

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

KAREEM JABBAR MOORE,

Defendant-Appellant.

UNPUBLISHED

July 31, 2003

No. 239242

Ingham Circuit Court

LC No. 00-075732-FC

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, possession of a firearm during the commission of a felony, MCL 750.227b, and carrying a concealed weapon, MCL 750.227. He was sentenced to concurrent prison terms of 240 to 360 months for the murder conviction and thirteen to sixty months for the carrying a concealed weapon conviction, to be preceded by a two-year prison term for the felony-firearm conviction. He appeals by right. We affirm.

This case arises from the shooting death of Timothy Nordman. Witnesses indicated that Nordman, John Paul Torres, Jerry Rutledge, and Derrick Simpson were together as a group at a bar named Dreamgirls on the night of the incident. Testimony from various witnesses, although differing in some respects, indicated that a two on one altercation occurred inside the bar between Torres and Everic Allen¹ and Kermit Lee Love and that later there was an argument in the parking lot outside the bar between Nordman, Torres, Rutledge, and Simpson on the one side and Allen and Love on the other. Torres indicated that he eventually saw Love get into a blue car, possibly a Ford Taurus, by himself.

Torres, Rutledge, and Simpson testified that they and Nordman left the bar together in Nordman's car, a gray Delta 88, with Nordman driving and that they then drove on Pennsylvania Avenue. According to Torres, they came near a car, which he believed was a blue Ford Taurus that was being driven by Love with the passenger side windows down, and then there was

¹ Allen was tried jointly with defendant in this case. Allen was also convicted of second-degree murder.

gunfire. Torres heard between ten and twelve shots and then something hit the car shattering glass. He recalled “a couple seconds” pause, and then heard a second round of gunshots that sounded much louder. Torres indicated that Nordman lay still, but Torres, Rutledge, and Simpson ran from the car. Torres did not see Nordman, Rutledge or Simpson² with a gun before the gunfire attack that night, although he knew there was a rifle in the trunk of Nordman’s car. He also testified that he did not have a gun during the incident.

Simpson similarly testified that Love was driving “a blue or a green like Ford Taurus or Tempo or something like that” and had its front passenger window halfway down. Simpson indicated that eventually Love’s car was right next to Nordman’s car, that he heard about four or five gunshots, and that a window broke out of Nordman’s car. He indicated there was a pause and then more shots. Simpson testified that he saw a Cutlass right next to Nordman’s car around the time the second series of shots were fired. He estimated that he heard “[b]etween like nine and twelve” shots in total. Simpson said that he did not have a gun that evening and that he never saw Rutledge, Torres, or Nordman with a gun, although he knew there was a gun in the trunk of Nordman’s car.

Rutledge testified that Love was in his blue Ford Taurus in the turning lane and that when Nordman’s car approached Love’s car, there was “[p]robably eight, ten shots.” Rutledge too recalled a short pause, and thought another car might be near, and that he then heard “probably three or four more shots.” Rutledge testified that he did not have a gun and that he did not see anyone else in Nordman’s car with a gun.

Officer Herman Jones testified that he saw a light colored Oldsmobile, perhaps gray, with its headlights off pull into a driveway off Pennsylvania Avenue. Officer Jones and Officer Brian Bakos ordered the two occupants to exit the car. Officer Jones identified Allen as the driver of the Oldsmobile and defendant the front passenger. The officers indicated that defendant told them there was a knife in the car, which they found. They also said that they found a shotgun that was partially sticking out of the snow in the area of the car and a spent shotgun shell inside the car.

The forensic pathologist who autopsied Nordman testified that a gunshot wound caused his death. A firearms expert indicated that the bullet recovered from Nordman’s body was a “9-millimeter luger caliber” bullet, meaning that he was “real confident” it was fired from a handgun. The bullet was not fired from the shotgun found near the Oldsmobile.

Detectives Christopher Devlin and Michael Simpson interviewed defendant, which was tape recorded. The jury heard the interview tape. In that interview, defendant said he picked up Allen, who is his half-brother, at Dreamgirls on the night of the incident and that he drove a silver or gray 1989 Cutlass SL car. Allen told him there was an argument at the bar and that a Hispanic man had “followed him [Allen] to the bathroom and you know and try to jump on him and stuff.” Later, they passed a car on Pennsylvania Avenue in which the front seat passenger

² In his testimony, Torres actually referred to being with Nordman, Rutledge, and a black man whose name he did not know. It is evident that this man was Simpson.

was holding a handgun. Shots were first fired from that other car. Defendant initially denied having fired any shots that night, but eventually conceded that when Allen began driving, he shot at the other car once or twice with a shotgun after shots were first fired at him from the other car.

