

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRONE SELENA MOORE,

Defendant-Appellant.

UNPUBLISHED

January 22, 2008

No. 274714

Wayne Circuit Court

LC No. 06-007908-01

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

PER CURIAM.

Defendant appeals as of right from convictions by a jury of first-degree premeditated murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to mandatory life imprisonment for the first-degree premeditated murder conviction, three to five years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court's jury instruction on the prosecution's aiding and abetting theory was unsupported by the evidence, and that, accordingly, reversal of his conviction is warranted. We disagree.

"The determination whether a jury instruction is applicable to the facts of [a] case lies within the sound discretion of the trial court." *People v Ho*, 231 Mich App 178, 585 NW2d 357 (1998). Jury instructions "must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). As a general rule, juries are presumed to have followed their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 221 (1998). Where a correct and incorrect jury instruction is given, this Court presumes that the jury followed the incorrect instruction. *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995).

To convict defendant on the first-degree premeditated murder charge, the prosecution had the burden to prove beyond a reasonable doubt that "the defendant intentionally killed the victim and the act of killing was deliberate and premeditated." *People v Wofford*, 196 Mich App 275, 278; 492 NW2d 747 (1992). [T]he three elements necessary for a conviction under an aiding and abetting theory [are]:

(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement. [*People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (internal citation and quotation marks omitted).]

We find no error with regard to the trial court's decision to instruct the jury on the aiding and abetting theory. The only question before the trial court was whether there was evidence to support the aiding and abetting instruction. The trial court decided that there was some evidence to support the prosecution's theory and deferred to the trier of fact to judge the facts of the case. See *People v Lemons*, 454 Mich 234, 245 n 14; 562 NW2d 447 (1997).

Keisha Fair testified that a man with braids fired the first three shots at the decedent Jason Richardson during a bar confrontation, and she additionally stated that defendant did not have braided hair. She also testified that Richardson was not dead following the first gunshots. Fair, as well as a second witness, Alycia Miller, testified that defendant fired the final shots. Fair testified that Richardson died following the gunshots fired by defendant, while Richardson was lying wounded on the barroom floor. The ballistics expert testified that the bullets recovered from Richardson's body were fired from a single gun.

This evidence supported the aiding and abetting instruction. If defendant was not the sole assailant, the evidence supports the prosecution's alternate theory, that defendant assisted the first gunman by obtaining the firearm from him and shooting Richardson, thus bringing about Richardson's death. Because there was evidence to support the elements of aiding and abetting, the trial court did not err in instructing the jury on that theory and leaving it to the trier of fact to weigh the evidence and determine credibility.

Defendant presupposes a favorable result from this Court on the above issue in next arguing that the general guilty verdict, which could have been decided by the jury on the basis of the allegedly unsupported aiding and abetting theory, necessitates reversal. However, because there was sufficient evidence to warrant a jury instruction on the prosecution's theory that defendant was an aider and abettor, we do not reach the question of whether the jury convicted defendant on the basis of misdirection of the jury.

Defendant next argues that the trial court erroneously denied his motion for the appointment of a medical expert. Again, we disagree. A trial court's decision to grant or deny an indigent criminal defendant's motion for appointment of an expert witness at public expense is reviewed for an abuse of discretion. *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003). An abuse of discretion exists where the trial court's decision results in an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

An indigent criminal defendant does not have an automatic right to a court-appointed expert. *Tanner*, *supra* at 442-443. Rather, a defendant must persuade the trial court to exercise its discretion by demonstrating a "nexus between the facts of the case and need for an expert." *Id.* at 443 (internal citations and quotation marks omitted). A defendant is required to show more than a possibility that the expert would be of assistance. *Id.* A defendant may not predicate error

on the denial of a motion for the appointment of an expert witness in the absence of “an indication that expert testimony would likely [have] benefit[ted] the defense.” *Id.* (internal citation and quotation marks omitted).

The trial court in this case appointed an investigator and an identification expert. However, defendant contends that he also needed a medical expert witness to address the prosecution’s theory that defendant was the second person who shot Richardson. In defendant’s view, a medical expert could have determined the order in which the shots were fired. Also, according to defendant, the expert could have opined that Richardson was already dead by the time defendant fired the final shots.

However, defendant failed to show beyond a mere remote possibility that a medical expert would have been able to determine the sequence of the gunshots, which of the shots was fatal, and at what point Richardson actually died. In light of the fact that Richardson had been buried by the time of trial, an opinion would likely have required speculation on the part of any expert appointed at that juncture. Even if defendant’s questions regarding causation could have been answered by an additional witness, the witness in the best position to offer reliable opinions would have been the examiner who performed the autopsy.

Dr. Leigh Hlavaty, the medical examiner who performed the autopsy on Richardson, testified at trial. She opined that Richardson sustained the gunshot wound to his chest while he was pressed against a hard surface because, although the bullet pierced the skin of his back, it could not completely exit Richardson’s body. This testimony would give rise to the inference that defendant shot Richardson in the chest during the second volley of shots while Richardson was lying prone on the barroom floor.

Dr. Hlavaty also testified that the bullet fired into Richardson’s temple lodged in his throat. According to Dr. Hlavaty, an injury of this kind would have resulted in the presence of a large amount of blood in Richardson’s mouth, which would have been visible to observers had Richardson opened his mouth. Following the second set of shots, Richardson appeared dead due to the blood emerging from his mouth and nose. An inference from this testimony is that defendant inflicted the gunshot wound to Richardson’s temple during the second set of shots. Moreover, as noted earlier, Fair testified that Richardson was not dead after the first set of shots. We conclude that, even if the trial court had appointed a medical examiner expert, the likelihood that this expert could have demonstrated that Richardson was dead by the time defendant shot him is remote.

Defendant did not directly contend that Dr. Hlavaty’s testimony was biased, or that he was denied either the opportunity to adequately cross-examine her or access to her report. The testimony of a second medical examiner, had the court appointed one, would have been duplicative at best, and speculative otherwise. Defendant failed to establish a nexus between the facts of the case and his need for an expert beyond a mere possibility that the expert would assist him. As such, the trial court did not abuse its discretion when it decided not to appoint a second medical expert.

Affirmed.

/s/ Michael J. Talbot

/s/ Brian K. Zahra

/s/ Patrick M. Meter