STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEON JERMAINE PRINCE,

Defendant-Appellant.

UNPUBLISHED
February 28, 1997

No. 186979
Recorder's Court
LC No. 94-010227

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBIE LANELL GEORGE,

Defendant-Appellant.

No. 186988
Recorder's Court
LC No. 94-012633

Before: Bandstra, P.J., and Neff and M.E. Dodge,* JJ.

PER CURIAM.

Defendant Prince was convicted of second-degree murder, MCL 750.317; MSA 28.549, armed robbery, MCL 750.529; MSA 28.797, four counts of attempted armed robbery, MCL 750.92; MSA 28.287; MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent terms of forty to sixty years' imprisonment on the second-degree murder conviction, forty to sixty years on the armed robbery conviction, and forty to sixty months on each attempted armed robbery conviction, and to a consecutive sentence of two years on the felony-firearm conviction. Defendant George was convicted of second-

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

degree murder, MCL 750.317; MSA 28.549, armed robbery, MCL 750.529; MSA 28.797, four counts of assault with intent to rob while armed, MCL 750.89; MSA 28.284, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant George was sentenced to concurrent terms of forty to sixty years on the second-degree murder conviction, forty to sixty years on the armed robbery conviction, forty to sixty years on each assault conviction, and to a consecutive two-year term on the felony-firearm conviction. In these consolidated cases, defendants appeal as of right their convictions and sentences. We affirm defendants' convictions, but remand for resentencing in both cases.

Defendant George

Defendant argues that the trial court improperly refused to allow full cross-examination of witnesses Riley and Collins. Under MRE 611(b), a trial court has discretion regarding the scope of cross-examination, and a court's decision is not subject to review unless a clear abuse of discretion is shown. *People v Taylor*, 386 Mich 204, 208; 191 NW2d 310 (1971). We find no abuse of discretion here. With respect to witness Riley, defendant was provided the opportunity to impeach her identification testimony during cross-examination. Upon redirect, witness Riley did not provide a new basis for her identification of defendant, and the trial court correctly determined that "no new subject matter" was brought up on redirect examination to justify recross-examination. With respect to witness Collins, defendant's area of cross-examination was properly considered immaterial by the trial court.

Defendant contends that the trial court incorrectly instructed the jury regarding the intent element for aiding and abetting. In the absence of an objection at trial, appellate review is precluded absent manifest injustice. *People v Ferguson*, 208 Mich App 508, 510; 528 NW2d 825 (1995). We conclude that the instructions in the present case adequately conveyed to the jury that an aider and abettor must, at the time of giving the aid, intend the commission of the crime charged. See *People v Burgess*, 67 Mich App 214, 216-218; 240 NW2d 485 (1976). There was no manifest injustice.

Defendant objects to the admission of evidence that he gave an alias at the time of his arrest, but this was relevant to the issue of his credibility and was not unfairly prejudicial. See *People v Bowens*, 119 Mich App 470, 472-473; 326 NW2d 406 (1982). Officer Turner's comment that he knew defendant from prior arrests was given in response to defense counsel's questions to Turner about why he had arrested defendant when defendant had produced an identification indicating that he was someone else. This was a permissible response to the question and was not so unfairly prejudicial as to require reversal. See *People v Amison*, 70 Mich App 70, 75; 245 NW2d 405 (1976).

Defendant argues that the prosecutor made improper remarks requiring a new trial during closing argument. As there was no objection at trial, our review is precluded unless the prejudice was so serious to defendant that a timely requested instruction could have not cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Having reviewed the contested prosecutor statements in this case with those at issue in precedents where this Court has decided that a jury instruction could have cured any damage, we conclude that our review is precluded. See *People v Swartz*, 171 Mich App 364, 372-373; 429

NW2d 905 (1988) (considering comments criticized as asking for

jury sympathy for the victim of the crime); *People v Kent*, 157 Mich App 780, 794; 404 NW2d 668 (1987) (considering prosecutor comments regarding defense counsel's trying to mislead the jury).

Defendant argues that the felony-firearm instruction provided to the jury did not define the term "firearm," but, again, this was not the subject of an objection at trial and we review only for a miscarriage of justice. *People v Buck*, 197 Mich App 404, 423; 496 NW2d 321 (1992), rev'd in part on other grounds sub nom *People v Holcomb*, 444 Mich 853; 508 NW2d 502 (1993). In any event, defendant's argument is meritless as a panel of this Court has concluded that it is unnecessary to provide the jury a definition of "firearm." *People v Parker*, 133 Mich App 358, 361; 349 NW2d 514 (1984).

