STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK PAUL JEHMLICH,

Defendant-Appellant.

UNPUBLISHED
November 26, 1996

No. 180409
LC No. 92-009456

Before: Hoekstra, P.J., and Sawyer and T.P. Pickard,* JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of second-degree murder, MCL 750.317; MSA 28.549, and first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2). Defendant was sentenced to two concurrent terms of twenty-five to fifty years' imprisonment for his second-degree murder and first-degree criminal sexual conduct convictions. We affirm.

First, defendant argues that the evidence was insufficient to establish beyond a reasonable doubt that defendant was guilty of second-degree murder, either as a principal or as an aider and abettor. We disagree.

The elements of second-degree murder are: (1) that a death occurred, (2) that it was caused by the defendant, (3) that the killing was done with malice, and (4) without justification or excuse. *People v Lewis*, 168 Mich App 255, 268; 423 NW2d 637 (1988). To be guilty of second-degree murder, a defendant must have possessed one of three possible intents: the intent to kill, the intent to inflict great bodily harm, or the intent to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm will probably result. *People v Flowers*, 191 Mich App 169, 176; 477 NW2d 473 (1991).

In order to convict a defendant as an aider and abettor, the prosecution must demonstrate that: (1) the crime was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that aided or assisted the commission of the crime; and, (3) the defendant

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

intended the commission of the crime or had knowledge that the principal intended its commission at the time that the defendant gave the aid or assistance. *People v Jones (On Rehearing),* 201 Mich App 449, 451; 506 NW2d 542 (1993). An aider and abettor's state of mind may be inferred from all of the facts and circumstances. *People v Turner,* 213 Mich App 558, 568; 540 NW2d 728 (1995).

Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found that the essential elements of the crime were established beyond a reasonable doubt. *People v Hutner,* 209 Mich App 280, 282; 530 NW2d 174 (1995). The prosecution witnesses' testimony established that defendant's cofelon stabbed the victim in her arm and threatened to kill her when she attempted to get out of defendant's car. The evidence also showed that, despite the victim's pleas to not kill her and to let her see her children, defendant and his cofelons engaged in numerous sexual acts with the victim. Defendant watched as his cofelons choked, repeatedly stabbed, and slit the throat of the victim. Moreover, defendant drove with one of his cofelons to dump the victim's naked body in the streets of Detroit. Although defendant did not participate in the stabbing, there was sufficient evidence for the trier of fact to conclude that defendant knew that his cofelons intended to kill or to do great bodily harm, knowing that the victim's death was a probable consequence of their actions. *Jones, supra* 201 Mich App 451.

Next, defendant contends that the trial judge erred in refusing to consider the charge of accessory after the fact, which deprived defendant of a fair trial. We disagree. We regard defendant's request for the trial court to instruct itself on the uncharged offense as the equivalent of a motion to amend the information pursuant to MCL 767.76; MSA 28.1016. See *People v Williams,* 412 Mich 711, 714; 316 NW2d 717 (1982). The prosecuting attorney, as the chief law enforcement officer in the county, decides the initial charge, not the police or the court. The prosecutor's decision to add a count is discretionary and, unless this discretion is clearly abused, it should stand. *People v Evans,* 94 Mich App 4, 6-7; 287 NW2d 608 (1979); *People v Matulonis,* 60 Mich App 143, 149; 230 NW2d 347 (1975). The judiciary may not control the institution and conduct of prosecutions. *People v Morrow,* 214 Mich App 158, 160; 542 NW2d 324 (1995). Since the prosecution objected to the additional charge in this case, the trial court did not err in refusing to consider the offense of accessory after the fact.

