

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARCIA DAVIS,

Defendant-Appellant.

UNPUBLISHED

August 30, 1996

No. 175638

LC No. 92010392

Before: Marilyn Kelly, P.J., and Gribbs and W.E. Collette,* JJ.

PER CURIAM.

Defendant appeals as of right following his jury trial conviction for second-degree murder, three counts of assault with intent to commit murder and possession of a firearm during the commission of a felony. MCL 750.317; MSA 28.549, MCL 750.83 MSA 28.278, MCL 750.227b; MSA 28.424(2).

He argues that the judge's "state of mind" instruction improperly shifted the burden of proof. He asserts that the judge incorrectly instructed the jury on aiding and abetting. He claims that a ruling at the due diligence hearing violated his rights under MRE 106. Finally, he argues that the prosecutor improperly commented on his decision not to take the stand. We affirm.

We reject defendant's claim that the state of mind instruction given by the judge could be construed as a conclusive presumption of guilt or a burden shifting device. The judge's instruction is identical to portions of CJI2d 16.21. It provides for a permissive inference, not a mandatory one. See *People v Morrin*, 31 Mich App 301, 319; 187 NW2d 434 (1971). Defendant's reliance on *People v Woods*¹ is misplaced. In *Woods*, the Michigan Supreme Court held that an instruction which implies malice as the result of the facts and circumstances of a killing constituted reversible error. Here, the jurors were not instructed to imply anything from the use of weapons. Rather, they were permitted to draw their own inferences.

Additionally, we reject defendant's claim that the burden of proof was shifted because the judge

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

allowed the jurors to infer defendant's criminal intent from the weapons used by another person. The instruction clearly permitted the jurors to infer a defendant's state of mind "if he used a dangerous weapon." It does not allow them to infer state of mind from another person's use of a weapon.

The judge properly instructed the jury on aiding and abetting. The judge's instruction follows CJI2d 8.1. It provides, in part:

Third, that when the Defendant gave his assistance he intended to help another commit the crime.

In *People v Buck*,² this Court held that in order to sustain a conviction for aiding and abetting "the intent requirement may be satisfied upon a showing that the defendant either intended commission of the crime or knew that the principal intended its commission at the time the aid was proffered." The instruction in CJI2d 8.1 complies with *Buck*. By implication, if a defendant, in giving his assistance intends to help another commit the crime, he must either intend its commission or know the principal's intentions at the time he offered his aid. Therefore, the jury was properly instructed.

Defendant argues that, under MRE 106, Kevin Jett's preliminary examination testimony should not have been admitted into evidence without the contemporaneous admission of Jett's statement at a codefendant's trial. This issue has not been preserved. An issue not raised below is not preserved for appellate review. *People v Hoffman*, 205 Mich App 1, 14-15; 518 NW2d 817 (1994). No manifest injustice occurred respecting this issue. *People v Stimage*, 202 Mich App 28, 29; 507 NW2d 778 (1993).

The prosecutor did not comment on defendant's right to remain silent. *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991). Moreover, defendant failed to object to the alleged improper remark. No miscarriage of justice would result from our failure to further review this issue. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Affirmed.

/s/ Marilyn Kelly
/s/ Roman S. Gribbs
/s/ William E. Collette

¹ 416 Mich 581; 331 NW2d 707 (1982).

² 197 Mich App 404, 425-426; 442 NW2d 321 (1992), modified 444 Mich 853 (1993).