STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 13, 2011
v	No. 296585 Oakland Circuit Court
DEANDRE ANTOINE STURGES, Defendant-Appellant.	LC No. 2009-225505-FC

Before: MURPHY, C.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree felony murder, MCL 750.316(1)(c), conspiracy to commit armed robbery, MCL 750.529, MCL 750.157a, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent prison terms of life without parole for the first-degree felony murder conviction and 20 to 40 years for the conspiracy to commit armed robbery conviction, as well as to a consecutive two-year term for the felony-firearm conviction. We affirm defendant's convictions, but remand for correction of the judgment of sentence.

Catherine Blain was found slumped over in her car in the parking lot of the Rib Rack restaurant; she was declared dead the next day. The medical examiner determined that the cause of death was a gunshot wound to the head, and the manner of death was homicide.

Police identified defendant, Jerome Hamilton, and Brandon Davis as suspects in the murder.[1] Davis entered into an agreement with the prosecutor with the belief that if he cooperated he would not be charged with Blain's murder. Davis testified at trial regarding the circumstances surrounding the incident at the Rib Rack.

[1] Jerome Hamilton was tried separately and after two mistrials, was acquitted in a third trial. Brandon Davis pleaded guilty to accessory after the fact to a felony, MCL 750.505, and conspiracy to commit armed robbery, MCL 750.529, MCL 750.157a. Davis was sentenced to two to five years for the accessory conviction, and 12 to 30 years for the conspiracy conviction.

Other witnesses corroborated parts of Davis's testimony. Video surveillance footage of the Rib Rack parking lot was of poor quality, and did not identify defendant or a gun. The footage did corroborate Davis's account of what happened at the Rib Rack. The prosecutor also introduced defendant's interview with investigating officers in which defendant admitted to being the driver on October 15, 2008.

Defendant first argues that the prosecutor failed to present sufficient evidence to substantiate the jury's verdicts. Sufficiency of the evidence questions are reviewed de novo, in a light most favorable to the prosecution. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). Due process requires that a prosecutor present sufficient evidence of each crime to substantiate a guilty verdict from the jury. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). The jury determines the credibility of each witness and what weight to give witness testimony. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992) amended 441 Mich 1201 (1992). The jury determines what inferences it may reasonably draw from the evidence, and the weight to give to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Questions of intent inherently involve weighing the evidence and assessing the credibility of the witnesses, and therefore are left for the jury. *People v Cain*, 238 Mich App 95, 119; 605 NW2d 28 (1999). Circumstantial evidence and the reasonable inferences arising therefrom can establish the elements of a given crime. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

MCL 750.316(1)(b) defines felony murder as:

> Murder committed in the *perpetration* of, *or attempt to perpetrate*, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, *robbery*, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, kidnapping, vulnerable adult abuse in the first and second degree under section 145n, torture under section 85, or aggravated stalking under section 411i. [Emphasis added.]

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 [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [the statute, including armed robbery]. [*People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999), quoting *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995) overruled in part on other grounds *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001).]

Malice may be inferred when evidence demonstrates use of a deadly weapon or that the defendant intentionally set in motion "a force likely to cause death or great bodily harm." *Carines*, 460 Mich at 759.

Armed robbery falls within the meaning of robbery under the statute, and an attempt to commit an armed robbery constitutes a predicate felony for felony murder. *People v Akins*, 259 Mich App 545, 552; 675 NW2d 863 (2003). '"The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon. . . ."' *Carines*, 460 Mich at 757, quoting *Turner*, 213 Mich App at 569. The elements of attempt are: (1) an attempt to perpetrate an offense prohibited by law and (2) any act committed toward commission of that crime. *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001).

Defendant's specific argument is that the prosecution failed to introduce sufficient evidence to support his conviction of felony murder because there was no evidence to support the element of intent.

The intent element can be met by demonstrating that defendant acted with malice. *Carines*, 460 Mich at 759. Malice can be inferred from the use of a deadly weapon, or if defendant set in motion a force likely to cause great bodily harm. *Id.* Evidence was presented that defendant knew that Hamilton had a gun. A gun is a deadly weapon and defendant's knowledge that a deadly weapon was used was enough to infer malice. In addition, evidence was also introduced that defendant planned with Hamilton and Davis to rob Blain. Defendant created a high risk of great bodily injury by driving Hamilton and Davis to the Rib Rack and waiting while Hamilton got out of the car to rob Blain. Any time someone is robbed at gun point there is a high risk of death or great bodily injury and Blain was shot and killed. Defendant set in motion the robbery by planning the robbery and participating in the robbery by acting as the driver; therefore sufficient evidence was presented to the jury to find that defendant acted with malice. *Id*.

