

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENYA ROGERS,

Defendant-Appellant.

UNPUBLISHED

July 24, 2003

No. 236334

Wayne Circuit Court

LC No. 00-007613

Before: Wilder, P.J., and Griffin and Gage, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, armed robbery, MCL 750.529, assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of thirty to fifty years for the second-degree murder conviction, and nineteen to forty years each for the armed robbery and assault with intent to rob convictions, to be served consecutive to a two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the shooting death of Tranika Brown and the nonfatal wounding of Kelvin Brown, which occurred after defendant and codefendant Diarre Hamilton had robbed Corey Gibbs, and then were interrupted by Tranika Brown when they were subsequently attempting to rob Brown.

Defendant first argues on appeal that the evidence was insufficient to support his convictions of second-degree murder, armed robbery, and assault with intent to rob while armed. We disagree. This Court evaluates the sufficiency of the evidence to support a conviction by viewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified on other grounds, 441 Mich 1201 (1992); *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). The standard of review is deferential and this Court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000); *People v Griffin*, 235 Mich App 27, 31; 597 NW2d 176 (1999).

Second-degree murder is a general intent crime, which contains the following elements:

(1) a death, (2) caused by an act of the defendant, (3) absent circumstances of justification, excuse, or mitigation, (4) done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm. [*People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996) (citations omitted).]

The elements of armed robbery are (1) an assault, (2) a felonious taking, (3) while the defendant is armed. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

In this case, defendant was convicted on an aiding and abetting theory.

“Aiding and abetting” describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime.

. . . To support a finding that a defendant aided and abetted a crime, the prosecutor must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted 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 and encouragement. An aider and abettor’s state of mind may be inferred from all the facts and circumstances. Factors that may be considered include a close association between the defendant and the principal, the defendant’s participation in the planning or execution of the crime, and evidence of flight after the crime. [*People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995), overruled in part on other grounds, *People v Mass*, 464 Mich 615, 627-628; 628 NW2d 540 (2001) (citations omitted).]

The prosecution presented evidence that defendant, accompanied by codefendant Hamilton, robbed Gibbs of \$300 at gunpoint. When Kelvin Brown arrived, defendant handed the gun to codefendant Hamilton and opened the door to let Brown in while codefendant Hamilton stood out of sight with the gun. Defendant subsequently tried to stop Tranika Brown and Sallie Jackson from entering the house while codefendant Hamilton was ordering Kelvin Brown to take off his clothing. After the women proceeded to enter the house, codefendant Hamilton began shooting, and defendant prevented the women from leaving through the front door. Tranika Brown was shot and killed. Although defendant suggests that Gibbs’ testimony concerning the initial robbery was not credible, the credibility of the witnesses was for the jury to resolve, and this Court must resolve credibility choices in favor of the jury’s verdict. *Nowack, supra*. Viewed in a light most favorable to the prosecution, the evidence was sufficient to support defendant’s convictions for each of the crimes beyond a reasonable doubt. Although the evidence did not show that defendant was the person who shot Tranika Brown, given the evidence that he knowingly helped plan and carry out a crime in which there was a high degree of risk that someone could be killed, and further, that he prevented Brown from leaving when codefendant Hamilton started shooting, the evidence was sufficient to support defendant’s conviction of second-degree murder under an aiding and abetting theory. *Bailey, supra; Turner, supra*.

Defendant next argues that he was denied a fair trial because of misconduct by the prosecutor. This Court generally reviews claims of prosecutorial misconduct on a case by case basis to determine whether the defendant was denied a fair trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000); *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). Because defendant did not object to the allegedly improper conduct at trial, however, we review this issue for plain error affecting defendant's substantial rights. *Carines, supra* at 763; *Schutte, supra*.

Defendant argues that the prosecutor improperly accused defense counsel of attempting to "obfuscate" and "confuse" the case, and denigrated counsel by insulting him and remarking on his "down home" style. It is generally improper for a prosecutor to attack defense counsel and suggest that counsel is intentionally trying to mislead the jury. *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988).

Considered in context, for the most part the prosecutor was properly attempting to urge the jury to stay focused on the evidence. Further, it was not improper for the prosecutor to suggest that the defense's version of the evidence was not worthy of belief. Cf. *People v Buckey*, 424 Mich 1, 14-15; 378 NW2d 432 (1985). To the extent the prosecutor's remarks could be viewed as improperly attacking defense counsel personally, a timely instruction upon request could have cured any prejudice. *Schutte, supra*. Therefore, this unpreserved issue does not warrant reversal.

Defendant also argues that the prosecutor improperly commented on his silence. Again, because there was no objection to the prosecutor's remarks at trial, we review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines, supra* at 763. Contrary to what defendant suggests, the prosecutor did not comment on defendant's silence to the police or at trial. Rather, the comments were directed at defendant's refusal to answer questions when he presented himself at the emergency room with a gunshot wound to his chest. The prosecutor remarked that defendant did not complain or describe what happened after he apparently had been shot accidentally by codefendant Hamilton. Because we conclude that evidence of defendant's silence at the emergency room was properly admitted at trial (see discussion, *infra*), we conclude that the prosecutor's commentary on this evidence did not constitute plain error. *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996).

We reject defendant's related argument that the trial court abused its discretion by allowing the evidence of his silence at the emergency room. We are not persuaded by defendant's attempt to equate this evidence to improper commentary on a defendant's assertion of his Fifth Amendment privilege against self-incrimination. The silence in question was not made in the face of police conduct or interrogation. Although defendant was later kept in custody in the hospital, he was not in custody when he walked into the emergency room on his own accord, and the evidence here pertains only to prearrest silence, which occurred before the police became involved. As such, the *Miranda*¹ protections were not implicated. See *People v Coomer*, 245 Mich App 206, 218-219; 627 NW2d 612 (2001). Rather, the issue of defendant's

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

prearrest silence was solely a question of relevance. See *People v Hackett*, 460 Mich 202, 214; 596 NW2d 107 (1999), citing *People v Cetlinski (After Remand)*, 435 Mich 742, 757; 460 NW2d 534 (1990). Evidence that defendant, who had suffered a severe gunshot wound, refused to give routine information at the hospital emergency room was at least marginally relevant to his state of mind following the shooting incident, which was clearly at issue in determining his intent. *Bailey, supra*. The court did not abuse its discretion in allowing the evidence.

Defendant also raises two issues in propria persona. First, he argues that trial counsel was ineffective for failing to require that the prosecutor establish a foundation for the admission of prosecution exhibits two through eighty-three. Because defendant did not raise this issue in a motion for a new trial or request for a *Ginther*² hearing, our review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

To establish ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment and that the deficient performance prejudiced defendant. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel’s conduct was reasonable. *Id.*

We find no merit to defendant’s claim. The challenged exhibits were all validated by the physician and officers who either recovered the items depicted in the photos or who produced the documents. MRE 901(2). Further, the evidence was relevant in that it concerned the conditions at the crime scene when the police arrived on the night of the incident. MRE 401; MRE 402; *People v Mills*, 450 Mich 61, 69; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Because defendant has not shown that the evidence was either irrelevant or improperly admitted, he has not shown that defense counsel was ineffective for failing to object. Counsel is not required to make futile objections. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Because defendant has failed to show that the foregoing evidence was irrelevant, we also reject defendant’s related pro se argument that the prosecutor committed misconduct by introducing this evidence. Similarly, we find no merit to defendant’s pro se arguments concerning the prosecutor’s theories of the case. The prosecutor’s remarks were proper commentary on the evidence presented at trial and reasonable inferences drawn therefrom. *Buckey, supra*.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Hilda R. Gage

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).