

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN ANTHONY SPRATT,

Defendant-Appellant.

UNPUBLISHED
November 3, 2005

No. 254767
Oakland Circuit Court
LC No. 2003-193007-FC

Before: Fitzgerald, P.J., and Cooper and Kelly, J.J.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316(b), armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and three counts of felony-firearm, MCL 750.227b. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of life without parole for the felony murder conviction, forty to sixty years for the armed robbery conviction, and six to twenty years for the felon in possession conviction. His concurrent prison terms of two years for each of the felony-firearm convictions are consecutive to the other sentences. We affirm.

Defendant first argues that the trial court erred when it permitted the prosecution to introduce other acts, MRE 404(b) testimony regarding a home invasion committed before the charged crimes occurred. We disagree. Because defendant failed to preserve this evidentiary issue for appellate review, we review it for plain error affecting defendant's substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

The prosecution sought to introduce this testimony under the res gestae exception to MRE 404(b). Under the res gestae exception, "[e]vidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused the proof of one incidentally involves the other or explains the circumstances of the crime." *People v Scholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).

The prosecution presented evidence that two nine-millimeter weapons were fired during the commission of the robbery and murder. The prosecution also presented evidence that a .40 caliber gun was carried during the charged crimes, though there was no evidence that the gun was fired. The challenged testimony, that of co-defendant Haywood, explained that defendant stole a third weapon from a home in the hour preceding the charged crimes. Haywood testified

that this gun was neither the nine-millimeter nor the .40 caliber weapon recovered by the police. Thus, this testimony provided crucial evidence that, during the commission of the charged crimes, the co-defendants possessed a third weapon, never recovered by police. Therefore, Hayward's testimony provided the complete story and explained the circumstances of the charged crimes.

Defendant contends that this third weapon was used only to shoot the second victim and that, because defendant was not charged with any crime related to that victim's shooting, this evidence was irrelevant. However, the prosecution presented testimony that multiple shots were fired by the unrecovered gun during the events giving rise to the charged crimes, including the shot that injured the second victim. The prosecution further presented testimony from the second victim that only one shot was fired at her. Taken together, this testimony indicates that the unrecovered gun must also have been fired during the robbery and shooting of the first victim, in connection with whose death defendant is charged. Accordingly, this argument is without merit.

Further, one of the prosecution's theories of the case was that the four co-defendants committed the robbery and murder because they did not succeed in getting any money during the home robbery described by Hayward. On this basis, too, the evidence gave the jury the complete story and explained the circumstances of the charged crimes.

For these reasons, we conclude that Hayward's testimony was admissible under the res gestae exception. Because the trial court correctly admitted this testimony, defendant's ineffective assistance of counsel claim is also without merit. "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Defendant also argues that the trial court erred when it permitted defendant's jury to hear Rachel Joost's testimony regarding events that took place after the crimes giving rise to the charges against him. We disagree. Because defendant failed to preserve this issue for appellate review, we review it for plain error affecting his substantial rights. *Knox, supra* at 508.

This evidence was also admissible under the res gestae exception. The events described by Joost were incident to and intimately related to the events giving rise to the charges against defendant. After shooting the hotel clerk and robbing the hotel, defendant and the co-defendants departed the crime scene. However, upon returning to the hotel, they encountered Joost, a hotel guest. Joost would not have been shot had the events giving rise to the charges against defendant not occurred. Further, Joost's testimony provided an explanation for some of the physical evidence the police found in the hotel. This physical evidence included bloodstains that had no obvious source without testimony about Joost's injury. Because Joost's testimony was admissible under the res gestae exception, the trial court did not err in its admission.

Defendant next argues that the trial court improperly instructed the jury on the malice element necessary to find defendant guilty under an aiding and abetting theory of first-degree felony murder and second-degree murder. We review de novo claims of instructional error. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002).

To convict a defendant of first-degree felony murder under an aiding and abetting theory the prosecution must prove: (1) the crime charged was committed by defendant or some other

person, (2) defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that he gave aid and encouragement. *People v Atkins*, 259 Mich App 545, 554-555; 675 NW2d 863 (2003). Moreover, “[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.” *Riley, supra* at 141.

Because the court’s instruction virtually mirrored the elements set forth in *Akins*, we conclude that the trial court’s jury instruction fairly presented the issues to be tried and sufficiently protected defendant’s rights. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 449 (2003). Therefore, reversal is not warranted on the basis of the trial court’s instruction on first-degree felony murder. *Id.*

Defendant also argues that the trial court erred in its jury instruction on second-degree murder under an aiding and abetting theory. However, the trial court instructed the jury that it must first consider the first-degree felony murder charge and, only after finding defendant not guilty of that charge or failing to reach an agreement on that charge, could it proceed to consider the lesser offense of second-degree murder. “It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Because the jury found defendant guilty of first-degree felony murder, we must presume that it never considered the second-degree murder charge. Therefore, even if the trial court’s instruction on second-degree murder was erroneous, it was harmless and does not warrant reversal. *People v Bartlett*, 231 Mich App 139, 144; 585 NW2d 341 (1998).

Finally, defendant argues that the prosecution engaged in misconduct in its closing and rebuttal arguments by appealing to the jury’s sympathy and its sense of civic duty, and by denigrating the defense. We disagree. Because defendant failed to preserve this issue for appellate review, we review it for plain error affecting defendant’s substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, a prosecutor may not appeal to the jury to sympathize with the victim. *Watson, supra* at 591. Nor may a prosecutor urge the jurors to convict the defendant as part of their civic duty. *Bahoda, supra* at 282.

Defendant argues that the prosecutor made three statements that improperly appealed the jurors’ sympathy. In two of the challenged statements, the prosecutor merely argued the facts in evidence and inferences drawn therefrom. While the prosecutor’s remarks were somewhat emotional in nature, “a prosecutor may use emotional language during closing argument.” *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). These arguments were not improper.

The third statement, referring to defendant as the victim’s judge, jury and executioner, initially appears more problematic. However, in *People v Hall*, 396 Mich 650, 656; 242 NW2d

377 (1976), our Supreme Court, faced with a similar prosecutorial argument, concluded that such did not entitle the defendant to the reversal of his convictions because any error was cured by the court's cautionary instruction that the attorneys' arguments did not constitute evidence. In this case, the trial court similarly instructed the jury that the attorneys' statements and arguments were not evidence. Therefore, this statement does not provide a basis for reversal of defendant's convictions.

Defendant also argues that the prosecutor made an improper plea to the jurors' sense of civic duty. *Bahoda, supra* at 282. However, viewed in context, it appears that the prosecutor was simply asking the jurors to use their common sense. He argued that armed robberies always have the potential for violence and, therefore, defendant, by participating in an armed robbery, acted with willful and wanton disregard of the likelihood of the natural tendency of his behavior to cause death or great bodily harm. Accordingly, this statement did not constitute an improper appeal to the jurors' sense of civic duty.

Defendant also argues that the prosecutor improperly denigrated the defense. *Watson, supra* at 592. Defendant argued in his closing argument that Haywood, who testified about the existence of a third weapon at the crime scene, was lying to protect herself. The prosecution responded to this argument by suggesting that defense counsel was attempting to divert the jury's attention from the truth. This was a proper rebuttal to defendant's closing argument.

Because each of the challenged statements was proper, reversal is not warranted on the basis of the cumulative effect of the prosecutor's comments. *People v LeBlanc*, 465 Mich 575, 591-592; 640 NW2d 246 (2002). Defendant's ineffective assistance of counsel claim is also without merit because each of the challenged prosecutor's statements was proper. *Riley, supra* at 142.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly

I concur in result only.

/s/ Jessica R. Cooper