Defendant also argues that a robbery did not take place because no evidence was presented that anything was taken from Blain. However, an attempt to commit an armed robbery constitutes a predicate felony for felony murder. *Akins*, 259 Mich App at 552. Sufficient evidence supported a finding that at minimum an attempted robbery took place.

MCL 767.39 states that, "[e]very person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." The prosecutor must prove three elements to establish guilt under an aiding and abetting theory: (1) the crime was committed by the defendant or some other person, (2) the defendant participated in or encouraged the crime, and (3) the defendant intended to commit the crime or knew that the other person intended to commit the crime when the aid or encouragement was given. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006). The "defendant is liable for the crime the defendant intends to aid and abet as well as the natural and probable consequences of that crime." *Id*. at 14-15 (footnote omitted).

All the facts and circumstances are properly considered when determining an aider and abettor's state of mind. *Carines*, 460 Mich at 757-758. A principal's intent can also be inferred from all the facts and circumstances surrounding the crime or event. *People v Bennett*, ___ Mich App ___; ___ NW2d ___ (Docket No. 286960, 287768, issued November 2, 2010), slip op, p 5.

There was sufficient evidence presented for the jury to determine that defendant aided and abetted the robbery or attempted robbery and therefore the felony murder.

The evidence presented demonstrated that a crime was committed, i.e., Blain was killed. The evidence also indicated that defendant participated in the crime in that he drove the car and participated in planning the robbery. Finally, defendant intended that the armed robbery take place. Defendant drove to the Rib Rack, parked the car, turned the headlights off, and waited for Hamilton to rob Blain. Defendant may not have specifically intended that Hamilton kill Blain, but her death was a natural and probable consequence of an armed robbery. It was for the jury to decide whether it believed Davis's testimony. *Wolfe*, 440 Mich at 514-515. The direct and circumstantial evidence, viewed in a light most favorable to the prosecution, was sufficient to support the verdict that defendant was guilty of felony murder. *Ericksen*, 288 Mich App at 195-196.

We also disagree with defendant's argument that Davis's testimony regarding the circumstances surrounding the incident at the Rib Rack was impermissible other acts evidence.

Unpreserved arguments regarding the admission of evidence are reviewed for plain error affecting substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Properly preserved arguments regarding the admission of evidence are reviewed for an abuse of discretion. *People v Orr*, 275 Mich App 587, 588; 739 NW2d 385 (2007). An abuse of discretion occurs when the trial court's result is outside the range of reasonable and principled outcomes. *Id*. at 588-589.

Other acts evidence is not admissible for the purpose of demonstrating that the defendant acted in conformity therewith, but it may be used for other purposes, such as demonstrating intent, scheme, or plan. MRE 404(b)(1); *People v Mardlin*, 487 Mich 609, 614-615; 790 NW2d 607 (2010). If the prosecution wishes to introduce other acts evidence, it bears the burden of proving that the evidence (1) is relevant to a material fact in the case, and (2) is not simply evidence of the defendant's character. *Mardlin*, 487 Mich at 615.

Other acts evidence is admissible when it explains the circumstances of the crime. *People v Malone*, 287 Mich App 648, 662; 792 NW2d 7 (2010). The jury is better equipped to perform its sworn duty when it knows the whole story; therefore, other acts evidence including evidence about other crimes is ordinarily admissible when it explains the circumstances of the charged crime. *Id.*

Only relevant evidence is admissible. Evidence is relevant if it has any tendency to make a fact of consequence more or less probable. MRE 401. But relevant evidence will be excluded if the probative value is substantially outweighed by the prejudicial effect. MRE 403; *People v Ortiz*, 249 Mich App 297, 306-307; 642 NW2d 417 (2001). Other acts evidence must be relevant and the probative value must outweigh any prejudicial effect. *Id.* at 306. Other acts evidence carries the risk of being misused or confusing; therefore, there is a heightened need for a careful balancing of the probative value and prejudicial effect. *Id*.

Davis's testimony was relevant to explain the circumstances of the crime. Defendant argues that since none of the other "planned robberies" ever occurred that Davis's testimony was

not other acts testimony but was idle chatter, and was introduced merely to demonstrate defendant's character. However, is up to the jury to make what reasonable inferences it may from the evidence presented. *Kanaan*, 278 Mich App at 619.

