

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALFRED JONES,

Defendant-Appellant.

UNPUBLISHED

October 23, 2003

No. 241433

Wayne Circuit Court

LC No. 00-004149

Before: Fitzgerald, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree felony murder, MCL 750.316(1)(b), two counts of assault with intent to murder, MCL 750.83, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the felony murder conviction, thirty-one years and three months to fifty years' imprisonment for the assault convictions, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant's convictions arise from the robbery of a grocery center where the manager was killed and two others were shot. Defendant gave a statement to police. In the statement, defendant admitted to meeting with three other men to discuss the robbery of the store. A relative of codefendant, Nathan Peterson, worked the lottery counter at the store. The robbery was to occur after she finished her shift for the evening. Defendant acknowledged having a gun during the robbery, but alleged that the gun belonged to Peterson. Defendant's statement limited his role in the robbery to grabbing the money. He stated that Peterson "did the shooting." Men in masks perpetrated the robbery. However, descriptions of physical characteristics, such as height and weight, given by the witnesses and survivors of the shooting contradicted defendant's account of a limited role in the incident.

Defendant first alleges that there was insufficient evidence to support the felony-murder conviction. We disagree. A challenge to the sufficiency of the evidence is reviewed de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). "[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." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999), quoting *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748, amended 441 Mich 1201 (1992). In a criminal case, the prosecutor must prove every element of the crime beyond a reasonable doubt. *People v Jolly*,

442 Mich 458, 465; 502 NW2d 177 (1993). To convict a defendant of felony murder, the prosecutor must prove the killing of a human being, with malice, during the commission or attempted commission of one of the felonies enumerated in MCL 750.316(1)(b). *People v Watkins*, 247 Mich App 14, 32; 634 NW2d 370 (2001), mod on other grounds and aff'd 468 Mich 233 (2003). The intent required to commit the underlying felony does not suffice for the mens rea for murder. *People v Aaron*, 409 Mich 672, 730; 299 NW2d 304 (1980). The purpose of the felony murder statute is to raise an established murder to first degree, not to transform a death, without more, into murder. *Id.* at 717-718. The mens rea for murder may be shown by evidence of intent to kill, intent to do great bodily harm, or the “wanton and willful disregard of the likelihood that the natural tendency of defendant’s behavior is to cause death or great bodily harm.” *Id.* at 728-729.

“A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm.” *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999). The jury may also infer malice from the use of a deadly weapon. *Id.* By attempting to commit armed robbery with codefendants, a defendant sets in motion a force likely to cause death or great bodily harm. *Id.* at 760. A defendant need not personally use the weapon for the jury to infer malice. *Id.* In the present case, defendant and his codefendants agreed to rob the grocery center and brought loaded weapons into the store to achieve that purpose. Although defendant stated that his role was limited to stealing the money, he admitted taking a gun into the store. The question of intent was an issue for jury resolution based on the facts and circumstances surrounding the killing. *Id.* at 750. Accordingly, the prosecutor provided sufficient evidence from which a jury could infer malice.

Defendant next alleges that there was insufficient evidence to convict him of assault with intent to commit murder. We disagree. Assault with intent to commit murder requires proof that the defendant assaulted an individual with the specific intent to murder, and if successful, would make the killing murder. *People v Rockwell*, 188 Mich App 405, 411; 470 NW2d 673 (1991). A defendant may be found guilty of assault with intent to murder based on an aiding and abetting theory. *Id.* at 411-412. Aiding and abetting requires evidence that an offense was committed by the defendant or another, the defendant assisted in its commission, and he either intended the commission of the crime or knew that the principal intended its commission when assistance was given. *Id.* at 411. “[T]he intent of the aider and abettor is satisfied by proof that he knew the principal’s intent when he gave the aid or assistance.” *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). Because state of mind is difficult to prove, minimal circumstantial evidence is sufficient. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

Defendant’s challenge to the sufficiency of the evidence to support the intent requirement is without merit. Defendant knew that his codefendants had weapons and stated that codefendant Peterson provided him with a weapon. Thus, the prosecutor established the intent to kill based on the facts and circumstances of the case, including the use of loaded weapons in the commission of the robbery and the delay in entering the store until a relative completed her shift. The challenge to the sufficiency of the evidence of the assault element is also without merit. While defendant asserted that he was merely present to grab the money, the witnesses’

descriptions indicated that defendant assaulted and shot a store employee. While it was asserted that it was impossible for defendant to have committed a close range shooting, this argument was presented to the jury, which resolved the argument against defendant. *Carines, supra*.¹

Defendant next alleges that he was denied a fair trial based on prosecutorial misconduct. We disagree. Claims of prosecutorial misconduct are reviewed de novo, and unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Remarks by a prosecutor are examined in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A prosecutor may argue the evidence and draw reasonable inferences from testimony during closing arguments. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998).

The statements made by the prosecutor, when viewed in context, did not indicate a personal belief in defendant's guilt,² but rather, were arguments based on the evidence elicited during trial. Therefore, no error occurred, and defendant was not denied a fair trial. *Watson, supra*. Counsel was not ineffective for failing to challenge the prosecutor's comments because counsel is not required to raise meritless or futile objections. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Brian K. Zahra

/s/ Karen M. Fort Hood

¹ Although not properly raised in the statement of questions presented, see *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999), defendant also alleges instructional error with regard to the aiding and abetting theory of the assault with intent to murder instructions. Jury instructions must be read as a whole, not extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Error requiring reversal will not be found where a timely objection and curative instruction would have cured any prejudicial effect. See *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Reviewing the jury instructions as a whole, the instructions were not limited in scope to the larceny aspect of felony murder, and defendant's claim of error is without merit.

² Defendant's contention that *People v Erb*, 48 Mich App 622; 211 NW2d 51 (1973), requires reversal is without merit. The prosecutor did not vouch for credibility, but merely stated what she "believed" the evidence produced at trial had established.