

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SERGIA G. LIGON,

Defendant-Appellant.

UNPUBLISHED

August 28, 2007

No. 267806

Wayne Circuit Court

LC No. 05-005640-01

Before: Servitto, P.J., and Jansen and Schuette, JJ.

PER CURIAM.

Defendant was charged with three counts of first-degree premeditated murder, MCL 750.316(1)(a), three counts of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1). Following a jury trial, he was convicted of three counts of second-degree murder, MCL 750.317, three counts of assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, and felony-firearm. He was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 54 years and 8 months to 85 years for the second-degree murder convictions, seven to ten years for the assault convictions, and 18 months to 5 years for the felon-in-possession conviction, to be served consecutive to a five-year term of imprisonment for the felony-firearm (second offense) conviction. He appeals as of right. We affirm.

I. FACTS

Defendant's convictions arise from an altercation that ended in the shooting deaths of Anthony Smith, Tyrone Smith, and Jermaine Henry, and assaults of Nicole Vaughn, Shirley Smith, and Frisco Williams. The situation began as a street fight between two girls, but escalated into a larger altercation where several gunshots were fired. Nicole Vaughn enlisted the aid of her brothers, Kimani and Chris. Evidence indicated that defendant procured a gun from Mike King, and then accompanied Nicole, Kimani, and Chris, to the scene of the fight, where a large crowd had gathered. Conflicting testimony was presented regarding who approached the crowd, who had a gun, and who shot whom. Most of the witnesses agreed that Chris was a shooter. Some witnesses saw two men with guns; others saw only one man with a gun. Monique Powell identified defendant as being at the scene, but only Nicole and Kimani testified that defendant shot Anthony Smith. The prosecutor's theory at trial was that defendant aided and abetted Chris.

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence to support his convictions. We disagree.

A. Standard of Review

In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

B. Analysis

Second-degree murder is a general intent crime, which requires proof of malice. Malice is shown by evidence of 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. A general intent to kill need not be directed at an identified individual or the eventual victim, and circumstantial evidence and the inferences from the evidence are admissible to establish malice. *People v Abraham*, 256 Mich App 265, 269-270; 662 NW2d 836 (2003).

Assault with intent to do great bodily harm less than murder is a specific intent crime. The elements are: “(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm *less than murder*.” *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), quoting *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997) (emphasis added by the *Brown* Court). The intent necessary may be established by several mental states, including an intent to inflict great bodily harm, i.e., an intent to do serious injury of an aggravated nature, or wanton and willful disregard. *Id.* at 149-150.

The prosecutor argued that defendant was guilty under an aiding and abetting theory, with Chris as the principal. “The general rule is that, to convict a defendant of aiding and abetting a crime, a prosecutor must establish 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 that [the defendant] gave aid and encouragement.’” *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999) (alteration by the *Moore* Court). As noted in *Carines*, *supra* at 757-758:

“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. . . . 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. [Citation omitted.]

Defendant argues that the evidence did not support his murder or assault convictions, either as a principal or an aider and abettor. We disagree. Kimani and Nicole testified that defendant was armed with a gun and used it. Although they had motive to lie to protect Chris, credibility determinations should be left to the jury. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). Also, Monique Powell testified that defendant was wearing a blue shirt. And another witness testified that the person with Nicole's brother was wearing a blue shirt and was the shooter. Although some witnesses identified Chris as the shooter and the testimony varied with regard to whether he wore a white or blue shirt, all conflicts should be resolved in favor of the prosecution. *Id.* at 562.

In regard to intent, it was reasonable for the jury to infer that defendant's use of a gun in a large crowd showed, at a minimum, wanton and willful disregard for the likelihood that the harm he may cause would create a very high risk of death with knowledge that the act probably would cause death or great bodily harm. Also, under the theory of transferred intent, it was sufficient that defendant possessed this state of mind, regardless of whether it was directed at a specific person. *Abraham, supra* at 270.

Under an aiding and abetting theory, there was ample evidence that Chris was the shooter. Four witnesses testified that Chris was the shooter. One of those witnesses further testified that Chris sprayed the crowd with bullets, shooting randomly in an arc from one side of the street to the other. Two other witnesses testified that the shooter confronted the group and asked who was messing with his sister. Kimani admitted that both he and Chris made this statement. Witnesses testified that both Chris and defendant engaged in a physical fight with others at the scene. It was reasonable for the jury to infer from the circumstances that defendant accompanied Chris in order to assist him in the fight. As our Supreme Court recently explained in *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006), "a defendant is liable for the crime the defendant intends to aid or abet as well as the natural and probable consequences of that crime." Here, the offenses for which defendant was convicted (second-degree murder and assault with intent to do great bodily harm) were a natural and probable consequence of engaging in a confrontation and assault while armed with a handgun.

