

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVIE L. JONES, JR.,

Defendant-Appellant.

---

UNPUBLISHED

October 26, 2001

No. 221690

Muskegon Circuit Court

LC No. 98-042937-FC

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of second-degree murder, MCL 750.317, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to enhanced, concurrent prison terms of twenty-five to seventy-five years for the murder conviction and twenty to fifty years for the robbery conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant first contends that the trial court erroneously permitted two witnesses to identify him in court because pretrial identifications by the witnesses were tainted and the witnesses had no independent bases for their identifications. We review for clear error the trial court's decision to admit an in court identification. *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Kurylczyk*, 443 Mich 289, 303 (opinion by Griffin, J.), 318 (opinion by Boyle, J.); 505 NW2d 528 (1993).

We initially note that the three pretrial photographic lineups were not tainted or unduly suggestive. The two eyewitnesses to the crimes separately were shown three photographic lineups. Both witnesses selected codefendant Will Harris from the first lineup, identifying him as the shooter of the victim. The witnesses did not identify anyone from the second lineup, which did not contain a photograph of either Harris or defendant, as a participant in the crime. The witnesses both picked defendant from the third lineup as the other participant in the robbery/murder. The fact that one of the photographs utilized in the third lineup, from which defendant was identified, previously had been utilized in the second photographic lineup did not render the third lineup unduly suggestive. "Generally, the photo spread is not suggestive as long

as it contains some photographs that are fairly representative of the defendant's physical features and thus sufficient to reasonably test the identification." *Kurylczyk, supra* at 304. Even disregarding the repeat photograph, the third lineup contained four photographs in addition to defendant's photograph.<sup>1</sup> We find that this third lineup reasonably tested the identifications.

Regarding another pretrial identification to which both witnesses were subjected at the trial of codefendant Harris, we agree with the trial court that this identification procedure, during which the witnesses were shown a single photograph of defendant, qualified as unduly suggestive. *People v McAllister*, 241 Mich App 466, 472; 616 NW2d 203 (2000). Thus, the trial court had to determine whether the witnesses possessed independent bases, apart from the impermissibly suggestive showing, to sustain their in court identifications of defendant. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996). The independent basis inquiry is a factual one, and the validity of the in court identification is viewed in light of the totality of the circumstances. *People v Davis*, 241 Mich App 697, 702; 617 NW2d 381 (2000).

After reviewing the relevant circumstances, we cannot conclude that the trial court clearly erred in finding that a clear and convincing independent basis supported each witness' in court identification of defendant. The totality of the circumstances indicates that shortly before the crime, for five or ten minutes, one of the witnesses had the opportunity to view defendant at the scene of the crimes, a well lit apartment, when Harris and defendant arrived and requested to purchase marijuana. When defendant and Harris later returned to rob the apartment, the witness testified that although they wore masks he recognized their clothing as the same worn by defendant and Harris when they had previously visited the apartment. No evidence indicated that on the evening in question the witness was under the influence of drugs or alcohol. Within nine days of the crimes, the witness with certainty selected defendant from the proper photographic array. It appears improbable that the witness' in court identification was affected by his viewing of the single photograph of defendant at Harris' trial because the witness could not recall being shown that photograph.

A clear and convincing independent basis also supported the other witness' in court identification of defendant. Trial testimony reflected that the witness, who was not under the influence of alcohol or controlled substances, had a good opportunity to view and even spoke with defendant and Harris when they came to the apartment approximately one-half hour before the crimes. When defendant later pushed his way inside the apartment, the witness recognized his clothes, voice and skin color, which the witness described to police shortly after the crimes. During the proper photographic lineup nine days after the crimes, this witness likewise expressed certainty when he identified defendant.

We conclude that the above evidence clearly and convincingly establishes that both witnesses had a basis independent from the improperly suggestive showing by which to identify defendant in court, and that the trial court did not clearly err in permitting the witnesses to identify defendant in court. *Colon, supra* at 304-305.

---

<sup>1</sup> We note that defendant does not contest that the other photographs displayed individuals that fairly represented his physical features.

## II

Defendant next argues that the trial court improperly admitted evidence of codefendant Harris' trial and conviction. Defendant has waived our consideration of this argument, however, because the record reflects that the prosecutor never informed the jury that Harris had been tried or convicted, but that defendant advised the jury of this information during his opening statement and repeatedly throughout the presentation of his case. Defendant specifically urged the trial court to admit evidence of Harris' conviction. Where a defendant intentionally relinquishes or abandons a right, he may not assert error on appeal. *People v Carter*, 462 Mich 206, 214-219; 612 NW2d 144 (2000) (explaining that when an issue is waived, an appellate court cannot address the issue because there is no error to review).

## III

Defendant additionally asserts that the trial court improperly allowed the prosecutor to impeach him by using evidence of defendant's prior controlled substance conviction and probation violation. We review for a clear abuse of discretion the trial court's decision whether to admit evidence. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

At trial, defendant theorized that he had been mistakenly identified as a participant in the crimes. To support his theory, defendant testified on his own behalf and attempted to portray himself as an accountable, law abiding citizen who did not use drugs or alcohol, and who did not flee to Minnesota because of the outstanding charges against him. Defendant's testimony to these effects justified the prosecutor's inquiries on cross examination regarding defendant's prior conviction of possessing cocaine and defendant's having lied to his probation officer that he had not consumed alcohol immediately before a breathalyzer test confirmed that defendant had a .18 percent blood alcohol content. *People v Vasher*, 449 Mich 494, 503; 537 NW2d 168 (1995) ("Once a defendant has placed his character in issue, it is proper for the prosecution to introduce evidence that the defendant's character is not as impeccable as is claimed."); *People v Leonard*, 224 Mich App 569, 594; 569 NW2d 663 (1997), citing *Vasher, supra*. We conclude that the trial court did not abuse its discretion in permitting the prosecutor to rebut defendant's testimony regarding his good character.

## IV

Defendant further claims that the trial court improperly refused to allow a witness to consult with his lawyer regarding invocation of his Fifth Amendment rights. The witness, who dropped off defendant and Harris near the crime scene, initially waived his Fifth Amendment rights and agreed to testify truthfully at trial in exchange for a promise from the prosecutor's office to refrain from charging him with first-degree murder in this case. The witness remained fully aware that he could face lesser charges, and during an evening break in the case was arrested on conspiracy to commit armed robbery charges. When trial resumed the following morning, the witness wanted to speak with his lawyer before resuming his testimony, but the trial court refused to allow this. While defendant suggests that the trial court erred, we note that defendant has no standing to challenge the trial court's decision regarding the rights of the witness to consult his lawyer. *People v Wood*, 447 Mich 80, 89; 523 NW2d 477 (1994). Moreover, defendant fails to cite any authority to support or explain how a deprivation of the witness' rights affected defendant. Consequently, we decline to consider this claim. *People v*

*Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) (“An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for the claims, nor may he give only cursory treatment with little or no citation of supporting authority.”).

## V

Defendant also submits that the trial court improperly admitted evidence of defendant’s flight. “It is well established in Michigan law that evidence of flight is admissible. . . . because it may indicate consciousness of guilt, although evidence of flight itself is insufficient to sustain a conviction.” *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). In this case, ample evidence supported the inference that after the crimes defendant fled the jurisdiction. Defendant moved to Minnesota nine days after the crimes. Defendant testified that it was a coincidence that he moved the same day that his mother received notice about an outstanding warrant for his arrest. Defendant claimed that although he was close to his mother when he lived in Michigan and spoke to her fairly often, he coincidentally never once spoke to her after he moved to Minnesota, and therefore never learned from her that a warrant for his arrest existed. Evidence also indicated that when in Minnesota defendant used his brother’s identity. After turning himself in to the police in the fall of 1998, defendant wrote a letter containing a reference to the fact that he made a change “with my brother’s identity.” We conclude that the court correctly permitted the prosecutor to elicit this evidence and argue that it raised the inference of flight. In light of this conclusion, we note our rejection of defendant’s related contention that the prosecutor committed misconduct by eliciting evidence to support his argument that defendant fled to Minnesota.

To the extent that defendant challenges the trial court’s failure to properly instruct the jury regarding the flight issue, we will not consider this claim because defendant did not raise it in his appellate brief’s statement of questions presented, *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999), and because defendant waived appellate review of this claim by expressing his agreement that the trial court should not read the standard jury instruction regarding flight. *Carter, supra*.

## VI

Defendant next contends that the trial court erred in permitting witnesses to testify about statements Harris made concerning the crime. Defendant was tried as an aider and abettor of the murder committed by Harris. Therefore, Harris’ intent became relevant at defendant’s trial. See *People v Barrera*, 451 Mich 261, 294; 547 NW2d 280 (1996) (“[A]n aider and abettor must possess the same requisite intent as that required of a principal.”). Because Harris was found unavailable as a witness after invoking his Fifth Amendment right against incrimination, the prosecutor sought to demonstrate Harris’ intent, and to connect his intent with defendant’s intent, by introducing the two statements by Harris through the testimony of other witnesses. The first statement reflecting Harris’ intent to rob someone was made out of defendant’s presence. A similar second statement was made in defendant’s presence, and elicited a snicker from defendant. Shortly after Harris made the second statement, one of the trial witnesses drove defendant and Harris to the vicinity of the crime scene. These circumstances raise the inference that defendant either shared in Harris’ intent or at least had knowledge of Harris’ intent.

Defendant's argument, that the statements attributed to Harris by other witnesses constituted inadmissible hearsay, lacks merit. The other witnesses' statements regarding Harris' declarations fell within an exception to the hearsay rule, specifically MRE 803(3), which excepts "statement[s] of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." (Emphasis added). See *People v Brownridge (On Remand)*, 237 Mich App 210, 216-217; 602 NW2d 584 (1999) (concluding that witness testimony regarding a deceased codefendant's statements of intent to burn down a home at the defendant's request fell within the hearsay exception contained in MRE 803(3)); *People v Paintman*, 92 Mich App 412, 420; 285 NW2d 206 (1979) (rejecting the defendant's argument that statements concerning a codefendant's threats to a victim were inadmissible because the codefendant's state of mind "was relevant to his intent in killing the victims and therefore to the defendant's guilt as an aider and abettor," and the codefendant's declarations regarding his existing state of mind were admissible under the MRE 803(3) exception to the hearsay rule), rev'd on other grounds 412 Mich 518; 315 NW2d 418 (1982). Because Harris' declarations regarding his intent were relevant to defendant's guilt as an aider and abettor and fell within the MRE 803(3) hearsay exception, we conclude that the trial court did not abuse its discretion in admitting the statements. *Snider, supra*.

## VII

Defendant also argues that the prosecutor committed misconduct because he improperly forced the witness who eventually was arrested for conspiracy to commit armed robbery to testify at trial. We review alleged prosecutorial misconduct in context to determine whether the defendant was denied a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). Our review of the record reveals that the prosecutor did not act improperly in talking to the witness, challenging his prior statements, and offering him a deal in exchange for truthful testimony. The record does not support that the prosecutor forced the witness to testify or intimidated him into giving false testimony.

## VIII

Defendant further claims that the prosecutor's questioning of him about different aliases constituted misconduct. Defendant failed to preserve this issue, however, because he never objected to the prosecutor's questions regarding aliases on the basis that they constituted improper character questions. Defendant objected to one question only on the ground of improper foundation. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992) (noting that an objection on one ground does not preserve a challenge on another ground). Review of unpreserved allegations of prosecutorial misconduct is foreclosed unless no curative instruction could have removed any undue prejudice to defendant or manifest injustice will result from failure to review the alleged misconduct. *Reid, supra*.

We find that no manifest injustice will result from our failure to review the claimed misconduct. Given the circumstances of this case, the prosecutor properly inquired regarding defendant's appropriation of his brother's identity when defendant resided in Minnesota. *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997). Furthermore, the prosecutor's questions regarding other aliases did not constitute plain error requiring reversal because the evidence against defendant was overwhelming and the alleged error did not affect defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

IX

Defendant next asserts that insufficient evidence established his identity as a participant in the crimes. Viewing the evidence in the light most favorable to the prosecution, we find abundant evidence supporting the jury's rational finding beyond any reasonable doubt that defendant committed the crimes for which he was convicted. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). Defendant's cousin testified that defendant confessed to committing the crimes with Harris. Two eyewitnesses, who identified defendant in court and in photographic lineups, testified that defendant was the perpetrator. Another witness placed defendant with Harris shortly before the crimes, and testified that when Harris commented about committing a robbery, defendant snickered. Yet another witness testified that he drove Harris and defendant to a location near the crime scene, and that at the time defendant was armed with a gun.

In his discussion of the issue presented, defendant also makes several separate evidentiary arguments that have no bearing on the sufficiency issue. We note that the issues are not properly before this Court because defendant failed to include them in his statement of the question presented. *Miller, supra*. Nonetheless, we have reviewed the evidentiary issues and find that they either lack merit or warrant no further discussion.

X

Lastly, defendant contends that the cumulative effect of multiple trial errors requires a new trial. Having reviewed the record we conclude, however, that defendant was not denied a fair trial because no errors of consequence occurred and defendant suffered no serious prejudice from a combination of errors. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999); *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999).

We also note that defendant again improperly raises several additional issues not set out in his statement of the question presented. *Miller, supra*. Although not properly before this Court, we again have reviewed those issues and find that they lack merit and warrant no further discussion.

Affirmed.

/s/ Richard Allen Griffin  
/s/ Hilda R. Gage  
/s/ Patrick M. Meter