

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
July 3, 2012

v

KEVIN BERNARD HUFFMAN,
Defendant-Appellant.

No. 303942
Oakland Circuit Court
LC No. 2010-233338-FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

JAMES EDWARD RANDLE,
Defendant-Appellant.

No. 303947
Oakland Circuit Court
LC No. 2010-233339-FC

Before: JANSEN, P.J., and CAVANAGH and HOEKSTRA, JJ.

PER CURIAM.

In docket number 303942, defendant Kevin Bernard Huffman was convicted by a jury of first-degree felony murder, MCL 750.316(b), armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a, and two counts of possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. Huffman was sentenced, as a fourth habitual offender, MCL 769.12, to mandatory life imprisonment without the possibility of parole for his felony murder conviction and to 30 to 75 years' imprisonment for his armed robbery and conspiracy to commit armed robbery convictions, to run concurrent to each other and consecutive to two mandatory concurrent two-year terms of imprisonment for his felony firearm convictions. In docket number 303947, defendant James Edward Randle was convicted by a jury of first-degree felony murder, MCL 750.316(b), armed robbery, MCL 750.529, and conspiracy to commit armed robbery, MCL 750.157a. Randle was sentenced, as a second habitual offender, MCL 769.11, to mandatory life imprisonment without the possibility of parole for his felony murder conviction and to 30 to 60 years' imprisonment for his armed robbery and conspiracy to commit armed robbery convictions. Both defendants appeal by right. We affirm.

I. FACTS

Defendants' convictions arise from the June 17, 2010 shooting death of Venkata Cattamanchi during a robbery at the Ez-Ee Rest motel on Telegraph Road in Southfield. Jessica Ermatinger, who had been working for Randle as a prostitute, and Lynn Coggins, Randle's friend, each testified that they went to the Ez-Ee Rest with Huffman and Randle for the purpose of robbing Cattamanchi. At Randle's behest, Ermatinger arranged to meet Cattamanchi at the motel for the purpose of committing the robbery. Randle recruited Huffman to participate in the robbery and Coggins to drive them to the meeting place. While Ermatinger was sitting with Cattamanchi in his vehicle, Huffman and Randle opened the vehicle doors and Huffman pointed a silver .45 caliber handgun at Cattamanchi, demanding his money. After Cattamanchi gave Randle his wallet and cellular telephone, Huffman fired two shots at Cattamanchi, one of which killed him almost instantly.

Coggins and Ermatinger were permitted to plead guilty to second-degree murder, armed robbery and conspiracy to commit armed robbery in exchange for their testimony against Huffman and Randle. Their testimony was corroborated by that of Kelly Washington, a witness who was present in the parking lot of the Ez-Ee Rest at the time of the shooting. Washington testified that she observed Randle and Huffman walking toward Cattamanchi's vehicle; Huffman was holding a silver hand gun in his right hand. Sensing danger, Washington and her male companion began to drive away from the Ez-Ee Rest. As they were leaving, Washington heard a gunshot.

I. FAIR TRIAL

Defendant Huffman argues in docket no. 303942, that he was denied a fair trial by Coggins' statement, during cross-examination, that she passed a lie detector test, and by the fact that Coggins and Ermatinger were housed together at the Southfield jail and were transported to court proceedings in the same vehicle before and during trial, affording them an opportunity to discuss and coordinate their testimony. We disagree.

