

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 18, 2012

v

JOIE RAYSHAWN BELL,
Defendant-Appellant.

No. 305103
Wayne Circuit Court
LC No. 10-013057-FC

Before: CAVANAGH, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree felony murder, MCL 750.316, felon in possession of a firearm (felon in possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

On appeal, defendant first argues that there was insufficient evidence of malice to support his felony murder conviction under an aiding and abetting theory. After de novo review of the evidence, considered in the light most favorable to the prosecution, we disagree. See *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

Defendant is correct that the prosecution must prove that one who aids and abets a felony murder possessed the requisite malice to be convicted of that offense. *People v Riley*, 468 Mich 135, 140-141; 659 NW2d 611 (2003). Accordingly, the prosecutor must prove that the aider and abettor either intended to kill, intended to cause great bodily harm, or wantonly and willfully disregarded the likelihood that the natural tendency of his behavior was to cause death or great bodily harm. *Id.* The aider and abettor is deemed to have acted with “wanton and willful disregard” sufficient to support a finding of malice if he participated in a crime with knowledge of the principal’s intent to kill or cause great bodily harm. *Id.* at 141. Malice may be inferred from the use of a weapon and from circumstantial evidence. *People v Roper*, 286 Mich App 77, 84-86; 777 NW2d 483 (2009).

Here, the evidence included that defendant knocked on the victim’s door and, when the door was opened about a foot, defendant pushed into the room brandishing a gun while wearing a bandanna over his face. Defendant’s friend, “Coach,” then entered the house brandishing a gun and physically attacked the victim in the kitchen while defendant stood in the doorway with his gun aimed at the victim’s girlfriend and their children, as well as a friend. After these people were ordered into a back bedroom, a gunshot was heard and then the victim came into the back

bedroom covered in blood. A witness, who personally knew both defendant and Coach, saw them leaving the scene of the shooting on foot and then they entered into a vehicle and drove away. After his arrest, defendant admitted to going with Coach to the victim's house for the purpose of beating the victim up for selling drugs to one of Coach's customers. They both had guns. This was sufficient evidence for the jury to conclude that defendant, at least, participated in this crime with knowledge of Coach's intent to kill or cause great bodily harm to the victim. See *Riley*, 468 Mich at 141. Accordingly, this issue is without merit.

Next, defendant argues that he was denied a fair trial because the trial court gave a flight instruction even though there was no evidence that he fled the scene because of his consciousness of guilt. After review of the court's decision for an abuse of discretion, we disagree. See *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

Evidence of flight, including fleeing the scene of a crime, is admissible. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). However, mere departure from a crime scene does not amount to flight. *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989). And while evidence of flight alone is insufficient to sustain a conviction, it is probative because it may support an inference of a consciousness of guilt. *Goodin*, 257 Mich App at 432.

The trial court did not abuse its discretion when it instructed the jury regarding defendant's flight from the scene of the shooting. The prosecution presented testimony from a witness who saw defendant and Coach leaving the scene of the shooting, through the backyard, in "a fast motion," but not running. They then entered into a black vehicle and drove away. This testimony leads to the logical inference that defendant wanted to leave the scene of the crime unseen and quickly, but that he did not want to attract attention to himself by running at full speed. Although defendant could have fled the scene for innocent reasons, the trial court properly allowed the jury to make this determination. See *id.* Accordingly, the trial court's decision to instruct the jury regarding defendant's flight did not fall outside the range of reasonable and principled outcomes. See *Gillis*, 474 Mich at 113.

Defendant next argues that he was denied the effective assistance of counsel because his attorney failed to move for a mistrial after the officer-in-charge testified that he received an anonymous tip implicating defendant, which constituted inadmissible hearsay and violated his constitutional right to confront the witnesses against him. We disagree.

To succeed on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's error, the result would have been different. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). In this case, our review is limited to errors apparent on the record because a *Ginther*¹ hearing was not held. See *id.*

During the testimony of the officer-in-charge, a discussion regarding the photo lineup was held and included the following exchange:

¹ *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

Q. How was it that you put [defendant] in the photo array

A. From the items we had, and an anonymous phone call that said that [defendant] actually was –

Defense Counsel: Objection, Your Honor. An anonymous phone call, that’s hearsay.

The objection was sustained by the trial court, and the officer-in-charge proceeded to testify that defendant was not identified in the photo array. Nevertheless, defendant argues that his counsel should have requested a mistrial because his constitutional right to confront the witnesses against him was violated. However, first, the contested testimony did not constitute testimonial hearsay because the officer did not repeat the statement provided by the anonymous tip; his testimony was halted by defense counsel’s objection. Second, even if we considered this to be testimonial hearsay, we would conclude that the confrontation clause was not implicated because the testimony was not offered to prove the truth of the matter asserted. See *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The testimony only explained why the officer included defendant’s photograph in the photo array and did not attempt to establish that defendant actually committed the crimes. See *id.*; *People v Fackelman*, 489 Mich 515, 528; 802 NW2d 552 (2011). In fact, the witnesses did not identify defendant from the photo array. Thus, defendant’s right to confront the witnesses against him was not infringed and his counsel was not ineffective for failing to move for a mistrial on this ground. See *Riley*, 468 Mich at 142.

Next, defendant argues in his Standard 4 brief that his due process rights were violated when the police disposed of a computer that may have contained a surveillance recording of the scene of the crime and, thus, potentially exculpatory evidence. We disagree. Because this issue was raised for the first time on appeal, our review is for plain error affecting defendant’s substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Hanks*, 276 Mich App 91, 96; 740 NW2d 530 (2007).

A defendant cannot establish a denial of due process claim for the failure to preserve evidentiary material unless he establishes that the evidence was exculpatory or that the police acted in bad faith. *Id.* at 95. Here, defendant has failed to demonstrate that the computer would have contained exculpatory surveillance footage or that the police acted in bad faith by disposing of the computer. First, defendant admitted being at the scene of the crime, the victims identified defendant as being at the scene of the crime, and an eyewitness saw defendant fleeing from the scene of the crime. Second, the evidence established that the police reviewed the surveillance footage and determined that the surveillance system was not operating at the time of this crime; thus, the computer was eventually discarded per routine procedure. Accordingly, defendant has failed to establish plain error that affected his substantial rights. See *Carines*, 460 Mich at 763.

Next, defendant argues that the prosecutor committed misconduct by misstating the facts and vouching for the credibility of the officer-in-charge during closing arguments. We disagree. Because defendant did not object to the alleged misconduct or request a curative instruction, this claim is reviewed for plain error affecting his substantial rights. See *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

This Court reviews claims of prosecutorial misconduct on a case-by-case basis, examining the record and the prosecutor's remarks in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). "Generally, prosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (quote marks and citation omitted). However, a prosecutor may not misstate the facts or argue facts not introduced into evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). But where a curative instruction could have alleviated any prejudicial effect, error requiring reversal will not be found. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

First, defendant argues that the prosecutor misstated facts when she said: "By the defendant's own words, he said exactly that - - we went to go beat him down. Two people beating the victim down with two witnesses" and "is it reasonable when the Defendant agreed to beat down [the victim] with a gun" However, the evidence admitted at trial included that defendant told the police that he and Coach went to the victim's house to beat him up because he was selling drugs to one of Coach's customers. And the victims testified that both defendant and Coach used guns in the attack, including that defendant held them at gunpoint. Although the evidence did not establish that he and Coach both "beat" the victim before the victim was shot, in light of the strength of the evidence against defendant, this slight misstatement did not constitute plain error affecting defendant's substantial rights. See *id.* at 448.

Second, the prosecutor did not vouch for the credibility of the officer-in-charge when she referenced the anonymous tip in her closing argument. Although a prosecutor may not "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness," *Bahoda*, 448 Mich at 276, here, the prosecutor merely argued defendant became a suspect after the officer-in-charge received an anonymous tip. This closing argument statement did not improperly bolster that officer's credibility, but merely stated facts properly admitted into evidence. Accordingly, defendant's claim of prosecutorial misconduct fails.

Next, defendant argues that the jury instructions related to the charges of second-degree murder and aiding and abetting were erroneous and denied him a fair and impartial trial. We disagree. Because defendant did not object to the jury instructions or request a different instruction, these claims are reviewed for plain error affecting defendant's substantial rights. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000).

Jury instructions must properly instruct the jury regarding all elements of an offense. *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). The instructions must not omit material issues, defenses, and theories if the evidence supports them. *People v Bartlett*, 231 Mich App 139, 143-144; 585 NW2d 341 (1998). Even if somewhat imperfect, instructions do not create error if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *Id.*

First, defendant argues that the jury instruction related to the second-degree murder charge was erroneous because it referenced the fact that the victim died as "the result of multiple gunshot wounds," and the evidence showed that only one shot was fired. However, the medical examiner testified that the victim sustained two gunshot wounds, one to his arm and one to his chest. Thus, the evidence supported the jury instruction. See *id.* Second, defendant argues that

an aiding and abetting instruction should not have been given. However, the evidence included that defendant agreed to go to the victim's house to beat him up, that he went to the victim's house, forced his way into the house, and held people in the house at gunpoint while Coach attacked and shot the victim. Thus, the evidence supported this jury instruction also. See *id.*

Finally, defendant raises several grounds in support of a claim of ineffective assistance of counsel. None of these grounds warrant relief.

First, defendant argues that his counsel should have objected to witness identification testimony because it occurred after an unduly suggestive identification procedure. An unnecessarily suggestive identification procedure may constitute a denial of due process. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). Here, defendant is claiming that the witnesses' identification testimony was improperly tainted because they saw his picture in a newspaper and on an internet site. But due process claims arise by state action and no improper state action is alleged; thus, this claim fails. See *People v Farrow*, 183 Mich App 436, 441; 455 NW2d 325 (1990); see, also, *Jordan*, 275 Mich App at 667.

Second, defendant argues that his counsel should have objected to testimony from the officer-in-charge regarding defendant's confessions because they were not immediately written down or recorded. However, this Court has previously held that the police need not record a defendant's statements, and that a police officer may testify regarding a defendant's statement even if the officer cannot remember everything the defendant said. *People v Eccles*, 141 Mich App 523, 524-525; 367 NW2d 355 (1984). That is, the testimony is admissible but weighs against the witness' credibility. *Id.* And, here, defendant has failed to demonstrate that the testimony of the officer-in-charge amounted to an "editorialized" version of defendant's statements. Further, defendant fails to point to any objectionable portion of the testimony. Thus, this claim fails.

Third, defendant argues that his counsel should have objected to the medical examiner's testimony because it was based on another examiner's autopsy report. However, at the time of trial, controlling precedent was that autopsy reports did not constitute testimonial evidence and did not implicate the Confrontation Clause. *People v Lewis (On Remand)*, 287 Mich App 356, 363; 788 NW2d 461 (2010), vacated in part 490 Mich 921 (2011). Defense counsel is not required to anticipate changes in the law; thus, this claim fails. See *People v McGraw*, 484 Mich 120, 143; 771 NW2d 655 (2009).

Fourth, defendant argues that his attorney was ineffective for stipulating to the facts of defendant's prior conviction and ineligibility to possess a firearm. However, contrary to defendant's claim, the stipulation did not amount to a guilty plea because the prosecution still had to prove that defendant possessed the firearm. Further, it appears that the decision amounted to trial strategy aimed at precluding prejudice by avoiding evidence of the prior conviction. Accordingly, this claim is without merit.

Fifth, defendant argues that his counsel's failure to investigate the computer for exculpatory surveillance footage constituted ineffective assistance of counsel. The failure to reasonably investigate a case can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). However, as discussed above, defendant has

failed to demonstrate that the computer would have contained exculpatory surveillance footage considering that defendant admitted being at the scene of the crime, the victims identified defendant as being at the scene of the crime, and an eyewitness saw defendant fleeing from the scene of the crime. Accordingly, even if counsel should have obtained the computer, defendant cannot establish that he was deprived of a substantial defense or that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. See *Jordan*, 275 Mich App at 667.

Six, defendant argues that his counsel should have objected to the jury instructions on second-degree murder and aiding and abetting. However, for the reasons discussed above, the jury instructions were proper; thus, this claim fails.

Seventh, defendant argues that his counsel should have objected to the alleged prosecutorial misconduct. However, as discussed above, the prosecutor did not commit misconduct requiring reversal of defendant's convictions. Thus, defense counsel's failure to object to the prosecutor's conduct cannot constitute a basis for finding that defendant has been denied the effective assistance of counsel because defense counsel need not raise meritless objections. See *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Pat M. Donofrio