

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ANTHONY LITTLE,

Defendant-Appellant.

UNPUBLISHED
February 13, 1998

No. 184535
Recorder's Court
LC No. 94-008342

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLARY DOSS JR., a/k/a LARRY ANDERSON,

Defendant-Appellant.

No. 188066
Recorder's Court
LC No. 94-008342

Before: Bandstra, P.J., and Cavanagh and Markman, JJ.

PER CURIAM.

Following a joint trial before separate juries, defendant Little was convicted of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2); defendant Doss was convicted of first-degree felony murder and armed robbery. Defendant Little was sentenced to life imprisonment without parole for the murder conviction, ten to twenty-five years' imprisonment for the robbery conviction, and two years' consecutive imprisonment for the felony-firearm conviction. Defendant Doss was sentenced to life imprisonment without parole for the murder conviction and ten to twenty-five years' imprisonment for the robbery conviction. Defendant Doss' armed robbery conviction was subsequently reversed by the trial court and his robbery sentence was vacated. Defendant Doss appeals his convictions by leave granted. We reverse defendant Little's

armed robbery conviction and vacate his sentence for armed robbery but otherwise affirm both defendants' remaining convictions.

Defendants robbed and murdered Leawann Coles after ensuring that she was home alone with her young son. Defendant Little knew both Mrs. Coles and her husband Terrance, a drug dealer. Defendant Little arranged to sell some stolen rifles to Mr. Coles and to drop them off at the Coles home while Mr. Coles was out. Defendants made up a fake package of guns and tricked Mrs. Coles into letting them into the house. Once inside the house, one defendant held Mrs. Coles at gunpoint while the other searched through the house for things to steal. Defendants stole heroin, money, and other items from the house. Before leaving the house, one defendant shot Mrs. Coles once in the chest and three times in the head from close range. Following their arrests, each defendant gave statements containing similar versions of the events that took place. However, each defendant accused the other of being the one who shot and killed Mrs. Coles. Neither defendant admitted that they had planned an armed robbery. Instead, both maintained that they planned to have one man distract Mrs. Coles while the other grabbed drugs and money from the kitchen, and claimed surprise when the other perpetrator pulled out a gun.

Both defendants moved to suppress their statements to the police. The trial court denied the motions. Each defendant's statement was admitted against him at trial.

I

Both defendants claim that they were denied the effective assistance of trial counsel because of errors committed by their respective lawyers at trial. We find nothing to indicate that either trial counsel made a serious error or that the asserted errors resulted in prejudice to either defendant's case. Neither defendant has shown that his trial counsel's performance denied him the effective assistance of counsel. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Reed*, 453 Mich 685, 694-695; 556 NW2d 858 (1996).

II

Next, defendants argue that their convictions must be reversed because the trial court never instructed their juries regarding aiding and abetting or the distinction between aiding and abetting and mere presence. However, neither defendant requested the instructions or objected to their omission. Any error because of the lack of an aiding and abetting instruction was of benefit to the defendants rather than the prosecutor, did not result in manifest injustice, and does not require reversal. MCL 768.29; MSA 28.1052; *People v Pouncey*, 437 Mich 382, 386; 471 NW2d 346 (1991); *People v Johnson*, 187 Mich App 621, 627-628; 468 NW2d 307 (1991).

III

Both defendants argue that the trial court erred by refusing to instruct the jury regarding the lesser included offense of larceny by trick. Defendant Little further asserts that the trial court erred by refusing to instruct the jury regarding the lesser included offense of attempted larceny in a building. We

find no error. Larceny by trick was not a cognate lesser included offense to defendants' crime because there was absolutely no evidence that they took the stolen property by means of fraudulent contrivances rather than by threat and force. It was unnecessary to instruct the jury regarding larceny by trick. *Pouncey, supra* at 387; *People v Styles*, 61 Mich App 532, 534; 233 NW2d 70 (1975). The trial court did give instructions regarding larceny in a building, but refused to instruct the jury regarding attempted larceny in a building. There was no evidence presented showing an attempted, rather than a completed, theft, so it was unnecessary to instruct the jury regarding attempted larceny in a building. *People v Adams*, 416 Mich 53, 59-60; 330 NW2d 634 (1982).

IV

Defendant Doss argues that the trial court improperly told potential jurors during voir dire that it would not be possible to have testimony read back to them. The record reveals that the trial court did not foreclose the possibility of having testimony read back, but instead simply explained some of the realistic restrictions in having transcripts of testimony immediately available. No error occurred. MCR 6.414(H); *People v Howe*, 392 Mich 670; 221 NW2d 350 (1974).

V

Defendant Doss argues that the trial court improperly gave a jury instruction that essentially followed CJI2d 3.7(2). Defendant Doss did not object to the instruction, nor did the instruction result in a miscarriage of justice. Accordingly, appellate review of this issue is waived. *Johnson, supra* at 627-628.

VI

Defendant Doss raises numerous acts by the prosecutor that he asserts constitute prosecutorial misconduct requiring reversal of his conviction. Our review of the prosecutor's comments in context indicates that they were proper. Any prejudicial effect could have been cured by an appropriate instruction to the jury. Failure to consider this issue will not result in a miscarriage of justice. Defendant Doss did not object to the complained-of remarks at trial, so this issue has not been preserved and will not be considered. *People v Malone*, 193 Mich App 366, 371; 483 NW2d 470 (1992), *aff'd* on other grounds 445 Mich 369; 518 NW2d 418 (1994). Defendant Doss also argues that the prosecutor used a police witness to improperly vouch for the veracity of a statement that defendant Doss gave to police. Our review of the complained-of testimony in context reveals that the prosecutor did not use the police officer's testimony to vouch for the truth of his case. *People v Smith*, 158 Mich App 220, 231-232; 405 NW2d 156 (1987).

VII

Defendant Doss argues that his murder conviction must be reversed because the verdict was unsupported by the evidence and was contrary to the great weight of the evidence. Specifically, defendant Doss argues that the prosecutor failed to show that he possessed the intent required for first-degree felony-murder.

In *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995), this Court explained the elements of felony murder as follows:

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, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548 [which includes robbery].

The element of malice required for first-degree felony murder in Michigan is the same as that required for second-degree murder, i.e. 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. *Id.* at 566-567. Malice may be shown by circumstantial evidence, and may be inferred from the use of a deadly weapon. *Id.*

Defendant Doss' statement to police indicated that he knew that defendant Little planned an armed robbery and that Terrance Coles was a drug dealer who supposedly had \$156,000 in cash in his house. Defendant Doss also knew that Mr. Coles knew Little because Little said he had helped Mr. Coles count out that cash. Defendant Doss also knew that Mrs. Coles knew Little because he went to the door with Little and watched him speak with Mrs. Coles before they dropped off the fake package of guns. After the robbery, Mrs. Coles was shot several times at very close range. The jury could easily infer that anyone who planned to rob a drug dealer of \$156,000 would be unlikely to leave behind any witnesses who could identify him. Even if defendant Doss himself had not intended to kill Mrs. Coles, he wantonly and willfully disregarded the likelihood that his aiding and abetting the robbery would have the natural tendency to cause Mrs. Coles death or great bodily harm because he knew that Little would be highly motivated not to leave behind any witnesses who could identify him. Viewing the evidence in a light most favorable to the prosecutor, a rational trier of fact could conclude that the required intent for felony murder had been proven in defendant Doss' case beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 465-466; 502 NW2d 177 (1993); *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

The jury's verdict is also not against the great weight of the evidence. A review of the evidence presented against defendant Doss shows that the physical evidence found on the scene and the testimony of other witnesses is consistent with the version of events in defendant Doss' statement to the police. *People v Herbert*, 444 Mich 466, 476-477; 511 NW2d 654 (1993).

VIII

Defendant Doss claims that the use of dual juries did not adequately protect him from the dangers posed by Little's antagonistic defense and so violated the holding in *Bruton v United States*, 391 US 123, 126; 88 S Ct 1620; 20 L Ed 2d 476 (1968). This issue is not preserved for appellate review. Defendant Doss' counsel did not request separate trials, and acquiesced to having separate juries. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995). There is no indication in the record that defendant Doss' jury was ever exposed to Little's statement accusing Doss of the

shooting or that Doss' substantial rights were in any way prejudiced by the use of separate juries rather than separate trials. The trial court did not abuse its discretion by failing to order separate trials. *People v Hana*, 447 Mich 325, 345-346, 351-352; 524 NW2d 682 (1994).

IX

Defendant Doss argues that the trial court erred by refusing to suppress the statement he made to police. Defendant Doss claims his statement was involuntary because he "was intoxicated and high on heroin," had been promised that he would not be charged if he gave a statement, and was advised of his rights only after he gave the statement. This issue involves a credibility contest between defendant Doss and Detroit Police Sergeant William Petersen, the police officer who interviewed him. Petersen testified that Doss appeared relatively healthy and did not appear intoxicated, that Doss was advised of his rights around 6:30 PM (about 1 and ½ hours before he gave his statement), and that Doss was not made any promises in exchange for his statement. The trial court found defendant Doss' testimony wholly incredible, self-serving, and not worthy of belief. That defendant Doss lacked credibility is apparent from a simple review of the record. Although defendant Doss claimed he was not advised of his rights, he signed and initialed an advice of rights form. Defendant Doss was not questioned until over eight hours after he claimed to have last used heroin. The trial court properly found that defendant Doss' statement was voluntary and denied his motion to suppress. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).

X

Defendant Doss argues that the trial court erred by admitting into evidence a photograph showing the doorway where Mrs. Coles' body was found. We find no error. Defendant Doss has not provided a copy of the complained-of photograph for review. Even without a copy of the photograph, the record indicates that it was properly admitted. The photograph's description in the record indicates that it only showed a doorway with some blood on the step, rather than a corpse lying in the doorway. The prosecutor used this photograph to show what the side doorway to the house looked like and to illustrate that when defendant Doss came up the stairs and saw Little holding a gun, he simply could have left the house rather than stay to rob it. The probative value of the picture was not outweighed by unfair prejudice. *People v Mills*, 450 Mich 61, 66; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995).

XI

Defendant Little argues that his conviction for armed robbery must be reversed and the sentence for this crime vacated because they violate constitutional guarantees against double jeopardy. We agree. *People v Wilder*, 411 Mich 328, 347-352; 308 NW2d 112 (1981); *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995). Hence, we reverse defendant Little's robbery conviction and vacate his sentence for armed robbery.

XII

Defendant Little argues that there was insufficient evidence to support his convictions for first-degree felony murder and felony-firearm. Specifically, defendant Little asserts that there was insufficient evidence to show that he aided and abetted in a robbery or murder or that he possessed the requisite intent for murder. He also argues that the prosecutor failed to show that he possessed a firearm during the crime. We disagree.

The evidence showed that Mrs. Coles was shot once in the chest and three times in the head at very close range, indicating both the use of a firearm and the intent to kill. Defendants Little and Doss planned to rob the Coles' home of drugs and money while Terrance Coles was out for the night. Defendant Little came up with a pretense of selling stolen guns to Mr. Coles as a ruse to get into the house, then made certain that only Mrs. Coles would be present when he delivered the fake package of guns. Defendant Little knew Mr. Coles personally and knew that Mr. Coles was a drug dealer who kept drugs and cash in the house. Defendant Little also knew Mrs. Coles and knew that she could identify him. The fact that Mr. Coles was a drug dealer and that Mrs. Coles could identify defendant Little as one of the robbers indicated that he had the motive to kill. The jury could reasonably infer that someone who robbed a drug dealer's home would not want to leave behind any witnesses who could identify him. Although defendant Little claimed that Doss held the gun on Mrs. Coles, he told police that she pleaded with defendant Little by name during the robbery and told him that she wouldn't tell anyone about the robbery. From these circumstances, the jury could infer that it was defendant Little, not Doss, who held Mrs. Coles at gunpoint during the robbery and shot her as they left. Viewing the evidence in a light most favorable to the prosecutor, a rational jury could have found beyond a reasonable doubt that defendant Little possessed the requisite intent for felony murder and also possessed a firearm during the commission of that felony. *Jolly, supra; Hampton, supra; Wayne Co Prosecutor v Recorder's Court Judge*, 406 Mich 374, 397-398; 280 NW2d 793 (1979); *Turner, supra*.

XIII

Defendant Little argues that the trial judge erred by giving a jury instruction that essentially followed CJI2d 16.21, regarding the inferences that can be drawn from the use of a dangerous weapon. The instruction was proper and did not result in a miscarriage of justice. Defendant Little did not object to the instruction below, so appellate review of this issue is waived. *Johnson, supra*.

XIV

Defendant Little also argues that the trial court erred by refusing to suppress the statement he made while in police custody. Defendant Little claims his statement was illegally coerced and the product of an illegal arrest. We disagree.

Although defendant Little did not give his incriminating statement until the day after he was arrested and was not arraigned until four days later, the delay in arraigning him does not appear to have been a deliberate attempt to elicit a confession. He was advised of his rights and questioned on the day of his arrest. He was readvised of his rights the next morning and led police to the home of James Doss, defendant Doss' brother. He was read his rights again that afternoon and gave his statement to police.

Defendant Little also claims the police used Terrance Coles to frighten him into giving a statement. According to defendant Little, Mr. Coles confronted him at the police station and asked why he killed Mrs. Coles. According to other testimony, Mr. Coles was brought in with two police officers and simply asked defendant Little how many times Little had called him on July 17. This issue presents a credibility contest between defendant Little and the other witnesses; in such a situation, we defer to the trial court's superior ability to gauge witness credibility. *People v Marshall*, 204 Mich App 584, 587; 517 NW2d 554 (1994). While defendant Little's encounter with Mr. Coles may have confronted him with the truth of how many times he called Mr. Coles before the robbery and murder and to let him know that the police knew about his various contacts with Mr. Coles, it does not appear to have been designed to simply frighten defendant Little into confessing. The totality of the circumstances indicates that defendant Little's statement was freely and voluntarily made. *Cipriano, supra*.

Defendant Little claims that his arrest was unlawful because the police lacked probable cause. Police found Mrs. Coles shot dead lying in the side doorway of her home. There were no signs of a forced entry; the door was unlocked. Mr. Coles had told police about the repeated calls from defendant Little, that Little had been to his house, and that Little was supposed to have returned to the house. These facts would justify a person of average intelligence in believing that defendant Little had returned to the house after ensuring that Mr. Coles was not present and was involved in the murder of Mrs. Coles. The police had probable cause to arrest defendant Little. *People v Oliver*, 417 Mich 366, 374; 338 NW2d 167 (1983).

Defendant Little's convictions of felony murder and felony-firearm are affirmed, but his armed robbery conviction is reversed, and his sentence for the robbery conviction is vacated. Defendant Doss' felony murder conviction is affirmed.

/s/ Richard A. Bandstra

/s/ Mark J. Cavanagh

/s/ Stephen J. Markman