

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROSS EDWARD YOUNG,

Defendant-Appellant.

UNPUBLISHED

September 30, 1997

No. 187373

St. Clair Circuit Court

LC No. 94-002833-FC

Before: Sawyer, P.J., and Hood and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was found guilty of first-degree murder, MCL 750.316(1)(a); MSA 28.548(1)(a), and conspiracy to commit first-degree murder, MCL 750.157a(a); MSA 28.354(1)(a) and MCL 750.316(1)(a); MSA 28.548(1)(a). He was sentenced to non-parolable life imprisonment for each offense, and now appeals as of right. We affirm defendant's convictions but remand for amendment of the judgment of sentence for his conspiracy conviction.

Defendant first argues the trial court erred by failing to instruct the jury that it must agree on a specific actus reus for first-degree murder. We disagree. A criminal defendant is entitled to a unanimous verdict. *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). However, a specific unanimity instruction is not required in all cases in which more than one act is presented as evidence of the actus reus of a single criminal offense. *Id.* Here, a general unanimity instruction was appropriate. A defendant may be charged as a principal but convicted as an aider and abettor. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). While "aiding and abetting" is distinct from being the "principal" in a crime, it is a difference without distinction for purposes of the instant case. Materially identical evidence was presented with respect to both acts, so there was no chance of juror confusion. *Cooks, supra*.

Next, defendant claims the hearsay statements of James Thompson and Jeff Worden were improperly admitted. We find this argument to be without merit. Thompson's direct testimony at trial, along with testimony regarding his, defendant's and Worden's conduct prior to the murder, was sufficient to establish the corpus delicti of the conspiracy. *People v Atley*, 392 Mich 298, 311; 220

NW2d 465 (1974); *People v Cadle*, 204 Mich App 646, 654; 516 NW2d 520 (1994); *People v Ochko*, 88 Mich App 737, 739-742; 279 NW2d 294 (1979). At that point, defendant's confession, which established there was a conspiracy between them to kill the victim, was admissible. *Cadle, supra*. Accordingly, Worden's and Thompson's hearsay statements were admissible. MRE 801(d)(2)(E).

We also find no merit in defendant's argument that he was denied a fair and impartial trial by certain prosecutorial comments. The prosecutor properly revealed Thompson's plea bargain to the jury. *People v Atkins*, 397 Mich 163, 173; 243 NW2d 292 (1976); *People v Dowdy*, 211 Mich App 562, 570-571; 536 NW2d 794 (1995). Contrary to defendant's characterization of the remarks, there was no "repeated" reference to the details of the bargain to the jury. Taken in context, the prosecutor's question of Thompson about whether he pleaded guilty because he was in fact guilty was an appropriate response to defense questions. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Finally, there is no evidence to support defendant's claim that the prosecutor improperly used Thompson's plea as substantive evidence of defendant's guilt. Cf. *People Eldridge*, 17 Mich App 306, 316-317; 169 NW2d 497 (1969). We have reviewed defendant's remaining claims and find he was not denied a fair and impartial trial by the alleged misconduct. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Defendant next argues the trial court's limitation of his cross-examination of Detective Herpel violated his right to adequate confrontation. We disagree. Defendant correctly notes that the constitutional right to confrontation, US Const, Am VI; Const 1963, art 1, § 20, is violated when limitations are placed on one's ability to cross-examine a witness to bring out facts from which bias, prejudice, or lack of credibility might be inferred. *People v Mack*, 218 Mich App 359, 360; 554 NW2d 324 (1996); *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1995). However, the issue of voluntariness of a confession is not submitted to a jury. *People v Walker*, 374 Mich 331, 337; 132 NW2d 87 (1965). Rather, jury consideration is limited to its weight and credibility. *Id.* Therefore, the court was correct in prohibiting questions regarding what Herpel would do if a defendant requested an attorney or did not validly waive his *Miranda*¹ rights. *Id.*

Defendant claims the trial court abused its discretion by denying his motion for a mistrial. This Court reviews the denial of such a motion for an abuse of discretion. *People v Messenger*, 221 Mich App 171, 175; ___ NW2d ___ (1997); *People v Sowders*, 164 Mich App 36, 47; 417 NW2d 78 (1987). A mistrial should be granted only for an irregularity which was prejudicial to the rights of the defendant and impaired his right to receive a fair trial. *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996).

In this case, the prosecutor's comment did not prejudice defendant's rights or impair his right to receive a fair trial. *Id.* The prosecutor's only reference to defendant's confession was that a *Walker*² hearing had been held and that the court had already ruled on the issue of admissibility. Contrary to defendant's assertion, the prosecutor never indicated that the court had found the confession to be voluntary. Furthermore, defendant himself highlighted the reference by continuing to improperly question Herpel after the court's decision, thereby necessitating further objections by the prosecutor.

Therefore, the trial court did not abuse its discretion by denying defendant's motion for a mistrial. *Messenger, supra; Sowders, supra.*

Defendant next argues that the trial court erred by finding his statement to be voluntary. This argument is without merit. Intoxication from alcohol or other substances can affect the validity of a waiver of Fifth Amendment rights, but is not dispositive. *People v Leighty*, 161 Mich App 565, 571; 411 NW2d 778 (1987). A substantial impairment of the will and mind must be demonstrated before intoxication will render a confession inadmissible. *People v Crawford*, 89 Mich App 30, 33-34; 279 NW2d 560 (1979). In this case, defendant failed to demonstrate that there was any such substantial impairment. *Id.* No testimony was presented which would indicate that any drug use prior to defendant's arrest and statement impaired his ability to freely waive his *Miranda* rights. To the extent that there is any conflict between Dr. Miller's testimony and that of the police officers, or an issue of weight of the evidence, deference must be given to the trial court's determination. *People v Cheatham*, 453 Mich 1, 29-30, 44; 551 NW2d 355 (1996). Thus, we cannot say that the trial court clearly erred in denying defendant's motion to suppress. *Id.*

Finally, defendant's judgment of sentence must be amended to reflect that his conviction for conspiracy to commit first-degree murder is punishable by life imprisonment with the possibility of parole, not mandatory life imprisonment without the possibility of parole. MCL 791.234(4); MSA 28.2304(4), now MCL 791.234(6); MSA 28.2304(6); *People v Jahner*, 433 Mich 490, 504; 446 NW2d 151 (1989).

Defendant's convictions are affirmed and this case is remanded for amendment of the judgment of sentence. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Harold Hood

/s/ Joel P. Hoekstra

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

² *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).