

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORTEZ DAVIS,

Defendant-Appellant.

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UNPUBLISHED

June 24, 1997

No. 183428

Recorder's Court

LC No. 94-002089

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant/Cross-  
Appellee,

v

CORTEZ ROLAND DAVIS,

Defendant-Appellant/Cross-  
Appellant.

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No. 192234

Recorder's Court

LC No. 94-002089

Before: Cavanagh, P.J., and Gage and D.A. Burrell,\* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316; MSA 28.548, armed robbery, MCL 750.529; MSA 28.797, 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, age sixteen at the time of the offense, was sentenced as an adult to a term of life imprisonment for the first-degree murder conviction, ten to twenty-five years' imprisonment for both the armed robbery conviction and the assault with intent to rob conviction, and

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

the mandatory two years' imprisonment for the felony-firearm conviction. In No. 183428, defendant appeals as of right. In No. 192234, the prosecutor appeals by leave granted, and defendant cross appeals. We affirm in part, reverse in part, and remand.

No. 183428

I

Defendant argues that the trial court's findings of fact relating to its decision to sentence defendant as an adult were clearly erroneous. The trial court's findings of fact regarding the statutory criteria involved in the decision to sentence a juvenile defendant as an adult are reviewed under the clearly erroneous standard. A finding is clearly erroneous if, upon review of the record, this Court is left with a definite and firm conviction that a mistake has been made. *People v Launsbury*, 217 Mich App 358, 362; 551 NW2d 460 (1996).

The trial court must consider the following factors in determining whether the best interests of the defendant and the public would be served by placing him in the juvenile system or by sentencing him as an adult:

- (a) The prior record and character of the juvenile, his or her physical and mental maturity, and his or her pattern of living.
- (b) The seriousness and the circumstances of the offense.
- (c) Whether the offense is part of a repetitive pattern of offenses which would lead to 1 of the following determinations:
  - (i) The juvenile is not amenable to treatment.
  - (ii) That despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to disrupt the rehabilitation of other juveniles in the treatment program.
- (d) Whether, despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to render the juvenile dangerous to the public if released at the age of 21.
- (e) Whether the juvenile is more likely to be rehabilitated by the services and facilities available in adult programs and procedures than in juvenile programs and procedures.
- (f) What is in the best interests of the public welfare and the protection of the public security. [MCL 769.1(3); MSA 28.1072(3).]

Defendant contends that, in determining to sentence him as an adult, the trial court considered improper factors. First, defendant argues that the trial court improperly considered his refusal to admit guilt. In support of this argument, defendant cites cases which stand for the proposition that a sentencing court may not base its sentence on the defendant's refusal to admit guilt. However, the trial court was not imposing a sentence but rather making the preliminary

determination of whether to sentence defendant as a juvenile or an adult. Defendant's refusal to acknowledge his culpability reflects on his character, which is a proper consideration under factor (a).

Defendant also contends that the trial court improperly based its conclusion that defendant could not be rehabilitated on her belief, unsupported in the record, that he would only end up participating in group therapy for eighteen months. The trial court did question psychologist Kevin Roby on this point and stated that the Department of Social Services had been petitioning for the release of juvenile offenders after eighteen months of group therapy because further therapy would be regressive. However, the trial court did not mention this factor in its explanation of its decision to sentence defendant as an adult. Rather, the court emphasized its belief that defendant could not be rehabilitated in just four years. Because there is no evidence that the trial court relied on factors not included in the record in sentencing defendant as an adult, we find no error requiring reversal.

Defendant also maintains that the trial court erred in considering allegations of past criminal conduct that did not result in juvenile adjudications. We disagree. Under factor (c), the trial court was required to consider whether the offense at issue was part of a pattern of offenses in order to determine whether defendant was amenable to treatment. The presentence report indicated that defendant was arrested for petty theft in July 1993, and was the subject of juvenile petitions with regard to an armed robbery in March 1991 and possession of a stolen motor vehicle in August 1991. Defendant does not challenge the accuracy of the prior charges and did not preserve an objection to the contents of the presentence report. See *People v Bailey (On Remand)*, 218 Mich App 645, 647; 554 NW2d 391 (1996). Because the prior charges were relevant to the statutory criteria, the trial court did not err in considering them.

Finally, defendant argues that the trial court improperly considered the fact that some of his relatives are in prison. However, the trial court was obligated to consider the defendant's pattern of living under factor (a). Defendant's family background and exposure to negative role models are relevant to the extent that they constitute a part of his life experience. See *People v Haynes*, 199 Mich App 593, 596-598; 502 NW2d 758 (1994).

In sum, we find that the trial court did not consider any improper factors in determining to sentence defendant as an adult. Furthermore, our review of the record indicates that the trial court considered the rehabilitation programs available and the best interests of the public in making its decision. We therefore find that defendant is not entitled to relief on this issue.

## II

Defendant next asserts that the trial court erred in sentencing him as an adult. The prosecution has the burden of proving, by a preponderance of the evidence, that the best interests of the juvenile and the public would be served by sentencing the juvenile defendant as an adult. *Haynes, supra* at 596. The trial court's decision to sentence a juvenile as an adult is reviewed for an abuse of discretion. *Launsbury, supra*.

Defendant relies on *People v Dunbar*, 423 Mich 380; 377 NW2d 262 (1985). However, unlike *Dunbar*, the trial court's decision in this case did not hinge on the availability of programs in the juvenile system, but rather on its finding that defendant could not be rehabilitated before the court would lose jurisdiction over him.

This case again presents the difficult question whether to underpunish older juveniles who commit serious offenses or to sentence teenagers to life in prison without the possibility of parole. See, e.g., *People v Black*, 203 Mich App 428, 430; 513 NW2d 152 (1994). We conclude that the trial court did not abuse its discretion in sentencing defendant as an adult rather than as a juvenile. Defendant, who was seventeen at the time of sentencing, had a history of criminal activity that culminated in his participation in a robbery that left one victim dead. Although the trial court agreed with the experts who testified that defendant was amenable to treatment, it concluded that four years of treatment would not be enough to ensure that defendant would not be a danger to the public when he was released. The ultimate goal of sentencing is to protect society from dangerous individuals who commit violent crimes, regardless of whether the individual is a juvenile or an adult. *People v Cheeks*, 216 Mich App 470, 478-479; 549 NW2d 584 (1996). The trial court did not err in basing its decision to sentence defendant as a juvenile on its certainty that defendant would be a danger to society if he were to be released at age twenty-one. Cf. *Black*, *supra* at 431.

### III

Defendant contends that the imposition of a mandatory life sentence for a juvenile convicted of first-degree murder is cruel or unusual punishment. This Court has recently held otherwise. See *Launsbury*, *supra* at 363-365.

### IV

Defendant further contends that his sentence is disproportionate under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). However, under the constitution of this state, the people have vested in the Legislature the exclusive authority to determine the terms of punishment imposed for violations of the criminal law. Const 1963, art 4, § 45; *People v Schultz*, 435 Mich 517, 525; 460 NW2d 505 (1990). In *Milbourn*, the Supreme Court determined that the Legislature delegated to the courts the task of imposing a sentence within the legislative range according to the principle of proportionality. *Milbourn*, *supra* at 650-651. However, for the offense of first-degree murder, the Legislature did not confer any discretion on the trial court, but rather established a mandatory penalty of life imprisonment without the possibility of parole. Thus, the sentence does not violate the principle of proportionality because the Legislature did not leave the sentencing decision to the trial court.

No. 192234

### V

The prosecutor asserts that the trial court erred in granting defendant's motion for a new trial. The decision to grant a new trial is within the trial court's discretion and will not be reversed absent an

abuse of that discretion. *People v Legrone*, 205 Mich App 77, 79; 517 NW2d 270 (1994). The standard for reviewing an abuse of discretion is narrow; the result must have been so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *People v Woods*, 200 Mich App 283, 288; 504 NW2d (1993).

While the trial court stated that it granted defendant's motion for a new trial on the basis of a flaw in the jury instructions, it is clear from the entirety of the court's comments that the basis for the grant of a new trial was its belief that the verdict was against the great weight of the evidence.<sup>1</sup> A new trial may be granted when the verdict is against the great weight of the evidence. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993). The trial court may vacate a verdict only when it does not find reasonable support in the evidence, but is more likely attributable to factors outside the record, such as passion, prejudice, sympathy, or other extraneous considerations. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993).

Based upon its recital of the facts of the shooting, the trial court apparently believed the version of events contained in defendant's confession. The trial court may evaluate credibility in deciding a motion for new trial. *People v Mechura*, 205 Mich App 481, 484; 517 NW2d 797 (1994). However, a grant of new trial based upon the credibility of the witnesses must be made with great caution and under a presumption against usurping the function of the jury. *Herbert*, *supra* at 477; *People v Bart (On Remand)*, 220 Mich App 1, 11; \_\_\_ NW2d \_\_\_ (1996). As this Court has recently stated,

[W]hen sitting as a thirteenth juror, the hurdle a judge must clear to overrule a jury, is unquestionably among the highest in our law. It is to be approached by the court with great trepidation and reserve, with all presumptions running against its invocation. [*Id.* at 13.]

After carefully reviewing the record, we find the reasons articulated by the trial court for using its thirteenth-juror status to grant a new trial to be insufficient. In this case, the trial court relied on defendant's out-of-court confession. Accordingly, although this Court normally defers to the trial court's ability to observe the demeanor of the witnesses and thus evaluate their credibility,<sup>2</sup> such deference is not required here. Because defendant's confession differed significantly from his testimony at trial, the version of events contained therein was open to doubt. We believe that the trial court improperly invaded the province of the jury in relying on the description of the shooting in defendant's confession when granting defendant's motion for a new trial. While there was conflicting evidence regarding defendant's intent, including the two different versions of events supplied by defendant and contradictions in the testimony of the eyewitnesses, the evidence in defendant's favor was not so overwhelming as to compel the conclusion that the verdict was against the great weight of the evidence. Accordingly, we find that the trial court abused its discretion in ordering a new trial.

## VI

Defendant argues that there was insufficient evidence to support the jury verdict. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

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 any of the felonies specifically enumerated in MCL 750.316; MSA 28.584. *People v Hutner*, 209 Mich App 280, 282-283; 530 NW2d 174 (1995).

To support a conviction of felony murder under an aiding and abetting theory, the prosecutor must prove that the accused had one of the three intents for murder. However, the defendant may be found to have acted with malice if he participated with the knowledge that his codefendant intended to kill or cause great bodily harm. *People v Barrera*, 451 Mich 261, 294; 547 NW2d 280, cert den \_\_\_\_ US \_\_\_\_; 117 S Ct 333; 136 L Ed 2d 246 (1996).

Defendant focuses on a theory of aiding and abetting because the ballistics evidence did not establish that the shot which killed the decedent came from defendant's handgun. However, Martin Arnold testified that both defendant and the codefendant fired their weapons at the decedent. The jury may infer malice from the use of a deadly weapon. See *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995).

Moreover, defendant admitted in his confession that he participated in the armed robbery knowing that his companion possessed a sawed-off rifle. The jury could also infer the requisite malice from the fact that defendant willingly participated in an armed robbery with the knowledge that his companion intended to cause great bodily harm. See *id.* at 572-573. In addition, evidence was presented that after the incident, defendant smiled as the codefendant bragged about the shooting. Viewing the evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence to support defendant's conviction.

## VII

Defendant next argues that his constitutional protection against double jeopardy was violated when he was convicted of both felony murder and the underlying offense of armed robbery. Conviction of both first-degree felony murder and the underlying felony violate a defendant's right against double jeopardy. *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996). Therefore, we vacate defendant's conviction for armed robbery.<sup>3</sup>

## VIII

Next, defendant maintains that he was denied a fair trial by prosecutorial misconduct. Defendant did not object at trial to the comments of which he now complains. To preserve for appeal an argument that the prosecutor committed misconduct during trial, a defendant must object to the conduct at trial on the same ground as he asserts on appeal. In the absence of a proper objection, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

After briefly examining the passages cited by defendant, we find that a failure to review this issue would not lead to a miscarriage of justice. Contrary to defendant's argument, the prosecutor's comment that the decedent "bought a Fila Jacket and paid for it with his life" was not an improper appeal to the jury to sympathize with the victim. Rather, the remark constituted a proper comment on the evidence presented at trial. The prosecutor is not required to phrase his arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

Defendant also claims that he was denied a fair trial by the prosecutor's comments that the jury could infer the intent to kill from the use of a firearm. We disagree. Circumstantial evidence and reasonable inferences arising therefrom may constitute proof of the elements of a crime. *McKenzie, supra*. The jury could infer malice from defendant's use of a deadly weapon even if he did not fire the fatal shot. See *Turner, supra* at 567. Thus, it was not improper for the prosecutor to argue that the jury could infer defendant's intent to kill from his possession of a deadly weapon.

