

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN DAVIS,

Defendant-Appellant.

UNPUBLISHED

September 23, 2004

No. 241710

Wayne Circuit Court

LC No. 00-013417-01

Before: Murphy, P.J., and O’Connell and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial for second-degree murder, MCL 750.317, assault with intent to do great bodily harm, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 30 to 60 years for the murder conviction and 80 to 120 months for the assault conviction, to be served consecutively to a two-year prison term for felony-firearm. We affirm.

This case arose when a black car in which defendant was riding with three friends drove up next to a burgundy Chevy Monte Carlo. One of the friends riding with defendant mistook the Monte Carlo for one recently stolen from him, so he started questioning the Monte Carlo’s driver about where he bought the car. Defendant’s friend asked if he could look at the car, and the Monte Carlo’s driver agreed. All at once, defendant and his three friends, carrying various firearms, jumped from the black car and pointed their weapons at the Monte Carlo’s driver and passenger. Defendant was carrying an assault rifle and pointing it at the Monte Carlo over the hood of the black car.

One of defendant’s friends aimed into the Monte Carlo and shot each occupant once in the legs. Defendant then moved to the front of the Monte Carlo and pointed his weapon at the occupants through the windshield. The passenger managed to crawl out of the Monte Carlo and squeeze his head and neck under it for protection. The group of gunmen opened fire on the driver, hitting him nineteen times and killing him. After shooting at the driver, the gunman who originally shot the passenger in the leg walked to the other side of the car, stood over him, and shot him four more times in the lower body as he lay, unarmed, with his head and shoulders under the car. The group then fled the scene in the black car. Almost immediately, a police officer spotted the black car running a stop sign and chased it in his unmarked police car. When the black car stopped, police observed defendant, who was occupying the front passenger’s seat,

throw an assault rifle and shed his dark clothes as he ran away. Police recovered an assault rifle by some black pants in a field near defendant's escape route. Police matched bullets fired and spent casings ejected from the assault rifle to bullets and spent casings found at the scene. While the shooting severely and permanently injured the passenger, he survived and testified at trial.

Defendant argues that there was insufficient evidence to support his convictions, either as a principal or as an aider and abettor. We disagree. We evaluate the sufficiency of a case's evidence "by viewing the evidence presented in a light most favorable to the prosecution and determining whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v Vaughn*, 186 Mich App 376, 379; 465 NW2d 365 (1990). "The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). "The elements of assault with intent to do great bodily harm less than murder are (1) an assault . . . coupled with (2) a specific intent to do great bodily harm less than murder." *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996).

Under an aiding and abetting theory, the prosecution must prove that "the defendant performed acts or gave encouragement that aided or assisted the commission of the crime, and that the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time the defendant gave the aid or assistance." *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993). The amount of aid or assistance a defendant provides is immaterial if it induced or encouraged the principal to commit the crime. *People v Palmer*, 392 Mich 370, 378; 220 NW2d 393 (1974).

In a statement to police, defendant admitted that he and two other friends were helping another friend look for his stolen Monte Carlo while armed with firearms. Two witnesses testified that defendant exited the car while carrying an assault rifle and pointed the rifle at the victims. Other witnesses and evidence linked defendant's rifle to fired bullets and spent shells found at the scene. Even disregarding this evidence, his participation in the crime as an armed gunman supports the jury's conclusion that he at least aided and abetted the murder and assault. The jury could reasonably infer that defendant intended the murder and assault, or at least knew of the intent of the other gunmen, when he shifted his position to the front of the car after the shooting started. Viewed in a light most favorable to the prosecution, a rational jury could find, beyond a reasonable doubt, that defendant actively assisted in the commission of the crimes while possessing the requisite knowledge or intent.

Defendant next argues that the trial court abused its discretion by departing from the minimum sentence ranges established by the sentencing guidelines. We disagree. The trial court sentenced defendant to five years more than the guidelines' range designated for defendant's murder conviction, and it upwardly departed from the range of assault sentences by twenty-three months.

A court may only depart from the appropriate sentence range because of a substantial and compelling reason. *People v Babcock*, 469 Mich 247, 255-256; 666 NW2d 231 (2003). A substantial and compelling reason for departure must be objective and verifiable. *Id.* at 257-258. We review for clear error a trial court's finding that a factor exists, and review the determination that a particular factor is objective and verifiable as a matter of law. *Id.* at 264-265. However,

we review for abuse of discretion a trial court's determination that an objective and verifiable factor constitutes a substantial and compelling reason for departure. *Id.* In the end, the trial court must tailor the sentence to make it proportionate to the seriousness of the crime and defendant's criminal history. *Id.* at 262.

This was a collaborative crime against unarmed men, carried out execution style by a well armed and organized group as revenge for a car theft that was not, in fact, committed by the victims. The trial court did not err in its determination that the objective and verified facts showed that defendant committed this crime in a calculated manner to exact revenge and implement vigilante justice. The trial court did not abuse its discretion when it found that this was a substantial and compelling reason to depart from the guidelines, and its final sentence reflected a punishment proportionate to the gravity of this crime.

Next, defendant argues that his trial counsel was ineffective because he repudiated an agreement for defendant to testify in exchange for not being charged, failed to interview and present character witnesses, advised defendant not to testify, and failed to pursue a mere-presence defense. Following a *Ginther*¹ hearing on remand from this Court, the trial court determined that defendant was not denied the effective assistance of counsel. We agree. We review the court's factual findings for clear error, while we review de novo its constitutional determinations. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, "defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Although defendant asserts that defense counsel, without his consent, repudiated an agreement for defendant to testify in exchange for not being charged, the testimony at the *Ginther* hearing established that there was never any formal agreement for defendant to testify in exchange for immunity from prosecution. Rather, at best, there were informal discussions between police and both defendant and defense counsel that defendant could possibly avoid being charged if he agreed to cooperate and testify against his codefendants. Before defendant gave a statement to police, defense counsel advised defendant that the police did not have authority to make any promises about his prosecution, but defendant made his statement to police anyway. Defense counsel subsequently contacted the prosecutor to discuss defendant's status, but the prosecutor had not yet decided whether defendant would be charged. Because the prosecutor was not willing to commit to a binding immunity agreement, defense counsel advised defendant not to make further statements or testify at the codefendants' preliminary examination, because, without immunity, any further statements or testimony could be used against him. This advice was sound and does not reflect ineffective assistance. Counsel properly advised defendant that the police did not have the authority to make decisions whether defendant would be charged. See *People v Gallego*, 430 Mich 443, 452; 424 NW2d 470 (1988). Without immunity, defendant could have been charged and, had he testified, his testimony could have been used against him later.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Regarding the presentation of witnesses, “[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy.” *People v Davis (On Rehearing)*, 250 Mich App 357, 368; 649 NW2d 94 (2002). A trial counsel’s decision to call character witnesses is a matter of trial strategy because injecting character into a trial generally opens the door to the prosecution’s rebuttal of that evidence. MRE 404(a)(1). Likewise, whether a defendant should testify and open himself to cross-examination is a question of strategy. If defendant had testified in this case, he would have been forced to explain several facts that were inconsistent with a claim of innocence and mere presence, such as the glove carrying his DNA and four homemade ski masks found inside the black car. Moreover, in light of the strong, objective evidence presented against defendant at trial, neither of these decisions deprived defendant of a substantial defense or was likely to change the outcome of defendant’s trial. Finally, the record discloses that defense counsel presented a mere-presence defense to the extent possible given the facts, so defendant’s last claim of ineffective assistance also lacks merit.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O’Connell
/s/ Hilda R. Gage