

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO FRENCH,

Defendant-Appellant.

UNPUBLISHED

February 1, 2005

No. 250904

Wayne Circuit Court

LC No. 03-005264-01

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), and assault with intent to commit murder, MCL 750.83.¹ The trial court sentenced him to life in prison for the first-degree murder conviction, and to 135 to 240 months in prison for the assault with intent to commit murder conviction. We affirm.

On January 7, 2002, the victim and his brother went to visit friends at a residence in Detroit. Defendant arrived at the residence with eight other people, but they left after they were denied permission to sell drugs in the residence. Defendant later returned to the residence with an unidentified man who had accompanied him on his earlier visit.

The victim, his brother, and several other people were watching television in the living room. Defendant stepped onto a flight of stairs, approaching the upper level, and the unidentified man remained downstairs in the living room. The victim's brother heard a gunshot, and he ran toward a side door with the victim. Although the victim's brother was certain that the unidentified man did not fire the gunshot, he saw the unidentified man subsequently draw a gun and fire four or five gunshots at them.

Defendant and the unidentified man ran out the front door, firing gunshots at the side door of the residence. The victim's brother saw defendant get into the driver's side of his car while pointing a gun at the victim and himself. Tonya White, who was a friend of defendant and an occupant of the home, did not see defendant with a gun. Defendant and the unidentified man

¹ Defendant was also acquitted of possession of a firearm during the commission of a felony, MCL 750.227b.

drove away together in defendant's vehicle. The victim was shot three times and died from a gunshot wound to his head. The victim's brother was injured when a gunshot grazed his leg.

Defendant argues that there was insufficient evidence to establish his first-degree murder and assault with intent to commit murder convictions beyond a reasonable doubt. Challenges to the sufficiency of the evidence in criminal trials are reviewed de novo to determine whether, viewing the evidence in a light most favorable to the prosecutor, any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Randolph*, 466 Mich 532, 572; 648 NW2d 164 (2002). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the crime. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993).

The elements of first-degree premeditated murder are (1) that the defendant killed the victim, and (2) that the killing was willful, deliberate, and premeditated. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). The elements of assault with intent to commit murder are: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999).

Anyone who intentionally assists another in committing a crime is as guilty as a person who directly commits the crime and can be convicted of those crimes as an aider and abettor. MCL 767.39; *People v Coomer*, 245 Mich App 206, 223; 627 NW2d 612 (2001). To prove aiding and abetting of a crime, a prosecutor must show: (1) that the crime charged was committed by the defendant or some other person; (2) that the defendant performed acts or gave encouragement that assisted in the commission of the crime; and (3) that the defendant intended the commission of the crime or had knowledge of the other's intent at the time he gave the aid or encouragement. *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004). To be convicted of aiding and abetting first-degree murder, the defendant must have had the intent to kill or have given the aid knowing that the principal possessed the intent to kill. *People v Buck*, 197 Mich App 404, 410; 496 NW2d 321 (1992), rev'd in part on other grounds *People v Holcomb*, 444 Mich 853; 508 NW2d 502 (1993).

Given that the jury acquitted defendant of his felony-firearm charge and no evidence was presented that defendant fired the fatal shots, it is likely that defendant was convicted for aiding and abetting a first-degree murder and assault with intent to commit murder. The unidentified man drew his nine-millimeter gun and pointed it at the victim and his brother. The police found nine-millimeter bullets and casings at the residence. White saw the unidentified man shooting at the side door while fleeing. The victim was shot and killed, the victim's brother was injured when a bullet grazed his leg, and the victim's brother told the police that the unidentified man fired the gun. Accordingly, a rational trier of fact could have reasonably found that another person (i.e., the unidentified man) committed first-degree murder and assault with intent to commit murder.

Furthermore, defendant brought the unidentified man to the residence earlier in the day. Defendant left the residence with the unidentified man, and they returned together later in the evening. Defendant was seen running out the door with the unidentified man while the unidentified man shot back at the residence. Defendant was seen in his car while the unidentified man continued to shoot and was seen driving off with the unidentified man after the

incident. A rational trier of fact could have reasonably inferred that defendant performed acts or gave encouragement that assisted in the commission of the crime.

Finally, defendant brought the unidentified man to the residence on two occasions, including the occasion when the victim was shot. The unidentified man would not have been at the residence if defendant had not brought him. Defendant was getting into his car or sitting in his car while the unidentified man was shooting at the side door. Defendant apparently waited for the unidentified man to finish shooting before he drove off with him. The victim's brother testified that he saw defendant holding a gun and was certain that the unidentified man was not the one who fired the first gunshot. Therefore, circumstantial evidence has been provided to lead a rational trier of fact to reasonably infer that defendant intended the commission of the charged crimes or had knowledge of the unidentified man's intent at the time he gave the aid or encouragement. Furthermore, consciousness of guilt can be inferred from the fact that defendant disappeared the day after the shooting and was later found in Dallas, Texas, living under a different name. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003).

Therefore, looking at the evidence in a light most favorable to the prosecution, a rational trier of fact could reasonably find that defendant aided and abetted in first-degree murder and assault with intent to commit murder. Accordingly, we conclude that there was sufficient evidence to convict defendant of first-degree murder and assault with intent to commit murder.

