

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 7, 2013

v

MICAI DONTE HILL,

No. 304972
Wayne Circuit Court
LC No. 10-009876-FC

Defendant-Appellant.

Before: BECKERING, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Defendant, Micai Donte Hill, appeals as of right his jury-trial convictions of two counts of second-degree murder, MCL 750.317.¹ The trial court sentenced him as a third-offense habitual offender, MCL 769.11, to concurrent sentences of 39 years to 60 years' imprisonment for each conviction. We affirm.

This case arises from the fatal shootings that occurred at 19255 Yacama in Detroit, on April 2, 2010, resulting in the deaths of Trenton Johnson and Thomas Neal Cook.

Defendant initially contends that the prosecution presented insufficient evidence to sustain his convictions. This Court reviews de novo a sufficiency-of-the-evidence claim. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). "When reviewing a claim that the evidence presented was insufficient to support the defendant's conviction, this Court must view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find beyond a reasonable doubt that the prosecution established the essential elements of the crime." *People v Kissner*, 292 Mich App 526, 533-534; 808 NW2d 522 (2011).

The elements of second-degree murder are: "(1) death, (2) caused by defendant's act, (3) with malice, and (4) without justification." *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003). The term "malice" includes the "intent to kill, the intent to cause great bodily harm,

¹ The jury acquitted defendant of the charges of first-degree murder, MCL 750.316, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b.

or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). “The intent to do an act in obvious disregard of life-endangering consequences is a malicious intent” for purposes of second-degree murder, and does not require that the defendant actually intended the resultant harm. See *id.* at 466. In addition, proof of an intention to kill may be derived through inference from any of the facts in evidence. *People v Dumas*, 454 Mich 390, 403; 563 NW2d 31 (1997). As stated in *People v Bulls*, 262 Mich App 618, 624; 687 NW2d 159 (2004), “Circumstantial evidence and reasonable inferences arising from the evidence may sufficiently prove the elements of a crime.”

With regard to aiding and abetting, “[e]very person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.” MCL 767.39.

A conviction of aiding and abetting requires proof of the following elements: (1) the underlying crime was committed by either the defendant or some other person, (2) the defendant performed acts or gave encouragement that aided and 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 of giving aid or encouragement. [*People v Smielewski*, 235 Mich App 196, 207; 596 NW2d 636 (1999).]

Although “[m]ere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to show that a person is an aider and abettor[,]” any advice, aid, or encouragement, if effective, is sufficient to establish guilt on an aiding and abetting theory. See *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991) (internal citation and quotation marks omitted). The intent element for aiding and abetting can be established if “(1) the defendant intends or is aware that the principal is going to commit a specific criminal act; or (2) the criminal act committed by the principal is an incidental consequence[] which might reasonably be expected to result from the intended wrong.” *People v Robinson*, 475 Mich 1, 6–7, 9; 715 NW2d 44 (2006) (internal citations and quotation marks omitted). The requisite intent can be inferred from all of the facts and circumstances of the case, and minimal circumstantial evidence is sufficient to establish the necessary intent. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998).

Defendant is incorrect in his assertion that the prosecution presented insufficient evidence to sustain his second-degree murder convictions premised on a theory of aiding and abetting. At the outset, there was substantial physical evidence, as defendant concedes in his brief, that defendant was present at the scene of the shooting, based on the blood trail and hat that were outside the home. The DNA results obtained from this evidence show that the material obtained from the hat and blood were matched to defendant.² Additionally, defendant appeared at Henry

² More specifically, the blood samples obtained from the blood trail leading to the crime scene matched that of defendant with a random-match probability of 1:607.8 trillion African-American

Ford Hospital System (HFHS) within approximately 30 minutes of the shooting, suffering from seven gunshot wounds. Based on this evidence, it is simply not in dispute that defendant was present at the scene of the shootings.

Defendant's clothing taken from HFHS by police included some clothing matching the apparel of the perpetrators as identified by witnesses to the shootings. Further, defendant was not identified as a friend or houseguest by Jermaine Coppage, Derrick Coppage, or any of the individuals present in the home at the time of the shooting (the shooting took place at the Coppage residence). In other words, no viable innocent explanation has been offered for defendant's presence in close proximity to the house in the early morning hours at the time of the shootings.

