

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ABIDOON AL-DILAIMI,

Defendant-Appellant.

UNPUBLISHED

July 15, 2003

No. 236323

Wayne Circuit Court

LC No. 00-008198-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALI AL-DILAIMI,

Defendant-Appellant.

No. 236324

Wayne Circuit Court

LC No. 00-008198-02

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AKRAM AL-DILAIMI,

Defendant-Appellant.

No. 236326

Wayne Circuit Court

LC No. 00-008198

Before: Hoekstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

In these consolidated cases, defendants Abidoon Al-Dilaimi and Ali Al-Dilaimi appeal as of right their convictions of assault with intent to murder, MCL 750.83, and defendant Akram Al-Dilaimi appeals as of right his conviction of assault with intent to do great bodily harm less

than murder, MCL 750.84. The trial court sentenced Abidoon to five to fifteen years' imprisonment, Ali to twelve months in jail, and Akram to two years probation. We affirm in all respects.

I

The defendants were tried together in February 2001. Abidoon Al-Dilaimi is the father of Akram and Ali Al-Dilaimi. The incident leading to the instant charges occurred on February 23, 2000, in the city of Detroit, in the area of Trenton Street, where the Al-Dilaimi household is located.

The complainant, Kadhum Al-Ebadi, testified that on February 23, 2000, he was in a truck with Amanda Sitto, a passenger, in the area of Trenton Street. The two were going to borrow a truck from a man. Al-Ebadi testified that he got out of the truck, and that a vehicle driven by Ali, in which Akram was a passenger, tried to run him down. Al-Ebadi testified that the Al-Dilaimi brothers got out of their vehicle and came after him armed with knives, and that Abidoon appeared on foot, with a knife. Al-Ebadi testified that he ran, but stopped when he heard Ms. Sitto scream, and that he was then repeatedly stabbed in the shoulder and arm by Abidoon, that Ali at one point tried to stab him in the heart, and that Akram repeatedly kicked him in the face and head as he lay on the ground. Ms. Sitto's testimony was mostly in accord, although there were discrepancies between the two. She testified that the vehicle Ali was driving crashed into the truck she and the complainant were borrowing and that the chasing of the complainant and the stabbing then ensued. Photos of Al-Ebadi's stab wounds, defensive wounds, and lacerations to the face and head were shown to the jury, and there was testimony that he spent about eight days in the hospital as a result of these injuries.

The defense's theory of the case was that on February 23, 2000, the complainant, Al-Ebadi, drove to the Al-Dilaimis neighborhood and purposely rammed the vehicle the Al-Dilaimis were in, and that that is what caused the defendants to get out of the vehicle. Abidoon Al-Dilaimi was the only defendant to testify at trial. Through an interpreter, he testified to the extensive acrimony between his family and the Al-Ebadi family, dating back several years. He testified that in July 1999, after he objected to his son, Ali, marrying the complainant's fourteen year old niece, Ali was so severely beaten by the complainant that he sustained a serious head injury, which at the time of trial continued to cause Ali to have seizures, and that Ali had been hospitalized for two weeks as a result of the beating. Abidoon testified that on February 23, 2000, he was at home when his son, Akram, came into the house yelling that Kadhum was killing Ali, that he went outside and saw Kadhum choking Ali, and that he reacted to save his son. Abidoon testified that the complainant's 1999 beating of Ali was foremost in his mind when he rushed out to save Ali from the complainant in February 2000. Abidoon testified that he did not remember how long the incident lasted or whether he stabbed the complainant.

The defense presented an accident reconstructionist, who testified that a vehicle in a photo he examined (presumably, Ali's vehicle) was damaged around the front driver door, and that the damage could not have been caused by that vehicle hitting another vehicle, but rather, the impact had to have occurred the other way around. The defense also presented testimony of a Henry Ford Hospital nurse that cared for Ali during his two-week stay in the hospital following the July 1999 beating, who testified that Ali's head injuries were extremely serious and life threatening. Although the investigating officer of the July 1999 incident (and the February 2000

incident), Jackson, testified that he took pictures of Ali following the 1999 incident and that he remembered the injuries being very serious, Jackson testified that those photographs could not be located for trial. We glean from the record that Ali's 1999 head injuries left significant scarring on his head and face. The jury was able to observe Ali during trial.

The jury found Akram guilty of assault with intent to do great bodily harm less than murder, and found Ali and Abidoon guilty of assault with intent to commit murder. These appeals ensued.

II

The three defendants contend on appeal that the prosecutor's remarks that Abidoon Al-Dilaimi had "selective recall," and was lying when he testified, deprived them of due process and a fair trial. Defendants also contend that the prosecutor made cryptic remarks meant to demean defense counsel in the eyes of the jury, resulting in prejudice to all of them.