Defendant argues that he is entitled to resentencing because the trial court based its sentence on the conclusion that George was guilty of first-degree murder, although the jury acquitted him of that charge. This contention is supported by the record, which shows that the trial court justified its sentence, in part, by saying: "We all heard the evidence. We all heard the witness, and we all understand the circumstances…. And what you really committed was murder in the first degree." Clearly, "the sentencing judge improperly found that…defendant was actually guilty of first-degree murder." *People v Shavers*, 448 Mich 389, 393; 531 NW2d 165 (1995). We agree with defendant that this was error requiring resentencing. *People v Glover*, 154 Mich App 22, 44-45; 397 NW2d 199 (1986).

Defendant also argues that the trial court improperly based its sentencing decision on his refusal to admit guilt. However, it is appropriate for a sentencing judge to consider evidence indicating a lack of remorse in sentencing because this is relevant to the defendant's potential for rehabilitation. *People v Calabro*, 166 Mich App 389, 394-396; 419 NW2d 791 (1988). Our review of the record indicates that, although defendant maintained his innocence after conviction, the judge did not attempt to coerce defendant into admitting his guilt, and there is nothing to indicate that, had the defendant done so, his sentence would have been less severe. *People v Wesley*, 428 Mich 708, 713; 411 NW2d 159 (1987). We do not conclude that defendant's sentence was based on any improper influence arising out of his failure to admit guilt.

Finally, our review of the record does not indicate that the trial court based its sentence upon a finding that defendant had committed other offenses, as defendant argues, but instead the court was merely commenting on its impression of defendant's potential for reform.

Defendant Prince

Defendant argues that there was inadequate probable cause for his arrest, likening the present case to one involving an anonymous tip. However, the arrest in the instant matter was based on the statement given to police by a known person, Leon Williams, and not as the result of an anonymous tip. The fact that Williams received information suggesting that defendant had been involved in the killing from a person unknown to the police does not make Williams himself into an anonymous informant. See *People v Mosley*, 338 Mich 559, 563-564; 61 NW2d 785 (1953). We conclude that Williams'

statement to the police about what he saw at the crime scene and what he learned about the person involved constituted probable cause for defendant's arrest.

Defendant further argues that his Fourth Amendment rights were violated because the police entered into his home without a warrant to arrest him. However, when this issue was raised at the pretrial evidentiary hearing, no evidence was offered suggesting that there was any entry into defendant's home. The evidence at trial showed that a police officer in uniform along with three other officers went to defendant's home, announced why they were there, and then arrested defendant without incident after defendant came to the door. Even if we were to conclude that the police entered defendant's home, defendant's conduct was sufficient to constitute a valid consent and the Fourth Amendment was not violated. *People v Smith,* 148 Mich App 16, 23; 384 NW2d 68 (1985).

Defendant Prince argues, as does defendant George, that the trial court based his sentence, in part, on the belief that Prince was guilty of first-degree murder, notwithstanding the jury's acquittal on that charge. For the reasons stated with respect to this claim made by defendant George, we agree that this matter requires a remand for resentencing. Because we are remanding for resentencing, we need not consider defendant's proportionality argument at this time.

Defendant argues that, although the trial court gave an instruction with respect to the "reasonable doubt" aspect of the alibi defense, the court improperly failed to instruct the jury that his alibi evidence might establish a "perfect defense." However, this was not the subject of objection at trial, and we do not conclude that the alibi instruction given constituted manifest injustice. *People v Burden*, 395 Mich 462, 467; 236 NW2d 505 (1975); *People v Larry*, 162 Mich App 142, 152; 412 NW2d 674 (1987).

Finally, defendant argues that the trial court improperly failed to take judicial notice of a weather report that defendant contends impeached the testimony of prosecution witnesses. However, the weather report defendant claims should have been judicially noticed did not necessarily impeach that testimony as it was from a place other than where the crime occurred. Even if it did impeach the witnesses' testimony, the probative value of that impeachment would be low as it did not contradict the witnesses' version of events or interfere with their ability to see and remember what happened. We do not conclude that the trial court's decision that the evidence was not relevant enough to admit was an abuse of discretion. MRE 402.

We affirm the convictions of both defendants. We remand for resentencing as to both defendants as it is clear that the trial court improperly relied on its belief that defendants had committed first-degree murder, a charge of which they were acquitted by the jury. Although we are not expressing any personal criticism of the trial judge, resentencing should occur before a different judge as we believe that it would be unreasonable to expect the trial judge to be able to put previously expressed findings out of her mind without substantial difficulty. *DeRush v DeRush*, 218 Mich App 638, 642; 554 NW2d 322 (1996); *People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986). We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Michael E. Dodge