STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DEL DELANEY,

Defendant-Appellant.

UNPUBLISHED
June 11, 1996

No. 168946
LC No. 93-062038-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID CHARLES CORBETT,

Defendant-Appellant.

No. 168947
LC No. 93-062038-FC

Before: Hood, P.J., and Young and T.L. Brown,* JJ.

PER CURIAM.

In these consolidated cases, defendants appeal by right their convictions of first-degree felony murder. MCL 750.316; MSA 28.548. Both defendants were sentenced to life imprisonment. We affirm.

I

Defendants Corbett and Delaney met with co-defendants McKibben and Burgess to rob a local bar. The night before, Delaney discovered that the bar was attended by a female bartender. Corbett told his colleagues that "we're going to go in and rob the place, and [I'm] going to kill the lady so she

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* Circuit Judge, sitting on the Court of Appeals by Assignment

couldn't identify anybody." Delaney, armed with a baseball bat, and Corbett, armed with a six-inch knife, proceeded with the two other co-defendants to the bar. Delaney said that "he would go and … [c]heck out the -- inside [o]f the bar to see how many people were inside."

Delaney entered the bar, purchased a bag of potato chips, then returned to his friends outside and reported that "there was one person in the bar, a lady," but that she did not look "like the type of person who would put up a fight." McKibben was instructed to remain outside as a lookout while Burgess, Corbett and Delaney went inside.

Delaney swung his bat at the victim with such force that she was toppled from the bar stool she was sitting on. Corbett, despite the victim's pleas that they not hurt her, jumped on her and began stabbing her in the breast and back. Neither Delaney nor Burgess attempted to stop Corbett from stabbing the victim who sustained approximately ten stab wounds. Delaney was unable to open the register but took the victim's purse when Corbett shouted "let's get out of here."

Afterwards, defendants were not secretive about their crime. When exiting the bar, Delaney told McKibben that he had struck the victim with his bat and Corbett admitted that he "freaked out and stabbed the woman." The four returned to Corbett's sister's house where they examined the contents of the victim's purse and Corbett tried to clean his pants and knife of the victim's blood. Corbett admitted to his sister that he had "stabbed somebody."

Later that same evening, Corbett and Delaney met three female friends, Samantha and Vicki Wiebenga and CeCe DiPiazza. Corbett admitted to CeCe and Samantha that "he just stabbed a woman." Corbett and Delaney also described their attacks on the victim to Vicki.

The four were arrested. Corbett and Delaney were tried by separate juries, and each was convicted of first-degree felony murder.

II

People v Delaney (No 168946)

On appeal, Delaney argues that his conviction should be overturned for the following reasons: (a) the evidence was insufficient to support a conviction of first-degree murder and the verdict was against the great weight of the evidence; (b) the substitution of judges during voir dire was reversible error; (c) the judge conducting voir dire made prejudicial statements against Delaney; (d) the trial court erred in failing to allow separate trials because Delaney was prejudiced by the admission of "adoptive admissions"; (e) the trial court improperly instructed the jury that their verdict need not be unanimous; and (f) the trial court erred in admitting prejudicial photographs of the victim.

On appeal, Corbett also challenges the trial court's decision to admit the "adoptive admissions" (discussed jointly with Delaney's claim in Section III D, infra). Corbett argues that the trial court improperly instructed the jury regarding the elements of felony murder. (See discussion III G, infra).

III

A

Delaney first challenges the sufficiency of the evidence and asserts further that the verdict was against the great weight of the evidence. When reviewing whether the prosecution has presented sufficient evidence to sustain a conviction, this Court must review the evidence in light most favorable to the prosecution and determine whether a rationale trier of fact could have found each element of the crime proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Circumstantial evidence and all reasonable inferences which can arise from that evidence can constitute satisfactory proof of the elements of the crime. *People v Jolly*, 442 Mich 458; 502 NW2d 177 (1993); *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 767 (1991). A challenge to a denial of a motion for a new trial based on an attack that the verdict is against the great weight of the evidence is reviewed under an abuse of discretion standard. *People v Harris*, 190 Mich App 652, 658-659; 476 NW2d 767 (1993). Reversal is warranted only when the verdict does not find reasonable support in the record, but is more likely to be a product of passion or some other extraneous influence. *Nagi v Detroit United Railway*, 231 Mich 452, 457; 204 NW 126 (1925).

