

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GUY A. BUCK,

Defendant-Appellant.

UNPUBLISHED

June 12, 2012

No. 300702

Menominee Circuit Court

LC No. 09-003280-FC

Before: MARKEY, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

Defendant Guy A. Buck appeals by right his jury conviction of felony murder. MCL 750.316(1)(b). The trial court sentenced Buck to serve life in prison without the possibility of parole. Because we conclude that there were no errors warranting relief, we affirm.

I. BASIC FACTS

In separate trials, Keith Benson testified against Buck and Jim Dulak. In exchange for his testimony, the prosecutor agreed to accept Benson's guilty plea for second-degree murder arising out of his involvement in Mark Keller's death.

Benson testified that, in May 2008, he, Buck and Dulak drove from their Wisconsin apartment to Keller's residence in Menominee County, Michigan. Benson and Buck forced entry into Keller's home after pretending to inquire about Keller's brother. Benson knocked Keller down and Buck proceeded to repeatedly punch Keller in the face and head. Dulak then entered and started to kick Keller in the head. After Dulak began to kick Keller, Benson and Buck searched Keller's residence for money, drugs, guns, and other valuable property. Benson and Buck carried this property out to their truck while Dulak continued to beat Keller. The three men then stole tools from Keller's shed. Before leaving, Dulak and Buck checked on Keller. He was apparently bloody, unconscious and in serious need of medical attention. The entire incident occurred over approximately two hours. The medical examiner suggested that Keller had been struck a minimum of 63 times. Expert testimony indicated that Keller would have survived the assault had he received immediate medical assistance.

The next day, the three men were arrested in Wisconsin after attempting to sell the stolen guns from Keller's residence. Buck provided a written, signed confession admitting that he participated in the robbery. However, he denied hitting Keller or having the intent to kill Keller. Rather, Buck claimed that Dulak initiated the violent assault without his or Benson's approval.

At trial, multiple witnesses testified that Buck's pants were stained with blood after the incident, and forensic testimony linked the blood on Buck's pants to Keller. Multiple witnesses also testified that after the men returned to Wisconsin, Buck referred to striking Keller. These witnesses testified that Dulak responded with a reference to breaking Keller's nose.

Approximately three months after Buck's trial and conviction, Benson wrote a letter to the trial court recanting his testimony. Benson indicated that he had testified falsely to avoid a life sentence. Benson's letter placed responsibility for the assault on Dulak, and the letter indicated that neither Benson nor Buck ever struck Keller. This Court remanded for an evidentiary hearing to determine whether Buck was entitled to a new trial on the basis of this newly discovered evidence. At the evidentiary hearing, Benson testified that his testimony in Buck's trial was true and accurate, and that he only wrote the letter in question to avoid being labeled a "snitch." The trial court subsequently denied Buck's motion for a new trial.

II. NEWLY DISCOVERED EVIDENCE

Buck first argues that the trial court abused its discretion by denying his motion for a new trial. This Court reviews a trial court's ruling on a motion for a new trial premised on newly discovered evidence for an abuse of discretion. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006).

For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) "the evidence itself, not merely its materiality, was newly discovered"; (2) "the newly discovered evidence was not cumulative"; (3) "the party could not, using reasonable diligence, have discovered and produced the evidence at trial"; and (4) the new evidence makes a different result probable on retrial. [*People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), quoting *People v Johnson*, 451 Mich 115, 118 n 6, 545 NW2d 637 (1996).]

Newly discovered impeachment evidence cannot be the basis for a new trial because it is merely cumulative. *People v Barbara*, 400 Mich 352, 363; 255 NW2d 171 (1977). "However, the discovery that testimony introduced at trial was perjured may be grounds for ordering a new trial." *Id.*

Michigan courts are reluctant to grant a new trial on the basis of recanted testimony because recanted testimony is "traditionally regarded as suspect and untrustworthy." *People v Canter*, 197 Mich App 550, 559-560; 496 NW2d 336 (1992). Nevertheless, it is within the trial court's discretion to grant a new trial on the basis of recanted testimony. See *People v Cress*, 250 Mich App 110, 137-138; 645 NW2d 669 (2002), reversed on other grounds 468 Mich 678 (2003). In evaluating a trial court's decision to grant or deny a new trial on the basis of recanted

testimony, this Court will defer to the trial court's superior ability to judge the credibility of the recanting witness.

Buck contends that he deserves a new trial so that he can use the letter in which Benson recanted to impeach Benson's testimony. We need not decide whether the letter could be used for this purpose because, even assuming that it could, we conclude that a different result would not be probable on retrial. First, the jury would hear multiple witnesses testify that Buck returned to his Wisconsin apartment with blood on his pants and a forensic expert would testify that this blood was a DNA match for Keller. This evidence strongly indicates that Buck was directly involved in the assault. Second, the jury would hear that in a letter Buck wrote while in jail, he referred to another man in writing, "I wish it was him that I killed." With this letter, Buck essentially admitted that he participated in Keller's murder. Third, and most importantly, the jury would hear Benson testify in a manner consistent with his testimony in Buck's first trial. Even if Benson's letter were admitted, it would have minimal impeachment value. At Buck's trial and the evidentiary hearing, Benson repeatedly linked Buck to the assault. Moreover, Benson's letter would likely be disregarded by the jury because Benson would presumably reiterate his trial testimony and would also presumably reiterate that the letter was written under the pressure of being labeled a jailhouse "snitch." Finally, considering the entirety of Benson's statements regarding the crime in question, the statements supporting a felony murder conviction appear more credible than the statements in the letter. Benson's letter, therefore, does not make a different result more likely on retrial.

In *Canter*, 197 Mich App 550, the trial court "questioned the veracity of [the witness's] recanting testimony" and noted that the witness had testified consistently with her trial testimony in other proceedings. *Id.* at 560-561. This Court held that the trial court's decision to deny the defendant's motion for a new trial on the basis of this newly discovered evidence was not an abuse of discretion. *Id.* at 561-562. In this case, the trial court's decision had even greater support because Benson disavowed his letter of recantation at the evidentiary hearing. Accordingly, we cannot conclude that the trial court abused its discretion when it denied Buck's motion for a new trial on the "newly discovered" evidence that Benson had written a letter recanting his earlier trial testimony.

III. JUROR BIAS

Buck next argues that at least one juror was prejudiced against him due to the courtroom security provided during the trial. Because he did not object or seek any other remedy, we must review this claim for plain error affecting substantial rights. *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). "Under the plain error rule, defendants must show that (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant." *Id.* "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Every defendant has a due process right to be presumed innocent, which requires that his or her guilt be determined "on the basis of the evidence introduced at trial rather than on official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *People v Rose*, 289 Mich App 499, 517; 808 NW2d 301 (2010) (quotation marks and citations

omitted). The presence of courtroom security may implicate a defendant's due process right to the presumption of innocence. See *Holbrook v Flynn*, 475 US 560, 570-571; 106 S Ct 1340; 89 L Ed 2d 525 (1986). Nevertheless, "not every practice tending to single out the accused must be struck down. This is because the jurors are understood to be 'quite aware that the defendant appearing before them did not arrive there by choice or happenstance . . .'" *Rose*, 289 Mich App at 517, quoting *Holbrook*, 475 US at 567.

Buck claims that additional courtroom security implied to a juror that Buck was especially dangerous. When a juror inquired whether he should be cautious outside the courtroom given the presence of security in the courtroom, the trial court properly investigated the juror's concerns to determine whether he was biased against Buck. The trial court confirmed that the juror would not change any of his answers to voir dire questions and informed the juror that the security was for control of the courtroom and did not reflect upon Buck. Defense counsel reinforced the trial court's statements, advising that the security could be there to protect Buck and that the courtroom security was not an indication that Buck posed a threat to the jury. Further, the juror stated that he was not biased.

There is nothing in the record to indicate that the presence of courtroom security was unusually alarming or troublesome. Although jurors might interpret the presence of guards as evidence that a defendant is dangerous, "[j]urors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence." *Holbrook*, 475 US at 569. Here, the trial judge specifically noted at the beginning of trial that "emotions run high in this case." The trial judge further noted that he was concerned with controlling the courtroom during the trial, as courtroom control was apparently an issue in Dulak's trial. In light of these statements, it would have been entirely reasonable for the jury to assume that the additional courtroom security was due to the nature of the trial, not Buck. In addition, the trial court carefully assessed the juror's concerns and determined that he was not biased. Consequently, Buck has not established plain error affecting his substantial rights.

IV. HEARSAY

Buck next argues that Dulak's statement regarding Keller's nose should not have been admitted because it was hearsay and did not qualify for admission as an excited utterance. This Court reviews a trial court's decision concerning the admission of evidence for an abuse of discretion. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008).

Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay statements are generally inadmissible. *Yost*, 278 Mich App at 363, citing MRE 802.

Two witnesses testified that Dulak made a statement about Buck breaking Keller's nose. The trial court sustained an objection when Buck argued that it was hearsay. However, it then allowed the statement under the excited utterance exception. See MRE 803(2). Even assuming that Dulak's statement constituted hearsay, see *People v Martin*, 271 Mich App 280, 316-318; 721 NW2d 815 (2006) (explaining that a statement by a coconspirator made during the course and in furtherance of the conspiracy is not hearsay), and was inadmissible under the exception

provided under MRE 803(2), we conclude that any error in its admission was harmless. In the face of the other evidence presented in this case, it cannot be said that the jury's verdict turned on whether Buck broke Keller's nose. Benson's testimony describing Buck's actions during the robbery was far more incriminating. Moreover, there was blood on Buck's clothes that was a DNA match for Keller, indicting he was personally involved in the beating. Finally, Buck confessed to the robbery and he said in a letter that "I wish it was [Bob] that I killed," implying that he understood that he was responsible for Keller's death. Given the overwhelming evidence of Buck's guilt, any error in the admission of evidence indicating that he broke the victim's nose would be harmless. See *People v Lukity*, 460 Mich 484, 494-496; 596 NW2d 607 (1999).

V. PROSECUTORIAL MISCONDUCT

Buck also argues that the prosecutor committed misconduct by misstating the elements of felony murder. Because his trial lawyer did not object, we shall review the issue for plain error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

"When reviewing a claim of prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context." *Id.* at 330. "A prosecutor's clear misstatement of the law that remains uncorrected may deprive a defendant of a fair trial. However, if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can potentially be cured." *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002) (citation omitted).

Felony murder has three elements: (1) the killing of a human being; (2) with the intent to kill, do great bodily harm, or create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result; and (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(b). *Carines*, 460 Mich at 758-759. The intent outlined in the second element is malice. *Id.* at 758. Malice may be inferred from the "facts and circumstances of the killing." *Id.* at 759.

A defendant may be convicted of felony murder either as a principal or as an aider and abettor. *People v Barrera*, 451 Mich 261, 294; 547 NW2d 280 (1996). "Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aides, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." MCL 767.39. Aiding and abetting is not an independent offense; rather, it is "simply a theory of prosecution that permits the imposition of vicarious liability for accomplices." *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (quotation and footnote omitted).

To convict a defendant under an aiding and abetting theory, the prosecution must establish:

- (1) the crime charged was committed by the defendant or some other person;
- (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and
- (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the

defendant] gave aid and encouragement. [*Id.* (quotation marks and citations omitted).]

A defendant convicted of felony murder as an aider and abettor must have possessed the requisite intent. *Barrera*, 451 Mich at 295.

In his arguments, the prosecutor stated that Buck was guilty even if he did not actually strike the victim: “Whether you’re the guy doing the beating that ultimately killed the guy, or you’re the guy carrying the property out, you’re both just as guilty. That’s the law in Michigan.” Considered in isolation, this would be a misstatement of the law. The mere participation in the underlying felony is not sufficient for a felony murder conviction. *People v Flowers*, 191 Mich App 169, 176-178; 477 NW2d 473 (1991). However, immediately before the statement in question, the prosecutor argued:

We know Buck went to a back room, and yes, he spent time looking for the property. And I submit to you every time he walked by Mark Keller with a piece of property in his hand, that made him guilty of helping create that situation of causing or increasing the likelihood of death or great bodily harm. He was part of creating that situation.

The prosecutor permissibly argued that Buck’s participation in the robbery, under the specific facts of this case, indicated that he also played an active role in Keller’s death. See *People v Kelly*, 423 Mich 261, 280-281; 378 NW2d 365 (1985). The statement in question simply restates the law that an aider and abettor may share the same legal responsibility for felony murder as the principal. Moreover, the trial court properly instructed the jury on the elements of felony murder.

Buck claims that the prosecutor again misstated the law at the conclusion of his rebuttal argument. However, the prosecutor did not make any such statement. Rather, he simply summarized his overall argument by stating that Buck participated in the robbery, created the situation that caused Keller’s death, and should therefore be found guilty of robbery and felony murder. The prosecutor’s remarks, examined in context, were not inappropriate and did not deprive Buck of a fair trial.

Next, Buck argues that the prosecutor committed misconduct by permitting Benson to provide perjured testimony. There is no dispute that “a conviction obtained through the knowing use of perjured testimony offends a defendant’s due process protections guaranteed under the Fourteenth Amendment.” *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). Moreover, a prosecutor has a duty to correct false testimony. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001). However, in cases involving perjured testimony, a conviction is only reversed where “the tainted evidence is material to the defendant’s guilt or punishment.” *Aceval*, 282 Mich App at 389. This Court examines the “fairness of the trial,” not the alleged culpability of the prosecutor. *Id.* at 390.

The record does not support Buck's contention that the prosecutor knowingly submitted perjured testimony. Benson was one of the four men present during the crime, so he certainly had personal knowledge of the crime's events. Benson's plea agreement required him to testify truthfully and violating this requirement would have terminated the plea agreement and subjected Benson to felony murder charges. Buck contends that perjury was evident from an inconsistency between Benson's statement that Buck struck Keller with his knee and the fact that Buck's shoes had only a small spot of blood. However, it is reasonable to assume that kneeling a person would cause blood to appear on one's pants, not one's shoes. Multiple witnesses testified that Buck's pants were stained with blood. On this record, there is no evidence that the prosecutor deliberately submitted perjured testimony or failed to correct perjured testimony.

VI. JUDICIAL MISCONDUCT

Buck argues that the trial court improperly instructed the jury with respect to the elements of felony murder. However, defense counsel affirmatively agreed that the instructions were proper and did not require any changes. Thus, he waived this claim of error. *People v Kowalski*, 489 Mich 488, 504; 803 NW2d 200 (2011). In any event, we conclude that the trial court properly instructed the jury regarding the elements of felony murder and aiding and abetting. See *Carines*, 460 Mich 757-758.

Buck also argues that the trial judge should have disqualified himself because he presided over Dulak's trial. However, that a trial judge acquired knowledge of disputed evidentiary facts through previous legal proceedings does not provide a basis for disqualification. *FMB-First Nat'l Bank v Bailey*, 232 Mich App 711, 728-729; 591 NW2d 676 (1998). Additionally, the mere fact that a trial judge presided over previous legal proceedings in a related matter does not automatically establish judicial bias. *Id.* Finally, there is no record evidence that the trial judge was prejudiced or biased against defendant. The trial judge fairly considered each of defense counsel's objections and concerns, and there is not a single instance in the record where the trial judge belittled, criticized, or otherwise verbally abused Buck or his lawyer. This issue is without merit.

VII. INEFFECTIVE ASSISTANCE OF COUNSEL

Buck argues that he was denied the effective assistance of counsel when his lawyer failed to object to the alleged instances of prosecutorial and judicial misconduct. As already discussed, however, there was no misconduct. Any objections, therefore, would have been futile and the failure to make them does not warrant relief. See *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001).

Finally, Buck argues that his trial lawyer was ineffective by failing to request an instruction on voluntary manslaughter. Manslaughter is a "necessarily included lesser offense of murder." *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003). As such, when a defendant is charged with felony murder, the trial court must give an instruction on voluntary manslaughter if the requested instruction is "supported by a rational view of the evidence." *Id.* at 541.

In order to warrant an instruction on manslaughter, there must be evidence that the defendant killed in the heat of passion caused by an adequate provocation. *People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005). The provocation required to mitigate a homicide from murder to manslaughter “is that which causes the defendant to act out of passion rather than reason.” *Id.* at 714-715 (quotation marks and citation omitted).

Here, no rational view of the evidence would support a voluntary manslaughter instruction because there was no evidence indicating any type of “provocation.” It is undisputed that Buck and the two other men planned and reflected upon the robbery before arriving at Keller’s residence. It is undisputed that Keller was immediately knocked to the ground and was unable to defend himself. It is also undisputed that the men robbed and assaulted Keller for over two hours after entering his residence. Buck has not identified any evidence which could be remotely construed to amount to provocation. Accordingly, his trial lawyer cannot be faulted for failing to request an unwarranted instruction. *Rodgers*, 248 Mich App at 715.

There were no errors warranting relief.

Affirmed.

/s/ Jane E. Markey
/s/ Jane M. Beckering
/s/ Michael J. Kelly