Contrary to Detroit Police Department Sergeant Michael Martel's response at trial indicating that there was no witness who placed a gun in defendant's hand at the scene, Earl Lawton indicated that the middle person out of the three individuals he observed approaching the house—a person presumed to be defendant³—had a weapon and discharged the firearm while approaching the house and directly shot his nephew, Trenton Johnson, when he was down. Even though the third individual's possession and use of a weapon was in dispute based on Ferris Curney's disavowal of having observed him with a weapon, the testimony of these witnesses was consistent regarding the impression that defendant was acting in concert with the other two perpetrators. Lawton observed three men walking together toward the home. The middle individual, presumed to be defendant, was between two other individuals clad in white tee shirts.⁴ The individuals were near each other and walking side-by-side, and Lawton asserted that the middle individual verbally engaged his nephew while approaching the house. The individuals approached the house and then immediately began to discharge their weapons. According to Lawton, all three individuals left the scene together and in the same direction.

Curney observed that a hurt individual remained with and accepted the assistance of a man clad in a white tee shirt while this man (the one in the white tee shirt) continued to discharge his weapon at the house in the course of retreating.

people (defendant is African-American). As for the hat, defendant could not be excluded as a DNA contributor, with a random-match probability of 1:2.9 million African-American people.

³ Indeed, defendant does not dispute on appeal that this third individual was presumed to be himself. As noted in footnote 4, he concedes that the evidence established that he was "the third man" at the scene. He focuses, instead, on arguing that Lawton's testimony about a gun was unreliable and contradicted by other testimony.

⁴ Although Lawton himself was not specific concerning which people were wearing which clothing, Curney testified that he observed "one of the guys in [a] white shirt" assisting the "third guy in the black clothes back to the alley." Curney answered "[y]es" when asked, "So the man in the white shirt had one arm around the shoulders of the man that was hurt?" As noted, defendant sustained seven gunshot wounds that night. Defendant concedes on appeal that the evidence established that there were two men clad in white tee shirts and he was "the third man in dark clothing that required help to leave the scene."

Earlier on the day of the shooting, Derrick Coppage had received a threatening telephone call regarding the intent of Domingo Rosario and his family to inflict harm on the household. The content of the telephone call was confirmed by the police during their investigation. While Domingo's nephew, Joseph Rosario, denied his presence at the scene of the shooting, the videotape procured from the HFHS emergency room showed a van, matching the description provided by Curney, at the entrance within 30 minutes of the shooting and Joseph Rosario assisting defendant to the entrance. Although Lawton's identification of Joseph Rosario in a photographic array was not definitive, he did indicate that Joseph bore a resemblance to one of the perpetrators.

In addition, and significantly, defendant's version of how he incurred his seven gunshot wounds was not borne out following investigation by the police. Defendant initially indicated that he was the victim of an armed robbery at a gas station at Seven Mile and Woodward. Upon learning of this allegation, police were dispatched to the area and could find no evidence to confirm that a shooting had occurred in that area. Defendant then altered his story, indicating that the shooting had occurred at Seven Mile and Schaefer or Wyoming. Again, police were unable to verify any such incident through documentation of 911 calls.

As noted, there was evidence of defendant's use of a gun; further, evidence of defendant's knowledge or intent to aid or encourage the perpetrators can be deduced from his arrival at the scene with the perpetrators, his speaking with a victim, and his remaining at the scene until the shooting terminated. In addition, the nature of the shooting, resulting in the deaths of two individuals, suggests both knowledge and the intent to inflict serious injury or damage. "The use of a lethal weapon will support an inference of an intent to kill." *People v Ray*, 56 Mich App 610, 615; 224 NW2d 735 (1974). Specifically, "[a] defendant's malice, sometimes described as 'acting in wanton and wilful disregard of the possibility that death or great bodily harm would result,' can be inferred from evidence that the defendant 'intentionally set in motion a force likely to cause death or great bodily harm.'" *Bulls*, 262 Mich App at 626 (citations and footnote omitted). Further, proof that the Coppages and their home had been threatened early in the day supports an inference of malice and intent. We find that sufficient evidence existed to sustain defendant's convictions.