Regardless of the theory on which the jury relied, there was sufficient evidence to support defendant's other convictions. Regarding the felony-firearm charge, the prosecutor had to prove that defendant possessed a firearm during the commission of a felony or that he aided and abetted someone who did. *People v Akins*, 259 Mich App 545, 554-555; 675 NW2d 863 (2003). As previously discussed, the evidence supported an inference that defendant possessed a gun and used it in the commission of a felony. Regarding the felon in possession of a firearm charge, the parties stipulated that defendant had a previous felony conviction and could not legally possess a firearm. Kimani testified that he saw defendant retrieve a gun from King's trunk. The trial court may not determine the weight of the evidence or the credibility of the witnesses, regardless of how inconsistent or vague the testimony was. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). Thus, there was sufficient evidence to support defendant's convictions for these two charges.¹

¹ Having concluded that there was sufficient evidence to support defendant's convictions, we
(continued...)

III. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor engaged in misconduct concerning late disclosure of police reports, by encouraging false testimony, by making improper comments during closing arguments, and by failing to produce evidence. Again, we disagree.

A. Standard of Review

This Court reviews de novo claims of prosecutorial misconduct to determine whether a defendant was denied a fair and impartial trial. *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). However, we review unpreserved claims of error only for plain error affecting a defendant's substantial rights. *Carines, supra* at 763-764.

B. Analysis

Defendant argues that he was prejudiced by the late disclosure of a fingerprint comparison report and another police report. Although the fingerprint report indicated that none of the lifted prints from a van in which defendant allegedly rode to the scene matched defendant's prints, defendant asserts that it bolstered the evidence technician's testimony regarding the relative uselessness of fingerprint evidence in this case. However, the prosecutor only engaged in that line of questioning in response to defendant's cross-examination. Given that the evidence was exculpatory, that defendant was able to cross-examine the fingerprint examiner, and that defendant was allowed to argue the evidence in his closing argument, we fail to see how defendant was denied a fair trial.

The other report related to a police officer's testimony that Frisco Williams was transported by EMS to the hospital after the shootings, contrary to Williams's testimony that he drove himself to the hospital. Defendant asserts that the officer's testimony made Williams look like a "lying fool" and suggested that defendant was manipulating the witness or that Williams was hiding information for defendant. Williams admitted, however, that his intoxication from drinking and smoking marijuana may have affected his memory. Additionally, in her direct examination, the prosecutor raised inconsistencies between Williams's police statement and his trial testimony. Thus, his credibility was already suspect. Under these circumstances, defendant was not denied a fair trial.

Defendant also argues that the prosecutor allowed Nicole and Kimani to give false testimony when they stated that defendant shot Anthony Smith. Defendant presents no evidence

(...continued)

need not address defendant's claims challenging whether there was sufficient evidence at the preliminary examination on which to bind him over for trial on the original, greater charges, or whether the trial court properly denied his motion for a directed verdict and submitted the original charges to the jury. Defendant was not convicted of the original charges, so any error was harmless. See *People v Graves*, 458 Mich 476, 479 n 2, 486; 581 NW2d 229 (1998); *People v Moorer*, 246 Mich App 680, 682; 635 NW2d 47 (2001); *People v Meadows*, 175 Mich App 355, 359; 437 NW2d 405 (1989).

that the prosecutor had knowledge that Kimani and Nicole perjured themselves, and it is apparent that defendant was aware of the substance of the witnesses' testimony based on their preliminary examination testimony and testimony at the previous trial of Chris and King. Defendant did not object to their testimony or seek to exclude it. Moreover, the prosecutor argued that defendant was guilty under an aiding and abetting theory. Under these circumstances, defendant has not established a plain error affecting his substantial rights.

Defendant also objects to statements made by the prosecutor in her closing argument regarding King. The first claim of error is unpreserved. In closing argument, the prosecutor discussed the law of aiding and abetting, attempting to demonstrate that defendant did not need to do anything at the scene in order to be held liable for the murders and assaults. She focused on defendant's conduct before his arrival at the scene. To illustrate this point, she stated that no one had identified King at the scene, yet he had been convicted. Regardless of the accuracy of the prosecutor's statement, defendant's substantial rights were not affected. The prosecutor was simply making a point regarding aiding and abetting law. She did not argue that defendant should be convicted because King was, but rather consistently argued the evidence as it applied to defendant. Therefore, appellate relief is not warranted. *Carines, supra* at 763.

Defendant also takes issue with a statement regarding King that the prosecutor made in her rebuttal closing argument. To the extent that the prosecutor may have misstated defendant's comments, defendant was not denied a fair trial. The prosecutor was again trying to point out that defendant did not need to be identified at the scene in order to be convicted. His actions beforehand were sufficient. Furthermore, the trial court instructed the jury on the law and that the lawyer's arguments were not evidence. This was sufficient to cure any prejudice. See *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Lastly, defendant argues that the prosecutor's failure to produce the bullet that was removed from Tyrone Smith's body denied him his right to present a substantial defense. We note that defendant did not raise this issue below. Therefore, our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763.

There is no evidence that defendant requested, before or during trial, that the bullet be turned over to him for analysis or that a report was generated that the prosecutor failed to provide. Investigator Simon testified that she did not know if the bullet was submitted to ballistics for testing. Defendant's discovery motion only requested an opportunity to inspect tangible evidence if it was to be introduced at trial. The bullet was not introduced. To the extent defendant argues that there was a duty to have the bullet tested to determine whether it was fired from a revolver or an automatic weapon, no such duty existed. See *People v Anstey*, 476 Mich 436; 461; 719 NW2d 579 (2006) (distinguishing between failing to disclose evidence that has been developed and failing to develop evidence in the first instance, and holding that there is no constitutional duty to assist a defendant in developing potentially exculpatory evidence). Accordingly, defendant has not demonstrated a plain error.

IV. JURY INSTRUCTIONS

Defendant also argues that the trial court erred in denying his request for a disputed accomplice instruction and its accompanying cautionary instruction because it applied to Kimani. We disagree.

A. Standard of Review

This Court reviews for an abuse of discretion a trial court's decision whether to give an accomplice jury instruction. *People v Young*, 472 Mich 130, 135; 693 NW2d 801 (2005). An abuse of discretion occurs when the result is outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

B. Analysis

The disputed accomplice instruction, CJI2d 5.5, states:

(1) Before you may consider what [name witness] said in court, you must decide whether [he/she] took part in the crime the defendant is charged with committing. [Name witness] has not admitted taking part in the crime, but there is evidence that could lead you to think that [he/she] did.

(2) A person who knowingly and willingly helps or cooperates with someone else in committing a crime is called an accomplice.

(3) When you think about [name witness]'s testimony, first decide if [he/she] was an accomplice. If, after thinking about all the evidence, you decide that [he/she] did not take part in this crime, judge [his/her] testimony as you judge that of any other witness. But, if you decide that [name witness] was an accomplice, then you must consider [his/her] testimony in the following way: [CJI2d 5.6 is then to be given.]

The instruction is only required if supported by the evidence. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). The trial court refused to give the instruction because it found there was no evidence that Kimani was an accomplice.

Defendant argues that this jury instruction should have been given because several witnesses stated that one of the shooters asked who was messing with his sister and Kimani admitted that he asked that question. In response, plaintiff argues that although Kimani testified that he asked the question, the witness who identified that person as the shooter of Anthony Smith stated that the person was Chris. Defendant contends, however, that other witnesses testified that the shooter asked who was messing with his sister and they were unable to identify that person, leaving the door open to the possibility that the person was Kimani.

We believe that there was scant evidence to support the instruction and defendant's argument was weak in light of the other evidence. But there may have been a very tenuous question of fact whether Kimani was an accomplice to Chris. Defendant argues that the trial court abused its discretion in failing to give the instruction and in submitting the question to the jury. *People v Perry*, 218 Mich App 520, 527-529; 554 NW2d 362 (1996), *aff'd* 460 Mich 55 (1999). But even if defendant's argument is plausible, reversal is not required if the error was harmless, i.e., it is not more probable than not that the error affected the outcome of the proceedings. *Young, supra* at 141-142. Although Kimani was the only one to testify to seeing defendant with a gun before the shooting, Nicole testified that defendant called for a gun and later saw him shoot Anthony. Other witnesses testified that a person in a blue shirt entered the fight with Chris and one

witness identified this person as defendant. Also, several witnesses testified that these two people both had guns. In light of this other evidence, if the failure to give this requested jury instruction was error, it was harmless.

V. SENTENCING

Finally, defendant argues that the trial court improperly considered his lack of remorse when fashioning his sentences. Although lack of remorse is an impermissible consideration in determining whether to depart from the sentencing guidelines range because it is not objective and verifiable, *People v Daniel*, 462 Mich 1, 8; 609 NW2d 557 (2000), it is otherwise a proper sentencing consideration because it is relevant to a defendant's potential for rehabilitation. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995). In any event, defendant was sentenced within the appropriate guidelines ranges and does not assert that there were scoring errors or factual inaccuracies in the presentence investigation report. Therefore, resentencing is not warranted. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004).

Affirmed.

/s/ Deborah A. Servitto

/s/ Kathleen Jansen

/s/ Bill Schuette