STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL PHILLIPS,

Defendant-Appellant.

UNPUBLISHED
December 30, 1996

No. 173188
Recorder's Court
LC No. 93-1262

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DEVON CHEATHAM,

Defendant-Appellant.

No. 173189
LC No. 93-1262

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL DEVON HESTER,

Defendant-Appellant.

No. 173190
LC No. 93-1262

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

Before: Taylor, P.J., and Markman and P. J. Clulo,* JJ.

PER CURIAM.

In these three consolidated cases, defendants appeal as of right their convictions which were entered following a joint bench trial. Defendant Phillips was convicted of accessory after the fact, MCL 750.505; MSA 28.773, and habitual offender, second offense, MCL 769.10; MSA 28.1082, and was sentenced as an habitual offender to forty-two to ninety months in prison. Defendant Cheatham was convicted of assault with intent to rob and steal being armed, MCL 750.89; MSA 28.284, assault with intent to rob and steal being unarmed, MCL 750.88; MSA 28.283, and habitual offender, third offense, MCL 769.11; MSA 28.1083, and was subsequently sentenced as an habitual offender to twenty to forty years in prison. Defendant Hester was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, assault with intent to rob while armed, MCL 750.89; MSA 28.284, possession of a firearm at time of commission or attempted commission of a felony, MCL 750.227b; MSA 28.424(2), assault with intent to rob or steal being unarmed, MCL 750.88; MSA 28.283, and habitual offender, third offense, MCL 769.11; MSA 28.1083, and was sentenced to two years for the felony-firearm conviction and as an habitual offender to twenty-two to forty-five years in prison. MCL 769.11; MSA 28.1083. We affirm.

These convictions arose from defendants' abortive attempt to rob a restaurant manager and several restaurant employees of the restaurant's evening proceeds. Hester and Cheatham attempted the actual robbery, in the course of which Hester was shot. Cheatham escaped, only to be apprehended a short time later in Hester's car, which Phillips was driving.

Phillips argues that his conviction of accessory after the fact violated his due process rights because he was given inadequate notice that he would face this charge. We disagree. Phillips was charged with assault with intent to rob while armed on an aiding and abetting theory. A finder of fact may be instructed on a cognate lesser included offense where the charging document provided the defendant with notice that he could face such a charge. *People v Adams*, 202 Mich App 385, 387-388; 509 NW2d 530 (1993). Because the evidence raised a question of fact regarding whether Phillips became involved in the assault before or after its completion, there was both a logical connection and a similarity between the charges of aiding and abetting and accessory after the fact. Phillips therefore was provided with sufficient notice that he could face an accessory after the fact charge despite the relative lateness of his learning of the prosecutor's intentions to seek a conviction on this charge. *People v Usher*, 196 Mich App 228, 233-234; 492 NW2d 786 (1992); *Adams, supra* at 389 -390.

Cheatham argues that the trial court denied his constitutional right of confrontation by introducing non-testifying codefendant Hester's inculpatory statement against him. Although the rule of

Bruton v United States, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), which prevents the introduction of a non-testifying codefendant's inculpatory statement, does not apply to bench trials, *People v Butler*, 193 Mich App 63, 66; 483 NW2d 430 (1992), even if applicable, it is not violated to the extent that a codefendant's statement has been admitted pursuant to a "firmly rooted" hearsay exception. MRE 803(2) (excited utterance). *People v Petros*, 198 Mich App 401, 409; 499 NW2d 784 (1994), citing *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980). In this case, Hester's statement was admissible under MRE 803(2) as an excited utterance. *People v Kowalak*, 215 Mich App 554, 557; 546 NW2d 681 (1996); *People v Hackney*, 183 Mich App 516, 522-23; 455 NW2d 358 (1990); Hester named Cheatham as an accomplice immediately after he had been shot and believed himself to be dying; further, Hester's statement related to the immediate circumstances surrounding his shooting, namely his involvement in a failed criminal activity with Cheatham. We are therefore unable to conclude that the trial court abused its discretion in admitting Hester's statement. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). Further, we believe that Hester's statements concerning the getaway car's description and defendants' meeting place after the robbery was sufficiently closely connected to the startling event also to be admissible under MRE 803(2). However, even to the extent that such testimony was too attenuated in its relationship to Hester's shooting, given the rapid subsequent discovery of Cheatham in Hester's car and the lineup identification of Cheatham by witnesses, we conclude that any error was harmless.

Cheatham also argues that he did not knowingly and intelligently waive his right to a jury trial because he waived it on the mistaken belief that he would thereby avoid facing Hester's incriminating statements. However, the trial court sufficiently ascertained that Cheatham's waiver was informed, knowing and intelligent. Its findings were significantly more in-depth than in *People v Shields*, 200 Mich App 554, 560-561; 504 NW2d 711 (1993), in which this Court upheld such a waiver. That Cheatham may have made miscalculations about the nature of his trial does not obviate an otherwise proper waiver. Accordingly, we find no error.

