

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL MORAN,

Defendant-Appellant.

UNPUBLISHED

July 26, 1996

No. 181736

LC No. 88-005100

Before: Murphy, P.J., and O'Connell and M.J. Matuzak,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316b; MSA 28.548(2), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to the mandatory term of life imprisonment for the murder conviction and to two consecutive years' imprisonment for the felony-firearm conviction. Defendant appeals as of right and we affirm.

On November 14, 1987, defendant, Theodore Scafe and Woodrow Ritchie drove to John Valchine's party store in the City of Wayne. Scafe went inside the store, shot Valchine in the chest, and stole one hundred and twenty-five dollars from the store's cash register. On October 13, 1988, a jury convicted defendant and Scafe of first-degree felony murder, MCL 750.316b; MSA 28.548(2), and felony-firearm, MCL 750.227b; MSA 28.424(2). On appeal, defendant challenged the admission of a nontestifying codefendant's confession and we reversed his convictions, and affirmed Scafe's convictions, in an unpublished per curiam opinion. *People v Moran*, unpublished opinion per curiam of the Court of Appeals, issued November 29, 1990 (Docket No. 113821). By order of our Supreme Court, 439 Mich 903 (1992), defendant case was remanded to us for reconsideration in light of *People v Banks*, 438 Mich 408; 475 NW2d 769 (1991), and *People v Watkins*, 438 Mich 627; 475 NW2d 727 (1991). After reconsidering the matter, we again reversed defendant's convictions in an unpublished per curiam opinion. *People v Moran*, unpublished opinion per curiam of the Court of Appeals, issued October 16, 1992 (Docket No. 147930). Defendant was retried on October 3, 1994,

* Circuit judge, sitting on the Court of Appeals by assignment.

and was once again convicted by a jury of first-degree felony murder, MCL 750.316b; MSA 28.548(2), and felony-firearm, MCL 750.227b; MSA 28.424(2).

Defendant's first argument is that the trial court erred in denying his motion for a directed verdict on aiding and abetting felony murder because there was insufficient evidence to show that he actually intended to kill Valchine. We disagree.

In order to convict defendant of aiding and abetting felony murder, the prosecution had to prove that defendant acted with malice by showing that defendant intended to kill, that he intended to cause great bodily harm, or that he wantonly and willfully disregarded the likelihood that the natural tendency of his acts would cause death or great bodily harm to Valchine. *People v Flowers*, 191 Mich App 169, 171; 477 NW2d 473 (1991).

The evidence presented at trial established that defendant was in possession of a chrome-plated revolver on the night Valchine was murdered. When defendant, Scafe and Ritchie stopped at Valchine's party store, defendant and Scafe exited the van and walked around the back of the vehicle to talk. A few minutes later, defendant jumped back into the van and Scafe went into Valchine's store. When Scafe returned to the van after robbing Valchine, Scafe placed defendant's chrome-plated revolver on the van's dashboard. Defendant then removed the revolver from the dashboard. The bullet that killed Valchine was fired from a revolver. This evidence supports the reasonable inference that defendant supplied Scafe with the revolver that Scafe used to shoot Valchine. *People v Kelley*, 423 Mich 261, 275; 378 NW2d 365 (1985).

Defendant's knowledge that Scafe was armed during the commission of the armed robbery was sufficient for a rational trier of fact to find that defendant, acting as an aider and abettor, participated in the crime with knowledge of Scafe's intent to cause great bodily harm. *People v Turner*, 213 Mich App 558, 572; 540 NW2d 728 (1995). In creating an inherently dangerous situation, by giving Scafe a gun knowing that Scafe was about to commit a robbery, defendant was aware that there was a likelihood that Scafe would harm Valchine if he resisted the attempted robbery. *People v Hart*, 161 Mich App 630, 636 (1987). Since defendant knew of Scafe's intent to at least cause great bodily harm, a rational trier of fact could have concluded that defendant was acting with "wanton and willful disregard" sufficient to support a finding of malice. *Id.* The trial court did not err in denying defendant's motion for a directed verdict.

Defendant's next argument is that he was denied his right to a speedy trial. In order to determine whether a defendant has been denied his right to a speedy trial, this Court balances the following factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right to a speedy trial; and (4) any prejudice to the defendant. *People v Simpson*, 207 Mich App 560, 563-564; 526 NW2d 33 (1994).