Next, defendant contends that the trial court erred in imposing the enhanced fee of \$130 under the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq.*, allegedly violating constitutional prohibitions regarding ex post facto laws. To preserve a constitutional challenge for appellate review, a defendant must first raise the issue in the trial court. *People v Hogan*, 225 Mich App 431, 438; 571 NW2d 737 (1997). Additionally, to preserve a challenge to a trial court's interpretation or application of a statute, a defendant is required to initially raise the argument in the trial court. See *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). Because defendant did not object in the trial court, this issue is unpreserved. We review unpreserved claims for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

This Court recently addressed this issue in *People v Earl*, 297 Mich App 104, 114; 822 NW2d 271 (2012), lv granted ___ Mich ___ (2013), ruling, in relevant part:

[A]n assessment under the CVRA is *not*, in fact, restitution. It is not punitive in nature nor does it affect matters of substance. Our Constitution has specifically authorized the Legislature to provide for an assessment against convicted defendants for the benefit of victims of crime. Accordingly, the trial court's order that defendant pay \$130 under the CVRA is not a violation of the ex post facto constitutional clauses. [Emphasis in original; footnote omitted.]

In accordance with MCR 7.215(C)(2), “[a] published opinion of the Court of Appeals has precedential effect under the rule of stare decisis. The filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals.” This Court is required to follow the rule of law established by the *Earl* Court. MCR 7.215(J)(1).

Finally, defendant contends that he was deprived of the effective assistance of counsel at trial due to the alleged failure of counsel to present the defense of “mere presence” and the failure to call various witnesses. To preserve a claim of ineffective assistance of counsel, a defendant, generally, is required to file a motion for a new trial or a *Ginther*⁵ hearing in the trial court. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Because defendant did not seek a *Ginther* hearing or move for a new trial premised on the effectiveness of counsel, review is limited to mistakes apparent from the existing record. *Id.*

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of law and fact. *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). This Court reviews a trial court's factual findings for clear error, while the trial court's constitutional determinations are reviewed de novo. *Id.*

Both the United States Constitution and the Michigan Constitution guarantee criminal defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. The test used to determine whether a defendant has been deprived of the effective assistance of counsel was discussed by the Michigan Supreme Court in *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001):

A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the “counsel” guaranteed by the Sixth Amendment. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that,

⁵ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. [Internal citations and quotation marks omitted; footnote omitted.]

The defendant must also show that "the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). "Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

Defendant contends that his trial counsel was ineffective for failing to pursue a defense of mere presence. A review of the lower-court record reveals that defense counsel did address the defense of mere presence through cross-examination of the various witnesses and by attacking the credibility of the witnesses. Defense counsel, in questioning witnesses who were within the home, secured admissions that they did not see and could not identify defendant as a perpetrator and emphasized through other testimony the alleged absence of direct or physical evidence linking defendant to the crimes as an active participant in the shootings. Further, defendant's counsel attacked the credibility of certain witnesses by procuring their acknowledgements of physical conditions that limited their abilities to perceive the events and concentrate. Defense counsel also engaged in a substantial effort to discredit witnesses based on the inconsistencies between their previous testimony at the preliminary examination and their testimony at trial.

Moreover, defense counsel further bolstered the theory of defendant's innocence of the charges in closing argument. Counsel emphasized to the jury the presumption of innocence and the burden on the prosecutor to prove every element of the charged crimes. Defendant's attorney specifically attacked the alleged failure of the prosecutor to produce evidence of the existence of "three shooters." He emphasized testimony by a police officer who stated that no witness "put the gun in [defendant's] hand[.]" Defense counsel specifically and repeatedly addressed the theory of aiding and abetting in his closing argument and alleged that the prosecution did not meet its burden of proof.

