# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYREE LAMARR HART,

Defendant-Appellant.

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UNPUBLISHED
July 9, 1996

No. 181008
LC No. 94-001926

Before: Corrigan, P.J., and MacKenzie and P.J. Clulo,* JJ.

PER CURIAM.

Defendant appeals by right his conviction by jury of two counts of assault with intent to murder, MCL 750.83; MSA 28.278, and his sentence to two concurrent terms of imprisonment of twelve to twenty years. We affirm.

On February 2, 1994, at about 1:30 p.m., Joseph Logan and his friend, Naikia White, left Kettering High School in Detroit. A gang of six or eight boys called the "Winfields" walked toward Logan and White. Logan said that he previously had experienced trouble from the Winfields. Defendant, with whom Logan was acquainted, bumped into Logan. Defendant cursed at Logan; some witnesses claimed that defendant swung his fist at Logan. Logan saw defendant reach under his coat. Defendant's codefendant, Timothy Elam, came up behind Logan and tried to grab him. Logan saw Elam also reach for something within his coat. Logan heard a female yell, "Watch out, Joe." Logan turned and ran. As he ran, Logan heard four gunshots. White, who exited the school slightly behind Logan, was shot twice, once in the stomach and once in the chest. Police recovered two spent bullet casings. White identified Elam as the person who shot him.

Defendant first argues that the prosecutor impermissibly stated facts within his personal knowledge and expressed his belief in defendant's guilt. Defendant did not object to the prosecutor's remarks. Appellate review of prosecutorial misconduct is foreclosed where the defendant fails to object or to request a curative instruction, unless the misconduct was so egregious that no curative instruction

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

could have removed the prejudice to the defendant, or manifest injustice would result from this Court's failure to review the alleged misconduct. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.*

The prosecutor's remarks during closing argument did not deny defendant a fair and impartial trial. Trial testimony from a Winfield gang member, who stated that the Winfields went to Kettering to fight with a rival gang, supported the prosecutor's comments that the gang went to the school for a confrontation. (The gang member denied that Logan and White were members of the rival gang. He stated that Logan and White had nothing to do with the intended confrontation.) Moreover, the fact that at least one Winfield member carried a gun to Kettering and fired it at White and Logan supports the prosecutor's theory that the Winfields went to Kettering for something other than school business. Prosecutors are free to relate the facts adduced at trial to their theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant also complains that the prosecutor should not have theorized to the jury that defendant bumped into Logan, who was larger in size than defendant, because defendant had a gun. The prosecutor is permitted to state his theory of the case to the jury. *People v William R. Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991). The prosecutor's additional statements about defendant's gun possession also comported with his theory of the case. The prosecutor surmised that White and defendant each had a gun because witnesses testified that they heard four gunshots, although police found only two spent shell casings at the scene. The prosecutor may argue reasonable inferences from the evidence. *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995). Also, the prosecutor did not substantially misstate the elements of aiding and abetting so as to deny defendant a fair trial. See *People v Partridge*, 211 Mich App 239, 240; 535 NW2d 251 (1995); *People v McCray*, 210 Mich App 9, 13; 533 NW2d 359 (1995). Moreover, the court corrected any error by instructing the jury that it must follow the court's instructions, not the attorneys' views of the law. The prosecutor's remaining remarks thus do not require reversal in this case.

Defendant next argues that the trial court erroneously instructed the jury on flight, on lesser included offenses, and on aiding and abetting. Defendant did not object to the instructions. To preserve an instructional issue for appeal, a party must object to the instruction. MCR 2.516(C); *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Because defendant failed to object, this Court examines the issue in the context of manifest injustice. *People v Ferguson*, 208 Mich App 508, 510; 528 NW2d 825 (1995).

First, the testimony that defendant ran from the police supported the trial court's decision to instruct the jury on flight. The instruction sufficiently protected defendant's rights and fairly presented the triable issues. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). Second, the court correctly told the jury that it could consider the lesser offense of assault with intent to do great bodily harm if it found defendant not guilty of assault with intent to murder. See *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982). Third, our review of the trial court's instruction on aiding and

abetting yields no manifest injustice. Although imperfect, the instruction fairly presented the issues to be tried and sufficiently protected defendant's rights. See *Bell, supra*.

Defendant's next contention, that the trial court gave an inaccurate supplemental charge to the deadlocked jury, is without merit. The instruction was not a substantial departure from ABA standard jury instruction 5.4 and it did not constitute coercion. *People v Hardin*, 421 Mich 296, 308-322; 365 NW2d 101 (1984), *People v Sullivan*, 392 Mich 324; 220 NW2d 441 (1974). The judge merely answered in the negative the jury's inquiry whether two hours and fifteen minutes of deliberation was sufficient.

