STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAMIRO ARIAS,

Defendant-Appellant.

UNPUBLISHED
October 8, 1996

No. 174887
LC No. 93-002821

Before: Michael J. Kelly, P.J., and Markman and J. L. Martlew,* JJ.

PER CURIAM.

Defendant was charged with first-degree premeditated murder, MCL 750.316; MSA 28.548, and first-degree felony murder, MCL 750.316; MSA 28.548, for his role in the February 1993 robbery and subsequent shooting death of the victim, Nassar Kahn. Defendant was convicted following a bench trial of second-degree murder, MCL 750.317; MSA 28.549. On March 3, 1994, defendant was sentenced to serve thirteen to twenty years' imprisonment. He now appeals as of right. We affirm.

In 1993, defendant and two others, Daniel Sanchez and Ernesto Cruz, undertook a plan to rob the victim of cocaine in his possession. In accord with the plan, Sanchez, posing as a middle man, contacted the victim and arranged for a meeting between defendant and Cruz, posing as buyers, and the victim. In the evening of February 1, 1993, the victim, accompanied by Sanchez, drove his vehicle to a residence belonging to defendant's aunt, where he picked up defendant and Cruz. All four men then proceeded together in the victim's car to a deserted location; defendant was seated behind Sanchez, who was positioned in the front passenger seat, and Cruz was seated behind the victim. Cruz carried a paper bag. Although defendant did not know the contents of the bag, he knew Cruz was in possession of a gun.

After they reached their destination, the victim was shot in the head. Sanchez, Cruz, and defendant exited from the vehicle. Defendant opened the driver's-side door and the victim's bag of cocaine fell to the ground. Defendant noticed a gun in the victim's right hand, grabbed the dope, and ran to a nearby residence also belonging to one of defendant's relatives. Cruz followed. Cruz obtained

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

kerosene and alcohol from the residence, returned to the scene, and burned the car containing the victim's body. A few days later, defendant, who used the proceeds from the sale of the stolen drugs to buy clothing, attempted to flee the state, but was later arrested.

In his statement to police, defendant admitted to his participation in the scheme. He also identified Cruz as the shooter, but later retracted that portion of his statement. At trial, defendant testified that the plan, which the three men concocted during a ten-minute conversation, did not involve killing the victim. Ramone Evans, a friend to all three participants, also made a statement to police. The statement described a February 9, 1993, conversation between Evans and defendant in which defendant described the shooting in detail and implied his participation by his use of the first person plural pronoun "we" in describing the incident.

In his original appellate brief, defendant advances five arguments. First, defendant contends that his jury trial waiver was invalid because the trial court failed to make sufficient factual findings to establish voluntariness. We disagree.

MCR 6.402 sets forth the procedure for securing a proper jury trial waiver. This rule, which eliminated the written waiver requirement and replaced it with an oral waiver procedure, reads in part:

> Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding. [MCR 6.402(B).]

In the present case, the following colloquy took place prior to trial:

> *The Court:* What is your full name, sir?
>
> *The Defendant:* Ramiro Arias.
>
> *The Court:* How old are you?
>
> *The Defendant:* Nineteen.
>
> *The Court:* How far have you gone in school?
>
> *The Defendant:* Ninth grade.
>
> *The Court:* I have in my right hand a document entitled Waiver of Trial by Jury. Did you discuss the fact that you have a constitutional right to have a jury trial with your attorney?
>
> *The Defendant:* Yes.

The Court: Am I correct in understanding that you do not want to have a jury decide this case; you'd rather have the court decide this case?

The Defendant: Yes.

The Court: Is this your signature on this document?

The Defendant: It is, sir.

The Court: All right. The Court will accept the signature and the document, and place it in the court file.

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Mr. Pearl [Assistant Prosecuting Attorney]: All right. I do believe that the Court, that the waiver was entered knowingly and intelligently, voluntarily waived.

The Court: That is correct.

The record of the waiver in this case is similar to that in *People v Gist*, 188 Mich App 610, 611-612; 470 NW2d 475 (1991), which another panel of this Court held was proper. In *Gist*, the defendant claimed that he had waived his right to a jury trial in order to secure a lighter sentence. *Id*. Because the trial judge ascertained, on the record, that the defendant, himself, signed the waiver form free from duress or coercion and that the defendant understood the consequence of his signature on the form, this Court rejected the defendant's claim. *Id*.

Although the trial judge in the present case did not specifically ask defendant if he had been coerced, defendant makes no allegations of duress or coercion in his brief on appeal. Further, our review of the record reveals no evidence of such impropriety. Rather, the record of the waiver shows that the trial judge, in compliance with MCR 6.402(B), advised defendant of his constitutional right to a jury trial and ascertained that defendant understood and knowingly surrendered the right. Accordingly, we agree with the trial court's determination of voluntariness and therefore reject defendant's request for a new trial.

Defendant next argues that the trial court failed to properly secure a waiver of his right to trial by jury because of the chronology of events leading up to the trial court's acceptance of the waiver. This issue presents a question of law which we will review de novo. *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995).

Defendant's claim arises out of the following turn of events: On January 31, 1994, defendant appeared before the trial judge. After being sworn by the court, defendant waived his right to trial by jury. The trial judge accepted the waiver. Subsequently, the prosecutor, in an effort to correct a possible oversight, requested that the trial court arraign defendant on the amended information.[1] Specifically, the prosecutor stated, "There very well may have been [an arraignment on the amended information]" but that he "wasn't sure." He asked that the court arraign defendant at that time in case

he had not been arraigned on the amended information. The court read the amended charge to defendant and defendant chose to stand mute. Upon entering a plea of not guilty on behalf of defendant, the trial court reiterated its acceptance of defendant's jury trial waiver.

On appeal, defendant asserts that the "corrective" arraignment on the amended information after defendant's assertion of his waiver of jury trial rendered the trial court's acceptance of defendant's waiver improper. In order to resolve defendant's claim, we turn our attention to MCR 6.402(A), which governs when a court may properly accept a waiver of defendant's right to trial by jury. The rule reads:

> The court may not accept a waiver of trial by jury until *after the defendant has had or waived an arraignment on the information* and has been offered an opportunity to consult with a lawyer. [MCR 6.402(A) (emphasis added).]

Upon inspection of the lower court record, we find that waiver at issue met the requirements of the MCR 6.402(A). The information was amended prior to defendant's appearance before the trial court, and, more importantly, prior to defendant's arraignment on the information. On March 2, 1993, almost one year before defendant's jury waiver trial, defendant appeared before the 36th District Court for a preliminary examination. At the examination, the magistrate granted the prosecutor's motion to amend the information regarding the count of first-degree felony murder to include "and/or a larceny." After binding defendant over on both counts, the magistrate scheduled defendant's arraignment on the matter for March 16, 1993. The lower court record indicates that the arraignment was held on this scheduled date. In the absence of evidence to the contrary, we assume that this arraignment was on the amended information because it was held two weeks after the preliminary examination during which the information was amended. Accordingly, defendant was arraigned on the amended information on March 16, 1993 and the "corrective" arraignment on January 31, 1994 was unnecessary.

"[T]he trial judge must find on the record, from evidence sufficient to warrant such finding, that the defendant, in open court, voluntarily and understandingly gave up his right to trial by jury." *People v Pasley*, 419 Mich 297, 303; 353 NW2d 440 (1984). We find that this is precisely what occurred in this case in a manner and sequence consistent with the requirements of MCR .6.402(A).

Defendant next argues that there was insufficient evidence to support his conviction as an aider and abettor. However, when considering a sufficiency of the evidence challenge following a bench trial, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985); *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

Second-degree murder is established where the defendant causes a death with malice and without provocation. *People v Harris*, 190 Mich App 652, 659; 476 NW2d 767 (1991). Malice is defined as the intent to kill or to cause great bodily harm, or as the wanton or willful disregard of the possibility that a death or great bodily harm might result. *People v Kelly*, 423 Mich 261, 273; 378 NW2d 365 (1985). Malice may be inferred from the intent to commit another felony, as well as from the facts and circumstances surrounding the commission of that felony. *People v Spearman*, 195 Mich