Finally, defendant was not denied a fair trial by the prosecutor's remark that if the police had fabricated defendant's confession, they would have made up a better one. When read in context, it is clear that the prosecutor's comments were tailored to the evidence and did not convey that she had some special knowledge of Officer Lovier's truthfulness. See *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Moreover, because the remarks were made in response to defendant's argument that the confession was fabricated, we find no error requiring reversal. See *id.* at 280.

In a related argument, defendant asserts that his counsel was ineffective for failing to object to the alleged misconduct. However, because we find that the prosecutor's remarks were proper, we conclude that defendant's trial counsel was not ineffective on this basis. Defense counsel was not required to raise a meritless objection. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

## IX

Defendant contends that the trial court erred in permitting, over defendant's objection, the prosecutor to question defendant about a statement made by defense counsel during opening argument. The decision whether to admit or exclude evidence is within the trial court's discretion. This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).



We conclude that the trial court abused its discretion in permitting the prosecutor to question defendant about a statement made by trial counsel during open argument. Statements by defense counsel containing an admission of fact are not attributable to the defendant and cannot be considered as evidence.<sup>4</sup> *People v Kelley*, 176 Mich App 219, 224; 439 NW2d 315, rev'd on other grounds 433 Mich 882 (1989).

We find, however, that the error was harmless. The improper questions constituted only a small portion of the prosecutor's lengthy cross-examination. In response to the questioning, defendant reiterated his contention that he was not involved in the offense and recalled only that, consistent with his testimony, defense counsel had argued that defendant was not the shooter. Given both that the jury was instructed not to consider the attorneys' questions as evidence and the absence of further reference to the subject, we find that the actual prejudicial effect of the error on the factfinder was negligible. Reversal is therefore not required. See *People v Mateo*, 453 Mich 203, 221; 551 NW2d 891 (1996).

## X

Defendant next claims that his confession was the result of an illegal arrest and therefore should have been suppressed. Defendant did not move to suppress his confession in the trial court.<sup>5</sup> Nevertheless, consideration of this issue is warranted because it presents a significant constitutional question that could have been decisive of the outcome. See *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). However, because this issue was not raised in the trial court, the record regarding this issue was not fully developed. We therefore remand to the trial court for an evidentiary hearing to address whether defendant's confession was the product of an unlawful arrest.

## XI

Defendant claims that his trial counsel was ineffective for failing to move to suppress his confession. However, we find it unnecessary to address this issue. If the trial court determines on remand that defendant's confession was the result of an illegal arrest, defendant will be entitled to a new trial on that basis. If the trial court finds that defendant's confession was properly admitted into evidence, then this issue has no merit.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Daniel A. Burrell

<sup>1</sup> Defendant moved for a new trial on the basis that he was denied effective assistance of counsel by his trial counsel's failure to move to suppress defendant's confession as the fruit of an illegal arrest. A trial court may not order a new trial when the defendant has not so moved. *People v McEwan*, 214 Mich App 690, 694-698; 543 NW2d 367 (1995). However, once the defendant has moved for a new trial, the court may grant the motion on any ground supported by the record. MCR 6.431(B); see *People v McBride*, 450 Mich 872; 539 NW2d 504 (1995).

<sup>2</sup> See MCR 2.613(3); *People v Mack*, 190 Mich App 7, 18; 475 NW2d 830 (1991).

<sup>3</sup> We note that defendant's conviction of assault with intent to rob is not precluded because that offense stemmed from defendant's attempt to rob Arnold, not the decedent.

<sup>4</sup> The prosecutor correctly notes that a prosecutor may comment in closing argument on a defendant's failure to prove what he had promised in his opening statement. See *People v Sanders*, 163 Mich App 606, 610-611; 415 NW2d 218 (1987). However, such remarks are permissible because counsel's argument is not evidence and should not be considered as evidence by the jury. See CJI 2d 3.5(5). In the instant case, however, the trial court improperly permitted defense counsel's statement to be used for evidentiary purposes.

<sup>5</sup> Defendant did move for a new trial on the basis that his confession should have been suppressed as the fruit of an illegal arrest.