STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENNIE LAYTON,

Defendant-Appellant.

UNPUBLISHED
December 9, 1997

No. 199364
Oakland Circuit Court
LC No. 96-143720-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROSEMARIE REINHARDT-JACKSON a/k/a ROSEMARIE JACKSON-REINHARDT,

Defendant-Appellant.

No. 203427
Oakland Circuit Court
LC No. 96-143718-FC

Before: Bandstra, P.J., and Cavanagh and Markman, JJ.

PER CURIAM.

In these consolidated appeals, defendants were tried jointly before a single jury. Following the joint jury trial, defendant Layton was convicted of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), and armed robbery, MCL 750.529; MSA 28.797. He was sentenced to mandatory life imprisonment without parole for the felony murder conviction and twenty to forty years' imprisonment for the armed robbery conviction. Defendant Reinhardt-Jackson was convicted of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), armed robbery, MCL 750.529; MSA 28.797, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b(1); MSA 28.424(2)(1). She was sentenced to mandatory life imprisonment for the felony murder conviction, twenty to forty years' imprisonment for the armed robbery conviction, and two

years' imprisonment for each felony-firearm conviction. The trial court vacated defendant's sentences for the felony-firearm convictions. Defendants each appeal as of right. We affirm, except with regard to defendants' convictions and sentences for armed robbery.

Defendants' convictions arise out of the shooting death of James Groppi. While Groppi and his wife were walking to their van, defendant Reinhardt-Jackson and three other individuals approached the Groppis. Defendant Layton remained in a car parked at the end of the parking lot with the engine running. Defendant Reinhardt-Jackson hit Mrs. Groppi in the mouth with the gun she was carrying, while the other individuals restrained Mr. Groppi. Defendant Reinhardt-Jackson and Mrs. Groppi began struggling over Mrs. Groppi's purse. During the struggle, defendant Reinhardt-Jackson dropped the gun she was carrying. One of the other individuals, Shameka Layton, picked up the gun. As Karen Groppi drove up in her car to try to scare away her parents' attackers, two of the individuals fled to the car in which defendant Layton was waiting. As they fled, Shameka Layton shot and killed Mr. Groppi. She and defendant Reinhardt-Jackson then ran to the car, which sped off toward I-75. Police apprehended the vehicle a short while later. The gun was found between the driver's seat and the emergency brake, and Mrs. Groppi's purse was found in the back seat.

Both defendants argue on appeal that the trial court erred in denying their motions for directed verdicts because there was insufficient evidence to sustain their convictions. When reviewing the denial of a directed verdict, this Court must consider all the evidence presented by the prosecution in the light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995).

To sustain a conviction for felony murder, the prosecution must prove the following elements:

> (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very 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 28.548. [*People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1996).][1]

Felony murder requires proof of malice.

> The element of malice required for statutory felony murder was redefined in *Aaron* to be the same as that required for second-degree murder: the intention to kill, the intention to do great bodily harm, or the wanton and wilful disregard of the likelihood that the natural tendency of the defendant's behavior is to cause death or great bodily harm. [*People v Flowers*, 191 Mich App 169, 176; 477 NW2d 473 (1991) (citing *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980).]

One who aids or abets in the commission of an offense may convicted and sentenced as if he or she directly committed the offense. *Turner*, *supra* at 568. MCL 767.39; MSA 28.979 provides:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

To sustain a conviction for aiding and abetting in the commission of a crime, the prosecution must prove that:

> (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted in 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.]

Therefore, to sustain an aider and abettor's conviction for felony murder, it must be shown that he or she acted with the same intent necessary to convict the principal of felony murder. *Flowers, supra* at 178; *People v Hart*, 161 Mich App 630, 635; 411 NW2d 803 (1987). Intent may be inferred from all the facts and circumstances, including the weapon used, the type of wounds inflicted, the circumstances surrounding the killing, the acts, conduct, and language of the defendant, the degree of association between the defendant and the principal, the defendant's participation in the planning of the crime, and evidence of flight after the crime. *Id.; Turner, supra* at 568-569.

