STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM EDWARD NEILLY,

Defendant-Appellant.

UNPUBLISHED
July 5, 1996

No. 172339
LC No. 93-000756-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANGELO BURNETT,

Defendant-Appellant.

No. 173107
LC No. 93-000752-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OMAR WOGOMAN,

Defendant-Appellant.

No. 173121
LC No. 93-000888-FH

Before: Markey, P.J., and McDonald, and M.J. Talbot,* JJ.

PER CURIAM.

The defendants in this matter were jointly tried before two separate juries. Defendant William Neilly was convicted of first-degree felony murder, MCL 750.316; MSA 28.548, conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1); MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). For those respective convictions, he was sentenced to life imprisonment without possibility of parole, life imprisonment and two years' consecutive imprisonment.

Defendant Angelo Burnett was acquitted of felony murder but convicted of assault with intent to rob while armed, MCL 750.89; MSA 28.284, and conspiracy to commit armed

*Circuit judge, sitting on the Court of Appeals by assignment.

robbery, MCL 750.157a; MSA 28.354(1) and MCL 750.529; MSA 28.797. He was sentenced to concurrent terms of fifteen to thirty years' imprisonment.

Defendant Omar Wogoman was convicted of first-degree felony murder, MCL 750.316; MSA 28.548, conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1); MCL 750.529; MSA 28.797, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). For those respective convictions, he received sentences of life imprisonment without possibility of parole, life imprisonment and two terms of two years' consecutive imprisonment.

Defendants filed separate appeals as of right which were consolidated for our review. We affirm defendants' convictions and sentences.

Defendants, along with one other individual, Matrice Brown, were involved in the robbery and shooting death of seventeen-year-old Christopher Ricketts. Ricketts was shot when Neilly and Brown tried to rob Ricketts of his car stereo system and Ricketts attempted to drive away. Before committing the crime, Neilly, Wogoman and Burnett were all involved in a discussion about taking the stereo but had not discussed shooting the victim.

I

All three defendants argue that the trial court's voir dire was improper. We review both the scope and conduct of voir dire for an abuse of discretion. *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994); MCR 6.412(C).

First, the trial court did not abuse its discretion in assuming control of the questioning of the venirepersons during voir dire because the attorneys had wasted considerable time asking repetitious and sometimes irrelevant questions. While conducting voir dire, the court frequently asked counsel if there were other areas that needed to be covered. The court was also more thorough in its questions when a new group of venirepersons was brought into court because they were not present when the attorneys questioned the original venire panel.

Second, the trial court did not abuse its discretion in failing to ask potential jurors about the effect of pretrial publicity and to conduct this inquiry in chambers. The trial court ruled that it would question the venire members en masse regarding their exposure to publicity about this case. If an individual venire member's opinion had to be further explored, the court then conduct a sequestered questioning in chambers of that venire member. We do not believe that the court abused its discretion by using this procedure.

Contrary to defendants' position, this case did not involve the type or amount of publicity that was present in *Tyburski, supra*. While some venire members were familiar with the facts of the case, few held opinions which they could not set aside. Any venire members who could not set aside his or her opinions was dismissed for cause. Thus, the procedures outlined in *Tyburski* were not required in this case to ensure that defendants received a fair trial. *People v Sawyer*, 215 Mich App 183; 545 NW2d 6 (1996).

The court's questions were also sufficiently probing to enable the court to independently decide if a potential juror could be fair even if he or she had been exposed to some publicity about this case. The court's questions were also adequate to enable the attorneys to intelligently exercise their peremptory challenges. *Tyburski, supra*. The venirepersons were not allowed to decide for themselves whether they could be fair.

Finally, there is no record support for defendants' claims that the trial court suggested how venirepersons should answer questions during voir dire in order to be picked as jurors for this case. The court's instruction only informed the venire members what the standard was for serving as a juror even if one had heard about this case. This instruction simply clarified the law in this area, and the court did not suggest answers to the venire.

II

Defendants Neilly and Wogoman argue that the trial court erred by not sequestering their jury or requiring that both juries' verdicts be received simultaneously. Burnett's jury returned a verdict on a Friday afternoon while the other jury was still deliberating. Both Wogoman and Neilly were concerned that their jury might hear of the verdict in Burnett's case over the weekend if the jury were not sequestered or the verdicts were not received simultaneously.

The court declined to sequester Wogoman's and Neilly's jury indicating it was highly speculative that the jurors would be exposed to any publicity about the other jury's verdict. The jury was instructed that it was to avoid any exposure to publicity about this case while it was on break from deliberations over the weekend. The court also planned to individually question each juror on Monday morning to ensure that there was no exposure to publicity about the case over the weekend.