Delaney was convicted of aiding and abetting felony murder, it being uncontested in the record that the stab wounds were inflicted by Corbett and that these wounds were the cause of the victim's death. The elements of this crime are: (a) the killing of a human being; (b) 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 was a probable result; and (c) while committing, attempting to commit, or assisting in the commission of any of the felonies enumerated in MCL 750.316; MSA 28.548. *People v Brannon*, 194 Mich App 121, 124-125; 496 NW2d 83 (1992).

Delaney argues that there was insufficient evidence to support the element of intent. To convict a defendant of aiding an abetting, the prosecution must prove that the defendant had the intent to commit the crime or that he participated in the crime with knowledge of the principal's intent. *People v Flowers*, 191 Mich App 169, 179; 477 NW2d 473 (1991). At trial, the evidence established that Delaney and Corbett planned to rob the bar. Delaney knew that Corbett had a knife before they went inside the bar, and in the presence of Delaney and the others, Corbett stated that he intended to kill the victim so she could not identify anyone. Inside the bar, Delaney swung a wooden baseball bat at the victim with such force that she fell to the floor, and then he concentrated on opening the cash register while Corbett repeatedly stabbed the victim. After being unable to open the cash register, Delaney

grabbed the victim's purse and left with Corbett. Therefore, reviewed in the light most favorable to the prosecution, a rational trier of fact could conclude that Delaney acted with the requisite intent. Since the evidence was sufficient to support the verdict, we conclude that the trial court's refusal to grant a new trial was not an abuse of discretion.

B

Delaney also challenges as error the substitution of judges which occurred after voir dire had commenced but before it was completed and before any opening statements or evidence had been presented to the jury. These consolidated cases had been assigned to Judge Dennis Kolenda, and each defendant was to be tried with a separate jury. However, because Judge Kolenda was engaged in the selection of the Corbett jury, Judge Robert Benson conducted the voir dire of the Delaney jury. Judge Benson informed the jury that Judge Kolenda was presiding over the trial, and that his role would be limited to presiding over jury selection. There was no objection to this procedure. At the conclusion of the day, both sides indicated satisfaction with the jury. However, the next day, when the case had been returned to Judge Kolenda, additional voir dire was conducted to select the final juror. Following the swearing in of the jury, opening statements were made and the prosecutor commenced the presentation of evidence. Delaney now contends that the substitution of judges constituted reversible error. We disagree.

While the substitution of judges after the presentation of evidence constitutes reversible error, a different rule applies at other stages of trial. *People v McCline*, 442 Mich 127, 131; 499 NW2d 341 (1993). The utilization of another judge during voir dire, and before opening statements or the introduction of any evidence, is not automatic grounds for reversal in the absence of a showing that prejudice resulted from the substitution. *Id.* at 134. The substitution of judges occurred before opening statements and the introduction of any evidence, and Delaney has failed to demonstrate prejudice. Thus, we find no error.

C

Defendant Delaney next objects to the Judge Benson's effort to distinguish for the jury pool between his middle (Del) and last names (Delaney) by spelling them: "Michael Del, his middle name is Del, 'D' as in 'dog,' E-L, his last name if Delaney, 'D' as in 'dog,' E-L-A-N-E-Y." Delaney contends that the use of the word "dog" prejudiced the jury pool. However, Delaney did not object to these remarks.