Defendant Layton argues that the evidence was insufficient to sustain his conviction as an aider and abettor to the armed robbery and the felony murder.[2] We disagree with defendant Layton's argument and conclude that there was sufficient evidence to sustain his convictions. In *Turner, supra*, this Court sustained the first-degree felony-murder conviction of the defendant who acted as lookout while three other individuals robbed, beat, and shot the victim. This Court stated:

> [that the defendant's] knowledge that Johnson was armed during the commission of the armed robbery and that Johnson and the others participated in beating [the victim] is enough for a rational trier of fact to find that [the defendant], as an aider and abettor, participated in the crime with knowledge of Johnson's intent to commit great bodily harm. Because [the defendant] knew of Johnson's intent, a rational trier of fact could find that [the defendant] was acting with "wanton and willful disregard" sufficient to support a finding of malice under *Aaron*. [*Id.* at 575.]

In the present case, defendant Layton admitted that he knew that the gun was in the car and, in fact, the gun was found between the driver's seat and the emergency brake. At least one officer testified that the gun was visible from the driver's seat. Although defendant stated that he stopped at the bowling alley to allow the occupants of the vehicle to use the bathroom and that he was unaware that the other defendants intended to commit armed robbery, the evidence indicates that defendant parked at the far end of the parking lot, away from the bowling alley facility, although there were many open spaces closer to the building. Defendant remained in the car with the engine running and the lights off. The car

was located near a driveway which led to a side street and the closest parking lot light was not working. After the other defendants returned to the car, defendant drove down the side street and headed for I-75. Another witness testified that he heard defendant Layton indicate that he "blew it" by choosing the wrong escape route. We find this evidence sufficient to allow a rational trier of fact to infer that defendant Layton acted with the requisite intent.

Defendant Reinhardt-Jackson also argues that the evidence was insufficient to sustain her convictions because she was unaware Shameka Layton intended to kill anyone, she did not supply the gun and she did not assault Mrs. Groppi with lethal force. We again disagree and conclude that there was sufficient evidence to sustain defendant Reinhardt-Jackson's convictions. The evidence demonstrated that not only was she aware of the gun, but that she also possessed the gun when they approached the Groppis and hit Mrs. Groppi in the face with it. Additionally, defendant stated that when they approached the Groppis, they intended to steal Mrs. Groppi's purse. By helping to create an inherently dangerous situation, defendant should have been aware that there was a likelihood that one of her codefendants would harm one of the victims if they resisted the robbery attempt. See *Hart, supra* at 635-636.

Defendants also argue that the trial court erred in admitting their statements because the investigating officer destroyed the handwritten copy of his notes, while retaining a typed copy. We disagree. In *People v Paris*, 166 Mich App 276, 283; 420 NW2d 184 (1988), this Court stated that the original notes of a defendant's statement constitute material evidence which the prosecution and the police have a duty to retain. Where the evidence has been destroyed, this Court must determine:

> (1) whether the suppression was deliberate; (2) whether the evidence was requested; and (3) whether "hindsight discloses . . . that [the] defense could have put the evidence to not insignificant use." [*Id.* (citations omitted).]

This Court concluded that the destruction of the notes deprived the defendant of the ability to effectively examine the officer and noted the following factors: the officer repeatedly referred to a police report he had prepared from the notes to refresh his memory; his testimony was the only evidence of the defendant's statements to police immediately following the crime; and evidence against the defendant was otherwise weak. *Id.* at 283-284.

We conclude that the present case is distinguishable from *Paris* because the evidence demonstrated that the investigating officer destroyed his handwritten notes only after they had been typed into his computer. The officer testified that he did not alter the notes in any way when he typed them and that he did not use them to create another report. He further testified that he checked the typed notes for accuracy against the handwritten copy before shredding the handwritten notes. Moreover, the evidence against defendants in the present case was not weak. Therefore, we conclude that the trial court did not abuse its discretion by allowing the statements to be admitted.

Defendant Reinhardt-Jackson also argues that the trial court erred in admitting her statements to police because they were not voluntarily, knowingly, and intelligently made. However, after examining the entire record and the circumstances surrounding the interrogation, we conclude that the trial court

did not err. *People v Cheatham*, 453 Mich 1, 27 (Boyle, J.), 44 (Weaver, J.); 551 NW2d 355 (1996); *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992). Although defendant initially wrote "yes" to the question "Do you want to talk to a lawyer before answering any questions," defendant crossed out her answer and wrote "no" after the officer indicated that he would stop questioning defendant. The officer then clarified that defendant intended to speak without a lawyer and had her initial the change she made on the waiver form. Defendant then affirmatively answered the last question on the form which asked whether she would waive her right to remain silent and answer questions. We find that these facts demonstrate that defendant's statements were voluntarily, intelligently, and knowingly made.

Defendant Reinhardt-Jackson also argues that three sets of statements should have been excluded because their probative value was substantially outweighed by the danger of unfair prejudice and because one of the statements contained hearsay within hearsay. However, defendant failed to preserve this issue for appeal by making a timely objection in the trial court. Where defendant fails to object to the evidence, review is precluded absent manifest injustice. *People v King*, 210 Mich App 425, 433; 534 NW2d 534 (1995). Defendant has not demonstrated that the statements caused manifest injustice.

Defendant Reinhardt-Jackson also argues that she was deprived of a fair trial by a remark that the prosecutor made during her rebuttal argument. Again, defendant failed to object. Therefore, this Court may review the issue only if the failure to do so would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). A miscarriage of justice will not be found unless the prejudicial effect of the prosecutor's comments were so great that it could not have been cured with a proper instruction. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996). Upon review, we conclude that the prosecutor's remark did not result in a miscarriage of justice.

Finally, defendant Reinhardt-Jackson argues that the cumulative effect of the errors deprived her of a fair trial. However, defendant has failed to identify *any* cognizable errors which deprived her of a fair trial. *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996). Therefore, we conclude that this argument is without merit.

Defendants also argue that their convictions and sentences for both felony murder, as well as the underlying felony of armed robbery, violate the double jeopardy prohibition against multiple punishments for the same offense. Although defendants did not raise the double jeopardy issue in the trial court, this Court may review the issue because it involves a significant constitutional question. *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995). A double jeopardy issue is a question of law which this Court reviews de novo. *Id.*

The Supreme Court has held that it is a violation of both the state and federal double jeopardy clauses to sentence defendants for both felony murder and the underlying felony of armed robbery. *People v Harding*, 443 Mich 693, 712 (Brickley, J.), 735 (Cavanaugh, C.J., concurring in part and dissenting in part); 506 NW2d 482 (1993). The proper remedy for such a violation is to vacate the conviction and sentence for the underlying felony. *Id.* at 714; *People v Gimotty*, 216 Mich App 254,

259-260; 549 NW2d 39 (1996). Accordingly, we vacate defendants' convictions and sentences for the underlying armed robbery felony.

Defendants' convictions are affirmed, with the exception of the underlying armed robbery felony convictions which are vacated.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Stephen J. Markman

[1] Robbery is included as one of the enumerated offenses in 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 the defendant is armed with a weapon described in the statute." *Turner, supra* at 569.

[2] Defendant Layton contends that at most, the evidence suggests that he was an accessory after the fact. An accessory after the fact is one who, knowing of another's guilt, "renders assistance to him in the effort to hinder his detection, arrest, trial or punishment." *People v Mitchell*, 138 Mich App 163, 168; 360 NW2d 158 (1984). The aiding and abetting statute does not include accessories after the fact. *People v Lucas*, 402 Mich 302, 304-305; 262 NW2d 662 (1978).