Detective Michael Simpson testified that he again interviewed and tape-recorded defendant and that the tape was transcribed. The jury heard a tape of that interview too. In the second interview, defendant indicated that Allen telephoned him and asked him to pick him up from Dreamgirls because “they has [sic] some problems up there.” Defendant brought his fourteen-gauge shotgun with him and went to Dreamgirls. Defendant indicated that Allen was at the bar with Love and that he heard Love was hit in the jaw by Torres or “[o]ne of his people.” Defendant said that Torres and his companions drove down Pennsylvania Avenue and that Love followed them in a blue Taurus. Defendant indicated that Love fired shots from his car toward the car with Torres in it. Defendant agreed he had gone to where the shots were being fired, but added “[w]ith no intentions on firing, just to see what was going on.” Defendant said that Torres was flashing a gun. Defendant thought Torres was firing at him, so he returned fire, shooting his shotgun twice but “wasn’t aiming at anybody.” He agreed, however, when asked by Detective Simpson if he was shooting “[a]t the car.”

I

Defendant first argues that the trial court erred by denying his motion to suppress his statements to the police. While we review the voluntariness of a defendant’s statement independently, we will affirm the trial court’s decision unless we are left with a firm and definite conviction that a mistake has been made. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). We defer to the trial court if resolution of a disputed factual question turns on witness credibility or the weight of the evidence. *Id.* We may reverse the trial court’s factual findings only if they are clearly erroneous. *People v Kimble*, 252 Mich App 269, 272; 651 NW2d 798 (2002), lv gtd on other grounds ___ Mich ___ ; 659 NW2d 231 (2003). Giving appropriate deference to the trial court’s findings, we affirm its determination that defendant’s statements were voluntary.

In reviewing the voluntariness of a defendant’s statement, we consider the totality of the circumstances, including the defendant’s age, education, intelligence, his prior experience with the police, whether the questioning was repeated and prolonged, the length of the defendant’s detention before giving the statement in question, whether the defendant was advised of his constitutional rights, whether there was an unnecessary delay in bringing the defendant before a magistrate before the statement, whether the defendant was injured, intoxicated, drugged, or ill before giving the statement, and whether the defendant was deprived of food, sleep, or medical attention or physically abused or threatened with abuse before giving a statement. *People v Givans*, 227 Mich App 113, 121; 575 NW2d 84 (1997). The test of voluntariness is whether considering the totality of the circumstances the statement “is the product of an essentially free and unconstrained choice by its maker, or whether the accused’s will has been overborne and his capacity for self-determination critically impaired.” *Id.*

It is undisputed that defendant was a twenty-year-old adult when he was interviewed. Despite his age, defendant was in the tenth grade in an alternative education program. This educational level, although limited, is sufficient for one to understand the right to remain silent

and the right to the presence of counsel during questioning. We agree with the trial court that the questioning at issue was not prolonged, as the first interview was fifty-nine minutes and the second a mere eleven minutes. The transcript of defendant's first interview reflects that he was advised of his right to remain silent and to have the presence of an attorney during questioning. There is no claim of an improper delay in bringing defendant before a magistrate, that defendant was intoxicated or drugged, or in need of medical attention at the time of the interview. Similarly, there is no claim that the police physically abused or threatened defendant. While defendant apparently lacked prior contact with the police, the trial court reasonably concluded that his answers to questions during the interviews indicated that he understood questions and rationally responded to them. Defendant argues that he lacked food and sleep at the time of the interviews. However, we agree with the trial court that defendant was not inappropriately deprived of food. The first interview began at approximately 8:00 a.m., with defendant claiming that he had not eaten since the night before, but, as the trial court observed, "[g]oing from dinner to breakfast without food is fairly normal." Further, as the trial court noted, defendant did not request food during the interview, but did ask for (and receive) water. We defer to the trial court in refusing to believe defendant's claim that he did not eat again before the second interview. The trial court reasonably considered clear indications that defendant lied while being interviewed. We also agree with the trial court that "[t]he flow of questions and answers [during the interviews] do not suggest that [defendant] was inattentive or that his mind was wandering or that he was unable to focus because of lack of sleep."³ Indeed, as the prosecution notes, defendant had the presence of mind to refuse to answer certain questions police detectives posed. Accordingly, consideration of the relevant factors supports the trial court's determination that defendant's statements were voluntary.

