STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARIO ESTUARIDO CARINES,

Defendant-Appellant.

UNPUBLISHED
April 25, 1997

No. 182792
Kent Circuit Court
LC No. 94-000501-FC

Before: Griffin, P.J., and Doctoroff and Markman, JJ.

PER CURIAM.

Defendant was charged and convicted of one count of armed robbery MCL 750.529; MSA 28.797, and one count of first-degree felony murder MCL 750.316(1)(b); MSA 28.548(1)(b). Defendant was sentenced to life imprisonment without the possibility of parole. He now appeals as of right. We affirm.

I.

Defendant first claims on appeal that the trial court erred in admitting the results of tests conducted on dried blood found on defendant which indicated that the blood was likely that of the victim. Defendant contends that the test, known as "serological electrophoresis," has not gained general scientific acceptance for reliability among experts. Defendant did not object to the admission of the bloodstain evidence at trial, therefore, the issue is not properly preserved for appeal. *People v Hannold*, 217 Mich App 382, 391; 551 NW2d 710 (1996). Nevertheless, We will address the issue given the importance of the blood evidence in this case.

The *Davis-Frye* rule, adopted from *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955), and *Frye v United States*, 293 F 1013 (1923), requires that, to be admissible at trial, novel scientific evidence must be shown to have gained general acceptance in the scientific community to which it belongs. *People v McMillan*, 213 Mich App 134, 136; 539 NW2d 553 (1995). The purpose of the rule is to prevent the jury from relying on unproved and ultimately unsound scientific methods. *People v Marsh*, 177 Mich App 161, 164; 441 NW2d 33 (1989). The burden rests upon the party offering the

evidence to demonstrate its acceptance in the scientific community. *People v Adams*, 195 Mich App 267, 269; 489 NW2d 192 (1992), modified on other grounds 441 Mich 916; 497 NW2d 182 (1993).

Defendant relies on *People v Young (After Remand)*, 425 Mich 470, 476; 391 NW2d 270 (1986), in which the defendant challenged the reliability of the results of electrophoresis of dried evidentiary bloodstains. In that case, the "Wraxall thin-gel multisystem" method of electrophoresis was used. In this process, three genetic markers, PGM (phosphoglucomutase), ESD (esterase D), and GLO (glyoxylase 1), were simultaneously analyzed on a single, thin-layer starch gel. *Id*. at 490. The Court concluded that general agreement in the scientific community on the reliability of the Wraxall multisystem test could not be achieved until independent verification tests could be conducted. *Id*. at 495. In *People v Stoughton*, 185 Mich App 219; 460 NW2d 591 (1990), this Court followed *Young* in holding that results of the Wraxall thin-gel multisystem were inadmissible. However, this Court reached a different conclusion with respect to testimony based on the single system method used in *Stoughton*, which develops only one marker on a gel at a time. This Court held that the relevant scientific community had adopted the single system method of electrophoresis as a reliable method for determining genetic markers in dried blood, as long as competent analysts performed the tests with adequate samples in compliance with approved laboratory protocols. *Id*. at 228. See also *People v Gistover*, 189 Mich App 44; 472 NW2d 27 (1991).

In this case, two genetic markers were tested, PGM and EAP (erythrocyte acid phosphate; also abbreviated ACP). Because no objection was raised at trial regarding the use of electrophoresis, there is no direct testimony regarding whether a single system or multisystem method was used. However, it appears from the testimony of Rodney Wolfarth, the laboratory technician who performed the electrophoresis, that a single system method, rather than the Wraxall multisystem method, was used in this case. At trial, the following exchange took place between the prosecutor and Wolfarth regarding the testing for the second enzyme, ACP:

> Q: I'm going to call it ACP. Do you go about testing for the ACP enzyme in the same fashion you test for the PGM enzyme?
>
> A: Yes. *It's another electrophoretic technique. Different voltages, different run conditions, different developments, but it works the same way*. It's separated by electricity. [Emphasis added.]

Wolfarth's statements that "different voltages," "different run conditions," etc. were used in the testing for ACP indicate that testing for each enzyme was done individually, as opposed to a multisystem method. Because the single system method of electrophoresis apparently utilized in this case has been accepted as reliable by the relevant scientific community, the trial court did not err in admitting the bloodstain evidence. *Stoughton, supra*.

II.