The evidence was also admissible to demonstrate intent, scheme, or plan. Based on the evidence presented the jury could have reasonably inferred that defendant, Davis, and Hamilton took steps toward the other robberies, and that Davis's testimony demonstrated more than mere talk of mischief. Davis's testimony may have been prejudicial, but defendant has failed to demonstrate how it was unfairly prejudicial. The trial court gave a limiting instruction to the jury to indicate that the other acts evidence was not to be considered as evidence of defendant's character. The evidence was relevant to the circumstances leading up to the crime, and was properly admitted.[2]

Defendant also claims that counsel rendered ineffective assistance by failing to adequately object to Davis's testimony; however, defense counsel was not ineffective for failing to object because the evidence was admissible. Counsel need not make a frivolous argument. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant also asserts that a cell phone text message was impermissible other acts evidence. Defense counsel objected to the admission of the text message, but did so after the text message had been admitted, and the objection was overruled. The prosecutor offered that defendant had made a statement to police that since the incident all defendant had been doing was praying, and the text message was offered to prove otherwise. Defendant has failed to demonstrate how the admission of the text message changed the outcome of the trial, as the trial court gave a proper limiting instruction and other evidence supported the jury's verdicts. Defense counsel was not ineffective because counsel did object, but the objection was overruled.

Finally, defendant argues that he was deprived the right to counsel and the right to present a defense because the trial court requested that the same defense attorney conduct the entire trial.[3]

A trial court's decision affecting the defendant's choice of counsel is reviewed for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999). Unpreserved constitutional errors are reviewed for plain error affecting the defendant's substantial rights. *Carines*, 460 Mich at 764.

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[2] Defendant's assertions that counsel rendered ineffective assistance by failing to adequately object to Davis's testimony likewise fails because defense counsel was not ineffective for failing to make a frivolous argument. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

[3] Defendant had two defense attorneys. Defendant's team planned to have one attorney handle cross-examination of prosecution witnesses, and to have the other attorney present the defense case.

The Sixth Amendment guarantees a criminal defendant the right to counsel. US Const, Am VI; Const 1963, art 1, § 20; *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004). This right includes the defendant's right to choose his own counsel. *United States v Gonzalez-Lopez*, 548 US 140, 144; 126 S Ct 2557; 165 L Ed 2d 409 (2006); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). But, the trial court has wide discretion in balancing the defendant's right to choice of counsel with the needs of fairness. *Aceval*, 282 Mich App at 387.

Before defense counsel proceeded with the case, the following exchange occurred:

> THE COURT: Counsel, before we proceed, it occurred to me over lunch that at the break there was an indication that--Mr. McGinnis, that you were not planning to conduct the defense in this case?
>
> MR. McGINNIS: No, Mr. Reed is, your Honor.
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> THE COURT: I think the Court at the beginning of the trial indicated that there would be no switching back and forth, that the attorney that presented this case would be the attorney that presented it throughout.
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> MR. McGINNIS: Not in this trial, I did not hear that; maybe it occurred in the other trial, it didn't occur in this trial.
>
> THE COURT: Mr. McGinnis, it is not the practice of this Court, and it never had been, that I have multiple attorneys throughout a trial; and so if you're going to put on a defense, you've been the trial attorney, you're going to have to handle it.
>
> MR. REED: Would the Court give us a moment to confer, then, with that, your Honor? And if that was the Court's procedure, I apologize, I didn't know that, and if the Court said it in the beginning of the trial, I'm not disputing the Court, I just didn't hear it, as well. But be that as it may, since that is the Court's definitive position, would the Court be so inclined to give us maybe an additional five minutes to confer?
>
> THE COURT: Yes, counsel.
>
> MR. REED: Thank you very much, your Honor. We will be ready in about five minutes, your Honor. Thank you very much.

The trial court did not deny defendant the right to counsel or the right to present a defense. Defendant fails to demonstrate how he was deprived of the right to counsel when one of his attorneys was allowed, and did, present a defense, while the other continued to act as co-counsel. No plain error occurred.

The judgment of sentence indicates that defendant was convicted of the murder of a peace officer, MCL 750.316(1)(c). However, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b). We remand this matter to the trial court for the ministerial task of

correcting the judgment of sentence. The trial court is to forward a copy of the corrected judgment of sentence to the Department of Corrections.

Affirmed and remanded. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Michael J. Talbot
/s/ Christopher M. Murray