Nearly forty-seven months passed between the time this Court originally reversed defendant's convictions on November 29, 1990, and the time defendant was retried for first-degree felony murder

and felony firearm on October 3, 1994. While a delay of forty-seven months may, at first glance, seem excessive, the delay was reasonable considering the delays attributable to defendant. *People v Rosengren*, 159 Mich App 492, 507-508; 407 NW2d 391 (1987).

A delay of more than eighteen months is presumed to be prejudicial to the defendant and the burden is on the prosecution to prove the lack of prejudice. *People v Wickham*, 200 Mich App 106, 109; 503 NW2d 701 (1993), citing *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182, 2192; 33 L Ed 2d 101 (1972). In this case, even though defendant timely asserted his right to a speedy trial, there was no evidence to establish that defendant was prejudiced by the delay. Anxiety created by incarceration is insufficient to establish a violation of the right to a speedy trial. *People v Jackson*, 171 Mich App 191, 201; 429 NW2d 849 (1988). The prosecution adequately proved that the lengthy delay did not harm defendant's defense, and did not result in the loss of evidence or witnesses. *People v Metzler*, 193 Mich App 541, 546 (1992). Based on a consideration of the length of the delay, the reasons for the delay, defendant's assertion of his right to a speedy trial, and the lack of any prejudice to defendant, we conclude that defendant was not denied his right to a speedy trial. *People v Cooper*, 166 Mich App 638, 655; 421 NW2d 177 (1987).

Defendant's next argument is that his convictions should be reversed because the trial court erroneously instructed the jury in "plain English" on the elements of the charged offenses, and because the trial court erroneously instructed the jury on the order of deliberations. Defendant failed to properly preserve these two issues for appeal because he did not object to the jury instructions given by the trial court and actually expressed satisfaction with the instructions that were given. *People v Ferguson*, 208 Mich App 508; 510; 528 NW2d 825 (1995); *People v Gregg*, 206 Mich App 208, 211; 520 NW2d 690 (1994).

The purpose of requiring an objection to preserve a jury instruction issue for review is to prevent the giving of an improper instruction or to facilitate correction of an erroneous instruction before a verdict is rendered, thereby avoiding a costly trial. *People v Lipps*, 167 Mich App 99, 105; 421 NW2d 586 (1988). We are not convinced that this case is one in which we should deviate from the general rule that instructional errors should not be considered on appeal unless the issue has been preserved by an objection at trial. *People v Handley*, 415 Mich 356, 360; 329 NW2d 710 (1982). Manifest injustice will not result from our failure to review the issue. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

Defendant's next argument is that the trial court erred in denying his motion for a mistrial after the jury informed the court on two occasions that it was unable to reach a decision regarding defendant's guilt. We disagree.

The decision to deny a motion for a mistrial rests within the sound discretion of the trial court and will not be disturbed unless such denial constituted an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). To find error requiring reversal, a trial court's denial of a mistrial must have been so gross as to have deprived the defendant of a fair trial and to have

resulted in a miscarriage of justice. *People v Vettese*, 195 Mich App 235, 246; 489 NW2d 514 (1992). Defendant has failed to make an affirmative showing of how the trial court abused its discretion in refusing to grant a mistrial or how he was prejudiced by that decision. *Id.* Furthermore, none of the trial court's supplemental instructions to the jury had the effect of coercing the jury in agreeing on a verdict, *People v Strezempkowski*, 211 Mich 266, 268; 178 NW 771 (1920), and there is nothing in the record to indicate that defendant was denied a fair trial. *Vettese, supra*, 195 Mich App 246. Thus, the trial court did not err in denying defendant's motion for a mistrial. *People v Siler*, 171 Mich App 246, 257; 429 NW2d 865 (1988).

Defendant argues that his convictions should be reversed because of prosecutorial misconduct. We have reviewed the prosecutor's comments in context and conclude that the prosecutor's remarks did not deny defendant a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). A review of the allegedly improper remarks reveals that the prosecutor was simply relating the facts adduced at trial to his theory of the case, and was arguing all reasonable inferences that arose from the evidence to the jury. *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991). Moreover, any prejudice that may have resulted from the prosecutor's comments was cured by the trial court's instruction to the jury that none of the lawyers' statements were evidence, that the jury should not convict defendant simply because he was a bad person, and that the jury should decide for itself what the evidence and the testimony presented at trial meant. *People v Daniel*, 207 Mich App 47, 56; 523 NW2d 830 (1994). Defendant was not denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Finally, we have reviewed the issues raised by defendant in his supplemental brief and find no error requiring reversal in the issues raised.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Michael J. Matuzak