STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CURTIS JEROME BYRD,

Defendant-Appellant.

UNPUBLISHED
May 10, 2012

No. 301322
Wayne Circuit Court
LC No. 10-003258-FC

Before: DONOFRIO, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b), assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony, MCL 750.227b. Because defendant was not denied the effective assistance of counsel, the evidence was sufficient to support his felony murder conviction, the trial court did not abuse its discretion by admitting a witness's police statement, and defendant is not entitled to a new trial based on prosecutorial misconduct, we affirm.

Defendant's convictions arise from the shooting death of Richard Joiner during an attempted robbery at a bank automated teller machine (ATM). Defendant and his codefendant, Charletta Atkinson, drove to the bank intending to rob someone. Defendant was armed with a gun. After they arrived at the bank, Atkinson took the gun from defendant and got out of the car. She confronted Joiner, cocked the gun, and demanded his money. Joiner grabbed the gun, and he and Atkinson fought for control over the gun as Joiner tried to get inside his car. During the struggle, the gun discharged and Joiner was fatally shot in the head. Atkinson returned to her vehicle, and defendant drove away.

Atkinson testified at trial pursuant to a plea agreement whereby she pled guilty to second-degree murder and felony-firearm in exchange for the dismissal of the original charges of first-degree premeditated murder, first-degree felony murder, and assault with intent to rob while armed. Atkinson testified that, after arriving at the bank, defendant told her, "No, babe. I can't do this," after which he gave the gun to her. Defendant's theory of defense was that although he was involved in planning a robbery with Atkinson, he abandoned any intent to commit the crime once they arrived at the bank.

I. COUNSEL'S FAILURE TO REQUEST JURY INSTRUCTION

Defendant first argues that trial counsel rendered ineffective assistance by failing to request a jury instruction on the defense of accident in accordance with CJI2d 7.1.[1] Because defendant did not raise this issue in an appropriate motion in the trial court, and no *Ginther*[2] hearing was held, our review of this issue is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). "To establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced him so as to deprive him of a fair trial." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). The defendant must overcome the presumption that the challenged action constituted sound trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id*.

"First-degree felony murder is a second-degree murder . . . committed during the course of one of the enumerated felonies [which include larceny]." *People v Hughey*, 186 Mich App 585, 591; 464 NW2d 914 (1990). "Thus, the only mens rea requirement for felony murder (in addition to the mens rea required for the underlying felony) is that required for second-degree murder, namely, malice, which is defined as the intent to kill, the intent to inflict great bodily harm, or acting with a wanton and wilful disregard of the likelihood that the natural tendency of the defendant's behavior is to cause death or great bodily harm." *Id.*

Here, defense counsel's failure to request a jury instruction on accident did not fall below an objective standard of reasonableness or prejudice defendant. The basis for defendant's theory of accident is that the gun accidentally discharged during the struggle between Atkinson and Joiner. But, a death that results from a force set in motion by the defendant that is likely to cause death or great bodily harm cannot be considered accidental. One of the natural risks when Atkinson pointed a loaded gun at Joiner and cocked the hammer was that Joiner might attempt to defend himself or struggle to control the gun, resulting in his death or great bodily harm. Because the mens rea required for second-degree murder was established, the defense of accident was not tenable, and defense counsel's failure to request an accident instruction was not objectively unreasonable. Further, notwithstanding counsel's failure to request the jury instruction, defendant's theory of defense was that he abandoned his role in the planned robbery,

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[1] CJI2d 7.1. provides, in pertinent part:

> (1) The defendant says that [he/she] is not guilty of _____ because _____'s death was accidental. That is, the defendant says that _____ died because *[describe outside force; e.g., "the gun went off as it hit the wall"]*.
>
> (2) If the defendant did not mean to [pull the trigger/*(state other action)*] then [he/she] is not guilty of murder. The prosecutor must prove beyond a reasonable doubt that the defendant meant to _____.

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

and both parties argued in closing that whether Atkinson shot Joiner intentionally or accidentally did not matter if defendant legally abandoned his role in the robbery. Accordingly, defendant cannot establish prejudice resulting from counsel's failure to request a jury instruction on accident.

II. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that there was insufficient evidence of malice to support his felony-murder conviction under an aiding and abetting theory. We review de novo a challenge to the sufficiency of the evidence by reviewing the evidence in a light most favorable to the prosecution to determine whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). Circumstantial evidence and reasonable inferences that arise from that evidence may be sufficient to prove the elements of a crime. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *Id*. We must resolve all conflicts in the evidence in favor of the prosecution. *Id*.

A defendant need not participate in the actual killing to be guilty of aiding and abetting felony murder. One who aids and abets a felony murder must have the requisite malice, but need not have the same malice as the principal. *People v Robinson*, 475 Mich 1, 14; 715 NW2d 44 (2006).

> To prove felony murder on an aiding and abetting theory, the prosecution must show that the defendant (1) performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a 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 the predicate felony. [*Riley*, 468 Mich at 140.]

In order to establish the requisite malice for felony murder, "the prosecution must show 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*. at 140-141. An aider and abettor's state of mind may be inferred from all of the facts and circumstances surrounding the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Factors to consider include a close association between the principal and the defendant, the defendant's participation in the planning or execution of the crime, and evidence of flight following the crime. *Id*. at 757-758. Malice, for purposes of proving felony murder, can be inferred from the use of a deadly weapon. *People v Bulls*, 262 Mich App 618, 627; 687 NW2d 159 (2004).

To the extent that defendant argues that he did not have the requisite malice because he abandoned the crime, sufficient evidence was presented from which the jury could conclude that defendant did not voluntarily and completely abandon his criminal purpose. See *People v Akins*, 259 Mich App 545, 555; 675 NW2d 863 (2003). Although Atkinson testified that defendant stated that he could not go through with the planned robbery, she did not mention this fact in her

previous statement to the police. The jury reasonably could have found that Atkinson's testimony regarding defendant's alleged reluctance to proceed with the crime was not credible. In any event, Atkinson testified that after defendant told her that he could not "do this," he handed her the gun. Thus, even if the jury credited Atkinson's testimony that defendant expressed reluctance to commit the robbery, it reasonably could have determined that defendant was merely unwilling to commit the robbery himself, but was willing to allow Atkinson to commit the offense and supplied her with the gun for that purpose. Thus, the evidence was sufficient to allow the jury to determine that defendant did not abandon his criminal purpose.

Defendant also argues that the evidence was insufficient to support a finding of malice if the jury rejected his abandonment theory. The evidence showed that defendant intended to commit a robbery and obtained a loaded gun for that purpose. He gave the gun to Atkinson, knowing that it was loaded and that she intended to use it to commit the planned robbery. Thus, the evidence was sufficient to show that defendant "create[d] a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result[.]" *Riley*, 468 Mich at 140. Accordingly, there was sufficient evidence of malice to support defendant's felony murder conviction.

III. ADMISSION OF ATKINSON'S STATEMENT

Defendant next argues that the trial court abused its discretion by admitting Atkinson's entire recorded police interview, which contained inadmissible hearsay. We review for an abuse of discretion a trial court's evidentiary ruling.[3] *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). An abuse of discretion occurs when the trial court selects an outcome outside the range of reasonable and principled outcomes. *Roper*, 286 Mich App at 84.

Atkinson testified that after arriving at the bank, defendant told her, "No, babe. I can't do this." During her previous police interview, however, Atkinson never mentioned this fact. On the contrary, Atkinson told the police that both she and defendant had planned the crime and that defendant gave her the gun just before the attempted robbery because she was closer to the victim. That portion of Atkinson's statement directly contradicted her trial testimony that defendant gave her the gun because he was unwilling to go through with the robbery. Defendant appears to concede that portions of Atkinson's police statement were admissible for impeachment, a nonhearsay purpose. See MRE 613(b); *Merrow v Bofferding*, 458 Mich 617, 631; 581 NW2d 696 (1998). He argues, however, that the trial court abused its discretion by admitting as evidence the entire video recorded interview.

Defense counsel's cross-examination of Atkinson was aimed at establishing that she never had the opportunity to convey to the police that defendant expressed an unwillingness to proceed with the planned robbery. Atkinson's police interview was offered for the limited

[3] We reject the prosecution's argument that defense counsel waived appellate review of this issue by expressing agreement with the trial court's evidentiary ruling. Viewed in context, it is apparent that defense counsel was merely expressing his understanding of the trial court's ruling and was not expressing his agreement with that ruling. Accordingly, no waiver occurred.

purpose of rebutting the suggestion that Atkinson never had such an opportunity. Because it was not offered as substantive evidence to prove the truth of Atkinson's statements, it was not hearsay. See MRE 801(c). Further, it was necessary to admit the entire interview to show, contrary to defense counsel's suggestion, that Atkinson had the opportunity to tell the police that defendant had decided to back out. Such evidence was relevant to Atkinson's credibility. Thus, the trial court did not abuse its discretion by admitting Atkinson's entire police interview.

IV. PROSECUTORIAL MISCONDUCT

Finally, defendant argues that the prosecutor's misconduct during closing and rebuttal argument denied him a fair trial. Although defense counsel objected to the prosecutor's remarks related to defendant's character, thereby preserving that issue for appellate review, counsel failed to object to the remaining remarks that defendant now challenges on appeal, leaving those issues unpreserved. We review de novo preserved claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *Id.* at 274. "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). "Thus, where a curative instruction could have alleviated any prejudicial effect we will not find error requiring reversal. *Id*. at 449.

Claims of prosecutorial misconduct are reviewed on a case-by-case basis, and challenged remarks must be considered in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Generally, a prosecutor is afforded great latitude during closing argument. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor may argue the evidence and reasonable inferences arising from the evidence in support of his theory of the case, but must refrain from making prejudicial remarks. *Id*. at 282-283. While prosecutors have a duty to ensure that a defendant receives a fair trial, they are not required to phrase their arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). "A defendant's right to a fair trial may be violated when the prosecutor interjects issues broader than the guilt or innocence of the accused." *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). "A prosecutor's comments must be considered in light of defense arguments." *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Otherwise improper remarks may not result in error requiring reversal where the prosecutor's remarks are made in response to defense counsel's argument. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

Defendant argues that the prosecutor misrepresented the law by asserting during closing argument that "[a]ccident is not a defense to felony murder[.]" To the extent that the prosecutor's remark could be considered improper as being overly broad, it did not affect defendant's substantial rights because, as previously discussed, the defense of accident was not tenable in this case.

Next, defendant contends that the prosecutor essentially testified as an expert witness during his rebuttal argument by discussing his experience with armed robbery cases and

commenting that people are often killed or injured during robberies. The record shows that the prosecutor's remarks were in response to defense counsel's argument that even though Atkinson pulled the hammer on the gun and used it to assault Joiner, she did not knowingly intend to increase his risk of death because she only had a fourth-grade education, she was suffering from paranoia, bipolar disorder, and schizophrenia, and she was under the influence of crack cocaine. Although defendant characterizes the prosecutor's remarks as the equivalent of expert testimony, they merely involved commonsense observations and conclusions about the use of guns during robberies, which often do not go according to plan. Considering the responsive nature of the remarks and the fact that they were based on commonsense observations, they did not constitute plain error.

Defendant next challenges the prosecutor's rebuttal argument, as reflected in the following exchange:

> *MR. BRAXTON* [*the prosecutor*]: Look at the tape. That's all he [defendant] says throughout the whole thing. Didn't do a thing. Not me. Not me. Ooh, she was bad. He talked about her throughout whole tape [sic]. Threw her under the bus so fast you wouldn't even believe it. So that's the person that you got to make a decision about their character. You got to make a decision what kind of person --
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> *MR. BARNETT [defense counsel]*: Objection to character. Objection to telling the jury they have to make a decision about character. Character is totally inappropriate. No character instructions excluded. I urge the Court the [sic] please ask them, to instruct that this is not about character.
>
> If that's the case, then please give me about 30 minutes, and I can start talking about character myself. I can open the door on character. Character's out here, Judge. Ain't got nothing to do with character. That's all I got to say. I know it's closing, but they don't judge character.
>
> *THE COURT:* The objection's overruled. Please continue.
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> *MR. BRAXTON:* Thank you. I don't have much else to say. Mr. Barnett continues to interrupt me.
>
> *MR. BARNETT:* Judge, please, I'd ask that he be instructed that these are not interruptions. These are lawful objections that I'm making, and they are not interruptions. I am required to object, or I lose them. I'm not interrupting him. I'm objecting. Believe me.
>
> *THE COURT:* That's correct.
>
> *MR. BARNETT:* Thank you.
>
> *MR. BRAXTON:* I have nothing else to say. It's about credibility. It's about that man's credibility right there. He can call it whatever he wants. It's his

> credibility that's being called into question. Hold him accountable for what he did to Mr. Joiner.
>
> Mr. Joiner's not sitting here. You don't see Mr. Joiner. He doesn't have on a nice suit. He doesn't have on designer glasses. He doesn't have on that because he's dead. So Mr. Joiner's not here.

While defense counsel objected to the prosecutor's comments regarding defendant's character, he did not object to the prosecutor's subsequent comments about Joiner not being present. Therefore, defendant's argument regarding the latter comments is not preserved for appellate review.

Although defendant argues that it was improper for the prosecutor to comment on his character, viewed in context, it is apparent that the prosecutor was arguing that defendant's account of the incident in his police statement was not credible. Indeed, after defense counsel objected, the prosecutor rephrased his statements and clarified, "[i]t's about credibility." Defense counsel argued during his closing argument that defendant had told the truth during his statement to the police. As such, it was not improper for the prosecutor to respond to defense counsel's argument by asserting that defendant's statement was not credible. Thus, the prosecutor's reference to defendant's character did not deny defendant a fair and impartial trial.

Defendant also argues that the prosecutor improperly injected issues broader than defendant's guilt or innocence by referring to a nice suit and designer eyeglasses. Although those comments were extraneous, we conclude that they did not affect defendant's substantial rights. The remarks were brief, isolated, and not inherently prejudicial, and a cautionary instruction could have cured any perceived prejudice. Therefore, reversal is not warranted.

Affirmed.

/s/ Pat M. Donofrio
/s/ Kathleen Jansen
/s/ Douglas B. Shapiro