This Court reviews questions of prosecutorial misconduct on a case by case basis to determine whether the conduct denied the defendant a fair and impartial trial. *People v Bahoda*, 448 Mich 261; 531 NW2d 659 (1995). Because there was no objection to the challenged prosecutorial remarks, this Court's review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The plain error must have affected substantial rights, and generally requires a showing by the defendant that the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Id.*

The three defendants challenge the following prosecutorial remarks made in closing argument:

Then you have Mr. Abidoon Al-Dilaimi testify. He has a perfectly good memory when it suits his advantage and he has no memory at all when it doesn't. The polite terms is selective recall. The correct term is lying. . .

* * *

So, he (Abidoon Al-Dilaimi) knows very well, very well, ladies and gentlemen, whether he had a knife. And this selective recall is a lie.

We conclude that the challenged remarks do not warrant reversal. As summarized above, the defense presented a different account of the February 23, 2000 incident than did the prosecution. The prosecutor could properly argue inferences to be drawn from the conflicting testimony, and that Abidoon was not worthy of belief. *People v Buckey*, 424 Mich 1, 14-15; 378 NW2d 432 (1985). The remaining challenged remarks were minor, cryptic remarks made by the prosecutor and do not warrant reversal. The jury was instructed that attorney commentary was not evidence.

Defendants Ali and Akram also argue that their attorneys' failure to object to these prosecutorial remarks constituted ineffective assistance of counsel. We disagree.

To establish ineffectiveness of counsel, a defendant must show that trial counsel's performance was deficient and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). Because the prosecutor's remarks were not impermissible, neither Akram nor Ali can establish that failure to object to these remarks constituted deficient performance, or that there is a reasonable probability that had counsel objected the result of the proceeding would have been different. *Id.*

III

Defendants Ali and Akram both challenge the aiding and abetting jury instruction as erroneous and incomplete, and assert they were denied due process and a fair trial. Both argue that the instruction was confusing because it left open the question: If the defendant committed the crime, how could he have aided and abetted someone else to commit the crime? They contend that the instruction did not make clear that in order to be found guilty as a principal on an aiding and abetting theory, the prosecution must prove beyond a reasonable doubt that someone other than the defendant committed the crime. Ali and Akram also argue that the third portion of the aiding and abetting instruction, regarding intent, was inadequate. They argue that the requisite intent is that necessary to be convicted of the crime as a principal, but that the instruction in the instant case was ambiguous because the jury could have understood it to mean that they had to find that the defendant intended that the other commit the physical act that resulted in the death of the victim, without any reference to the intent that motivated the other's physical act that resulted in the death of the victim.

Because there was no objection to the aiding and abetting instructions, this Court's review is for plain error that affected defendant's substantial rights. *Carines, supra* at 763-764.

The trial court instructed the jury regarding aiding and abetting:

In this case the Defendant, Akram Al-Dilaimi, is charged with committing assault with intent to murder or intentionally assisting someone else in committing it.

Anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of that crime as an aider and abettor. To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the alleged crime was actually committed either by the Defendant or someone else. It does not matter whether anyone else has been convicted of that crime.

Second, that before or during the crime, the Defendant did something to assist in the commission of the crime.

Third, that the Defendant must have intended the commission of the crime alleged or must have known that the other person intended its commission at the time of giving of the assistance.

Even if the Defendant knew that the alleged crime was planned or was being committed, the mere fact that he was present when it was committed is not enough to prove that he assisted in committing it.

We conclude there was no plain error. Akram was charged with, and the jury was instructed on, assault with intent to murder. The court also instructed on the lesser offense of assault with intent to do great bodily harm less than murder and felonious assault. The court's aiding and abetting instruction is virtually identical to CJI2d 8.1. The instruction was not incomplete or misleading.

Because there was no error in the instruction, the allegation that counsel was ineffective for failing to object to the aiding and abetting instruction also fails.

IV

Ali argues he was deprived of due process and a fair trial when the trial court erroneously instructed the jury that his theory of the case was lawful self-defense. Ali maintains he never asserted such a defense at trial and that his father (Abidoon's) testimony cannot impose a particular theory of defense onto Ali. Ali concedes that his trial counsel made no objection to the court's instruction and that his trial counsel agreed with the trial court's statement that all defendants were asserting the theory of self-defense.

Because the alleged error is unpreserved, this Court's review is for plain error. *Carines, supra* at 763-764. The only defendant to testify at trial was Abidoon. Abidoon testified that defendant Ali was being attacked by Al-Ebadi on February 23, 2000, that Al-Ebadi was choking Ali, who was considerably smaller in stature and weight than Al-Ebadi, and that Abidoon believed Al-Ebadi was trying to kill Ali. Before opening statements, Ali's trial counsel had expressly stated on the record that Ali joined in Abidoon's defense of self-defense.

