

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL GAINS,

Defendant-Appellant.

UNPUBLISHED

April 29, 1997

No. 163665

Recorder's Court

LC No. 92-006123

Before: Young, P.J., and Taylor and R.C. Livo,* JJ.

PER CURIAM.

After a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to thirty to forty-five years in prison for the second-degree murder conviction and to a consecutive two year prison term for the felony firearm conviction. He now appeals as of right.

Defendant first argues that the trial court erred in finding the prosecution exercised due diligence in its attempts to locate two witnesses, Anthony Hooks and Vanessa Lewis. We disagree.

The test for due diligence is one of reasonableness. *People v Conner*, 182 Mich App 674, 681; 452 NW2d 877 (1990). The court must determine whether diligent, good-faith efforts were made to procure the testimony rather than whether more stringent efforts would have produced it. *Conner*, *supra*, 182 Mich App 681. Where there are no leads as to a witness' whereabouts, the prosecutor should inquire of known persons who might reasonably be expected to have information that would help locate the witness. *Id.* Where there are specific leads as to the witness' location, the prosecutor must pursue them. *Id.*

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

In the present case, Sergeant Harvel's testimony revealed that the prosecution exercised due diligence in attempting to locate Anthony Hooks and Vanessa Lewis. Sergeant Harvel's testimony indicated that all leads as to the witness' whereabouts were followed. We find no abuse of discretion in the trial court's finding of due diligence.

Defendant's second argument is that the trial court erroneously instructed the jury. We disagree. This Court reviews jury instructions as a whole to determine whether there is error; instructions need not be perfect such that no error is found if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). Inasmuch as defendant raised no objections after the jury was instructed, appellate review is foreclosed unless relief is necessary to avoid a miscarriage of justice. *People v VanDorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). A miscarriage of justice occurs when an erroneous or omitted instruction pertained to a basic or controlling issue in the case. *People v Chatfield*, 170 Mich App 831, 835; 428 NW2d 788 (1988).

Defendant first argues that the trial court's instruction regarding the intent required for aiding and abetting was a misstatement of the law. We disagree. The trial court read to the jury CJI 2d 8.1(3)(c), and stated "[a]nyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits and can be convicted as an aider and abettor. . . . [The prosecutor must prove t]hat when defendant gave his assistance, he intended to help someone else commit the crime." This Court has consistently held that to be convicted as an aider and abettor, a defendant must act with the intent necessary to be convicted as a principal or participate in the crime with the knowledge of the principal's intent. *People v King*, 210 Mich App 425, 430-431; 534 NW2d 534 (1995). Viewing the trial court's instruction as a whole, the instruction properly advised the jury regarding the evidence required to establish that defendant intended to aid and abet second-degree murder.

Second, defendant argues that the trial court's instruction regarding the evidence of defendant's other acts of misconduct was erroneous. We disagree. MRE 404(b)(1) provides that, although evidence of other crimes, wrongs, or acts is not admissible to prove character or conduct in conformity therewith, it is admissible for the purpose of proving, among other things, motive and intent. The trial court's instruction merely restated the provisions of MRE 404(b)(1). Contrary to defendant's contention, the instruction did not invite the jury to consider the evidence of defendant's prior crimes, wrongs, or acts to show that defendant had a propensity to commit the crime charged. In fact, the trial court specifically instructed the jury that the evidence of defendant's other bad acts may not be used to show that defendant "is likely to commit crimes." Therefore, the trial court's instruction was a correct statement of the law and did not result in a miscarriage of justice.

Third, defendant argues that the trial court's refusal to give an alibi instruction constituted reversible error. We disagree. Alibi testimony is testimony offered for the purpose of placing defendant somewhere other than the scene of the crime. *People v Mott*, 140 Mich App 289, 292; 364 NW2d 696 (1985). If a defendant gives specific testimony regarding his whereabouts at the time in question, the testimony is alibi testimony. *People v McGinnis*, 402 Mich 343, 346; 262 NW2d 669 (1978). Generally, an alibi instruction must be given when requested. *People v Matthews*, 163 Mich App 244,

249; 413 NW2d 755 (1987). However, a court's refusal to grant the defendant's request for an alibi instruction does not require reversal where there is overwhelming evidence of the defendant's guilt, where the jury is fully apprised of the defendant's alibi defense through testimony at trial, and where the jury is instructed that the burden of proof rested with the prosecutor. *Matthews, supra*, 163 Mich App 249.

In the present case, defendant testified before the jury that he was on the second floor talking to his girlfriend when the shooting occurred on the seventh floor. During closing arguments, defense counsel argued that defendant was not on the seventh floor at the time of the shooting and there was no evidence placing defendant on the seventh floor at the time of the shooting. Furthermore, the trial court instructed the jury that the burden of proof rested with the prosecution. Accordingly, we do not believe the trial court's refusal to give an alibi instruction resulted in a miscarriage of justice.

Defendant also argues that prosecutorial misconduct denied him a fair trial. We disagree. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Daniel*, 207 Mich App 47, 56; 523 NW2d 830 (1994). Questions of prosecutorial misconduct are decided on a case by case basis. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). On review, this Court examines the pertinent portions of the record and evaluates the prosecutor's remarks in context in order to determine whether the defendant was denied a fair and impartial trial. *Id.* However, because defendant did not object to the prosecutor's comments at trial, this Court's review is precluded unless a cautionary instruction could not have cured the prejudicial effect of the prosecutor's remarks or unless the remarks resulted in a miscarriage of justice. *People v Lee*, 212 Mich App 228, 245; 537 NW2d 233 (1995).

Defendant contends that the prosecutor argued facts not in evidence and made prejudicial inflammatory remarks. The prosecution may relate the facts relevant to its theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Although a prosecutor may not argue facts not in evidence, the prosecutor is free to argue the evidence and all reasonable inferences from the evidence. *Lee, supra*, 212 Mich App 245. In addition, a prosecutor, as an advocate, is not required to argue in the blandest terms. *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989). After reviewing the prosecutor's remarks in context, we conclude that the prosecutor properly argued the facts in evidence and inferences therefrom. Moreover, to the extent that the minor factual errors alleged by defendant had a prejudicial effect, we conclude that a proper instruction would have cured the error.

Defendant's final argument is that the sentencing court erroneously raised defendant's maximum sentence to correct a violation of the two-thirds rule. Under the circumstances of this case, we disagree.

"Any sentence which provides for a minimum exceeding two-thirds of the maximum is improper as failing to comply with the indeterminate sentencing act." *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972). Because a sentence which violates the two-thirds rule is only invalid with respect to the minimum, generally, the proper remedy for a sentence which violates the two-thirds rule is to

reduce the minimum sentence, rather than to merely raise the maximum sentence. *People v Thomas*, 447 Mich 391, 392-394; 523 NW2d 215 (1994). However, a sentencing court may set aside a valid sentence and resentence the defendant as long as it does so before the defendant has been remanded to jail. *People v Bingaman*, 144 Mich App 152, 158; 375 NW2d 370 (1984).

In the present case, defendant's sentence was modified before defendant was remanded to jail and before the sentencing order was issued. Therefore, we find no error in defendant's sentence.

Affirmed.

/s/ Robert P. Young, Jr.

/s/ Clifford W. Taylor

/s/ Robert C. Livo