

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARCHIE LEE THOMAS, JR.,

Defendant-Appellant.

UNPUBLISHED

December 6, 1996

No. 176113

LC No. 93-008354-FC

Before: Jansen, P.J., and Reilly and E. Sosnick,* JJ.

PER CURIAM.

Following a jury trial in the Saginaw Circuit Court, defendant was convicted of four counts of armed robbery, MCL 750.529; MSA 28.797, three counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, conspiracy to commit murder, MCL 750.316; MSA 28.548, conspiracy to commit armed robbery, MCL 750.529; MSA 28.797, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2) and carrying a concealed weapon, MCL 750.227; MSA 28.424. Defendant subsequently pleaded guilty to habitual offender, second offense, MCL 769.10; MSA 28.1082. He was thereafter sentenced to thirty to fifty years' imprisonment for the armed robbery convictions, thirty-five to sixty years for the assault with intent to murder convictions, thirty to fifty years for the conspiracy to commit armed robbery convictions, life imprisonment for the conspiracy to commit murder conviction, thirty-six to ninety months for the concealed weapon conviction, and two years for the felony-firearm conviction. Defendant appeals as of right and we affirm.

Defendant's convictions arose out of an incident which occurred on August 24, 1993 in the City of Saginaw. Defendant was riding in a pickup truck with two other occupants. The pickup truck pulled up next to a car containing four teenagers. Defendant, who was armed with a nine-millimeter semi-automatic gun, entered the car occupied by the four teenagers, and demanded that they give him their money and other valuables. The teenagers handed over their cash and jewelry. Defendant directed the driver to go to a dead-end street, and he hit two of the teenagers on the head with his gun as they drove. As they were coming to a stop, the pickup truck passed them, pulled in front, and stopped

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

suddenly, causing a collision. Two of the teenagers jumped out of the car and ran. Defendant exited the car and began firing his gun at the boys. Defendant hit one of the boys three times (once in the back of each leg and in the buttocks), but missed the other. Defendant returned to the car and put his gun to the driver's head. Following a struggle, the driver was able to escape. Defendant then returned to the car and put his gun to the head of the last teenager sitting in the back seat. This teenager was killed as a result of a gunshot wound to his head. There was conflicting testimony regarding whether defendant actually pulled the trigger.

On appeal, defendant raises six issues. He claims that the prosecutor failed to produce sufficient evidence at trial to sustain his convictions of conspiracy to commit armed robbery and conspiracy to commit murder; that the trial court erred in failing to grant his motion for a directed verdict on the charges of conspiracy to commit murder and conspiracy to commit armed robbery; that his intoxication precluded a finding that he had the requisite intent to commit armed robbery, assault with intent to commit murder, conspiracy to commit armed robbery, and conspiracy to commit murder; that the prosecutor engaged in misconduct at trial; that the trial court's jury instructions were erroneous; and that he is entitled to resentencing. We do not find any issue to require reversal.

Defendant first argues that there was insufficient evidence of an agreement with defendant's accomplice, Keith Taylor, to support his conspiracy convictions, particularly a lack of evidence of shared intent. However, the prosecutor presented evidence that while following defendant, Taylor directed another person regarding where and when to drive, knew defendant was going to turn a corner, and ultimately directed the other person to pull ahead of the victim's car. This evidence was sufficient to give rise to a reasonable inference that the two men were participating together and made concerted efforts while in separate vehicles. It was sufficient for the jury to infer a conspiracy to commit armed robbery. *People v Atley*, 392 Mich 298, 311; 220 NW2d 465 (1974); *People v Barajas*, 198 Mich App 551, 554; 499 NW2d 396 (1993), aff'd 444 Mich 556; 513 NW2d 722 (1994).

Regarding conspiracy to commit murder, the prosecutor theorized that the men had a plan to eliminate witnesses, as evidenced by the fact that the victims were moved to a more isolated spot. In other words, because Taylor knew that defendant would direct the victims around the corner, the prosecutor asked the jury to infer that the two men planned to dispose of witnesses. Evidence that Taylor attempted to use the gun during the course of the incident was further support for an inference of a shared intent to kill. This combination of evidence was sufficient for the jury to make proper inferences to find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

Accordingly, because there was sufficient evidence presented at trial for the jury to find that the elements of conspiracy to commit armed robbery and conspiracy to commit murder were proven beyond a reasonable doubt, the trial court did not err in denying defendant's motions for directed verdict. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

Defendant also argues that there was insufficient evidence to overcome his affirmative defense of intoxication. Although there was evidence that defendant had drunk alcohol on the day of the incident, there was no evidence that defendant was intoxicated to a point where he would have been unable to

form the intent to either rob or murder. It was well within the jury's province to reject any claim of intoxication under these circumstances. Moreover, it is unnecessary for the prosecutor to negate every reasonable theory consistent with the defendant's innocence. Rather, it is sufficient if the prosecutor proves his own theory beyond a reasonable doubt in the face of whatever contradictory evidence that the defendant may provide. *People v Carson*, 189 Mich App 268, 269; 471 NW2d 655 (1991). There was sufficient evidence to establish that defendant committed the crimes beyond a reasonable doubt.

Next, defendant argues that his convictions should be reversed because the prosecutor's closing argument contained comments that constituted prosecutorial misconduct. A thorough reading of the prosecutor's argument fails to reveal any comments that would have deprived defendant of a fair trial or would have resulted in a miscarriage of justice. *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995). Evidence regarding defendant's flight and extradition was presented at trial and defendant's contention that the prosecutor argued facts not in evidence is incorrect.

Defendant next argues that the trial court erred in not sua sponte giving the jury instructions on intoxication, CJI2d 6.3, and disputed accomplice witness, CJI2d 5.5 and 5.6. An instruction on the defense of intoxication is only proper if the facts would allow the jury to conclude that a defendant's intoxication was so great that he would have been unable to form the requisite intent. *People v Mills*, 450 Mich 61, 82; 537 NW2d 909 (1995). Although there was evidence that defendant had consumed beer and appeared to have been drinking, there was no evidence of intoxication or that defendant was impaired to the point where he was incapable of forming the requisite intent. Therefore, even if defendant had requested the instruction, the trial court could have properly refused to give it. Additionally, because there was no evidence that the third man in the truck, James Chapman, Jr., knowingly and willingly helped or cooperated in the commission of the crimes, and several other eyewitnesses identified defendant, the absence of disputed accomplice instructions did not deprive defendant of a fair trial or result in a miscarriage of justice. *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993).

Because the trial court did not err in not giving the instructions on intoxication or disputed accomplice witness, trial counsel was not ineffective for failing to request those instructions. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Finally, we find no error in defendant's sentences. The trial court gave extensive reasoning for its sentencing decision, including the danger defendant posed to society, the death of one of the young victims, and defendant's status as an habitual offender. The court's reasoning constituted sufficient articulation of the bases of its sentencing decisions. *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987). Further, the court's consideration of one victim's death was not improper. A court may properly consider a charge on which a defendant is acquitted in sentencing, *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991), and the jury found defendant guilty of conspiracy to commit murder and other crimes that contributed to the death. Further, we do not find defendant's sentences for assault with intent to commit murder, conspiracy to commit armed robbery, and armed robbery to violate the principle of proportionality in considering the background of the offender and the

very serious nature of the crimes in this case. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990); *People v Houston*, 448 Mich 312; 532 NW2d 508 (1995).

Affirmed.

/s/ Kathleen Jansen

/s/ Maureen Pulte Reilly

/s/ Edward Sosnick