Cheatham next argues that the trial court denied him due process when it permitted a witness to identify him at trial based on a suggestive pretrial lineup. We disagree. Our review of Cheatham's *Wade*[1] hearing indicates that the lineup was not impermissibly suggestive. While Cheatham was the only individual at the lineup with a beard, he and the other lineup participants were all similar in weight, height, age, race and gender; further, no police officer made any suggestive statements to the witness who positively identified Cheatham at the lineup and who subsequently identified him at trial. *People v Kurylczyk*, 443 Mich 289, 311-312; 505 NW2d 528 (1993).

Hester argues that the trial court violated his right to freedom from self-incrimination by admitting statements that he made to a police officer without first being informed of his *Miranda*[2] rights. Hester gave the statements in question to a police officer after the abortive robbery attempt and after he had been shot, while he was still lying on the ground screaming that he was dying. The police officer attempted to instruct Hester on his *Miranda* rights but was interrupted by Hester who pleaded to be

taken to a hospital. In this situation, Hester could reasonably have believed that he was not free to leave; therefore, *Miranda* warnings were necessary before questioning him. *People v Mayes (After Remand)*, 202 Mich App 181, 190; 508 NW2d 161 (1993). However, whether Hester's interruption of the officer's *Miranda* warnings can be construed as a waiver is a matter that we need not address here.[3] Our review of the record indicates that the trial court relied exclusively upon the testimony of several eyewitnesses in finding Hester guilty beyond a reasonable doubt. Given the substantial evidence of Hester's guilt, where two witnesses saw him shoot one victim and four witnesses saw him lying on the ground with his gun at his side immediately following his clear attempt at murder or robbery, reversal would not be required even if Hester's statements were elicited absent *Miranda* warnings. Such error would constitute at most harmless error.

Hester next claims that his convictions of both assault with intent to do great bodily harm and assault with intent to rob while armed violated the double jeopardy clause. We disagree. This Court has already addressed this issue in *People v McRaft*, 102 Mich App 204, 215; 301 NW2d 852 (1980), holding that simultaneous convictions of both these crimes arising from the same transaction do not violate double jeopardy.

Hester next claims that the trial court failed to make specific findings of fact regarding his assault with intent to rob while armed conviction, as required by MCR 2.517(A). We disagree. Our review of the record shows that the trial court was aware of the factual issues before it, correctly applied the law and appropriately considered lesser included offenses. See *People v Wardlaw*, 190 Mich App 318, 320-321; 475 NW2d 387 (1991).

Hester next claims that the trial court erred in denying his motion for a directed verdict on his assault with intent to rob while armed charge, maintaining that there was insufficient evidence of his specific intent to rob or steal. However, where Hester was clearly engaged in the same crime as Cheatham, where there was evidence of prior planning and where Cheatham asked one employee that he attacked "Where is the money at?", a rational trier of fact, viewing the evidence in a light most favorable to the prosecution, could find beyond a reasonable doubt that Hester possessed the intent to rob or steal. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995).

Finally, Hester claims that defense counsel provided ineffective assistance by failing to move to suppress the incriminating statements that Hester made in violation of his *Miranda* rights. We disagree. While Hester's statements may have been taken in violation of his *Miranda* rights, as outlined above, the overwhelming evidence of his guilt leads us to the conclusion that, even if counsel had moved to suppress, there is no reasonable probability that the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). A defendant raising an ineffective assistance of counsel claim must show not only a reasonable probability that the result of the proceeding would have been different but also that the result of the proceeding was fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; ___ NW2d ___ (1996).

Affirmed regarding all three defendants.

/s/ Clifford W. Taylor
/s/ Stephen J. Markman
/s/ Paul J. Clulo

[1] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

[2] *Miranda v Arizona*, 484 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] Although it might be argued that no effective waiver could be made by Hester under circumstances in which he might have viewed the officer's willingness to take him to the hospital to be conditioned upon his response to the officer's questions, it is also hard to understand what a reasonable law enforcement officer could have done in these circumstances other than what Officer Campbell did. To insist upon instructing Hester on his *Miranda* rights as he lay screaming on the ground pleading to be taken to a hospital strikes us as an absurd proposition; on the other hand, we do not understand why a conscientious police officer should have to entirely forego any opportunity at all to question an obvious criminal suspect about a fresh criminal occurrence, one in which the suspect's colleagues had only recently departed the scene and were more likely to escape or commit further criminal activities if information about their flight could not be learned from the suspect.