Defendant next contends that the prosecutor committed misconduct during his opening statement by making remarks alleging that defendant had previously sold drugs in the residence and that he was arrested for doing so. To preserve a claim of prosecutorial misconduct for review, a defendant must timely and specifically object. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003). Because defendant failed to object at trial, we review his claim for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *Barber, supra* at 296. To avoid forfeiture under the plain error rule, defendant must establish that: (1) an error occurred; (2) the error was plain; (3) and the plain error affected his substantial rights, i.e., it affected the outcome of the lower court proceedings. *Barber, supra* at 296, citing *Carines, supra* at 763.

The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial, i.e., whether prejudice resulted. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *Id.* at 272-273. In the prosecutor's opening statement, he told the jury that "over the next day," you are going to hear that defendant had "sold drugs out of that address and approximately a week before January 7th or somewhere between a week and two weeks he was arrested" for doing so. Opening statements are the appropriate time for a prosecutor to state the facts to be proven at trial. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). When a prosecutor, acting in good faith, states that evidence will be submitted to the jury, and the evidence is not presented, reversal is not warranted. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997); *Johnson, supra* at 626. We find no evidence that the prosecutor made this comment in bad faith and conclude that defendant was not prejudiced by the prosecutor's remark or denied a fair and impartial trial. *Abraham, supra* at 272. During his opening statement, defense counsel admitted that defendant was at the residence "to find out if once again he can sell drugs" from the residence. Furthermore, testimony later established that someone was arrested at the residence

during a drug raid a few weeks prior to the shooting. The testimony regarding the arrest provided circumstantial evidence, which may or may not have led the trier of fact to conclude that the prosecutor's challenged opening remarks were true, but at the very least did establish a good faith effort by the prosecutor to prove the truth of the challenged remarks.

In the instant case, the trial court instructed the jury that the lawyers' statements and arguments were not evidence and were not to be considered in reaching a verdict. Further, given the overwhelming evidence of defendant's aiding and abetting the unidentified man in the first-degree murder and assault with intent to commit murder, any error in the opening statement does not merit reversal because it did not affect the outcome of the proceedings. Defendant brought the unidentified man to the residence on two occasions, including the occasion in which the victim was shot. The unidentified man would not have been at the residence if defendant had not brought him. The unidentified man was shooting at the side door of the residence, where the victim and his brother were standing. Circumstantial evidence showed that defendant was present when the unidentified man was shooting at the victim and his brother, and thus, an inference could have been made that defendant knew that the unidentified man possessed an intent to kill. Defendant waited for the unidentified man and drove away with him after he finished shooting. Defendant was also found in Texas living under another name, which tends to show a consciousness of guilt. *Goodin, supra* at 432. Because the evidence against defendant was overwhelming, we conclude that any error did not affect defendant's substantial rights or affect the outcome of the lower court proceedings.

Defendant argues that that he was denied effective assistance of counsel by trial counsel's failure to object to the prosecutor's remarks during his opening statement, that defendant had previously sold drugs in the residence and had been arrested for doing so. Because defendant failed to file a motion for a new trial on these grounds or request a *Ginther*² hearing, this issue has not been preserved for appellate review, and our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Whether a defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* We review a trial court's findings of fact for clear error and questions of constitutional law de novo. *Id.*

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Rodgers, supra* at 714. Even if we found that counsel's failure to object fell below an objective standard of reasonableness, the result of the proceedings would not have been any different if

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

counsel had objected. Therefore, ineffective assistance of counsel has not been established. Even if the statement was prejudicial, given the overwhelming evidence of defendant's aiding and abetting the unidentified man in first-degree murder and assault with intent to commit murder, it did not affect the outcome of the proceedings.

Defendant argues that trial court erred by admitting hearsay testimony as evidence of defendant's intent to sell drugs at the residence. We review a trial court's decision to admit evidence under a hearsay exception for an abuse of discretion. *People v Geno*, 261 Mich App 624, 631-632; 683 NW2d 687 (2004). An erroneous admission of hearsay evidence can be rendered harmless error if corroborated by other competent testimony. *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003). In order to overcome the presumption that a preserved nonconstitutional error is harmless,

a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative. An error is deemed to have been "outcome determinative" if it undermined the reliability of the verdict. In making this determination, the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence. [*People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001) (citations omitted).]

An unsworn, out-of-court statement offered to prove the truth of the matter asserted is hearsay and cannot be admitted except as provided by the Michigan Rules of Evidence. MRE 801; MRE 802. See also *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997). Here, the statement in question is White's testimony that "Ms. Thomas³ said that '[defendant's] friends . . . wanted to sell drugs,' and I told her no." This statement was Thomas' statement, which was not given by Thomas at a trial or hearing. The statement was offered to prove the truth of the matter asserted, i.e., that defendant and his friends wanted to sell drugs at the residence, and they were told that they could not.

Under MRE 801(d)(2)(B), a statement that is offered against a party and is a statement of which the party has manifested an adoption or belief in its truth, is an admission by a party opponent and is not considered hearsay. *People v Herndon*, 246 Mich App 371, 408; 633 NW2d 376 (2001). In the instant case, the statement helped establish a motive to kill. Because defendant was present when this statement was made and failed to object to the statement, it can be said that defendant adopted this statement. It is well established that, when an incriminating statement is made in the presence and hearing of an accused and naturally calls for a denial but is not challenged by the accused, the statement and the fact of his failure to deny it are admissible in evidence as an implied admission of the truth of the statement. *People v Solmonson*, 261 Mich App 657, 665; 683 NW2d 761 (2004). Because it could be found that the statement in

³ Farlona Thomas was another occupant of the residence.

question was an adopted admission by a party opponent, we conclude that the trial court did not abuse its discretion when it allowed the statement to be admitted as substantive evidence.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood