

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHANNON LADEL KEYS,

Defendant-Appellant.

UNPUBLISHED

February 6, 2007

No. 264387

Mecosta Circuit Court

LC No. 03-005118-FC

Before: Donofrio, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317, assault with intent to rob while armed, MCL 750.89, and conspiracy to commit unarmed robbery, MCL 750.157a and MCL 750.530. He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent terms of life in prison for the murder and assault convictions, and 12 to 15 years for the conspiracy conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the death of Jeremiah "Jake" Monroe, who was shot and killed during a failed robbery attempt. De Lauren Gordon allegedly committed the shooting, and was aided by Marvin Redmond and defendant, who allegedly planned the robbery and drove Gordon to Monroe's residence.

I

Defendant first argues that the evidence was insufficient to support his convictions of second-degree murder and assault with intent to rob while armed. We disagree.

When a defendant challenges the sufficiency of the evidence in a criminal case, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror in finding guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000); *People v Sexton*, 250 Mich App 211, 222; 646 NW2d 875 (2002).

To prove second-degree murder, the evidence must establish the following elements: (1) a death, (2) caused by an act of the defendant, (3) while the defendant had the intent to kill, the intent to cause great bodily harm, or the intent to perform an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily

harm, and (4) without justification or excuse. *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001). To support defendant's conviction pursuant to an aiding and abetting theory of guilt, the prosecutor had to show that (1) defendant or some other person committed the crime charged, (2) defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) at the time that he gave aid and encouragement, defendant had (a) the requisite intent necessary to be convicted of the crime as a principal, or (b) knowledge that the principal intended its commission. *People v Barrera*, 451 Mich 261, 294; 547 NW2d 280 (1996); *People v Tanner*, 255 Mich App 369, 418-419; 660 NW2d 746, rev'd on other grounds 469 Mich 437 (2003).

Defendant argues that the evidence was insufficient to establish that he possessed the requisite intent for second-degree murder or to establish an assault with intent to rob while armed because there was no evidence that he knew Gordon would use a gun to commit the robbery.

The requisite level of malice for second-degree murder is the same of that for first-degree felony murder. *People v Flowers*, 191 Mich App 169, 176; 477 NW2d 473 (1991). We therefore rely on this Court's statement in *Flowers* regarding proof that an aider and abettor possessed the requisite malice for felony murder:

In situations involving the vicarious liability of cofelons, the individual liability of each felon must be shown. It is fundamentally unfair and in violation of basic principles of individual criminal culpability to hold one felon liable for an unforeseen death that did not result from actions agreed upon by the participants. In cases where the felons are acting intentionally or recklessly in pursuit of a common plan, liability may be established on agency principles. [*People v Aaron*, 409 Mich 672, 731; 299 NW2d 304 (1980)]. . . .

In order to convict one charged as an aider and abettor of a first-degree felony murder, the prosecutor must show that the person charged had both the intent to commit the underlying felony and the same malice that is required to be shown to convict the principal perpetrator of the murder. Therefore, the prosecutor must show that the aider and abettor had the intent to commit not only the underlying felony, but also to kill or to cause great bodily harm, or had wantonly and wilfully disregarded the likelihood of the natural tendency of this behavior to cause death or great bodily harm. Further, if it can be shown that the aider and abettor participated in a crime with knowledge of his principal's intent to kill or to cause great bodily harm, he was acting with wanton and wilful disregard sufficient to support a finding of malice. [*Flowers, supra* at 178.]

See also *People v Carines*, 460 Mich 750, 755, 759-761; 597 NW2d 130 (1999) (evidence that the aider and abettor participated in an armed robbery knowing that his co-felon was armed is sufficient to establish that the defendant acted "in wanton and wilful disregard of the possibility that death or great bodily harm would result," and is therefore sufficient to establish a felony murder charge).

In this case, Redmond testified that Gordon was in defendant's presence and eyesight when he placed a gun in the console of defendant's vehicle on the way to Monroe's house the night before Monroe's murder. Unable to find Monroe, the group abandoned their plans to rob

Monroe that night, deciding to try again the next night. The jurors could infer from this testimony that defendant knew that Gordon had a gun and would again bring it on the subsequent attempt. Defendant maintains that the evidence shows that he did not plan or intend to assist an armed robbery, and that he actually tried to discourage and prevent Gordon from bringing a gun to the robbery. Defendant emphasizes that Redmond testified that he and defendant advised Gordon “a thousand times” that it was not necessary to use a gun because Monroe would be unlikely to resist the robbery. However, the jurors could infer from this testimony that defendant must have known about Gordon’s gun, otherwise he would not have thought it necessary to tell him repeatedly not to use it during the robbery attempt. Furthermore, defendant’s belief that Monroe would feel too intimidated and overpowered to resist the robbery attempt was based on defendant’s original plan in which four robbers would confront Monroe. In the final plan, only one robber – Gordon – was to confront Monroe, thus raising the possibility that Monroe might attempt to resist and that Gordon would resort to using a weapon to commit the robbery. Additionally, defendant and Redmond did not previously know Gordon, which increased the risk that Gordon would not follow defendant’s and Redmond’s repeated instructions to not involve a weapon in the robbery attempt. Thus, a rational trier of fact could find that defendant was acting with the requisite “wanton and wilful disregard” of the possibility that death or great bodily harm would result. The evidence was therefore sufficient to support the requisite finding of malice for second-degree murder. *Carines, supra* at 760-761. Similarly, the evidence was sufficient to support defendant’s conviction of assault with intent to rob while armed.

II

Defendant argues that he was denied a fair trial when the jurors saw him brought into the courtroom wearing arm and abdominal restraints and that the trial court compounded this error by failing to give a curative instruction. We disagree.

In general, a defendant’s right not to appear in physical restraints before the jurors has long been considered an important component of a fair and impartial trial. *People v Duplissey*, 380 Mich 100, 103; 155 NW2d 850 (1968); *People v Moore*, 164 Mich App 378, 384; 417 NW2d 2d 508 (1987). However, to obtain relief on appeal, a defendant asserting that he was deprived of a fair trial because the jury saw him in restraints must show that he was prejudiced as a result. *Id.* at 385. This Court will not reverse absent a showing of prejudice. *People v Herndon*, 98 Mich App 668, 672-673; 296 NW2d 333 (1980).

On the first day of trial, before jury voir dire, courtroom officers inadvertently brought defendant into the courtroom while he was wearing restraints. The prosecutor remarked that the restraints were not highly visible when defendant was sitting, and there was no way to know how many jurors observed anything at all. Defendant was not wearing jail attire. The trial court stated that the occurrence was not intentional. Defendant did not request an evidentiary hearing below to inquire as to whether members of the jury actually saw defendant’s restraints, and, if they did, whether they were prejudiced as a result, and it is not evident from the record that he was prejudiced. Defendant argues that the trial court erred by failing to give a curative instruction, as it initially intended. It appears, however, that the trial court substituted the remedy of having defendant subsequently brought into the courtroom without restraints, and defendant agreed to this substitution. In any event, without a showing of prejudice, there is no basis for granting defendant relief with respect to this issue.

III

Defendant argues that he was denied his right to an impartial jury when the trial court failed to remove two jurors who revealed for the first time mid-trial that they knew prosecution witnesses. Because defendant did not request that the trial court remove the jurors, we consider this issue unpreserved. Therefore, we review the issue for plain error affecting defendant's substantial rights. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

In *People v Daoust*, 228 Mich App 1; 577 NW2d 179 (1998), a juror came forward during the trial and informed the trial court that he went to junior high school with a key prosecution witness. The trial court permitted the juror to remain on the panel. *Id.* at 3. On appeal, this Court rejected the defendant's argument that he was entitled to relief on appeal if he could establish that he would have used a peremptory challenge to remove the juror during voir dire. *Id.* at 8. The Court stated that, "[a] defendant is not denied his right to an impartial jury simply because he is unable to make the most effective use of his peremptory challenges." *Id.* The Court also cited practical concerns, remarking that it would be "difficult for a court to reliably determine, in hindsight, whether a defendant possessing different information would have elected to exercise a peremptory challenge." *Id.* at 9. The Court commented that there was "no indication that the juror in question purposefully provided any false answers during voir dire." *Id.* at 9 n 3.

In *People v Manser*, 250 Mich App 21; 645 NW2d 65 (2002), however, this Court held that a defendant was deprived of his right to a fair and impartial jury when the trial court refused to remove a juror "who failed to initially disclose information relevant to her ability to objectively sit in judgment of this matter." *Id.* at 24. This Court distinguished *Daoust* on the ground that the juror in *Manser* could have been removed for cause if she had revealed the pertinent information during voir dire. *Id.* at 28.

The instant case is more similar to *Daoust*. Unlike the juror in *Manser*, who failed to reveal information that was highly pertinent to potential juror bias, neither of the jurors' experiences in the instant case created a likelihood of bias. The first juror was slightly acquainted with Dennis Cartwright, a relatively unimportant prosecution witness. There were no significant factual controversies regarding Cartwright's testimony or his role as Monroe's drug supplier. Moreover, the first juror assured the court that her familiarity with Cartwright would not affect her ability to be a fair and impartial juror. Under these circumstances, we cannot conclude that the first juror would have been excluded for cause, or that her participation denied defendant an impartial jury. Accordingly, there is no plain error affecting defendant's substantial rights.

The second juror was excused as an alternate before the jury began deliberating and thus, was not among the 12 jurors who rendered a verdict. Therefore, any error with respect to his presence on the jury likewise did not affect defendant's substantial rights. Defendant contends that removing both of these jurors during voir dire would have resulted in two different persons sitting on the jury and that the loss of this possibility was prejudicial. However, defendant is entitled only to an impartial jury, not a chance to use peremptory challenges in the manner most likely to compose a more sympathetic jury. *Daoust, supra* at 8.

For these reasons, reversal is not warranted.

IV

In a pro se supplemental brief, defendant argues that he was denied a fair trial because of misconduct by the prosecutor. A defendant must preserve a claim of prosecutorial misconduct by specific objection at trial. *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998). Defendant failed to object to the prosecutor's conduct at trial, so this issue is not preserved. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

Defendant contends that the prosecutor knowingly elicited false testimony from witnesses and then repeated this testimony in his closing argument. Certainly, prosecutors have a constitutional obligation to report to the defendant and to the trial court whenever a government witness lies under oath. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). "Michigan courts have also recognized that the prosecutor may not knowingly use false testimony to obtain a conviction, . . . and that a prosecutor has a duty to correct false evidence." *Id.* at 277 (citations omitted). Absent proof that the prosecutor knew that trial testimony was false, however, reversal is not warranted. *People v Herndon*, 246 Mich App 371, 417-418; 633 NW2d 376 (2001). Moreover, a prosecutor's failure to correct false testimony does not warrant automatic reversal unless there is a reasonable likelihood that the false testimony could have affected the verdict. *Lester*, *supra* at 279-280.

Here, we find no basis in the record for concluding that testimony about which defendant complains was actually false or, if it was false, that the prosecutor should have known that it was false. Several of defendant's arguments are based on testimony that was contrary to the witnesses' prior statements, or to other evidence. However, this does not establish either that the witness lied at trial or that the prosecutor knowingly elicited false testimony. In most of the challenged instances, defense counsel had access to the contradictory information, and could have used it to impeach the prosecution witnesses at trial. Furthermore, several of the allegedly false statements involved peripheral matters not directly related to defendant's guilt or innocence.

For these reasons, we reject this claim of error.

V

Finally, defendant argues that he was denied the effective assistance of counsel. Because defendant did not raise this issue in a motion for a new trial or for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to mistakes apparent from the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002).

Defendant argues that defense counsel was ineffective for failing to object to the prosecutor's knowing presentation of false testimony. As discussed above, however, there is no basis in the record to conclude that the testimony was false or, if it was false, that the prosecutor knew that it was false.

Defendant also argues that defense counsel was ineffective in failing to refute the prosecutor's timeline of events. This argument is based on defendant's own interpretation of the timeline evidence. It assumes, without a firm basis, that Monroe had to have been shot at least ten minutes before EMS was called. Contrary to defendant's argument, the evidence does not support the theory that Gordon could not have entered the house before 2:30 a.m. Therefore, defense counsel was not ineffective for failing to pursue this theory.

Finally, defendant argues that counsel improperly advised him not to testify. A criminal defendant has a constitutional right to testify, but may waive that right by deciding not to testify, or by acquiescing in his attorney's decision that he not testify. *People v Simmons*, 140 Mich App 681, 683-685; 364 NW2d 783 (1985). Here, the record discloses that defendant was advised that he had a constitutional right to testify, but acquiesced in his attorney's decision not to testify, as a matter of trial strategy. *Id.* at 685. This Court may not second-guess that decision on appeal. *People v Matuszak*, 263 Mich App 42, 58-59; 687 NW2d 342 (2004).

Defendant's claims that his attorney "coerced" him to waive his right to testify are not supported by the record. Defendant also asserts that defense counsel should have moved to prohibit use of defendant's prior convictions for impeachment purposes but he offers no argument explaining why such a motion would have been successful. Accordingly, there is no basis for finding that defendant was denied the effective assistance of counsel.

We affirm.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Brian K. Zahra