Additionally, defendant asserts that he was denied the effective assistance of counsel because his counsel failed to object: (1) to the prosecutor's closing argument, (2) to the trial court's jury instructions, (3) to the trial court's standard in denying the directed verdict motion, and (4) to the trial court's "coercion" of a verdict from the jury. As indicated in the preceding analysis, no grounds for objection existed on the cited issues. Counsel is not required to make meritless motions. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Defendant's other claims of ineffective counsel similarly fail; defendant has not shown that, but for his counsel's performance, the result in the proceeding would have been different. See *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Next, defendant asserts that the trial court used the wrong standard in deciding the motion for a directed verdict and erred in finding that the prosecutor presented sufficient evidence. When ruling on a motion for a directed verdict, the trial court must consider the evidence presented by the prosecutor up to the time the motion was made in a light most favorable to the prosecution, and determine whether a rational trier of fact could find the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Herbert*, 444 Mich 466, 473; 511 NW2d 654 (1993), *People v Peebles*, ___ Mich App ___; ___ NW2d ___ (Docket No. 174421, issued May 17, 1996).

In this case, the trial court denied defendant's motion for a directed verdict on the charge of aiding and abetting regarding White, and stated that a *genuine issue of fact* existed for the fact finder. The trial court further denied defendant's motion for a directed verdict on the charge of assault against Logan, commenting that *some evidence* supported the prosecution's theory. Although the trial court did not apply the correct standard for determining the motion for a directed verdict, and instead apparently used the civil summary disposition standard, this error was harmless. See *People v Sowders*, 164 Mich App 36, 41-42; 417 NW2d 78 (1984). The court did not err in denying the motion for a directed verdict; sufficient evidence to convict defendant was adduced, as detailed below.

Defendant also contends that the prosecutor presented insufficient evidence. In reviewing a challenge to the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution. It must then decide whether a rational trier of fact could find that the prosecutor proved beyond a reasonable doubt the crime's requisite elements. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). A trier of fact may draw reasonable inferences from the facts, but may not

draw inferences that are unsupported by any direct or circumstantial evidence. *People v Metzler*, 193 Mich App 541, 547; 484 NW2d 695 (1992).

The elements necessary to support a finding that a defendant aided and abetted the commission of a crime are: (1) the charged crime was committed by the defendant or some other person, (2) the defendant gave encouragement or performed acts that aided and assisted the commission of the crime, and (3) the defendant intended the commission of the crime or knew that the principal intended its commission at the time of giving aid or encouragement. *Partridge*, *supra* at 240.

The first element is met because White testified that he was shot by Elam, defendant's fellow gang member. Regarding the second element, the fact that defendant went to Kettering with the gang and confronted Logan permits an inference that defendant encouraged the crime against White, Logan's companion. The third element is also met by circumstantial inference. It is fair to infer that defendant knew that Elam intended the crime because the Winfields went to Kettering looking for trouble. While mere presence, even with knowledge that an offense is about to be committed, is not enough to make one an aider and abettor, *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992), defendant's actions in this case rise above mere presence.

The elements of assault with intent to murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). A simple criminal assault is defined as "either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). By bumping Logan, defendant committed an assault.

Circumstantial evidence and reasonable inferences arising therefrom may constitute satisfactory proof of the elements of an offense, *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). The evidence shows that defendant and his gang went to Kettering looking for a confrontation and carrying at least one weapon. Defendant bumped Logan and swore at him. Witnesses saw defendant reach into his coat and witnesses heard someone shout a warning to Logan. When Logan turned and ran, he heard gunshots. A reasonable inference may be drawn that defendant retrieved a gun from his coat and shot at Logan as Logan ran. Had defendant's shots met their target, Logan would have been severely injured or killed. Viewing this evidence in a light most favorable to the prosecution, the trial court correctly denied defendant's motion for a directed verdict.

Finally, defendant argues that the trial court abused its discretion in imposing a longer sentence on defendant than it imposed on his codefendant Elam. Defendant's argument fails. Sentencing is individualized, and a sentence should be tailored to fit the circumstances of the defendant and the crime. *In re Dana Jenkins*, 438 Mich 364, 376; 475 NW2d 279 (1991). Moreover, defendant was convicted of a greater offense than was Elam, who was convicted of two counts of assault with intent to commit great bodily harm, MCL 750.84; MSA 28.279, which carries a lesser penalty. Additionally,

defendant has not overcome the presumption of proportionality because his sentence fell within the minimum guidelines range. *McCray, supra* at 13.

Affirmed.

/s/ Maura D. Corrigan
/s/ Barbara B. MacKenzie
/s/ Paul J. Clulo