Defense counsel illuminated the inconsistencies and unanswered questions involved in the case, including the inability to determine "who shot who[m]," and challenged the credibility of the prosecution's witnesses. Defense counsel also challenged the direct evidence in an effort to create reasonable doubt, noting that one of the victims "got shot in the forehead and he was facing towards the house," implying that a bullet fired by Jermaine from inside the house was the cause of death. Counsel further emphasized that the medical examiner opined that there was a lack of evidence of close-range firing, thus potentially negating part of Lawton's testimony.

Defense counsel's responsibilities at trial encompass a general duty to advocate on behalf of his or her client and to "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 US at 688. "This Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58,

61; 687 NW2d 342 (2004). Trial strategy is deemed to include the presentation of evidence, the questioning of witnesses, and decisions pertaining to closing argument. *Horn*, 279 Mich App at 39. Contrary to defendant's contention, defense counsel did thoroughly address the defense of mere presence by repeatedly attacking the credibility of various witnesses and emphasizing the lack of evidence regarding his client's involvement in the commission of the crime. Merely because the strategy was ultimately unsuccessful cannot be equated to the ineffective assistance of counsel. *Matuszak*, 263 Mich App at 61.⁶

Further, the trial court provided the jury with an instruction on mere presence. The instruction "implies not only an absence of criminal intent but also passivity and nonparticipation in the actual commission of [the] crime." *People v Moldenhauer*, 210 Mich App 158, 160; 533 NW2d 9 (1995). Defense counsel's emphasis on the alleged lack of evidence to demonstrate defendant's participation in or contribution to the events that transpired, coupled with the trial court's specific instruction regarding mere presence, shows that this defense was adequately addressed and presented for the jury's consideration. "[J]urors are presumed to follow their instructions." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).⁷

Defendant further asserts a claim of ineffective assistance of counsel premised on his attorney's failure to locate or present various alleged witnesses for trial, even though defendant concedes a "great probability" that the named individuals would refuse to testify.⁸ "[T]he failure to call a witness only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A

⁶ Defense counsel also sought to preclude certain instructions in an effort to limit the choices for the jury in the determination of defendant's guilt. The jury was provided with different options to arrive at a verdict. Defendant was charged with first-degree murder, felon in possession of a firearm, and felony-firearm in addition to the alternative offense of second-degree murder. Defense counsel objected to the provision of the aiding-and-abetting and state-of-mind instructions requested by the prosecutor as being inconsistent with the prosecutor's theory of the case. It can be assumed that defense counsel was seeking to limit the jury's options for convicting defendant.

⁷ We note that the fact that the jury acquitted defendant of the firearm and first-degree murder charges indicates a significant level of overall success, in general, by defense counsel.

⁸ For example, the lower-court record reveals that Joseph Rosario was an endorsed witness and placed on the witness stand. The prosecutor informed the court, outside the presence of the jury, that Joseph had just obtained counsel and was indicating the intention to invoke his Fifth Amendment rights. At the request of defendant's counsel and with the agreement of the prosecutor, Joseph was placed on the witness stand solely for the purpose of permitting the jury to observe the invocation of his Fifth Amendment rights and was then released from any further questioning.

defense is deemed to be substantial only if it is “one that might have made a difference in the outcome of the trial.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Based on defendant’s *own assumption*, the possible witnesses most likely would not have provided exculpatory evidence for defendant. The anticipated invocation of their Fifth Amendment rights would merely have served to potentially implicate the witnesses in the crime, not vindicate defendant. In addition, as determined by the Michigan Supreme Court, “[a] lawyer may not knowingly offer inadmissible evidence or call a witness knowing that he will claim a valid privilege not to testify.” *People v Giacalone*, 399 Mich 642, 645; 250 NW2d 492 (1977). Moreover, the record demonstrates that counsel’s failure to call the noted witnesses for trial did not impede defendant’s ability to put forth a defense of mere presence or non-participation in the charged crimes.

Defendant has failed to proffer any evidence to demonstrate that the identified witnesses would have testified at trial and that the content of their testimony would have been helpful to the defense. Defendant has failed to establish that he was deprived of a substantial defense or that his counsel was ineffective. See *Carbin*, 463 Mich at 600; *Dixon*, 263 Mich App at 398.

Affirmed.

/s/ Jane M. Beckering
/s/ Patrick M. Meter
/s/ Michael J. Riordan