STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODNEY THOMAS,

Defendant-Appellant.

UNPUBLISHED
May 10, 1996

No. 179515
LC No. 93-13586

Before: Taylor, P.J., and Fitzgerald and P. D. Houk,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant appeals as of right, and we affirm.

Defendant first argues that the trial court pierced the veil of judicial impartiality when it declared, sua sponte, a prosecution witness to be hostile. Defendant did not object to the trial court's action at trial and, thus, this issue is not preserved for appellate review. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). We only review this issue for manifest injustice and serious error. *People v Moore*, 161 Mich App 615, 619-620; 411 NW2d 797 (1987). We find none. A trial judge has the duty to control all proceedings during the trial. MCL 768.29; MSA 28.1052. Indeed, MRE 611(a) states that the court shall exercise reasonable control over the mode and order of interrogation. While the trial court arguably should have waited for the prosecutor to ask it to declare the witness hostile so leading questions could be asked pursuant to MRE 611(c)(3), the court's conduct certainly did not deprive defendant of a fair trial. Defendant argues that the court's comment could have unjustifiably raised suspicion in the minds of the jury regarding the witness' credibility. However, if this occurred, it benefited defendant as the witness who was declared hostile was a prosecution witness who eventually provided damaging testimony to defendant.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant also argues that the court erred in denying his motion for directed verdict, thereby improperly allowing the jury to consider a first-degree murder charge. A trial court must assess the merits of a directed verdict motion by considering the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *Id*. One who procures, counsels, aids or abets in the commission of an offense may be convicted and punished as if he directly committed the offense. MCL 767.39; MSA 28.979. In order to be convicted as an aider and abettor, the prosecution must show that the crime was committed by the defendant or another, that the defendant performed acts or gave encouragement that aided or assisted the commission of the crime, or that defendant had knowledge that the principal intended its commission at the time the defendant gave the aid or assistance. *People v Sean Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993). There was evidence that defendant retrieved guns from an abandoned house, went looking for the victim with his cousin in a stolen car, got out of the car with his cousin after they saw the victim, and shot the victim at close range. Defendant shot at the victim six times after his cousin shot the victim. The cousin's shotgun blast was the actual cause of the victim's death. Immediately after the shooting, defendant told Darrell Dalton "we got" the victim. After a review of the record in a light most favorable to the prosecution, we are satisfied that a rational jury could have convicted defendant of first-degree murder on an aider and abettor theory. Thus, the trial court did not err in denying defendant's motion for a directed verdict.

Defendant further contends the court erred in allowing the second-degree murder charge to go to the jury and that there was insufficient evidence to find him guilty of second-degree murder as an aider and abettor. In determining whether sufficient evidence was presented to sustain a conviction, we view the evidence in a light most favorable to the prosecution to determine whether a reasonable trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). To establish second-degree murder, the prosecution must show that defendant caused the death of the victim and that the killing was done with malice and without legal justification. *People v Wofford*, 196 Mich App 275, 278; 492 NW2d 747 (1992). This argument is without merit. As we are satisfied that the first-degree murder charge was properly allowed to go to the jury, we are necessarily satisfied that there was sufficient evidence to convict defendant of aiding and abetting the commission of second-degree murder.

Defendant also argues that the court erred in failing to instruct the jury regarding the following lesser offenses: (1) attempted murder, (2) aiming or discharging a firearm without malice, and (3) reckless use of a firearm. Defendant also claims the court should have given a cautionary instruction regarding the accomplice testimony of Darrell Dalton. This claim is without merit.

MCL 768.29; MSA 28.1052 provides that it is the duty of the trial court to instruct the jury as to the law applicable to the case. Similarly, MCR 6.414(F) provides that the court must instruct the jury as required and as appropriate. Defendant, however, did not request instructions regarding attempted murder, reckless use of a firearm, or the cautionary instruction regarding accomplice

testimony. Thus, these arguments are not preserved for appeal. *Grant*, *supra*. Indeed, the failure of a court to instruct on any point of law shall not be grounds for setting aside a conviction unless such an instruction was requested by the accused. MCL 768.29; MSA 28.1052. Notwithstanding this legislative pronouncement, we still review for manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). We find no manifest injustice. We further note that the argument that the court should have given the instruction concerning reckless use of a firearm is not properly before this Court as it is not set forth in defendant's statement of questions involved. MCR 7.212(C)(5); *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990). It is further the case that even if the instructions are imperfect, reversal is not required if they presented the issues to be tried and sufficiently protected the rights of the defendant. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). We find that the instructions that were given adequately protected defendant's rights and presented the issues that were tried. We also note that Dalton was not charged as an accomplice and that defendant never argued that Dalton was an accomplice at trial. Even if we assume that Dalton was an accomplice, the court did not have a duty to give a sua sponte cautionary instruction regarding Dalton's testimony because the case was not "closely drawn." *People v Russell*, 439 Mich 921; 479 NW2d 351 (1992); *People v Buck*, 197 Mich App 404, 415; 496 NW2d 321 (1992) lv den 445 Mich 937 (1994). Dalton did not provide the only evidence against defendant as defendant's confession was admitted into evidence. There was no error in the court's failing to give the requested instruction regarding aiming or discharging a weapon without malice as there was no evidence from which the jury could have determined that defendant acted without malice. *People v Steele*, 429 Mich 13; 15; 412 NW2d 206 (1987). Finally, we note that even if one assumes error in the court's failing to instruct regarding the lesser offense of aiming or discharging a firearm without malice and reckless use of a firearm, such error was harmless because the jury was instructed that it could find defendant guilty of felonious assault, yet it convicted defendant of the more serious second-degree murder charge. *People v Mosko*, 441 Mich 496, 501-506; 495 NW2d 534 (1992).

Affirmed.

/s/ Clifford W. Taylor
/s/ E. Thomas Fitzgerald
/s/ Peter D. Houk