Defendant's second claim on appeal is that the prosecutor failed to present sufficient evidence that defendant was guilty of armed robbery or possessed the necessary mens rea for felony murder. In

a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jacques*, 215 Mich App 699, 702-703; 547 NW2d 349 (1996).

The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of an enumerated felony. *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995). Armed robbery is one of the enumerated felonies in the felony murder statute. MCL 750.316(1)(b); MSA 28.548(1)(b). The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while defendant is armed with a dangerous weapon. *Turner, supra* at 569. With respect to armed robbery, the jury was also instructed on the elements of aiding and abetting. One who procures, counsels, aids, or abets in the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39; MSA 28.979; *In re McDaniel*, 186 Mich App 696, 697; 465 NW2d 51 (1991). To establish guilt on an aiding and abetting theory, the prosecution must show that (1) the crime charged was committed by defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid or encouragement. *Turner, supra* at 568.

The following facts were presented as evidence at trial. James Warren testified that as he was emptying his garbage into a dumpster on Campau behind Z's Restaurant in downtown Grand Rapids, he heard "struggling" noises coming from the second floor of the Monroe Avenue parking ramp adjacent to him. Warren looked up and saw a person in a green sweater and the head of second person, and the individuals appeared to be kneeling down with their arms moving around. When Warren yelled up at the individuals, they immediately fled the parking structure. Warren saw three people running out of the north door: the man in the green sweater (later identified as Victor Escobar), a man wearing a black coat with red on the sleeve (later identified as defendant) and a third person he could not describe (who was never apprehended). Latisha Washington, a parking attendant at the Monroe Avenue ramp, also identified defendant as one of three men that she saw running away from the Monroe parking ramp about fifteen minutes before the victim was found.

Within minutes after the crime was discovered, defendant was found by police a short distance from the scene of the crime in the company of Escobar. A watch belonging to the victim was found in Escobar's pocket. Defendant was discovered wearing his jacket inside-out, which was the opposite of how he was wearing it when Washington and Warren observed him fleeing the parking ramp. Additionally, the evidence showed that bloodstains were found on the outside of defendant's jacket, and that the blood was consistent with that of the victim, but could not have belonged to defendant or Escobar. The victim's PGM and ACP enzyme combination factored in with the victim's type A blood,

is a combination that occurs in only one-third of one percent (.33%) of the Caucasian population, .07% of the black population and .2% of the Hispanic population. The victim was found lying on the second floor of the parking structure with a pool of blood around his head. The victim bled to death as the result of a stab wound inflicted in the right side of his neck by a weapon that had an inch-and-a-half wide blade that was sharp on one side and dull on the other.

There was sufficient evidence that defendant aided and abetted in the armed robbery. With respect to the crime of armed robbery, there was sufficient evidence that (1) the victim was assaulted (stabbed in the neck), (2) there was a felonious taking of property from the victim (his watch was found in Escobar's possession, his AAA card was recovered from the vicinity, his money clip was missing), (3) and that one or more of the individuals involved in the robbery was armed with a dangerous weapon (death was caused by stabbing with a knife).

Once the prosecution has presented sufficient evidence of the armed robbery, it must show by direct or circumstantial evidence that defendant performed acts or gave encouragement that assisted in the commission of the crime and that he intended the commission of the crime or had knowledge that the principal intended its commission. *Turner, supra* at 568. An aider and abettor's state of mind may be inferred from all of the facts and circumstances. *Id*. Factors that may be considered include a close association between defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Id.* at 569. In this case, defendant was seen fleeing the scene with Escobar; defendant was found shortly thereafter with Escobar, who had the victim's watch in his pocket; blood consistent with that of the victim was found on the outside of defendant's jacket, and defendant turned his jacket inside out after he fled the scene, presumably to hide his identity or the bloodstains. These facts present sufficient circumstantial evidence that defendant gave encouragement that assisted in the commission of the armed robbery, or that he intended the that the crime be committed, or that he had knowledge that the principal intended the crime's commission.

