trial court's partiality was demonstrated by comments the trial court made to the prosecutor, the fact that the trial court permitted the prosecutor to charge defendant with a delivery offense rather than a possession offense, the trial court's allowance of perjured testimony from prosecution witness Gilman and the trial court's refusal to grant the jury's request to be given a copy of defendant's statement to the police. A criminal defendant is entitled to a neutral and detached magistrate. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). A defendant challenging a judge for bias "must overcome a heavy presumption of judicial impartiality." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). The test to determine if the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial. *People v Conley*, 270 Mich App 301, 308; 715 NW2d 377 (2006). Even assuming defendant's argument in this regard is preserved, none of the trial court's conduct cited by defendant establish that the trial court was biased against defendant. We observe that the trial court's

comment to the prosecutor was actually somewhat critical of the prosecutor; moreover, it was not made in the presence of the jury. In any event, comments critical of or hostile to counsel or the parties are not ordinarily supportive of finding bias or partiality. *Wells*, 238 Mich App at 391. Furthermore, most of defendant's allegations of judicial bias concern the trial court's rulings. Judicial rulings are not valid grounds for alleging bias "unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible." *Id.* The trial court's rulings do not exhibit deep-seated favoritism. None of the conduct alleged by defendant pierced the veil of judicial impartiality.

Defendant next argues that the trial court abused its discretion in admitting evidence "that was clearly in violation of the chain of custody[.]" According to defendant, the testimony at trial established that the crime scene had been tampered with prior to the arrival of the police because Gilman admitted that he removed items from Soto's pocket. Defendant's issue in his statement of questions presented does not correlate with his argument of this issue. Moreover, defendant's argument is unclear and undeveloped. It is not enough for a party to simply assert an error in their brief and then leave it up to this Court to discover and rationalize the basis for their claims, elaborate and unravel their arguments for them, and then search for authority to sustain or reject their position. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Due to defendant's failure to adequately brief and argue this issue, we decline to address it on appeal.

Defendant also argues that he was denied his right to present a defense because of the absence of a *res gestae* witness. Defendant has not preserved this issue for appellate review because he did not raise the issue below in a motion for post trial evidentiary hearing or in a motion for a new trial. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). Our review is therefore for plain error affecting defendant's substantial rights, and we will reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *Carines*, 460 Mich at 763. We conclude that reversal is not warranted based on this issue.

Finally, defendant argues that he was deprived of effective assistance of counsel. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). A "defendant must show that his attorney's conduct fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was deprived a fair trial." *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003). To demonstrate ineffective assistance, a defendant must show that there is a reasonable probability that the result of the proceeding would have been different but for defense counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Because defendant failed to raise the issue of the effectiveness of defense counsel in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

Defendant argues that defense counsel was ineffective for failing to object to or "challenge the entire testimony of S. Gilman." According to defendant, Gilman's testimony should have been precluded because Gilman admitted at trial that he lied to the police initially about what Soto was doing when he was shot. Gilman was a childhood friend of Soto's, and he

was with Soto on the night of his death. Gilman was sworn and affirmed that he would tell the truth, and there is no indication that he did not have the capacity and sense of obligation to testify truthfully. There is no evidence that Gilman lied on the witness stand at trial; rather, he admitted on the witness stand that he initially did not tell the police the truth about the fact that the victim was involved in a drug transaction because he wanted to protect Soto and he did not want anyone to know that Soto was selling drugs. Gilman's admission that he initially lied to the police does not affect the admissibility of his entire testimony, but rather relates to the weight and credibility of the testimony. Gilman offered relevant testimony about the events leading to Soto's death, and the fact that he admitted that he initially lied to the police does not operate to bar his entire testimony. It would have been futile for defense counsel to object to Gilman testifying as a witness at all, and defense counsel is not ineffective for failing to make a futile objection. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant also argues that defense counsel was ineffective for failing to object to the prosecutor constantly referring to defendant as a liar. The record does not support defendant's contention that the prosecutor constantly referred to defendant as a liar. The record does reveal that the prosecutor questioned defendant's veracity during closing argument and characterized some of defendant's statement as "a bold faced lie." A prosecutor may comment on the credibility of witnesses. *People v Stacy*, 193 Mich App 19, 37; 484 NW2d 675 (1992). While the prosecutor questioned defendant's credibility, the prosecutor also stated to the jury that it was its duty to decide which witnesses were telling the truth and which witnesses were lying and that a big part of the jury's decision would entail determining whether defendant was being truthful or lying in his statement. Viewing the prosecutor's remarks as a whole, and the particular remarks complained of in context, the comments did not deny defendant a fair trial. *Stacy*, 193 Mich App at 36.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello
/s/ Amy Ronayne Krause