Huffman did not object, request a curative instruction, move for a mistrial or join in a motion for a mistrial made by Randle's counsel following Coggins' statement regarding the lie detector test. Nor did Huffman raise with the trial court any issue regarding the manner in which Ermatinger and Coggins were housed or transported to court. Therefore, the issues raised by Huffman are not preserved for this Court's review.¹ Accordingly, our review of the claimed errors is for plain error affecting Huffman's substantial rights.² Under this standard, "[r]eversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually

¹ *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

² *People v Jones*, 468 Mich 345, 354-355; 662 NW2d 376 (2003).

innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence."³

"[T]he results of a polygraph examination are inadmissible in evidence because polygraphs are not generally accepted as reliable by the scientific community."⁴ However, the mere mention of a polygraph does not justify reversal.⁵ As this Court explained in *Nash*:⁶

Although reference to a polygraph test is inadmissible, [*People v*] *Pureifoy*, [128 Mich App 531, 535; 340 NW2d 320 (1983)], it does not always constitute error requiring reversal, *People v Rocha*, 110 Mich App 1, 8; 312 NW2d 657 (1981). For example, "[a] reference may be a matter of defense strategy, the result of a nonresponse [sic] answer, or otherwise brief, inadvertent and isolated." *Id.* Previously, to determine if reversal is required, this Court has analyzed a number of factors, including

"(1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted." [*People v Kiczenski*, 118 Mich App 341, 346-347; 324 NW2d 614 (1982), quoting *Rocha*, [110 Mich App] at 9.]

Here, the trial court, prompted by Randle's request for a mistrial, gave a curative instruction advising the jury of the scientific unreliability of polygraph examinations and instructing the jury to disregard Coggins' reference to her polygraph examination. Coggins' reference was isolated and inadvertent and was uttered in response to cross-examination by Huffman's counsel. It was not elicited by the prosecutor in order to bolster Coggins' credibility and it was not repeated or referred to further by any party. Each of these factors weighed in favor of the trial court's decision not to grant a mistrial. While the final factor weighed in favor of the granting of a mistrial, as Coggins revealed the results of her polygraph examination, the trial court's cautionary instruction forbade the jury from considering her statement during their deliberations, clearly informing the jury that the test was not reliable, and this Court presumes that a jury follows its instructions.⁷ Accordingly, the trial court's instruction cured any error arising from Coggins' statement.⁸

³ *Id.* at 355.

⁴ *People v Rogers*, 140 Mich App 576, 579; 364 NW2d 748 (1985).

⁵ *People v Kahley*, 277 Mich App 182, 183-184; 744 NW2d 194 (2007).

⁶ 244 Mich App 93, 98; 625 NW2d 87 (2000).

⁷ *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

⁸ *People v Mesik*, 285 Mich App 535, 542; 775 NW2d 857 (2009).

Further, generally, an unresponsive volunteered answer that injects improper evidence into a trial is not grounds for mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony.⁹ Coggins' reference to her lie detector test was an unresponsive volunteered answer invited by questioning from Huffman's counsel. There is no indication that the prosecutor knew that Coggins would give this testimony during cross-examination or that he conspired with or encouraged her to do so. Thus, Huffman has not established plain error in that decision.

Moreover, additional evidence presented at trial corroborated Coggins' testimony. Ermatinger detailed Huffman's participation in the robbery in much the same manner as Coggins, with the additional testimony that Huffman possessed a gun and shot Cattamanchi during the robbery. And, Washington, a disinterested eyewitness, identified Huffman as the person walking with Randle towards Cattamanchi's vehicle while holding a silver semi-automatic handgun in his right hand. A gun matching that description was found in a location in which it could have only been dropped by Huffman, and a holster fitting that gun was found in the location where Huffman was apprehended. Considering the evidence presented against him, Huffman has not established that Coggins' isolated and inadvertent reference to her polygraph examination, elicited by his counsel's vigorous cross-examination, was so prejudicial that it deprived him of a fair trial. Accordingly, Huffman has not established plain error affecting his substantial rights warranting a new trial.¹⁰

III. WITNESS SEQUESTRATION

Next, defendant Huffman argues in docket no. 303942 that the trial court erred by allowing Ermatinger and Coggins to bunk together in jail during Huffman's trial, giving Ermatinger and Coggins "time to discuss their testimony at length." We disagree.

This issue is unpreserved, as it was not raised below, and our review is accordingly for plain error affecting Huffman's substantial rights.¹¹ A trial court may order that potential witnesses be sequestered either at the request of a party or on its own motion.¹² In general, reasonable requests to sequester witnesses should be granted; however, such a decision is at the discretion of the trial court.¹³ Even where entered, however, a sequestration order does not automatically place witnesses on notice that they must not discuss their testimony.¹⁴ Thus, this Court has held that "[w]here the trial court is not requested to caution the sequestered witnesses

⁹ *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

¹⁰ *Jones*, 468 Mich at 354-355; *Carines*, 460 Mich at 763.

¹¹ *Carines*, 460 Mich at 763.

¹² MRE 615.

¹³ *People v Hayden*, 125 Mich App 650, 659; 337 NW2d 258 (1983).

¹⁴ *People v Davis*, 133 Mich App 707, 714; 350 NW2d 796 (1984).

not to discuss the evidence, the sequestration order is not violated by such discussion, and therefore the court does not abuse its discretion in permitting the witnesses to testify.”¹⁵

There is nothing in the record to indicate that defendants requested, or that the trial court ordered, that Ermatinger and Coggins be held separately from each other in the months leading up to trial. Nor was any request made of the trial court to instruct the witnesses not to discuss their testimony with each other either before or during trial. Thus, Huffman cannot establish that Ermatinger or Coggins violated any sequestration order. Indeed, Huffman’s claim of error is based not on an asserted violation of a sequestration order issued by the trial court, but rather on the absence of any such order, which he asserts should have been issued by the trial court on its own initiative in advance of trial.

While a trial court has the discretion to order witnesses to be sequestered on its own motion, Huffman does not offer any authority, and we find none, requiring that a trial court do so. MRE 615 provides that a “[a]t the request of a party the court *may* order witnesses excluded so that they cannot hear the testimony of other witnesses, and it *may* make the order of its own motion” (emphasis added). Likewise, MCL 600.1402 provides:

The sittings of every court within this state shall be public except that a court *may*, for good cause shown, exclude from the courtroom other witnesses in the case when they are not testifying and *may*, in actions involving scandal or immorality, exclude all minors from the courtroom unless the minor is a party or witness. This section shall not apply to cases involving national security. [Emphasis added.]

The word “may” indicates permissive, and not mandatory, action.¹⁶ Likewise, while a trial court may instruct witnesses to refrain from discussing their testimony with each other,¹⁷ Huffman offers no authority, and we find none, requiring that a trial court do so. Thus, Huffman has not established that any error, let alone plain error,¹⁸ occurred as a result of the manner in which Ermatinger and Coggins were housed and transported before or during trial. Additionally, Huffman offers no evidence to show that Ermatinger and Coggins colluded to craft testimony falsely implicating him in Cattamanchi’s death. Therefore, Huffman has not established any prejudice arising from the manner in which Ermatinger and Coggins were housed and transported before or during trial.¹⁹

Moreover, even if Huffman was able to establish that Ermatinger and Coggins violated a sequestration order, exclusion of their testimony at trial would not have been warranted.

¹⁵ *Id.*

¹⁶ *AFSCME v Detroit*, 267 Mich App 255, 260; 704 NW2d 712 (2005).

¹⁷ *Davis*, 133 Mich App 714.

¹⁸ That is, clear or obvious error. *Carines*, 460 Mich at 763.

¹⁹ *People v Solak*, 146 Mich App 659, 669; 382 NW2d 495 (1985).

Although a court may preclude testimony by a witness who has violated a sequestration order, “courts have routinely held that exclusion of a witness’s testimony is an extreme remedy that should be sparingly used.”²⁰ When considering whether a witness’s testimony should be excluded because of a violation of a sequestration order, “significant mitigating factor[s]” include whether the “violation of the sequestration order resulted from an innocent mistake,” whether a party or witness was blameworthy for the violation and whether the violation was “purposeful.”²¹ Considering that Ermatinger and Coggins were housed together involuntarily while in police custody and that they were not admonished by the court not to discuss the case before trial, exclusion of their testimony as a consequence of any such communication would not have been warranted. Huffman’s and Randle’s counsel each had ample opportunity to cross examine Ermatinger and Coggins, including about discussions they had immediately following their arrest, while being held awaiting trial and during transport to and from court proceedings. This was sufficient to allow the jury to consider whether Ermatinger and Coggins were being truthful, or whether their ability to converse with each other in advance of their testimony affected their credibility. Consequently, Huffman has not established plain error affecting his substantial rights. No relief is warranted.

III. SUFFICIENCY OF THE EVIDENCE

At trial, defendant Randle admitted his guilt to the armed robbery and conspiracy to commit armed robbery charges against him, contesting only the felony-murder charge. On appeal, Randle argues to this Court in docket no. 303947, that the prosecution presented insufficient evidence to establish that he aided and abetted felony murder.

We review de novo challenges to the sufficiency of the evidence.²² “[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.”²³ Circumstantial evidence and reasonable inferences may be used to prove the elements of the crime.²⁴ Minimal circumstantial evidence is sufficient to establish intent because of the difficulty of proving an actor’s state of mind.²⁵

To prove felony murder on an aiding and abetting theory, the prosecution must show that the defendant (1) performed acts or gave encouragement that assisted the commission of the

²⁰ *People v Meconi*, 277 Mich App 651, 654-655; 746 NW2d 881 (2008).

²¹ *Id.*

²² *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011).

²³ *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

²⁴ *Carines*, 460 Mich at 757.

²⁵ *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of one of the predicate felonies specified in MCL 750.316(1)(b), including robbery.²⁶ Aiding and abetting describes all forms of assistance rendered to the perpetrator of a crime and includes all words or deeds that might support, encourage, or incite the commission of a crime.²⁷ The prosecution must prove that one who aids and abets felony murder possessed the requisite malice to be convicted of that offense; that is, that the aider and abettor either intended to kill, intended to cause great bodily harm, or wantonly and willfully disregarded the likelihood that the natural tendency of his behavior was to cause death or great bodily harm.²⁸ If an aider and abettor participates in a crime with knowledge of the principal's intent to kill or cause great bodily harm, the aider and abettor is acting with "wanton and willful disregard" sufficient to support a finding of malice.²⁹ And, for purposes of proving felony murder, malice can be inferred when the evidence demonstrates the use of a deadly weapon, or that the defendant intentionally set in motion "a force likely to cause death or great bodily harm."³⁰

Evidence presented at trial established that Randle initiated and set in motion the plan to rob Cattamanchi, inciting the robbery and encouraging Huffman to participate in it, and that Huffman carried a gun with him, in open sight, as he and Randle walked toward Cattamanchi's vehicle to commit that robbery. From this, the jury could infer that Randle was aware in advance of the robbery that Huffman was armed and that he actively assisted in the armed robbery of Cattamanchi with this knowledge. Randle's active assistance in the robbery, with knowledge that Huffman possessed a deadly weapon, was sufficient to permit the jury to infer that Randle acted with malice. Additionally, there was testimony that established that Randle knew that Huffman was going to "pop" Cattamanchi; that is, that Randle aided and abetted a robbery knowing that Huffman's intent was to kill or cause great bodily harm to the victim. Keeping in mind that minimal circumstantial evidence is sufficient to establish intent,³¹ we conclude that the evidence presented at trial was sufficient to permit the jury to conclude that Randle had the requisite intent necessary to support a conviction for felony murder as an aider and abettor.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra

²⁶ MCL 750.316(1)(b); *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003).

²⁷ *Carines*, 460 Mich at 757.

²⁸ *Riley*, 468 Mich at 140-141.

²⁹ *Id.* at 141.

³⁰ *Carines*, 460 Mich at 759.

³¹ *McRunels*, 237 Mich App at 181.