Defendant Ali's argument on appeal that he never asserted the defense of self-defense and that it was the trial judge that injected that defense into the trial is belied by his counsel's agreement on the record to join in Abidoon's assertion of that defense. Although Ali's trial counsel did not mention self-defense in her very short closing argument, she posed no objection to the reading of the self-defense instructions. Under these circumstances, we find no error.

For the same reasons, we reject defendant Ali's argument that his counsel was ineffective for failing to object to the court's self-defense instructions.

V

The remaining issues are raised by defendant Abidoon only. Abidoon argues there was insufficient evidence to support his conviction of assault with intent to commit murder and, alternatively, that his motion for directed verdict should have been granted. Abidoon challenges the sufficiency of the evidence on the mens rea element only.

When reviewing a challenge to the sufficiency of the evidence, this Court must examine the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.

People v Wolfe, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence can constitute sufficient proof of the elements of a crime. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). “The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *Id.* The requisite intent to kill may be proven by inference from any facts in evidence. *Id.*

“A trial court assesses the merits of a directed verdict motion through consideration of the evidence presented by the prosecution in a light most favorable to the prosecution, to determine whether a rational trier of fact could find that the elements of a crime were proven beyond a reasonable doubt.” *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

Amanda Sitto testified at trial that when the three defendants were chasing Al-Ebadi, Abidoon was armed with a knife and yelled “catch him, catch him.” Sitto testified that Al-Ebadi stopped running when she screamed, that Ali then stabbed Al-Ebadi, Al-Ebadi then fell to the ground face down, and that Abidoon and Ali then stabbed Al-Ebadi repeatedly in the shoulder, arm, and in the hands as he lay on the ground face down, and that Akram kicked Al-Ebadi multiple times. There was testimony that Al-Ebadi was bleeding profusely, and that when Abidoon and Ali stopped stabbing him, they left, saying something to the effect of “he’s dead, it’s over.” Al-Ebadi testified that he was stabbed six times, twice in the arm, twice in the shoulder, and twice in the left hand, and that he lost consciousness. Al-Ebadi testified that he spent eight days in the hospital as a result of his injuries.

Although Abidoon’s testimony at trial, if believed, was such that a rational trier of fact could have concluded that when he acted his thinking was disturbed by emotional excitement to the point that an ordinary person might have acted on impulse, see CJI2d 17.4, the jury was free to disbelieve Abidoon’s version of the incident. Given Al-Ebadi’s and Sitto’s testimony, a rational trier of fact could find that the mens rea element of assault with intent to commit murder was proven beyond a reasonable doubt. The trial court properly denied defendant’s motion for directed verdict, and defendant’s insufficiency of the evidence claim fails as well.

Abidoon also contends that the trial court erred in denying his *in propria persona* motion for a *Ginther* hearing. A trial court’s determination whether to grant a post-conviction motion is reviewed for abuse of discretion. *People v Gadomski*, 232 Mich App 24, 27; 592 NW2d 75 (1998).

Abidoon’s motion asserted that his trial counsel did not investigate and present evidence as he should have. The first seven pages of the motion set forth in minute detail the history of the acrimony between the Al-Dilaimi and Al-Ebadi families. This acrimony was extensively explored at trial. Abidoon’s motion also argued that he wanted to tell the court the “whole story” because the court had never heard the whole story. Among the facts the trial court never heard, according to Abidoon’s motion, was that neither he nor Ali had been armed with knives. The jury clearly disbelieved that account. Abidoon’s motion also argued that had certain witnesses been called to testify they would have supported his version of events, including the man he was working with when Akram ran into the house and told Abidoon that Al-Ebadi was killing Ali. There is no indication that the names Abidoon raised in his motion actually witnessed the incident. Under these circumstances, we conclude that the trial court’s denial of Abidoon’s motion for a *Ginther* hearing was not an abuse of discretion.

Abidoon's final argument is that his conviction should be reversed because the trial court denied admission of a prior bad act of the complainant known to Abidoon, specifically, that Al-Ebadi had been charged with an assault that involved a stabbing. This claim is reviewed for abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

The complainant's violent history was amply discussed at trial in connection with the July 1999 beating of Ali, and the complainant's subsequent conduct toward the Al-Dilaimi defendants. The trial court concluded that the probative value of evidence that the complainant had been charged with an assault involving a stabbing, arising from an incident not involving any of the instant defendants, and where the charge had been dropped, would be substantially outweighed by the risk of unfair prejudice MRE 404(b). We find no abuse of discretion. In any event, even if the trial court erred in not admitting this instance of prior conduct, it is highly unlikely that evidence of yet another bad act on the complainant's part would have changed the outcome of the case. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White