On Monday, six jurors revealed that they were exposed to some form of outside information about this case. Some jurors just inadvertently heard that the other jury had reached a verdict. A few jurors were aware that Burnett was convicted but did not know on what charges.

We find no abuse of discretion in the decision to deny the motion to sequester. *People v Haggart*, 142 Mich App 330, 337; 370 NW2d 345 (1985). Even if the court erred in its ruling, defendants were still required to show prejudice as a result of the failure to sequester the jury in order to receive a mistrial. *People v McAlister*, 203 Mich App 495, 503; 513 NW2d 431 (1994); *People v Todd*, 186 Mich App 625, 637-638; 465 NW2d 380 (1990). Because the jurors were not aware of the details regarding Burnett's jury's verdict, and each juror assured the court that he or she was not influenced by the exposure but could decide Neilly's and Wogoman's cases on their facts, defendants have not shown the requisite prejudice. Because the juries were deciding different cases, the fact that some jurors were aware of the other jury returning a guilty verdict is not enough alone to establish prejudice.

III

Defendants Burnett and Wogoman contend that their presumption of innocence was destroyed when the juries viewed them in handcuffs. Defendants had moved for a mistrial on this ground but the trial court denied their motions. We find no error.

The juries did not view defendants in shackles during trial. The juries only inadvertently saw defendants handcuffed together when they were brought into the courtroom or when they were transported outside of the courtroom during breaks from the trial. Because defendants were not restrained during the course of trial, there was no need to show that restraint was necessary to maintain order. *People v Moore*, 164 Mich App 378, 384-385; 417 NW2d 508 (1987), modified on other grounds 433 Mich 851; 442 NW2d 638 (1989). Instead,

defendants were required to show that they were prejudiced as a result of the juries' inadvertent viewing of them in handcuffs. *Id.* Defendants have not shown how they were prejudiced. Accordingly, the trial court did not abuse its discretion in denying defendants' motions for a mistrial on this ground. *McAlister, supra.*

IV

Defendant Neilly's last issue involves the number of peremptory challenges he was allowed to exercise in voir dire. Neilly requested that the trial court grant him additional peremptory challenges after he exhausted his allotted amount.

The trial court did not abuse its discretion in denying Neilly's request for additional peremptory challenges. *People v Lee*, 212 Mich App 228, 252; 537 NW2d 233 (1995). Neilly failed to demonstrate good cause for needing the additional challenges. MCR 6.412(E)(2). The amount of publicity concerning this case did not merit additional challenges given that any venirepersons who admitted that they could not be fair and impartial were dismissed for cause. *People v King*, 215 Mich App 301, 304; 544 NW2d 765 (1996). Furthermore, defendant failed to ask or request that the court ask during voir dire whether the victim's father's outbursts and verbal threats against defendants and their attorneys had any impact upon the venirepersons. We therefore find no good cause to grant defendant's request for additional peremptory challenges.

V

Defendant Burnett also argues that there was insufficient evidence of assault with intent to rob while armed and conspiracy to commit armed robbery. We disagree.

In reviewing the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crimes were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 748 (1992).

The crime of assault with intent to rob while armed requires evidence of an assault with force and violence, an intent to rob or steal, and that the defendant was armed. *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). For the crime of conspiracy to commit armed robbery, there must be evidence of a mutual agreement or understanding, either express or implied, between two or more persons to commit a criminal act or to accomplish a legal act by unlawful means. There must be an intent to combine with others and an intent to accomplish the illegal objective. The crime is complete upon formation of the agreement. *People v Meredith (On Remand)*, 209 Mich App 403, 408; 531 NW2d 749 (1995); *Cotton, supra* at 392-393.

The prosecution argued that defendant Burnett aided and abetted in the crime of assault with intent to rob while armed. Therefore, the prosecution was required to show that the crime charged was committed by defendant Burnett or some other person, that Burnett performed acts or gave encouragement which assisted in the crime, and Burnett intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).

There was evidence that Burnett willingly participated in the plan to commit this crime by his involvement in the discussion about jacking the victim for his car stereo. Burnett

provided a hooded sweatshirt to Matrice Brown who, with Neilly, approached the victim and asked for the car stereo. While Burnett gave his sweatshirt to Brown before there was any discussion about guns, Burnett did not withdraw from the conspiracy after it was clear that Brown and Neilly planned to commit an armed robbery. Therefore, sufficient evidence existed to support finding defendant Burnett guilty of aiding and abetting in the assault and conspiracy.

