

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERAY JEROME SMITH,

Defendant-Appellant.

UNPUBLISHED

May 11, 2006

No. 254523

Wayne Circuit Court

LC No. 03-003196-02

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree felony murder, MCL 750.316(1)(b), and armed robbery, MCL 750.529. We affirm.

Defendant's convictions arise from the shooting death of Timothy Allen during a robbery of Allen and Samuel Dowdell. Defendant allegedly participated in the offense with codefendants Keith Ross, Johnny Ray Moore, and Leo Glover. Defendant gave a statement to the police in which he admitted that he was involved in a struggle with Allen for his money, but he denied being armed or knowing that his codefendants intended to commit a robbery. Moore pleaded guilty of second-degree murder pursuant to a plea agreement whereby he agreed to testify at defendant's trial. Moore claimed that he, along with defendant, Ross, and Glover, jointly decided to rob someone. When they saw Dowdell and Allen leave a party store, Ross followed Dowdell and defendant followed Allen. Defendant began struggling with Allen and yelled for help, whereupon Ross and Glover, who was armed with a gun, ran to help him. According to Moore, as defendant and Ross continued to struggle with Allen, Glover fired his gun at least twice, fatally shooting Allen.

Defendant first argues that the evidence failed to demonstrate that he possessed the requisite intent necessary to convict him of felony murder. Our review of the sufficiency of the evidence to sustain a conviction turns on whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence must be viewed in a light most favorable to the prosecution. *Id.* at 515.

The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result (i.e., malice), (3) while

committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b). *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999). “Armed robbery involves (1) an assault, (2) a felonious taking of property from the victim’s presence or person, (3) while the defendant is armed with a dangerous weapon or “any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon.” MCL 750.529; *Carines, supra* at 757.

To find that a defendant aided and abetted in a crime, the prosecution must show that (1) the crime charged was committed by the defendant or another person, (2) the defendant performed acts or gave encouragement that assisted in 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 he gave aid and encouragement. *Id.* An aider and abettor’s state of mind may be inferred from all of the facts and circumstances of the crime. *Id.* Factors that can be considered include a close association between the principal and the defendant, the defendant’s participation in the planning and execution of the crime, and evidence of flight after the crime. *Id.* at 757-758. “Mere 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.” *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992).

In order to be convicted of felony murder under an aiding and abetting theory, the defendant need not participate in the actual killing to be guilty. *Carines, supra* at 769. However, he must have the requisite intent of malice for felony murder. *Id.* at 771-772. “[I]f an aider and abettor participates in a crime with knowledge of the principal’s intent to kill or to cause great bodily harm, the aider and abettor is acting with ‘wanton and willful disregard’ sufficient to support a finding of malice.” *People v Riley (After Remand)*, 468 Mich 135, 141; 659 NW2d 611 (2003).

In this case, Moore’s testimony established defendant’s participation in the armed robbery of Allen. Moore also testified that defendant had a gun while the group was in the car before the robbery. According to Moore, while defendant was struggling with Allen during the robbery, he called for assistance from Ross and Glover, who was armed with a gun. The evidence supported an inference that, at the least, defendant knowingly participated in the offense with knowledge that his codefendants intended a robbery and that at least one of his codefendants was armed with a gun. Viewed in conjunction with defendant’s call for assistance while struggling with Allen, the evidence was sufficient to prove that defendant possessed an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was a probable result. Thus, there was sufficient evidence to support defendant’s felony-murder conviction.

Defendant next argues that the trial court erred in denying his motion to suppress his custodial statement on the ground that it was involuntary. We review de novo a trial court’s ultimate decision on a motion to suppress evidence. *People v Akins*, 259 Mich App 545, 563-564; 675 NW2d 863 (2003). However, we will not disturb a trial court’s factual findings with respect to a *Walker*¹ hearing unless those findings are clearly erroneous. *People v Daoud*, 462

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

Mich 621, 629; 614 NW2d 152 (2000). “A finding is clearly erroneous if it leaves us with a definite and firm conviction that the trial court has made a mistake.” *People v Manning*, 243 Mich App 615, 620; 624 NW2d 746 (2000).

A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *Akins, supra* at 564. A confession or waiver of constitutional rights must be made without intimidation, coercion, or deception, and must be the product of an essentially free and unconstrained choice by its maker. *Id.* The burden is on the prosecution to prove voluntariness by a preponderance of the evidence. *Id.* In determining the voluntariness of a statement, we consider the following factors:

[T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness; the ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. *Akins, supra* at 564-565.