Defendant also asserts that he was deprived of his due process right to a fair trial when the trial judge refused to exclude evidence of the three knives that were confiscated from defendant's apartment, but that were not used in the stabbing. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v McAlister,* 203 Mich App 495, 505; 513 NW2d 431 (1994). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *Id.*

MRE 401 defines "relevant evidence" as "evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." (Emphasis added.) The evidence that there were three knives confiscated from the bedroom where the stabbing occurred was not "material" to a fact at issue, nor did

it tend to make the existence of any fact at issue more or less probable than it would have been without such evidence. This is especially true in light of the fact that defendant did not dispute that the stabbing occurred in his bedroom with a knife taken from his car. Moreover, testimony from the first trial established that the knives were not related to the offense. Thus, pursuant to MRE 401, the probative value of the testimony regarding the three knives was nil. However, based on the trial court's acknowledgment of the fact that the knives were not related to the offense, we conclude that there was no prejudicial effect of the evidence. A trial court sitting without a jury is less likely to be prejudiced by the erroneous admission of improper evidence. *People v Rosales*, 160 Mich App 304, 313; 408 NW2d 140 (1987). Therefore, given the overwhelming evidence against defendant, the error was harmless beyond a reasonable doubt and does not require reversal. See *People v Bahoda*, 448 Mich 261, 291-292; 531 NW2d 659 (1995).

Defendant further argues that the prosecutor improperly interjected prejudicial innuendo into the trial, disparaged defendant by comparing him to a Nazi death camp guard, and improperly appealed to religion during his rebuttal closing argument. We disagree. Generally, "[p]rosecutors are accorded great latitude regarding their argument and conduct." *Bahoda, supra,* 448 Mich 282 (quoting *People v Rohn,* 98 Mich App 593, 596; 296 NW2d 315 [1980]). They are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *Id.* (quoting *People v Gonzalez,* 178 Mich App 526, 535; 444 NW2d 228 [1989]). Nevertheless, a prosecutor must refrain from denigrating a defendant with intemperate and prejudicial remarks. *Id.* at 282-283. Considering the prosecutor's closing argument in its entirety, we conclude that no manifest injustice would result from our failure to further review this unpreserved issue. *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995); *People v Hedelsky*, 162 Mich App 382, 386; 442 NW2d 746 (1987).

Defendant's argument that he was denied effective assistance of counsel when defense counsel failed to adequately object to the contested prosecutorial comments must also fail. Upon a thorough review of the record, we conclude that defendant has not demonstrated that defense counsel's performance fell below an objective standard of reasonableness, or that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994), cert den sub nom *People v Caruso*, 513 US __; 115 S Ct 923; 130 L Ed 2d 802 (1995); *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

Next, defendant contends that since the trial judge accepted defendant's jury trial waiver without explaining the difference between a jury trial and a bench trial, the waiver was not valid because it was not knowingly and intelligently made. We disagree. Contrary to defendant's assertions, the trial court is not required to explain to a defendant that a jury must reach a unanimous verdict in order to convict him, while a single person would decide his fate in a bench trial. *People v James (After Remand)*, 192 Mich App 568, 570-571; 481 NW2d 715 (1992). The court followed the requirements of MCR 6.402(B) in ascertaining whether defendant knowingly and voluntarily waived his right to a jury trial. The court's inquiry revealed that defendant was a twenty-six-year-old high school graduate who could read and write, and that he was not threatened or promised anything to waive his

constitutional right to a jury trial. Accordingly, we conclude that the court properly determined that defendant knowingly, intelligently and voluntarily waived his right to a trial by jury.

Finally, defendant asserts that the trial court abused its discretion in imposing a minimum sentence of twenty-five years' imprisonment for the murder conviction, the uppermost range of the sentencing guidelines range of twelve to twenty-five years or life. We disagree. Sentences within the guidelines range are presumptively proportionate. *People v Cotton,* 209 Mich App 82, 85; 530 NW2d 495 (1995). Defendant has failed to raise any mitigating circumstances that would overcome the presumption of proportionality and demonstrate that the court abused its discretion in sentencing defendant. *People v Milbourn,* 435 Mich 630, 661; 461 NW2d 1 (1990); *People v Piotrowski,* 211 Mich App 527, 533; 536 NW2d 293 (1995). The court relied upon appropriate factors in imposing defendant's sentence, which was proportionate to both the offense and the offender. *Milbourn, supra,* 435 Mich 635-636; *People v Hunter,* 176 Mich App 319, 320-321; 439 NW2d 334 (1989).

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Timothy P. Pickard