Defendant further argues that the police failed to honor his request to remain silent during questioning. Defendant references his remarks during his first interview, "I have the right to stop don't I . . . answering questions" and "So what do I have to do to get out of here? Cause I haven't sleep [sic] all day." However, neither of these remarks constituted a request, let alone an unambiguous request, to end police questioning. In *People v Adams*, 245 Mich App 226, 234-235; 627 NW2d 623 (2001), this Court concluded that the defendant's right to remain silent was not violated when police continued questioning under circumstances in which the defendant did not unequivocally invoke his right to remain silent. Similarly, the police here did not violate defendant's right to remain silent by continuing to question him after he made the remarks at issue. Defendant essentially claims that the police used "trickery" in their framing of questions so that he would not unequivocally invoke his right to remain silent. It may well be that the police detectives interviewing defendant attempted to strategically phrase some of their questions and remarks in an effort to reduce the likelihood that defendant would unambiguously request an

³ We note that defendant indicates that the trial court concluded during the hearing that because he was given water when he requested it, if he had asked for sleep, he would have been allowed to sleep. However, the trial court made no such statement. Rather, in the portion of the record referenced by defendant, defendant responded negatively when defense counsel asked if he understood that he had the right to demand food, sleep and "things like that." The trial court then asked defendant "how was it that you got water," and defendant indicated that he asked the police officers for water.

end to questioning, but that does not violate a defendant's right to remain silent. In sum, we affirm the trial court's ruling that defendant's statements were voluntary.

II

Defendant next argues that insufficient evidence existed to support his conviction of second-degree murder. We disagree. In deciding whether sufficient evidence was presented at trial to support a conviction, we view the evidence in a light most favorable to the prosecution and decide whether any rational factfinder could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

We conclude that there was sufficient evidence to support defendant's second-degree murder conviction on an aiding and abetting theory. Second-degree murder consists of (1) a death, (2) caused by an act of a person, (3) committed with malice, i.e., the intent to kill, cause great bodily harm, or do 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) that the act is done without justification or excuse. *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001). In light of the expert testimony that a gunshot wound killed Nordman and that the shotgun defendant apparently fired was not the cause of death, defendant's statement to Detective Simpson that he saw Love fire shots into the car occupied by Torres and his companions constituted sufficient evidence to allow the jury to determine that Love caused Nordman's death.⁴ Torres' testimony indicated when Nordman's car was near Love's, between ten and twelve shots were fired. Accordingly, the jury could reasonably determine that Love fired that many shots at Nordman's car and, from this, could infer that Love was attempting to kill at least one occupant of Nordman's car. In light of the testimony of Torres, Simpson, and Rutledge that neither they nor Nordman had a gun during the incident, the jury could also reasonably have concluded that Love's shooting at Nordman's car, and killing him, was not self-defense or otherwise excused or justified. Thus, there was sufficient evidence that Love committed second-degree murder.

A person who aids or abets a crime may be convicted as if the person directly committed the crime. *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001). To support an aiding and abetting theory, the prosecution must show (1) the charged crime 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 knew that the principal intended its commission at the time he gave aid and encouragement. *Id.* at 495-496. As set forth above, there was sufficient evidence that Love committed second-degree murder. Crediting the testimony from Torres, Simpson, and

⁴ Regardless of whether defendant's statements during a police interview would be admissible to help establish that Lee shot Nordman in a prosecution against Lee, defendant's statements about Lee's acts could freely be used to establish Lee's conduct for purposes of the charges against defendant because the statements were admissible as substantive evidence against defendant as an admission of a party opponent under MRE 801(d)(2).

Rutledge that no one in Nordman's car had a gun, the jury could have concluded that defendant's statements to the police that an occupant of Nordman's car had a gun, were not credible. Accordingly, the jury could reasonably have concluded that defendant fired at Nordman's car without justification or excuse. Further, multiple witnesses testified that Love's car and/or a car that was or could have been a blue Taurus first pulled up beside Nordman's car and that then a Cutlass pulled up next to Nordman's car during the shooting. From this testimony, coupled with defendant's acknowledgment to the police that he was driving a Cutlass, the jury could reasonably have concluded that he and Love planned a coordinated attack. From the nature of this violent attack, the jury could reasonably have inferred that defendant assisted or encouraged Love in committing second-degree murder and that defendant intended, and knew Love intended, that at least one occupant of Nordman's car be killed without justification. Thus, there was sufficient evidence to support defendant's conviction of second-degree murder on an aiding and abetting theory.

Defendant also argues that we should reverse the trial court's denial of his motion for a new trial based on the great weight of the evidence. We disagree. We review the trial court's denial of defendant's motion for a new trial on this ground for an abuse of discretion. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). The test for whether a jury verdict is against the great weight of the evidence is "whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id.* Conflicting testimony, even if impeached to some extent, is an insufficient basis for granting a new trial. *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998); *McCray, supra* at 638. As we have discussed, three witnesses who were in Nordman's car at the time of the shooting testified that neither they nor Nordman had guns, which contradicts defendant's statements in his interviews with the police claiming that an occupant of the car had and used a gun. Accordingly, the evidence at trial did not heavily preponderate against the jury's verdict that defendant was guilty of second-degree murder. The trial court did not abuse its discretion by denying defendant's motion for a new trial based on the great weight of the evidence.