VI

In his final issue, defendant Burnett alleges that his sentence violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). We disagree.

Burnett was sentenced to terms of fifteen to thirty years' imprisonment for both assault with intent to rob while armed and conspiracy to commit armed robbery. The guidelines were 96 to 240 months for assault with intent to rob while armed. Defendant's sentences fell in the middle of the recommended guidelines' range and are presumptively proportionate. *People v Dukes*, 189 Mich App 262, 266; 471 NW2d 651 (1991). Where a sentence is within the guidelines, an abuse of sentencing discretion may only be shown upon a demonstration that there were unusual circumstances that make the sentence disproportionate. *People v Piotrowski*, 211 Mich App 527, 532; 536 NW2d 293 (1995). Burnett has not shown that unusual circumstances were present in this case.

Burnett argues that there were unusual circumstances in this case because he did not anticipate the victim's death. The guidelines accounted for the victim's death in the scoring of Offense Variable 2. Of all the participants in this crime, Burnett was the least active in either preparing to commit the crime or encouraging the others to go ahead with it. The evidence also did not show that Burnett anticipated his codefendants would fire the guns or shoot at the victim, even if Burnett willingly participated in a plan to commit an armed assault. The trial court took this fact into consideration in its sentencing decision, however. Contrary to Burnett's arguments, the trial court did not make an independent finding of guilt on Burnett's participation in the felony murder. It is apparent that the trial court took Burnett's limited role in this crime into consideration by giving Burnett a sentence in the middle of the guidelines' range. Furthermore, the trial court did not place undue weight on the message it wanted to send the community to the exclusion of considering defendant's potential for rehabilitation. Therefore, we cannot say that defendant's sentences violate the principle of proportionality. *Milbourn, supra*.

VII

Defendant Wogoman argues that the trial court abused its discretion in allowing the prosecution to use Wogoman's prior conviction for larceny in a building for impeachment if Wogoman testified. We hold that the trial court did not abuse its discretion. MRE 609; *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995). Crimes of theft are admissible for impeachment purposes if their probative value outweighs any prejudicial effect of their admission. *People v Allen*, 429 Mich 550, 595-596; 420 NW2d 499 (1988). Wogoman argues that the larceny conviction was sufficiently similar to the crimes charged against him to be prejudicial. We disagree. After a thorough analysis of the parties' arguments, the trial court properly determined that the prejudicial effect of admitting the prior convictions into evidence for impeachment purposes was outweighed by its probative value. *Id.* at 595-596. Even assuming error, it was harmless given the overwhelming evidence of defendant's guilt. *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 766 (1992).

VIII

Defendant Wogoman next argues that there was insufficient evidence for the jury to find him guilty of felony murder. We disagree.

This Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Wolfe, supra* at 513-515. Felony murder requires (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to 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; MSA 28.548. *People v Brannon*, 194 Mich App 121, 124-125; 486 NW2d 83 (1992).

Under the prosecution's theory, Wogoman aided and abetted felony murder. The prosecutor was therefore required to show that, in aiding and abetting the felony murder, defendant intended to commit the underlying felony and also had the same malice required to convict the principal of felony murder. *Turner, supra* at 567. If a defendant aided and abetted in a crime with knowledge of his principal's intent to kill or to cause great bodily harm, he was acting with wanton and willful disregard sufficient to support a finding of malice for felony murder. *Id.*

An individual defendant cannot be held criminally liable, however, for an unforeseen death that did not result from actions agreed upon by the participants. If the defendants acted intentionally or recklessly in pursuit of a common plan, liability can be based on agency principles. Only if a homicide occurs outside the scope of the conspiracy's main purpose will those conspirators be free from criminal liability for their codefendants' actions. *Id.*

The evidence showed that Wogoman provided a gun to Brown. Wogoman made sure that Brown had bullets for the gun. Wogoman's state of mind for both armed robbery and felony murder can be inferred from the fact that he supplied his codefendant with a loaded gun to use in the commission of this crime. This was sufficient to show that, at the time he participated in the plan to commit the robbery, Wogoman acted with wanton and willful disregard to support a finding of malice for felony murder.

In Docket No. 172339, defendant Neilly's convictions are affirmed.

In Docket No. 173107, defendant Burnett's convictions and sentences are affirmed.

In Docket No. 173121, defendant Wogoman's convictions are affirmed.

/s/ Jane E. Markey
/s/ Gary R. McDonald
/s/ Michael J. Talbot