Generally, this Court will not review allegations of error based upon the conduct of the lower court when no objection was made unless manifest injustice will result. *People v Collier*, 168 Mich App 687, 697; 425 NW2d 118 (1988). The judge spelled other names and used common "word tags" to distinguish letters that are often confused. We find no error amounting to undue influence of the jury or deprivation of the right to a fair trial in these remarks. See *People v Romano*, 181 Mich App 204, 220; 448 NW2d 795 (1989).

D

The next issue Delaney complains of concerns the denial of his motion for separate trials. Delaney contends that he was prejudiced in his joint trial with Corbett because the trial court admitted prejudicial adoptive admissions. MRE 801(d)(2)(B). Corbett also argues that the court erred in admitting this evidence as an "adoptive admission," and further challenges the trial court's reasoning that the testimony was admissible as a statement by a co-conspirator. MRE 801(d)(2)(E).

At trial, defendants' friends testified that each defendant made implicating statements about the other's role in the crime. Both defendants objected to the introduction of this testimony. The trial judge ruled that each statement was made in the presence of the other defendant and under circumstances in which it was clear that each defendant's silence constituted a tacit admission of the other's account of the crime. Later, the trial court added that the testimony was also admissible as statements by a co-conspirator because both defendants were engaged in a conspiracy at the time the statements were made.

The decision whether to allow a separate trial is within the discretion of the trial court and is reversible only when the court abuses its discretion. *People v Hicks*, 185 Mich App 107, 117; 460 NW2d 569 (1990). A defendant does not have an absolute right to a separate trial unless he satisfies the burden of establishing that a substantial right will be prejudiced in a joint trial. *Id*. With respect to adoptive admissions, such admissions are permissible in criminal trials when it unambiguously appears that the defendant assented to the statement made. *People v Karam*, 106 Mich App 383; 308 NW2d 220 (1981). Even if these statements are admitted in error, it may be harmless if the testimony was cumulative of other properly admitted evidence. *People v Crawford*, 187 Mich App 344, 353; 467 NW2d 818 (1991).

Joe Burgess, an eyewitness to the fatal assault on the victim testified as to defendants' respective roles. Chris McKibben testified that after they exited the bar, Delaney stated that he hit the woman with the bat and Corbett stated that he stabbed her. The adoptive admissions testified to by other witnesses merely corroborated the testimony of McKibben and Burgess, which was properly admitted. We further find that the adoptive admissions allowed during the trial satisfied the standard set forth in *Karam*, *supra*. Hence, we conclude that the trial court did not abuse its discretion when denying the motion for separate trials.

Corbett argues that the statements were made after the killing and robbery, and as such, after the conspiracy. Co-conspirator's statements are not admissible where they occur before or after the conspiracy. *People v Johnson*, 103 Mich App 825, 832; 303 NW2d 908 (1981). However, the trial court was correct in concluding that the statements were admissible as statements by a co-conspirator. Evidence at trial established that either Delaney or Corbett threatened those who had knowledge of the crime to maintain their silence. Thus, the trial court correctly noted that defendants were engaged in a

conspiracy to "cover up" the crime or evade detection at the time the statements were made. As such, the statements were not so tenuous or circumstantial to defendants and the conspiracy as to avoid admissibility.[1] See *Johnson*, *supra* at 832.

E

Delaney next contends that the trial court erred in its instruction on malice because it advised the jury that it need not make a unanimous finding of malice to convict Delaney of first-degree murder.

Under the Michigan constitution, a defendant is entitled to a unanimous verdict, and a trial judge must properly instruct the jury that it is required to return a unanimous verdict. See *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). Jury instructions are to be read as a whole and the reviewing court must balance the general tenor of the instructions in their entirety against the misleading effect of a single isolated sentence. *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989), lv den 434 Mich 903, cert den 498 US 853; 111 S Ct 147; 112 L Ed 2d 113 (1990). Even if imperfect, instructions do not create reversible error if they fairly present the issues to be tried and adequately protect the defendant's rights. *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991).