Defendant argues that even if the prosecutor proved that he aided and abetted in the commission of the armed robbery during which the victim was killed, he could not be found guilty of felony murder as a principal or as an aider and abettor because there was insufficient evidence that he committed that offense with the requisite mens rea. The mens rea requirement for felony murder is that required for second-degree murder -- malice. *People v Hughey*, 186 Mich App 585, 591; 464 NW2d 914 (1990). Malice is defined as the intent to kill, the intent to inflict great bodily harm, or acting with a wanton and willful disregard of the likelihood that the natural tendency of the defendant's behavior is to cause death or great bodily harm. *Id*. The mens rea requirement for felony murder is the same whether the defendant is being tried as a principal or as an aider and abettor. *People v Flowers*, 191 Mich App 169, 178; 477 NW2d 473 (1991). The facts and circumstances of a killing may give rise to an inference of malice, however, it is for the jury to determine whether the elements of malice can be inferred from the totality of the evidence. *Id.* at 176-177. Malice may be inferred from the use of a deadly weapon. *Turner, supra* at 566.

In this case, there was sufficient circumstantial evidence from which a jury could find beyond a reasonable doubt that defendant possessed the requisite mens rea for felony murder. It is undisputed

that a single-edged knife was used to stab the victim in the right side neck, which resulted in his death from blood loss. The pathologist who performed the victim's autopsy also testified that the location and angle of the wound were consistent with the theory that someone stabbed the victim from behind using his right hand.[1] The record also shows that blood consistent with the victim's was found on the right cuff area and on the right shoulder area of defendant's jacket. Therefore, the jurors could have reasonably concluded that defendant stabbed the victim from behind with his right hand, which caused blood to flow onto his right sleeve and shoulder area. Moreover, blood consistent with the victim's was found in both of defendant's pockets, indicating that defendant had the victim's blood on his hands when he inserted them in his pockets.

The fact that none of the victim's blood was found on Escobar's clothing is further evidence from which the jury could infer that defendant was the person who stabbed the victim. According to the expert testimony at trial, the victim would have begun bleeding profusely as soon as he was stabbed. Thus, if Escobar had stabbed the victim, he would likely have gotten some of the victim's blood on his clothing. In addition, defendant fled the scene without seeking help for the victim. Defendant also turned his jacket inside out, from which the jury could reasonably infer that defendant was attempting to hide the bloodstains. Therefore, the jurors could have reasonably inferred malice from defendant's use of a deadly weapon. *Turner*, *supra* at 566.

III.

Defendant claims on appeal that the trial court erroneously instructed the jury on the elements of felony murder. However, defendant did not object to the jury instructions given at trial. Failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice. MCL 768.29; MSA 28.1052, *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). A miscarriage of justice occurs when an erroneous or omitted instruction pertains to a basic and controlling issue in the case. *People v Perry*, 218 Mich App 520, 530; 554 NW2d 362 (1996).

As stated above, the elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of an enumerated felony. *Turner*, *supra* at 566. The trial court correctly instructed the jury on the second two elements of felony murder. With respect to the first element, the trial court stated, "The first thing which the prosecution must prove is that the victim, Mr. Gober was killed during an armed robbery by one of the robbers." The court then made the following statements, of which defendant complains:

> The prosecutor does not have to prove that Mr. Carines, himself, killed him or participated in the killing. To prove this element the prosecution need prove only that one of the robbers killed Mr. Gober.

Defendant claims that it was error for the trial court to instruct the jury that the prosecution did not have to prove that defendant participated in the actual killing of the victim. According to defendant, the

prosecution was required to show that defendant committed some act that caused or contributed to causing the victim's death, even under an aiding and abetting theory.

It appears that the trial court blended an aiding and abetting element into the felony murder instructions without giving a separate instruction on aiding and abetting felony murder. To convict defendant as the principal in the felony murder, the prosecution would have to show that he caused the victim's death. However, under an aiding and abetting theory, there is no requirement that defendant actually participate in the physical killing of the victim, as long as the other elements of aiding and abetting in the felony murder are satisfied. See, e.g., *Turner, supra*. The question becomes whether the trial court properly instructed on all of the elements of aiding and abetting felony murder. To establish guilt on an aiding and abetting theory, the prosecution must show that (1) the crime charged was committed by defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid or encouragement. *Turner, supra* at 568.

