STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLAYTON SHAERON WILKINS,

Defendant-Appellant.

UNPUBLISHED
November 8, 1996

No. 185214
LC No. 94-005825

Before: Markman, P.J., and Smolenski and G. S. Buth,* JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of second-degree murder, MCL 750.317; MSA 28.549, and armed robbery, MCL 750.529; MSA 28.797, for the killing of a fast-food restaurant store manager. We affirm defendant's convictions and sentences.

First, defendant argues that the prosecution failed to introduce sufficient evidence of defendant's intent to convict him as an aider and abettor to second-degree murder beyond a reasonable doubt.

To convict a defendant of second-degree murder, the prosecution must prove beyond a reasonable doubt that the defendant caused the victim's death, and the killing was committed with malice and without justification. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Malice is either the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm, knowing that death or great bodily harm will probably result. *Id.* The finder of fact may infer malice from the circumstances of the killing. *Id.* Malice is a permissible inference from the use of a deadly weapon. *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995).

To convict a defendant as an aider and abettor, the prosecution must prove that: the crime was committed by defendant or someone else, the defendant acted or encouraged the principal in a manner that aided or assisted the commission of the crime, and the defendant intended that the crime be committed or knew that the principal intended the commission of the crime at the time defendant aided or assisted. *People v Sean Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993).

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

The state of mind of an aider and abettor may be inferred from the facts and circumstances, including a close association between the abettor and the principal, the abettor's participation in planning or committing the crime, and evidence of flight afterwards. *Turner, supra*, at 568-569.

The prosecution presented evidence that, while defendant waited in a car at the restaurant's drive-through window, co-defendant put his head and arms into the window, drew a gun, reached for the till and told the cashier he was robbing her. Defendant looked at the cashier as though nothing was happening and did not do or say anything. Throughout this time, defendant remained in the car, outside the window, while co-defendant committed the robbery and fatally shot the manager. Afterwards, co-defendant drove away with defendant. Additionally, the prosecutor proved that defendant had been present and acted as a decoy during an armed robbery of another fast food restaurant which co-defendant committed the previous week. This evidence was sufficient to establish beyond a reasonable doubt that defendant had the requisite intent.

Next, defendant argues that manifest injustice occurred when the prosecution introduced evidence of defendant's involvement in the previous armed robbery. We disagree. Evidence of other crimes or wrongful acts is admissible to show intent, knowledge or plan, among other purposes. MRE 404(b)(1). While such evidence may not be offered to prove a character trait of a defendant and that he acted in conformity with that trait, it is admissible if it is relevant to any fact in issue and properly used for such limited purpose. *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993). Because defendant's intent as an aider and abettor was one of the elements which the prosecution was required to prove, the evidence of the prior robbery was admissible to prove defendant had the requisite intent. That he may have acted as a decoy in the earlier robbery was highly relevant in interpreting his conduct in the instant case. Such evidence makes it more likely than not that defendant knew co-defendant was armed on the night of the incident and thus was aware that death or great bodily harm would occur.

Defendant contends that, presuming the evidence was relevant, it still should have been excluded because its probative value was substantially outweighed by the danger of unfair prejudice. However, the prosecution limited its argument about this evidence to arguing that it showed defendant's knowledge of his co-defendant's plan, and the trial court instructed the jury that it could only consider the evidence for the purpose of determining whether defendant used a plan or scheme he had used before and specifically instructed the jury that it could not consider the evidence for any other purpose. With these limitations, the danger of unfair prejudice was effectively minimized.

Lastly, defendant contends that his sentence was not proportionate, even though it was within the sentencing guidelines' recommendation, because he was only eighteen years old. A sentence which is within the guidelines is presumed to be proportionate. *People v Dukes*, 189 Mich App 262, 266; 471 NW2d 651 (1991). The presumption may be overcome in unusual circumstances, which must be presented to the trial court before sentencing. *People v Hadley*, 199 Mich App 96, 105; 501 NW2d 219 (1993), *People v Sharp*, 192 Mich App 501, 506; 481 NW2d 773 (1992). The only unusual circumstance which defendant was presented was his age. We do not find this factor to be sufficient to overcome the presumption of proportionality in this case. See *People v Piotrowski*, 211 Mich App

527, 532-533; 536 NW2d 293 (1995). Accordingly, we conclude that defendant's sentence was proportionate.

Affirmed.

/s/ Stephen J. Markman
/s/ Michael R. Smolenski
/s/ George S. Buth