During deliberations the jury asked for further instruction on the extent to which they had to unanimously agree on all the elements of first-degree murder. The trial judge properly instructed the jury that they had to unanimously agree on all elements of the offense and provided further explanation regarding intent. The judge explained that all jurors had to agree that Delaney acted with the requisite intent. However, the judge noted that because intent could be proven in three ways, i.e., intent to kill, intent to do great bodily harm, or wilful or wanton disregard that death or great bodily harm will result, each juror had to find one of the three had been proven, but it was not mandatory that all jurors find that intent had been proven under the same theory. Hence, the jurors were properly instructed that as long as each of them believed that Delaney acted with one of the states of mind necessary to support a finding of malice, and that they found the other elements proven beyond a reasonable doubt, they could find Delaney guilty of first-degree felony murder. This instruction was consistent with one approved in *People v Johnson*, 187 Mich App 621, 628-630; 468 NW2d 307 (1991).

F

Delaney lastly argues that the admission of a photograph depicting the bar with the victim's body in the picture was an abuse of discretion because the photograph was more probative than prejudicial. Delaney also claims that the error was compounded when the photograph was given to the jury during deliberations. We disagree.

We review the trial court's admission of photographic evidence for an abuse of discretion. *People v Strunk*, 184 Mich App 310, 323; 457 NW2d 149 (1990). Photographs are admissible if they are substantially necessary or instructive to show material facts or conditions. *People v Hoffman*,

205 Mich App 1, 18; 518 NW2d 817 (1994). If photographs are admissible for a proper purpose, they are not rendered inadmissible merely because they vividly portray details of a gruesome or shocking accident or crime, even if they have some tendency to arouse the passion or prejudice of jurors. *Id.*

Delaney did not provide this Court with the photograph in question. It is the burden of the challenging party to see that offered exhibits whether admitted or not admitted are included in the record upon which we must make a decision. *Wade v Bay City*, 57 Mich App 581, 589; 226 NW2d 569(1975). Nonetheless, we find no error based on information in the record regarding this photograph. The photograph apparently depicted the interior of the bar as it appeared when police found the victim's body. The victim's body apparently was in the background of the picture because the trial court noted that the photograph did not depict a closeup of the body. The trial court found that the picture was not inflammatory or gruesome. We find that it is apparent from the record that the photograph was properly admitted as a depiction of the crime scene when first viewed by the police. Accordingly, we find that the photograph was substantially instructive, and based upon the trial court's commentary (in the absence of the photograph in question), we conclude that any prejudice was outweighed by probative value. *Hoffman*, *supra*.

G

Corbett lastly argues that, before deliberations, the trial court improperly instructed the jury on the elements of felony murder. Corbett did not object below. If a defendant fails to object to an alleged instructional error in the trial court, his challenge to an instructional error will not be considered on appeal unless the error caused manifest injustice to the defendant. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). The trial court properly instructed the jury on the law. As such, no manifest injustice resulted from the challenged instructions.

IV

In conclusion, in No. 168946, we hold that the evidence was sufficient to sustain Delaney's conviction. The trial court did not abuse its discretion when admitting the challenged evidence or when ruling on motions for a new trial, mistrial or separate trials. Also, the substitution of judges during voir dire did not prejudice defendant Delaney. Finally, the trial court properly instructed the jury during deliberations. In No. 168947, we hold that the trial court did not err when admitting challenged testimony as adoptive admissions or co-conspirator statements, and the trial court properly instructed the jury regarding the elements of felony murder.

Accordingly, we affirm the convictions and sentences of defendants Delaney and Corbett.

Affirmed.

/s/ Harold Hood

/s/ Robert P. Young, Jr.
/s/ Thomas Leo Brown

[1] We note that the admission of this evidence does not run afoul of the Confrontation Clause. US Const, Am VI. The statements were voluntarily made around friends contemporaneous to the time of the offense, and as such, have the necessary indicia of reliability. *People v Poole*, 444 Mich 151, 164-165; 506 NW2d 505 (1993).