In this case, the question of voluntariness turned on the credibility of defendant and the officer who took defendant’s statement. The trial court determined that the officer’s testimony was credible and that defendant’s testimony was not credible. We give deference to the trial court’s assessment of the weight of the evidence and the credibility of the witnesses, *People v Shipley*, 256 Mich App 367, 373; 662 NW2d 856 (2003), because the trial court is in the best position to determine credibility. *Daoud, supra* at 629. Defendant has failed to show that the trial court clearly erred in its determination of credibility. Accordingly, we find no error in the trial court’s denial of defendant’s motion to suppress his statement.

Defendant next argues that the trial court erroneously admitted the portions of his statement referring to his presence when Ross and Glover committed a different robbery approximately two or three weeks before the charged offense. We review for an abuse of discretion a trial court’s decision to admit evidence. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). When the decision regarding the admission of evidence involves a preliminary question of law, we review the issue de novo. *Id.* at 670-671.

In his police statement, defendant claimed that he did not know that Ross and Glover intended to commit the charged robbery, but admitted to being present with Ross and Glover when they robbed a woman at a liquor store two or three weeks earlier. Where a defendant admits to other crimes in a statement, the trial court, within its discretion, may excise any

irrelevant or prejudicial portions of the statement that are not inextricably interwoven in the defendant's admissions. *People v Smith*, 120 Mich App 429, 435; 327 NW2d 499 (1982). Under MRE 404(b), evidence of other crimes, wrongs, or acts is not admissible to show a defendant's bad character, but is admissible if the evidence is (1) offered for a proper purpose, i.e., not to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994). The trial court, upon request, may provide the jury with a limiting instruction for any evidence admitted under MRE 404(b). *VanderVliet*, *supra* at 75. See also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

In this case, the trial court did not err in admitting defendant's entire statement under MRE 404(b). The evidence was probative of defendant's knowledge at the time of the offense, a noncharacter purpose. Defendant denied knowing that Ross and Glover intended to commit a robbery. The evidence that defendant was aware that Ross and Glover had previously committed an armed robbery at a liquor store was relevant to show that defendant participated in the instant offense with knowledge that Ross and Glover were armed and intended to rob the victim. Moreover, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, especially considering that defendant never admitted to participating in the previous robbery. Any prejudice was also diminished by the court's cautionary instruction advising the jury on the limited purpose of the evidence. Further, the record does not support defendant's claim that the prosecution failed to provide proper notice of its intent to offer this evidence. To the contrary, defense counsel admitted on the record that he had prior notice of the evidence. For these reasons, we reject this claim of error.

Next, defendant argues that he was entitled to an evidentiary hearing on his claim that the affidavit used to procure the search warrant of his home contained false information. We find no merit to this issue. Probable cause to search must exist at the time a warrant is issued. *People v Stumpf*, 196 Mich App 218, 227; 492 NW2d 795 (1992). However, false statements cannot be used to find probable cause. "*Franks v Delaware*, 438 US 154, 155-156; 98 S Ct 2674; 57 L Ed 2d 667 (1978), requires that if false statements are made in an affidavit in support of a search warrant, evidence obtained pursuant to the warrant must be suppressed if the false information was necessary to a finding of probable cause." *Stumpf*, *supra* at 224. "In order to prevail on a motion to suppress the evidence obtained pursuant to a search warrant procured with alleged false information, the defendant must show by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause." *Id.*

In this case, defendant relied on a letter written by codefendant Ross to support his claim that the search warrant affidavit contained false statements attributed to Ross. However, defendant's attorney agreed that Ross had essentially recanted the allegations made in the letter and wrote the letter only because he was threatened by Glover. Because the only basis for requesting a *Franks* hearing was discredited, the trial court did not err in denying defendant's request for an evidentiary hearing.

Defendant next argues that he was denied his constitutional and statutory right to a speedy trial. A defendant is required to make a formal demand on the record in order to preserve a speedy trial issue for appellate review. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28

(1999). There is no indication in the record that defendant preserved this issue below; therefore, we review the issue for plain error affecting defendant's substantial rights. *Carines, supra* at 761-767.

A defendant has the constitutional right to a speedy trial. US Const, Ams VI and XIV; Const 1963, art 1, § 20; *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000). In deciding whether a defendant has been denied his constitutional right to a speedy trial, we consider "(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 Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). Because the delay in this case was less than 18 months, defendant has the burden of showing that he was prejudiced by the delay. *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994). Some of the delay in this case was due to docket congestion, and that kind of delay is afforded only minimal weight. *People v Wickham*, 200 Mich App 106, 111; 503 NW2d 701 (1993). Much of the delay was caused by defendant's requests for a new attorney. Additionally, the case was delayed in order to consolidate defendant's case with the case against codefendant Moore who had recently been arrested, and defense counsel expressly indicated that he had no objection to the consolidation. Further, defendant did not assert his right to a speedy trial below and he has not demonstrated on appeal how he was prejudiced by the delay. We reject defendant's claim that his constitutional right to a speedy trial was violated.

Defendant also argues that the statutory 180-day rule, MCL 780.131, was violated. The purpose behind the 180-day rule is to require that prosecutors bring all pending charges against prison inmates so that a defendant has the opportunity to serve his sentences concurrently. *People v Smielewski*, 235 Mich App 196, 198; 596 NW2d 636 (1999); *People v McCullum*, 201 Mich App 463, 465; 507 NW2d 3 (1993). See also MCR 6.004(D). The 180-day rule applies only to defendants who, at the time of trial, are serving time in a state penal institution, and not to persons awaiting trial in a county jail. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003). There is no indication in the record that defendant was an inmate in a state penal institution while awaiting trial²; therefore, there is no merit to this issue.

Defendant next argues that trial counsel was ineffective for not objecting to portions of the prosecutor's closing argument. Although defendant did not raise this issue in a motion in the trial court, the record is sufficient to allow review the propriety of the prosecutor's conduct. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). In order to establish ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that,

² To the extent defendant is relying on MCR 6.004(C), that rule also does not afford a basis for relief in this case. The remedy for a violation of that court rule is release from jail while awaiting trial, not dismissal of the charges.

but for his counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

The test for prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267 nn 5-7; 531 NW2d 659 (1995). A prosecutor is afforded great latitude during closing argument, and is permitted to argue the evidence and make reasonable inferences to support her theory of the case. *Id.* at 282. However, the prosecutor must refrain from making prejudicial remarks. *Id.* at 283. While prosecutors have a duty to see to it that a defendant receives a fair trial, they may use "hard language" when it is supported by the evidence, and they are not required to phrase their arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Claims of prosecutorial misconduct are decided case by case and the challenged comments must be read in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

Defendant first argues that the prosecutor improperly informed the jury that it did not have to unanimously agree on defendant's precise state of mind in order to convict him of felony murder. Because the various states of mind to support a felony-murder conviction are alternative means of proving that offense, the jury was not required to unanimously agree on defendant's state of mind in order to convict him of that offense. See *People v Johnson*, 187 Mich App 621, 628-630; 468 NW2d 307 (1991) (jury was not required to unanimously agree on which of three alternative states of mind the defendant possessed to convict him of second-degree murder). See also *People v Gadomski*, 232 Mich App 24, 30-32; 592 NW2d 75 (1998). Because the prosecutor's argument was not improper, defense counsel was not ineffective for failing to object. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant also argues that the prosecutor improperly vouched for the credibility of Moore's testimony when she stated, "We know that Johnny Ray Moore wasn't lying about everything," and also commented on the time he will serve in prison. A prosecutor may not vouch for the credibility of her witnesses by suggesting that she has some special knowledge of the witnesses' truthfulness. *Bahoda, supra* at 276. Here, the prosecutor did not suggest that she had some special knowledge about the truthfulness of Moore's testimony. Rather, she argued that the evidence demonstrated his credibility. Additionally, the prosecutor's rebuttal arguments were largely responsive to defense counsel's closing argument. Considered in context, they were not improper, *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997); *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996), and counsel was not ineffective for failing to object. *Torres, supra* at 425.

Defendant also argues that the prosecutor denigrated defense counsel in her rebuttal argument. A prosecutor may not question the veracity of defense counsel. *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984). A prosecutor's argument that defense counsel is intentionally trying to mislead the jury can undermine the presumption of innocence and impermissibly shift the jury's focus from the evidence to defense counsel's personality. *Id.* at 102. Consequently, a prosecutor may not argue that defense counsel was attempting to intentionally mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). In this case, the challenged comments were generally confined to the evidence and did not involve a personal attack on defense counsel's veracity. Defense counsel was not ineffective for failing to object to the remarks. *Torres, supra* at 425.

We affirm.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper