

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK ALEXANDER HAMBY,

Defendant-Appellant.

UNPUBLISHED

June 14, 2005

No. 252735

Wayne Circuit Court

LC No. 03-006685-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLEOTIS JONES, JR.,

Defendant-Appellant.

No. 252850

Wayne Circuit Court

LC No. 03-004450-01

Before: Talbot, P.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendants Derrick Hamby and Cleotis Jones, Jr., were tried jointly, before separate juries, in connection with the fatal shooting of Nathaniel Travis (“the victim”). Defendant Hamby was convicted of first-degree felony-murder, MCL 750.316(1)(b), and second-degree murder, MCL 750.317. He was sentenced to life imprisonment for both convictions, but the trial court subsequently vacated his sentence for second-degree murder. Defendant Jones was convicted of manslaughter, MCL 750.321, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to ten to fifteen years’ imprisonment for the manslaughter conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. Both defendants appeal as of right. In Docket No. 252735, we affirm defendant Hamby’s conviction and sentence for first-degree murder, but vacate his conviction for second-degree murder. In Docket No. 252850, we affirm defendant Jones’ convictions and sentences.

I. Docket No. 252735

Defendant Hamby first argues that there was insufficient evidence to sustain his convictions for first-degree felony murder and second-degree murder because the prosecution failed to prove intent. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). Any conflicts in the witnesses' testimony must be resolved in favor of the prosecution. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004)

Defendant Hamby was convicted of felony murder and second-degree murder under an aiding and abetting theory. The elements of felony murder are: (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, i.e., malice, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in the statute. *Nowack, supra* at 401; MCL 750.316(1)(b). Second-degree murder is a general intent crime that requires proof of malice. "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). The intent required to be convicted under an aiding and abetting theory is the same as that necessary to convict the principal. *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001).

Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). An aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Id.* at 758. Because of the difficulty of proving a person's state of mind, minimal circumstantial evidence is sufficient. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

The evidence showed that Debra Jones was the victim's girlfriend and the mother of defendant Jones. Evidence was also presented from which the jury could infer that the victim had been violent toward Debra Jones in the past. Defendant Hamby was observed walking the victim away from Debra Jones' home with the victim in a headlock. Rufus McWilliams testified that the headlock was more of a chokehold. McWilliams saw both defendants walk down Concord Street with the victim and heard defendant Jones, who had a gun, tell the victim that he had "f---ed up." He did not hear defendant Hamby speak. The victim looked distressed.

McWilliams also saw the victim break away from defendant Hamby and the three men began to fight. McWilliams repeatedly called 911 because he was concerned for the victim's safety and insisted that he heard multiple gunshots while he was on the phone with a 911 operator. McWilliams saw both defendants leave the area from where he heard the shots, and both turned off Concord toward Foster Street, but at different points. Another witness, Glenn Davis, testified that he saw defendant Jones and a taller man cross a field coming from Concord

just after he heard multiple gunshots. He testified at trial that he did not know if the taller man had a gun, but he told the police that he did see him with a gun. Despite police efforts, which included notifying defendant Hamby's mother and some associates, defendant Hamby was not arrested until nearly two months after the shooting occurred.

From these facts, the jury could reasonably infer that defendant Hamby wilfully disregarded the likelihood that his action of walking the victim away from Debra Jones' house in a chokehold, accompanied by defendant Jones, who was visibly agitated with the victim and had a gun in his hand, would result in great bodily harm being inflicted on the victim. *Goecke, supra* at 464. The jury was entitled to believe this version of events and reject defendant Hamby's assertion that he was merely a peacemaker. It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. See *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). Additionally, it was the jury's role to determine the credibility of the witnesses and the weight that their testimony should be accorded. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to infer that defendant Hamby acted with the requisite malice to sustain convictions of both first-degree felony murder and second-degree murder.

Next, defendant Hamby argues that the prosecutor's comments regarding defense counsel, made during rebuttal closing argument, denied him a fair trial. This Court ordinarily reviews claims of prosecutorial misconduct de novo on a case-by-case basis and examines the prosecutor's arguments in context to determine whether the defendant was denied a fair trial. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). However, because defendant Hamby did not object to the prosecutor's comments, this issue is not preserved. This Court reviews unpreserved issues for plain error affecting substantial rights. *Id.*

The prosecutor's remarks do not constitute plain error. Although the prosecutor often directly referred to defense counsel, it is apparent that his comments were directed at the defense theories. The prosecutor was permissibly arguing why neither theory should be believed, responding to defense counsel's closing arguments in which he presented alternative defense theories consistent with defendant's innocence. *People v Knowles*, 256 Mich App 53, 60-61; 662 NW2d 824 (2003). Further, because the prosecutor's remarks were not improper, defense counsel was not ineffective for failing to object. Counsel is not required to make a futile objection. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Defendant Hamby also argues that his dual convictions for both first-degree felony murder and second-degree murder, arising from the death of a single victim, violate double jeopardy principles. We agree. Both the United States and Michigan constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15; *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). These guarantees are substantially identical and protect a defendant against both successive prosecutions for the same offense and multiple punishments for the same offense. *People v Nutt*, 469 Mich 565, 574-575; 677 NW2d 1 (2004); *Herron, supra*. Multiple murder convictions for the killing of a single victim violate double jeopardy principles. *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998). The appropriate remedy is to affirm the conviction for the higher offense and vacate the lower conviction. *Herron, supra* at 609.

We disagree with plaintiff's contention that our Supreme Court's recent decision in *Nutt, supra*, makes it unnecessary to vacate defendant Hamby's second-degree murder conviction. In *Nutt*, our Supreme Court readopted the "same elements" test for purposes of determining double jeopardy issues, overruling its previous decisions that used the "same conduct" test. *Nutt, supra* at 575. Offenses are not the same for double jeopardy purposes if each requires proof of a fact that the other does not. *Id.* at 576. Plaintiff's argument fails because second-degree murder does not contain an element that felony murder does not.

Additionally, "the purpose of the double jeopardy protection against multiple punishments for the same offense is to protect the defendant from having more punishment imposed than the Legislature intended." *People v Ford*, 262 Mich App 443, 447-448; 687 NW2d 119 (2004). In *Ford*, this Court recognized that the "same elements" test was simply a rule of statutory construction that created a presumption in the absence of a clearly expressed legislative intent. *Id.* at 448-449. The Court instructed that in determining whether the Legislature intended to impose multiple punishments, a court should look at the harm the Legislature intended to protect. *Id.* at 450. If two statutes protect the same societal norm, even if in a different manner, a court can conclude that the Legislature did not intend multiple punishments. *Id.* Because felony murder and second-degree murder were designed to protect against the same harm, the killing of another human being, the offenses should be considered the same for double jeopardy purposes. Therefore, defendant Hamby's second-degree murder conviction should be vacated. *Herron, supra* at 609.

Defendant Hamby further argues that he is entitled to a new trial based on newly discovered evidence, that being the testimony of a witness, Randall Jones, who lived next door to where the victim was shot and could testify that defendant Hamby was trying to break up the altercation between defendant Jones and the victim. A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). The trial court's factual findings are reviewed for clear error. *Id.*

To justify a new trial on the basis of newly discovered evidence, the moving party must show that: (1) the evidence itself, and not merely its materiality, is newly discovered; (2) the evidence is not merely cumulative; (3) including the new evidence on retrial would probably cause a different result; and (4) the party could not with reasonable diligence have discovered and produced the evidence at trial. *Id.* at 692. In denying defendant Hamby's motion for a new trial, the trial court found that defendant Hamby failed to prove that the evidence would probably cause a different result on retrial because Randall Jones' testimony was suspect.

A trial court may evaluate credibility in deciding a motion for a new trial, *Cress, supra* at 693-694, with due regard given to the trial court's opportunity to appraise the witness, *People v Canter*, 197 Mich App 550, 560; 496 NW2d 336 (1992). A trial court should consider the plausibility of the proposed testimony and compare it to the known body of evidence produced at trial as well as any rebuttal evidence presented by the prosecution to the proposed testimony. *People v Miller (After Remand)*, 211 Mich App 30, 48; 535 NW2d 518 (1995).

Randall Jones admitted that he did not see any of the events before he walked outside his house and saw the three men. Jones' testimony that defendant Hamby and the victim struggled was consistent with other testimony presented at trial. The main difference in Jones' testimony was that Jones stated that he heard defendant Hamby tell both defendant Jones and the victim to

go home and was pushing the two away from each other. He also heard defendant Hamby tell defendant Jones to put the gun away because it was not worth it. Jones concluded from defendant Hamby's words and actions that defendant Hamby was acting as a peacemaker.

Defendant Hamby and Randall Jones met in prison in late 2003, where Jones allegedly discovered that defendant Hamby had been charged with the victim's murder. Shortly after Jones was released from prison in July 2004, he received an affidavit with no instructions that was written and mailed by defendant Hamby. A week later, defendant Hamby's sister came to Jones' home and Jones signed the affidavit. The affidavit stated that shortly after defendant Hamby's trial, Jones was told that both defendants were in prison for the victim's murder. The affidavit further stated that because Jones knew that defendant Hamby did not shoot the victim, Jones contacted defendant Hamby and told him that he was willing to testify to what he saw. But at the hearing, Jones testified that he did not find out that defendant Hamby was in prison until he saw defendant Hamby in the same prison he was sent to for a probation violation. It was at this time that the first "contact" with defendant Hamby occurred. Additionally, Jones testified that the crime occurred between 3:45 and 5:00 P.M., and his affidavit stated that it occurred at 3:30 P.M. The 911 phone calls confirm that the victim was killed shortly before 5:00 P.M. Considering the circumstances surrounding the creation and execution of the affidavit, as well as the content of the affidavit, the trial court did not clearly err in finding that Jones' testimony was suspect. Clear error is found only when this Court is left with a definite and firm conviction that a mistake has been made. *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003). Therefore, we cannot conclude that the trial court abused its discretion in denying defendant Hamby's motion for a new trial on the basis that he failed to show that a different result was probable if Randall Jones' testimony was presented on retrial.

Next, defendant Hamby argues that the trial court erred in allowing one of McWilliams' 911 calls to be played in its entirety. At trial, defendant objected to the portion of the 911 tape on which McWilliams could be heard saying that the victim was being taken somewhere to be killed. A trial court's ruling regarding the admission of evidence is reviewed for an abuse of discretion. *People v Geno*, 261 Mich App 624, 631-632; 683 NW2d 687 (2004).

Defendant asserts that the statement was inadmissible as an excited utterance because the prosecution did not present independent evidence of the startling event as required under *People v Burton*, 433 Mich 268, 294; 445 NW2d 133 (1989). In *Burton*, the Court held that there must be evidence, direct or circumstantial, of the existence of the startling event, independent of the excited utterance, in order for the statement to be admissible. *Id.* In this case, McWilliams testified at trial about the startling event. The issue in *Burton* was whether the statement itself could provide evidence of the startling event because the declarant could not testify regarding the existence of the startling event. In each of the cases discussed in *Burton*, the declarant did not testify. See also *People v Hendrickson*, 459 Mich 229; 586 NW2d 906 (1998) (independent evidence of assault required for admission of 911 call made by the victim where the victim recanted her story and refused to testify to the assault).¹ We, therefore, find no merit to

¹ *Hendrickson* is a plurality decision. A plurality of three held that *Burton*, *supra*, was wrongly decided and that the excited utterance exception did not require independent corroboration. *Hendrickson*, *supra* at 241.

defendant Hamby's argument that the trial court abused its discretion in permitting the entire 911 call to be played.

Finally, defendant Hamby argues that this case should be remanded for a *Ginther*² hearing regarding his claims of ineffective assistance of counsel. Defendant Hamby has attached a motion to remand as an appendix to his Standard 4 brief. The motion to remand is not properly before this Court. The motion was required to be filed within the timeframe allowed for the filing of his appellate brief. MCR 7.211(C)(1). It was defendant's Hamby's obligation to seek to create an evidentiary record regarding this issue before this Court's consideration of his appeal on the merits. Indeed, we note that this Court previously granted defendant Hamby a remand regarding his motion for new trial. If he also desired a *Ginther* hearing, he should have requested it in his prior motion before this Court. Further, defendant Hamby's untimely motion consists mainly of his unsupported conclusions. It fails to set forth by affidavit or offer of proof facts to be established that would warrant relief for ineffective assistance of counsel. See MCR 7.211(C)(1)(a)(ii) and *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). For these reasons, we deny defendant Hamby's request for a remand.

II. Docket No. 252850

As his sole issue on appeal, defendant Jones contends that he is entitled to resentencing on his manslaughter conviction. We disagree.

The sentencing guidelines range for defendant Jones' manslaughter conviction was thirty-six to seventy-one months. The trial court departed from this range and sentenced defendant Jones to ten to fifteen years' imprisonment. Defendant Jones argues that the trial court failed to articulate objective and verifiable reasons for its departure that were not already taken into consideration by the guidelines. He also argues that the trial court did not have substantial and compelling reasons to justify the extent of the departure.

A trial court's decision to sentence a defendant outside the sentencing guidelines range must be supported by substantial and compelling reasons, which are objective and verifiable. *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003). The existence or nonexistence of a particular sentencing factor is a factual determination for the trial court that this Court reviews for clear error. Whether a particular sentencing factor is objective and verifiable is a question of law that this Court reviews de novo. *Id.* at 273. A trial court's decision that an objective and verifiable sentencing factor constitutes a substantial and compelling reason for departure is reviewed for an abuse of discretion. *Id.* at 274. An abuse of discretion does not occur when the trial court's decision is within the range of reasonable and principled outcomes. *Id.* at 269. Due deference should be given to the trial court's decision that a factor constitutes a substantial and compelling reason to depart. *Id.* at 270.

Here, the trial court gave the following reasons for its decision to depart from the guidelines recommendation: (1) the victim was moved in order to effectuate the killing; (2) the

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

victim was shot eight times, and defendant Jones walked away, then came back and shot the victim two more times while the victim was lying on the ground; and (3) the killing was a vigilante/retaliatory act for the neighborhood to see. The first two reasons are clearly objective and verifiable. The evidence at trial showed that the victim was taken from Foster Street to Concord Street, a distance of at least three blocks, where he was killed. The evidence also indicated that the victim sustained ten gunshot wounds and that at least two of the gunshots, which were to the head, were delivered while he was lying on the ground with the right side of his face to the pavement. Part of the trial court's third reason, that the killing was a vigilante act, is not objective and verifiable; however, that it occurred on a Monday afternoon, in broad daylight, on a residential street where people were outside and children were playing nearby, are objective and verifiable. In fact, a live round was found very near a playfield.

Defendant Jones is correct that offense variable (OV) 7 considers excessive brutality, MCL 777.37, and that OV 8 considers transportation of the victim, MCL 777.38. However, a trial court's departure decision may be based on factors taken into consideration by the sentencing guidelines if the court finds that those factors are not given sufficient weight by the guidelines. MCL 769.34(3)(b); *Babcock, supra* at 272. We believe that the determination whether a factor has been given sufficient weight relates to whether that factor constitutes a substantial and compelling reason for departure, which this Court reviews for an abuse of discretion giving deference to the trial court's determination. *Id.* at 267-268.

A "substantial and compelling" reason is one that keenly or irresistibly grabs a court's attention and is of considerable worth in deciding the length of sentence. *Id.* at 257-258, 272 (citation and quotations omitted). Substantial and compelling reasons exist only in exceptional cases. *Id.* at 258. With regard to the multiple shots the victim suffered, even though OV 7 contemplates excessive brutality, we believe that the ten gunshot wounds here, and the manner in which they were inflicted, is beyond excessive, particularly considering that two fatal shots were delivered to the victim's head after he had already fallen to the ground. At that point, the evidence showed, the victim had already sustained at least two other fatal shots to his head. We also conclude that the trial court did not abuse its discretion in its determination that the circumstances as they existed at the time of the shooting constituted a substantial and compelling reason to depart. The fact that this killing was committed in broad daylight in the presence of neighbors and children playing nearby is the type of reason that "keenly" grabs a court's attention and is of considerable worth in determining the length of defendant Jones' sentence. Although it is a closer call, we are not prepared to say that the trial court abused its discretion in determining that the victim's asportation constitutes a substantial and compelling reason for departing from the sentencing guidelines. Moving the victim three blocks away probably increased the risk of harm to him because defendant Jones was more likely to shoot the victim to death in front of the park down the street than in front of his mother's house, where the victim was dropped off. We find that the trial court did not abuse its discretion in determining that substantial and compelling reasons existed to justify departing from the sentencing guidelines.

Further, even if we were to conclude that one of the trial court's reasons did not constitute a substantial and compelling reason to depart, a remand would not be necessary. *Babcock, supra* at 273. Given the trial court's strong conviction that defendant Jones should be punished more severely than the sentencing guidelines provided for, which is evident from its comments at sentencing, it is apparent that the trial court would not have changed its sentence.

The final question we must address is whether the degree of departure constitutes an abuse of discretion. Defendant Jones asserts that the sentence is not proportional because his minimum sentence is nearly double that of the high end of the guidelines range.³ However, drastic departures alone do not make a sentence disproportionate. The relevant inquiry is whether defendant Jones' sentence is within the range of reasonable outcomes. *Id.* at 269-270. The trial court's sentence reflects the maximum statutory sentence permissible. We conclude that the trial court's decision to impose such a sentence was not an abuse of discretion considering that the victim was shot ten times in broad daylight on a residential street where adults and children were nearby.

III. Conclusion

In Docket No. 252735, we affirm defendant Hamby's conviction and sentence for first-degree felony murder, but vacate his conviction for second-degree murder. We remand for the trial court to modify defendant Hamby's judgment of sentence accordingly. In Docket No. 252850, we affirm defendant Jones' convictions and sentences.

Affirmed in part, vacated in part, and remanded. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Brian K. Zahra
/s/ Pat M. Donofrio

³ Defendant Jones also asserts that the trial court erred in relying on *People v Redman*, 188 Mich App 516; 470 NW2d 676 (1991), to support its sentencing departure decision. *Redman* is a pre-*Babcock* decision that speaks to the principle of proportionality announced in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). This principle is still a factor to be considered in a trial court's sentencing departure decision and thus, the trial court did not error in relying on *Redman* for that proposition. *Babcock, supra* at 263-264. The trial court's statements indicate that it understood that the principle of proportionality was not the only factor to consider in making its sentencing departure decision.