STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH LARRAINE HARBIN,

Defendant-Appellant.

UNPUBLISHED
January 23, 1998

No. 191750
Ottawa Circuit Court
LC No. 95-018651-FC

Before: Neff, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316; MSA 28.548, assault with intent to murder, MCL 750.83; MSA 28.278, assaulting an employee of a place of confinement, MCL 750.197c; MSA 28.394(3), jail escape, MCL 750.197(2); MSA 28.394, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and being a felon in possession of a firearm, 750.224f; MSA 28.421(6). Additionally, defendant was convicted following a bench trial of being a third felony offender, MCL 769.11; MSA 28.1083. Defendant was sentenced to two years' imprisonment for the felony-firearm conviction, to be followed by concurrent terms of life imprisonment for both the murder and assault with intent to murder convictions, 64 to 96 months' imprisonment for both the escape and assault on a jail employee convictions, and 80 to 120 months' imprisonment for the possession of a firearm by a felon conviction. Defendant appeals as of right. We affirm.

Defendant first contends that his constitutional protection against double jeopardy was violated. We disagree. Both the federal and state constitutions prohibit placing a person in jeopardy of criminal conviction or incarceration twice for the same offense. *People v Passeno*, 195 Mich App 91, 95; 489 NW2d 152 (1992).

In this case, while there is no doubt that multiple convictions and sentences for murder arising from the death of a single individual violates the constitutional guarantees against double jeopardy, *Passeno, supra*; *People v Zeitler*, 183 Mich App 68, 71; 454 NW2d 192 (1990), defendant was not given two murder convictions and sentences. Rather, there was only one first-degree murder conviction

and sentence, even though the judgment of sentence indicated the two theories the jury found applicable. This was entirely proper. *Zeitler, supra*. With respect to the two assault convictions and two weapons convictions, defendant has abandoned any claim of double jeopardy given his failure to refer this Court to any authority supporting his position, and failure to sufficiently argue the merits. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995); *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992).

Defendant next contends that the trial court abused its discretion in refusing to grant his motion for a change of venue. We disagree. The existence of pretrial publicity, standing alone, does not necessitate a change of venue. *Passeno, supra*, 195 Mich App 98. Rather, to be entitled to a change of venue, the defendant must show that there is either a pattern of strong community feeling against him and that the publicity is so extensive and inflammatory that jurors could not remain impartial when exposed to it or that the jury was actually prejudiced or the atmosphere surrounding the trial was such as would create a probability of prejudice. *Id*. Community prejudice amounting to actual bias has been found where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted. *People v Jenrzejewski*, 455 Mich 495, 500-501; 566 NW2d 530 (1997). Much more infrequently, community bias has been implied from a high percentage of the venire persons who admit to a disqualifying prejudice. *Id*. With respect to the amount of pretrial publicity, the question which must be addressed is whether there was such unrelenting prejudicial pretrial publicity that the entire community will be presumed both exposed to the publicity and prejudiced by it. *Id*. at 501. Juror exposure to newspaper accounts of the crime does not in itself establish a presumption that a defendant has been deprived of a fair trial by virtue of pretrial publicity. Instead, a reviewing court must consider any indications in the totality of circumstances that the defendant's trial was not fundamentally fair. *Id*. at 502.

In support of his motion for a change of venue, defendant argued that the prevailing community sentiment made it impossible to seat an impartial jury. However, the voir dire proceedings established that most of the potential jurors did not have an opinion that defendant was guilty. Most of the jurors indicated that they either had no opinion about defendant's guilt or that they were not biased against him despite their prior knowledge of the case. There is no indication that the media coverage was biased against defendant and that it was anything other that a factual account of the incident. Defendant has failed to show that there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted. Moreover, given the limited number of jurors excused, community bias cannot be implied. Further, there is no indication that the jury which decided the case was actually biased. Accordingly, this claim is without merit.

Next, defendant argues that the prosecutor engaged in misconduct. We again disagree. Defendant failed to lodge any objection below, precluding review unless the prejudicial effect was so great that it could not have been cured by an appropriate instruction and failure to consider the issue would result in a miscarriage of justice. *People v Malone*, 193 Mich App 366, 371; 483 NW2d 470 (1992). Here, we have reviewed defendant's allegations of misconduct and find them to be without merit. There were no improper appeals to sympathy, as defendant claims. Nor did the prosecutor improperly inject defendant's religion into the trial, given that defendant first raised the issue and used his

religion in order to benefit his defense. *People v Umerska*, 94 Mich App 799, 806-809; 289 NW2d 858 (1980). Given the defense strategy was to offer defendant's religion as justification for the escape, we reject defendant's claim of ineffective assistance of counsel stemming from the failure to object. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Next, defendant argues that introduction of certain evidence was unduly prejudicial. We disagree. Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if such evidence is (1) offered for a proper purpose rather than to prove defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to prevail the MRE 403 balancing test. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). Establishing motive is among the purposes for which bad acts evidence is expressly admissible. MRE 404(b).

In this case, the fact that there were references to gang activity, the Islamic religion and defendant's racial bias does not warrant reversal. Defendant introduced evidence of his religious beliefs and cannot raise this as a basis for reversal. *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991). Defendant's claim of ineffective assistance of counsel stemming from the fact that this evidence was admitted is without merit as this was trial strategy which will not be second-guessed. *Barnett*, *supra*. The references to gang activity and racial bias were relevant to the issue of motive for the crimes. The evidence suggested that the reason for the escape and resulting murder was to further the cause of defendant's gang and that defendant committed the murder because of the officer's race. While there may have been some prejudicial impact due to this evidence, this Court cannot conclude that the prejudicial impact substantially outweighed the probative value of the evidence.

Defendant next contends that the court erred in the exclusion of one accomplice's confession and in the admission of another accomplice's statement. We disagree. MRE 804(b)(3) provides that the following is not excluded by the hearsay rule if the declarant is unavailable as a witness:

> (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

We conclude that, although the trial court erred in concluding that Torres' statement was not against her penal interest, there was no abuse of discretion in excluding the statement on the ground that it was untrustworthy. While there was some corroborating circumstances, there were other circumstances which did not support Torres' claim of accident, such as testimony of police officers present at the crime scene describing the movements in the vehicle and defendant's statements when he was captured. There was evidence that Torres was pleading with police not to shoot defendant, which suggests that she was sympathetic to defendant and may have an incentive to give favorable statements. The fact that the statement was made to law enforcement officers, that Torres, at times, attempted to minimize her

role and somewhat shifted the blame to the other accomplice favors a finding of inadmissibility. On balance, we cannot conclude that the trial court abused its discretion in refusing to admit the statement.

We further conclude that the trial court properly admitted Salazar's statement. For the statement to be admissible as substantive evidence against defendant at trial, the statement must be admissible under the Michigan Rules of Evidence and admission of the statement cannot be violative of defendant's rights under the Confrontation Clause. *People v Poole*, 444 Mich 151, 157; 506 NW2d 505 (1993). Clearly the statement was admissible as a statement against interest, as Salazar admitted helping defendant escape. Further, the admission of the statement did not violate defendant's rights under the Confrontation Clause, as it bore adequate indicia of reliability. *Id*. at 163-164. While the statement was made to police, it was voluntarily given. There is no indication that it was made to avenge her or to curry favor or that she had a motive to lie or distort the truth. While some portions of her statement may be seen as somewhat shifting the blame to defendant or minimizing her role, it is apparent that she was merely giving a narrative description of the events and was not trying to incriminate defendant. Defendant points to no other fact or circumstance weighing against the reliability of the statement. Under these circumstances, the court did not abuse its discretion in admitting the statement.

Next, we reject defendant's claim that reversal is required because the trial court consulted the dictionary when the jury asked for a definition of the term "intent." Unlike the cases defendant cites, this is not a situation where there was much extrinsic evidence considered by the jury or the unauthorized use of a dictionary. See *United States v Martinez*, 14 F3d 543 (CA 11, 1994), and *Mayhue v St Francis Hospital of Wichita, Inc*, 969 F2d 919 (CA 10, 1992). Defendant does not explain how the definition given is inaccurate or how it conflicts with the other instructions given. This claim is without merit.

Given our resolution of the above issues, we reject the argument that the cumulative effect of alleged errors requires reversal. *People v Wilson*, 196 Mich App 604, 610; 493 NW2d 471 (1992).

Finally, defendant, in propria persona, contends that the court abused its discretion in denying defendant's request to have one of his witnesses testify unshackled. We disagree. In denying the request, the court cited the fact that the witness was currently serving time for jail escape and that he was a hostile and defiant witness, showing no respect for authority. Under these circumstances, we decline to find an abuse of discretion. *People v Williams*, 173 Mich App 312, 314-315; 433 NW2d 356 (1988).

Affirmed.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ William B. Murphy