The trial court instructed that the victim had to be killed by defendant *or some other person,* which is consistent with the first element of aiding and abetting. The court also satisfied the third element when it instructed the jury that defendant had to possess the requisite mens rea with respect to the murder and for the underlying felony. *Flowers, supra* at 169. However, the court failed to instruct the jury on the second element, that defendant performed acts or "gave encouragement" that assisted in the crime. Nevertheless, the court's error did not result in manifest injustice. As set forth above, the evidence at trial supported the theory that defendant was the individual who stabbed the victim. Because the jury apparently found defendant guilty as the principal in the felony murder, the aiding and abetting instructions for felony murder did not affect the jury's verdict.

IV.

Finally, defendant alleges five instances of ineffective assistance of counsel. Allegations pertaining to ineffective assistance of counsel must first be heard by the trial court to establish a record of the facts pertaining to such allegations. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). In cases such as this, where a *Ginther* hearing has not been held, review by this Court is limited to mistakes apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994), cert den sub nom *People v Caruso*, ___ US ___; 115 S Ct 923; 130 L Ed 2d 802 (1995). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Stanaway, supra*.

Defendant first claims that he was denied effective assistance of counsel due to his trial counsel's failure to object to testimony regarding the results of electrophoresis of dried bloodstains because it was

unreliable. As discussed *supra*, the single system method of electrophoresis used in this case has gained general acceptance in the scientific community, and thus, was admissible. *Gistover, supra*; *Stoughton, supra*. Defense counsel was not obligated to pursue and argue a futile motion. *People v Daniel*, 207 Mich App 47, 59; 523 NW2d 830 (1994).

Defendant's second claim of ineffective assistance of counsel is based on defense counsel's failure to object to the trial court's instructions on the elements of felony murder. We concluded, *supra*, that the trial court's error in instructing the jury on the elements of aiding and abetting felony murder did not result in manifest injustice because there was sufficient evidence upon which the jurors could find defendant guilty as the principal. Therefore, even if defense counsel should have objected to the instructions, the outcome of the proceedings would not have been affected, and any error was harmless.

Defendant next claims that he was denied effective assistance of counsel in that his trial counsel moved for a directed verdict only on the armed robbery charge, thereby failing to preserve an appeal based on the sufficiency of the evidence for the felony murder charge. However, there is no preservation requirement for a sufficiency of the evidence issue in a criminal case, *People v Patterson*, 428 Mich 502, 514; 410 NW2d 733 (1987), therefore, counsel's failure to move for a directed verdict on the felony murder charge did not constitute ineffective assistance of counsel.

Next, defendant claims that defense counsel was ineffective when he failed to impeach Latisha Washington's testimony with a prior inconsistent statement. At Escobar's trial, Washington testified that defendant was wearing a hood; but at defendant's subsequent trial, she testified that defendant was not wearing a hood. Defendant maintains that the jury could have inferred that defendant was one of the attackers because Warren testified that the individuals he saw stooping in the parking ramp were not wearing hoods. Defense counsel's failure to impeach Washington with her prior testimony did not fall below an objective standard of reasonableness. Washington's and Warren's testimony was offered by the prosecution to place defendant at the scene of the crime. The prosecutor never argued that either of the witnesses actually saw defendant commit the armed robbery or the murder, nor did the prosecutor argue or imply that defendant was one of the attackers because he was or was not wearing a hood. Moreover, during closing arguments, the prosecutor admitted that Warren did not see defendant until he was fleeing the parking structure. Even if trial counsel's failure to impeach Washington's testimony regarding this detail fell below an objective standard of reasonableness, there is no reasonable probability that but for counsel's alleged error, the result of defendant's trial would have been different. *Stanaway, supra*.

Finally, defendant claims that he was denied effective assistance of counsel because defense counsel failed to exclude some biased jurors because he incorrectly assumed that he was only entitled to five peremptory challenges. Pursuant to MCR 6.412(E), a defendant is entitled to twelve peremptory challenges if the offense charged is punishable by life in prison. The only support defendant provides for his claim is that defense counsel only used four peremptory challenges and that defense counsel told defendant that he was only entitled to five peremptory challenges. However, there is no evidence on the record to verify that defense counsel only used four peremptory challenges based on a belief that

defendant was only entitled to five challenges. Therefore, review by this Court is precluded. *Price, supra*.

Affirmed.

/s/ Richard Allen Griffin
/s/ Martin M. Doctoroff
/s/ Stephen J. Markman

[1] The pathologist indicated that stabbing from behind was not the only possible scenario of how the wound was inflicted, but the wound was consistent with such a theory.