III

Defendant argues that the trial court erred in ruling that the police and prosecution used due diligence in attempting to locate and produce Love as a witness and, accordingly, in denying his request for an instruction that the jury should infer that testimony from Love would have been adverse to the prosecution. We disagree. We review a trial court's denial of a "missing witness" instruction for an abuse of discretion. *People v Snider*, 239 Mich App 393, 422; 608 NW2d 502 (2000). Detective Jorge Gomez testified that he was one of the detectives seeking to arrest Love. He had requested the Michigan State Police fugitive team and the Federal Bureau of Investigation (FBI) to help find and arrest Love on a charge of open murder. Detective Gomez also testified that Love was broadcast as being wanted on "Crime Stoppers" in the Lansing area and that he was listed on an FBI website of wanted individuals. He also indicated that the police contacted local jurisdictions throughout the nation in response to tips that were received and that the FBI attempted to locate Love. Detective Gomez further testified about a surveillance conducted in the Battle Creek/Kalamazoo area in an effort to locate Love. He also replied affirmatively when asked if there was "a lot more" that had been done to try to locate Love. Detective Gomez' testimony was undisputed. Accordingly, it is manifest that the police made

reasonable efforts to locate Love. Thus, the trial court did not abuse its discretion by denying defendant's request for a "missing witness" instruction with regard to Love. See *Snider, supra* at 422-423 (there was no abuse of discretion in denying a "missing witness" instruction where the prosecutor could not locate the potential witness after exercising due diligence).

IV

Finally, defendant argues that the trial court erred by denying his request to instruct the jury on voluntary manslaughter as a lesser offense to the murder charge underlying this case. We disagree. In *People v Mendoza*, ___ Mich ___; ___ NW2d ___ (No. 120630, June 20, 2003) our Supreme Court clarified that voluntary and involuntary manslaughter are both necessarily included lesser offenses of murder. *Id.* slip op at 16, 23. Thus, both forms of manslaughter are "inferior offenses" of murder within the meaning MCL 768.32. *Id.* Accordingly, where murder is the charged offense, an instruction on manslaughter is warranted only where supported by a rational view of the evidence. *Id.*; *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). We conclude that defendant is not entitled to relief based on the trial court's failure to instruct the jury on voluntary manslaughter because it was not supported by a rational view of the evidence.⁵

Under *Mendoza* and *Cornell*, an instruction on a necessarily included offense is proper "if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Cornell, supra* at 357. A rational view of the evidence here does not support an instruction on voluntary manslaughter based on an adequate provocation theory. Voluntary manslaughter under such a theory consists of an intentional killing committed under the influence of passion produced by adequate provocation before a reasonable time has passed for the blood to cool. *Pouncey, supra* at 388. Defendant did not claim that he participated in the shooting because of passion; he claimed that he acted in self-defense. Indeed, he specifically disclaimed an intent to actually shoot anyone. Thus, a conviction of voluntary manslaughter could not have been supported by a rational view of the evidence because, if the jury believed defendant's version of events, then he lacked an intent to kill. Conversely, if the jury accepted the prosecution's contention that the occupants of Nordman's car were unarmed, then there was no adequate provocation for the shooting. In this regard, there was plainly time for defendant's "blood to cool" from any anger

⁵ We assume that defendant adequately preserved his argument that he was entitled to a voluntary manslaughter instruction based on an adequate provocation theory. If so, *Cornell* applies because this case was pending on appeal when *Cornell* was decided and the issue was properly raised and preserved. *People v Alter*, 255 Mich App 194, 201; 659 NW2d 667 (2003). If the issue was not preserved, then defendant is not entitled to relief. Before *Cornell* was decided, a trial court was not required to instruct on what was then considered a cognate lesser offense absent a proper request. *Cornell, supra* at 351. See, e.g., *People v Van Wyck*, 402 Mich. 266, 268; 262 N.W.2d 638 (1978)(holding that manslaughter is not a necessarily included offense of murder), and *People v Pouncey*, 437 Mich 382, 387-388; 471 NW2d 346 (1991)(holding that voluntary manslaughter is a cognate lesser offense of murder). Our Supreme Court explicitly overruled *Van Wyck* and its progeny to the extent they are inconsistent with *Mendoza*. *Id.*, slip op at 2, 23.

based on the altercation involving his half-brother Allen at the bar before the ensuing shooting incident.

We affirm.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder