STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEREK TURNER,

Defendant-Appellant.

UNPUBLISHED
November 24, 1998

No. 195538
Recorder's Court
LC No. 95-008782

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD S. FLOWERS,

Defendant-Appellant.

No. 196962
Recorder's Court
LC No. 95-008782

Before: Wahls, P.J., and Holbrook, Jr., and Fitzgerald, JJ.

PER CURIAM.

Defendants appeal as of right from their convictions of first-degree premeditated murder (hereinafter "premeditated-murder"), MCL 750.316; MSA 28.548, assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony (hereinafter "felony-firearm"), MCL 750.227b; MSA 28.424(2). Defendants were tried jointly before separate juries. Defendant Turner was sentenced to consecutive terms of mandatory life imprisonment for the premeditated-murder conviction and twenty to forty years' imprisonment for each of two assault with intent to commit murder convictions. Those prison terms are to run consecutive to a two-year term for the felony-firearm conviction. Defendant Flowers was sentenced to consecutive terms of mandatory life imprisonment for the premeditated-murder conviction and twenty to forty years' imprisonment for

each of four assault with intent to commit murder convictions. Those prison terms are to run consecutive to a two-year term for the felony-firearm conviction. We affirm.

People v Turner: Docket No. 195538

Defendant Turner first contends that the trial court erred by precluding his jury from hearing evidence of defendant Flowers' alibi defense, and by precluding him from cross-examining Flowers and his alibi witnesses. The decision to admit or exclude evidence is within the trial court's discretion and is reviewed for an abuse of discretion. *People v Price*, 214 Mich App 538, 546; 543 NW2d 49 (1995). However, the trial court did not have the opportunity to exercise its discretion on this matter because defendant failed to raise the issue below. Therefore, the issue has not been preserved for appellate review. *People v Carrick*, 220 Mich App 17, 19; 558 NW2d 242 (1996).

Defendant next contends that the trial court erroneously instructed the jury on both aiding and abetting, and reasonable doubt. We note that defendant failed to object to the instructions given by the trial court. Indeed, when specifically asked by the trial court if he had any objections to the jury instructions given, defendant indicated that he had none. Defendant's failure to object to the instructions given precludes appellate review of the matter unless to do so would result in manifest injustice. *People v Welch*, 226 Mich App 461, 463; 574 NW2d 682 (1997); *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996).[1]

The relevant portion of the aiding and abetting instructions given were:

> In the instant case the defendant is charged with either committing those offenses himself or intentionally assisting someone else in committing those crimes. Anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of that crime as an aider and abettor. To prove this charge the prosecution must prove each element beyond a reasonable doubt:
>
> First, that the alleged crime was actually committed either by the defendant or someone else.
>
> Second, that before or during the crime the defendant did something to assist in the commission of that crime.
>
> And third, that when the defendant . . . gave his help or his assistance, he intended to help someone else commit the crime.

This instruction is consistent with the version of CJI2d 8.1 current at the time of trial.

Defendant argues that the first element in the above instruction ("that the alleged crime was actually committed by the defendant or someone else") is erroneous because defendant cannot act as both the principal and an aider and abettor in the commission of the same crime. This argument is without merit. The element cited is an accurate statement on the state of the law in Michigan, see, e.g.,

People v Turner, 213 Mich App 558, 568; 540 NW2d 728 (1995), and therefore is not erroneous. MCL 768.29; MSA 28.1052.

Next, defendant argues that the third element improperly states the applicable law regarding intent. We disagree. This Court has consistently held that aiders and abettors can be convicted of a specific intent crime such as premeditated-murder "if they possess the specific intent required of the principal *or* if they know that the principal has that intent." *People v King*, 210 Mich App 425, 431; 534 NW2d 534 (1995) (emphasis added). Accord *People v Buck*, 197 Mich App 404, 410; 496 NW2d 321 (1992), modified on other grounds *People v Holcomb*, 444 Mich 853; 508 NW2d 502 (1993) (observing that "[t]o be convicted of aiding and abetting first-degree [premeditated] murder, the defendant must have had the intent to kill or have given the aid knowing the principal possessed the intent to kill"). Although it may not be so with regard to some felonies committed under particular circumstances,[2] in the case of premeditated-murder, if a defendant "intended to help someone else commit the crime," then it is reasonable and probable to infer that the defendant must have intended for the killing to take place. In other words, when engaging in the acts that aided in the killing, the defendant did more than just act in a manner that by happenstance turned out to aid the principal. Instead, the defendant "intended that his acts have the effect of assisting or encouraging another" in the killing. LaFave & Scott, Criminal Law, § 6.7(c), p 580 (Abridgment, 1986). See also *Hicks v United States*, 150 US 442, 449; 14 S Ct 144; 37 L Ed 2d 1137 (1893) (holding that it was error for the trial court to omit from its instructions on aiding and abetting "that the acts or words of encouragement and abetting must have been used by the accused with the intention of encouraging and abetting," as opposed to having just had the effect of causing such encouragement). Absent evidence that a defendant acted with a different state of mind than the principal,[3] such a defendant would thus possess the requisite state of mind for premeditated-murder. Thus, the trial court's instruction on the requisite intent was in accord with previous decisions of this Court.

Furthermore, we fail to see how the failure to include the "knowledge" standard adversely affected defendant. The "knowledge" standard allows for conviction on a showing that the aider and abettor had knowledge that the principal possessed the requisite intent. *King*, *supra* at 431. By its terms, this standard allows for conviction in circumstances where the aider and abettor himself does not possess the requisite state of mind. It is simply illogical to conclude that defendant was prejudiced by the failure to include a less stringent mens rea for the crime of which he was convicted. Accordingly, we find that manifest injustice would not result from a failure to review the issue.

Regarding reasonable doubt, the trial court first instructed the jury using language that tracked CJI2d 3.2(3). The trial court subsequently instructed the jurors that they were to approach the case with an open mind and, when discussing their views of the case, should give honest reasons for their opinions. It is this second portion of the instructions that is being challenged by defendant.

After reviewing the jury instructions in their entirety, we conclude that manifest injustice will not result from our failure to review this issue. The challenged portion of the instructions was not related to the definition of reasonable doubt. Rather, it was included in a lengthy admonishment that the jury should not be swayed by personal prejudices or sympathies. We are satisfied that the jury understood

the burden that was placed upon the prosecutor and what constituted a reasonable doubt. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

Next, defendant argues that his constitutional right to confrontation was violated when the trial court admitted into evidence the preliminary examination testimony of Lamar Yancy. Defendant asserts that because the prosecution did not proceed with due diligence and good-faith when attempting to locate Yancy, the admission of the preliminary examination testimony was erroneous. This Court will not set aside a trial court's finding with respect to due diligence "absent clear error. Because the trial court has the discretion to admit evidence, we review its ruling on admissibility for an abuse of discretion." *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995).

MRE 804(b)(1) states that an unavailable witness's former testimony may be admitted as evidence if that testimony was "given . . . at another hearing of the same or different proceeding, [and] if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." A witness is considered to be "unavailable" if the witness is absent from the hearing at which the former testimony is to be introduced, and if the proponent of the statement has used due diligence to produce the absent witness's attendance. MRE 804(a)(5). "The test for due diligence is one of reasonableness, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *People v James (After Remand)*, 192 Mich App 568, 571; 481 NW2d 715 (1992).

After being informed that Yancy could not be located, the trial court heard from Detroit Police Investigator Christopher Vintevoghel regarding his efforts to locate the witness. Based on our review of the record, we conclude that the trial court's finding that due diligence was used to try and find Yancy was not clearly erroneous. Accordingly, the trial court did not abuse its discretion when it admitted into evidence Yancy's preliminary examination testimony. *Briseno, supra* at 14.

Defendant next argues that he was denied effective assistance of counsel because his attorney did not (1) present Flowers' alibi evidence to his jury, or (2) object to the trial court's instructions. "To establish that the defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial." *Price, supra*, 214 Mich App at 547. Defendant must also "overcome a strong presumption that counsel's assistance constituted sound trial strategy[, and] . . . show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Because defendant failed to move in the trial court for an evidentiary hearing or a new trial based on ineffective assistance of counsel, appellate review is limited to errors apparent on the record. *Price, supra* at 547.

Given defendant's statement in which he admitted that he and Flowers were at the scene of the crime, defense counsel made a decision not to reconcile defendant's statement with Flowers' alibi evidence. Instead, counsel attempted to discredit the police officer's testimony regarding defendant's statement. This decision is a "matter[] of trial strategy which will not support a claim of ineffective assistance of counsel." *People v Campbell*, 165 Mich App 1, 7; 418 NW2d 404 (1987). Also,

because the trial court's instructions were not improper, see discussion *supra* at pp 2-3, defense counsel's failure to raise a meritless objection cannot be considered ineffective assistance. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant next argues that he was denied his constitutional rights to due process and confrontation of witnesses because the prosecutor neglected to include the name of a res gestae witness[4] on her witness list. This issue has not been preserved for appeal because defendant failed to raise it in a posttrial motion for an evidentiary hearing or a motion for a new trial. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996).[5]

Next, defendant contends that the trial court improperly refused the jury's request to review Yancy's "statement" and to rehear his testimony. Defendant failed to preserve this issue by raising an objection below. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Even if the issue were preserved, it is without merit. It is not clear from the record just what "statement" the jury was requesting. If it was a statement outside of the preliminary examination testimony that was read into the record, then the trial court was under no obligation to produce it. If the jury was seeking the preliminary examination testimony, then we conclude that the matter was adequately dealt with when the court addressed the jury's request for that testimony. Regarding the specific request for that testimony, we conclude that the trial court properly exercised its discretion when it asked the jurors to first attempt to rely on their memories, and explained that if, after further deliberation, they were unable to recall Yancy's testimony, it would be read back or a copy of the transcript would be provided to them. *People v Crowell*, 186 Mich App 505, 508; 465 NW2d 10 (1990), remanded *People v Crowell*, 437 Mich 1004; 469 NW2d 305 (1991).

Defendant next asserts that he was denied his constitutional rights to due process and to a fair trial because of improper comments by the prosecutor in her opening statement and closing argument. However, defendant failed to object to the challenged remarks before the trial court. "Appellate review of improper prosecutorial remarks is generally precluded absent objection . . . ." An exception exists if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice." *Stanaway, supra*, 446 Mich at 687. We find that a miscarriage of justice would not result from a failure to consider the issue, because the challenged remarks constituted fair commentary on the evidence and the prosecution's theory of the case. *People v Sharbnow*, 174 Mich App 94, 100; 435 NW2d 772 (1989). Moreover, the trial court's instruction that the lawyers' statements were not evidence effectively "dispelled any prejudice." *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

Defendant next contends that the trial court erred in denying his motion for a mistrial, premised on the fact that the prosecutor introduced his July 17, 1995, police statement before establishing the corpus delicti of the charged crimes. "It has long been the rule in this state that the corpus delecti of a crime cannot be established by the extrajudicial confession of the" defendant.[6] *People v Allen*, 91 Mich App 63, 66; 282 NW2d 836 (1979). "This rule is limited, however, to admissions which are *confessions, and not to admissions of fact* which do not amount to confessions of guilt." *People v Rockwell*, 188 Mich App 405, 407; 470 NW2d 673 (1991) (emphasis added). Because the facts admitted by defendant did not amount to an admission of guilt, it did not constitute a confession.

Therefore, the trial court did not abuse its discretion in denying the motion. *People v Wolverton,* 227 Mich App 72, 75; 574 NW2d 703 (1997). In any event, we note that the testimony of the eye witnesses established the corpus delicti of the crimes charged.

Defendant's final argument is that a police witness's testimony was so undermined by an alleged lie the officer told about participating in defendant's arrest, that the officer's testimony in total was inherently incredible and could not support a conviction. This argument is without merit. Because the determination of witness credibility is a function of the jury and not of the reviewing court, *People v McFall,* 224 Mich App 403, 412; 569 NW2d 828 (1997), defendant has failed to establish a basis for relief.

People v Flowers: Docket No. 196962

Defendant Flowers first contends that his convictions were against the great weight of the evidence. We disagree. In reviewing a motion for a new trial on the ground that the verdict was against the great weight of the evidence, the judge must review the whole body of proofs. *People v Herbert,* 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds *People v Lemmon,* 456 Mich 625, 627; 576 NW2d 129 (1998). The court may grant "a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *Lemmon, supra* at 627. "Questions of the credibility of witnesses are to be resolved by the trier of fact . . . ." *People v Daoust*, 228 Mich App 1, 17; 577 NW2d 179 (1998). "[A]bsent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility" when reviewing a great weight of the evidence motion. *Lemmon, supra* at 642. "A trial court's decision to grant or deny such a motion is reviewed for an abuse of discretion." *Daoust, supra* at 16. This Court gives substantial deference to a trial court's determination that a verdict is not against the great weight of the evidence. *Arrington v Detroit Osteopathic Hospital Corp (On Remand),* 196 Mich App 544, 560; 493 NW2d 492 (1992).

This case presented a credibility contest between the prosecution's eye witnesses on the one hand and defendant and his relatives on the other. Despite some minor discrepancies, the prosecution's witnesses placed defendant at the scene, firing a weapon at the victims, one of whom was killed. Defendant and his relatives testified that defendant was elsewhere when the crimes were committed. The witnesses' credibility was an issue for the jury to resolve. Because defendant has failed to establish that any exceptional circumstances exist that would warrant an intrusion upon the jury's role in evaluating witness credibility, *Lemmon, supra* at 643-644, and affording deference to both the jury and the trial judge who were present in the court room to observe the conflicting testimony of the witnesses, *Daoust, supra* at 17, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Defendant also argues that the trial court erred in excusing the production of res gestae witness Maurice Treadwell at trial after it found that the prosecution had exercised due diligence in trying to procure Treadwell's attendance. Because defendant failed to raise this issue in his motion for a new trial, the issue has not been preserved for appeal. *People v Lawton,* 196 Mich App 341, 356; 492 NW2d 810 (1992).

Finally, defendant contends that the trial court erred in admitting the preliminary examination testimony of Yancy. We have already reviewed this issue in the context of defendant Turner's appeal. See discussion p 4. For the reasons previously discussed, we conclude that this issue has no merit.

Affirmed.

/s/ Myron H. Wahls
/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald

[1] Defendant asserts that "it is clear that the jury convicted [him] . . . on the basis of the aiding and abetting theory." We do not believe that such a conclusion is as clear as defendant proclaims. Because the verdict form did not allow for the jury to indicate under which theory it found defendant guilty of premeditated-murder, there is no way for this Court to know if the jury convicted defendant as a principal or as an aider and abettor. If the jury's verdict was based on a finding that defendant had been principally involved in the murder, then the issue of whether the adding and abetting instructions were erroneous would be irrelevant. We choose to address this instructional issue, however, because of the lack of certainty on which theory underlies defendant's premeditated-murder conviction.

[2] For example, if an individual feigns support for another in a burglary "in order to obtain incriminating evidence against the primary party," then that individual would arguably not possess the criminal intent required for conviction as an aider and abettor. Dressler, Understanding Criminal Law, § 30.05[B][1], p 421. See also LaFave & Scott, *supra* at § 6.7(c), pp 580-581.

[3] For example, if the principal possessed the requisite mental state required for premeditated-murder, whereas the accomplice who aided in the killing acted in the heat of passion. LaFave & Scott, n 2 *supra* at 581.

[4] "A res gestae witness is a person who witnesses some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts." *People v O'Quinn*, 185 Mich App 40, 44; 460 NW2d 264 (1990).

[5] Furthermore, we note that MCL 767.40a; MSA 28.980(1) "does not require the prosecutor to endorse and produce all res gestae witnesses." *O'Quinn*, n 4 *supra* at 44.

[6] The corpus delecti "'rule provides that a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing [1] the occurrence of the specific injury [for example, death in cases of homicide] and [2] some criminal agency as the source of the injury.'" *People v McMahan*, 451 Mich 543, 549; 548 NW2d 199 (1996), quoting *People v Konrad*, 449 Mich 263, 269-270; 536 NW2d 517 (1995).