App 434, 441; 491 NW2d 606 (1992). A defendant would be guilty of aiding and abetting a crime upon proof that (1) another person committed a crime, (2) the defendant aided, assisted or encouraged its commission, and (3) the defendant, at the time of giving aid or encouragement, intended the commission of the crime or had knowledge that the principal intended its commission. *Id*. at 438. When determining whether there is sufficient evidence to show that defendant acted in concert with the principal, this Court may consider such factors as the nature of the association between defendant and the principal, the nature of defendant's participation in planning or executing the crime, and evidence of flight after the crime. *Id*. at 441.

Upon review of the evidence presented at trial, we conclude that a rational trier of fact could find that the essential elements of aiding and abetting second-degree murder were proven beyond a reasonable doubt. Defendant's actions before, during, and after the robbery-turned-homicide establish that defendant aided and abetted the principal while himself possessing the requisite intent to commit murder. At trial, defendant admitted not only to his presence, but to his participation, in the ten-minute conversation in which he and his associates concocted a plan to rob the victim. Defendant testified that he "dealt himself in on" the plan -- a plan which called for him to "snatch" dope from a known dealer and run. Further, defendant told the court that, during the course of the robbery, he feared that "the dope man might pull a gun on them," he knew that Sanchez frequently carried a gun, and he knew that Cruz was in possession of one. Clearly, defendant recognized that a death or great bodily harm might result and acted in spite of this recognition. Moreover, the court's finding that defendant was acting in concert with the principal when the victim was fatally shot is bolstered by the fact that defendant fled the scene and sought refuge at the home of a relative, that defendant facilitated Cruz' efforts to destroy any physical evidence by allowing him to remove kerosene and alcohol from the residence, and that defendant attempted to flee the state.[2]

Defendant next argues that the trial court failed to make sufficient findings of fact. Factual findings, however, are sufficient if it appears to this Court that the trial court was aware of the issues and correctly applied the law. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). By court rule, "a judge who sits without a jury in a criminal trial must make specific findings of fact and state conclusions of law." MCR 6.403; *People v Shields*, 200 Mich App 554, 558; 504 NW2d 711 (1993). This court rule reads:

> When trial by jury has been waived, the court with jurisdiction must proceed with the trial. The court must find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment. The court must state its findings and conclusions on the record or in a written opinion made a part of the record. [MCR 6.403.]

The purpose of articulation is to facilitate appellate review. *People v Johnson*, 208 Mich App 137, 141; 526 NW2d 617 (1994). Consequently, remand is unnecessary where it is manifest that the court was aware of the factual issues and resolved them and it would not facilitate appellate review to require further explication of the path the court followed in reaching the result. *Id*.

The record in the present case reveals that, contrary to defendant's argument, the trial court wholly complied with the court rule. Based upon its thorough factual findings, the court concluded that defendant participated in the perpetration of the robbery, as well as the killing of the victim; that, when defendant committed the act which led to the victim's death, he possessed the required mental state for second-degree murder, i.e., malice; and that the killing was neither justified nor excused. Because the evidence presented amply supports the trial court's findings, we find no merit in defendant's claim. *Johnson, supra*.

Defendant raises five additional issues in his supplemental brief on appeal. First, he contends that a new trial is warranted on account of newly discovered evidence. Defendant asserts that two anonymous telephone calls received by defense counsel following trial constitute newly discovered evidence because they establish that one of the prosecutor's witnesses committed perjury.

Whether these calls constitute newly discovered evidence presents a question of law, which we review de novo. *Connor, supra*. A court may grant a motion for a new trial based on newly discovered evidence if: (1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is more than cumulative, (3) the evidence would probably result in a different verdict on retrial, and (4) defendant could not with reasonable diligence have produced the evidence at trial. *People v Barbara*, 400 Mich 352, 362-363; 255 NW2d 171 (1977); *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). However, where newly discovered evidence would merely be used for impeachment purposes, it is not ground for a new trial. *Davis, supra*, 199 Mich App 516. The anonymous phone calls in question informed defense counsel that the caller had perjured herself when questioned about her knowledge of Sanchez' whereabouts. We fail to understand how such evidence is material or how its introduction would have affected the outcome of trial. Further, we believe that such evidence would have served at best only to impeach the witness' testimony by undermining her credibility. We therefore find that the evidence is not sufficient ground for a new trial.[3]

Defendant also challenges the propriety of the prosecutor's closing argument. Specifically, defendant argues that the prosecutor committed error requiring reversal in making several comments which were unsupported by the evidence. Because defendant failed to object to the prosecutor's remarks, this issue has not been properly preserved for appeal. Accordingly, appellate review is precluded unless failure to review the issue would result in a miscarriage of justice. *People v Whitfield*, 214 Mich App 348; 543 NW2d 347 (1995); *People v Lee*, 212 Mich App 228; 537 NW2d 233 (1995). Having reviewed these remarks, we find, in fact, that each of the allegedly improper comments was supported by the evidence and that the inferences drawn by the prosecutor were logical and reasonable. Accordingly, we find that no miscarriage of justice would result from our failure to review this issue and therefore we decline to do so.

Defendant next claims that trial counsel's failure to object to the allegedly improper prosecutorial remarks deprived defendant of effective assistance of counsel. Because the prosecutor's remarks were not improper, trial counsel's failure to object to the allegedly improper conduct could not have affected defendant's chances for acquittal and, therefore, defendant's claim of ineffective assistance of counsel on this ground is without merit. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

Defendant also argues that the trial court erred in sentencing him without first ascertaining whether he had adequate opportunity to review the presentence investigation report (PSR). Failure to challenge at sentencing the accuracy of information contained in the PSR waives the issue for appellate review. *People v Gezelman (On Reh)*, 202 Mich App 172, 173-174; 507 NW2d 744 (1993); *People v Sharp*, 192 Mich App 501, 504; 481 NW2d 773 (1992). Further, contrary to defendant's argument, the trial court afforded defendant an opportunity to challenge the information contained in the PSR. Defendant, however, not only failed to object, but he impliedly acquiesced to the court's reliance on the allegedly inaccurate report. Because defendant failed to properly preserve his sentencing challenge, we decline to review it.

Lastly, defendant argues that he was denied effective assistance of appellate counsel. More specifically, defendant argues that appellate counsel's failure to raise several unpreserved issues rendered appellate counsel's performance deficient. We disagree. The same standards apply to a claim of ineffective assistance of appellate counsel as apply to a claim of ineffective assistance of trial counsel. *People v Reed*, 198 Mich App 639, 646; 499 NW2d 441 (1993). Because defendant failed to overcome the presumption that appellate counsel's decision regarding which claims to pursue may be considered sound appellate strategy, we conclude that defendant's claim is without merit. *Reed*, *supra*, 198 Mich App 647.

Affirmed.

/s/ Michael J. Kelly
/s/ Stephen J. Markman
/s/ Jeffrey L. Martlew

[1] The original information, dated March 16, 1993, and filed on March 9, 1993, charged defendant with committing first-degree murder while in the perpetration or attempted perpetration of extortion. The amended information, however, listed larceny as the underlying felony for the first-degree murder charge.

[2] Based upon the court's findings, defendant could well have been convicted of the more serious crime of aiding and abetting first-degree felony murder. To establish a defendant's guilt of this crime, it must be demonstrated that defendant possessed both the intent to commit the underlying felony and the intent to kill or to cause great bodily harm, or else acted with wanton or willful disregard of the possibility that a death or great bodily harm might result. *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995). Here, the court found that defendant intended to commit the underlying felony, i.e. robbery, and also that defendant acted with malice when he committed the act which led to the victim's death. Because the requisite mens rea for both felony murder and second-degree murder is malice, *People v Feldmann*, 181 Mich App 523, 533-37; 449 NW2d 692 (1989), the court may well have concluded that defendant was guilty of the felony-murder offense.

[3] Further, we note that the "newly discovered evidence" was presented to the trial court prior to sentencing. The court determined that the evidence provided no basis for granting a new trial, much less for it altering its verdict.