

**Court of Appeals, State of Michigan**

**ORDER**

People of MI v Madge Ellen Matthews

Docket No. 304215

LC No. 10-059764 FC

Michael J. Kelly  
Presiding Judge

Joel P. Hoekstra

Cynthia Diane Stephens  
Judges

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The Court orders that the October 23, 2012, opinion in this matter is hereby AMENDED to correct two clerical errors in the caption of the opinion: (1) the defendant-appellant's name is Madge Ellen Matthews, and (2) the appeal is from the Muskegon Circuit Court.

In all other respects, the October 23, 2012 opinion remains unchanged.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

**OCT 31 2012**

Date

  
Chief Clerk

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

MADE ELLEN MATTHEWS,

Defendant-Appellant.

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UNPUBLISHED

October 23, 2012

No. 304215

Wayne Circuit Court

LC No. 10-059764

Before: M. J. KELLY, PJ., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Defendant, Madge Ellen Matthews, appeals as of right. On March 11, 2011, following a jury trial, she was convicted of first degree felony murder, MCL 750.316(1)(b), and conspiracy to commit armed robbery, MCL 750.529. Defendant's convictions arose from her participation in an armed robbery. Defendant was sentenced as a habitual offender on April 21, 2011, to life in prison for the felony murder conviction and to 40 to 75 years' imprisonment for the conspiracy to commit armed robbery conviction.<sup>1</sup> We affirm.

I. SUBSTITUTION OF COUNSEL

First, defendant argues that the trial court abused its discretion by denying defendant's request to substitute appointed counsel. We agree that the court failed to conduct a proper inquiry into the request for substitution and there were some meritorious issues raised in the request for the substitution. However, defendant fails to persuade this Court that any error resulted in either an unfair trial or the conviction of an actually innocent person. "A trial court's decision regarding the substitution of appointed counsel will be reviewed for an abuse of discretion." *People v Strickland*, 293 Mich App 393, 397; 810 NW2d 660, 663 (2011) (quoting *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001)). A trial court does not abuse its discretion so long as the outcome falls within a range of principled outcomes. *Id.* (quoting *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008)).

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<sup>1</sup> These sentences are served consecutively to defendant's parole sentence, which she violated when she was arrested for committing the offense.

An indigent defendant's guarantee of the right to appointed counsel does not include a right to her counsel of choice. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Only upon the showing of good cause and minimal disruption to the judicial process, will an appointment of substitute counsel be made. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973). A court should make an inquiry into a defendant's claim, *Id.*, and if there is a factual dispute, the court should place its findings on the record, *Strickland*, 293 Mich App at 397 (quoting *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005)). Good cause is established by the showing of a legitimate difference between the defendant and her appointed counsel regarding fundamental trial tactics. *People v Charles O Williams*, 386 Mich 565; 194 NW2d 337 (1972). A defendant's mere complaints or grievances regarding her attorney do not establish cause for the appointment of new counsel. *Strickland*, 293 Mich App at 397 (quoting *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001) (noting that the defendant was not entitled to substitute counsel based on filing an attorney grievance)).

Defendant made a timely request for substitute counsel on February 3, 2011, more than three months after her counsel was appointed on October 20, 2010, and a month before her trial date. We do not know what delay might have been caused by substitution of counsel at the time of the request. Both the nature and extent of the attorney-client communication and interaction prior to February 3, 2011, should have been the subject of judicial inquiry. However, a trial court's failure to develop a record regarding a motion to substitute counsel does not mandate that a conviction be set aside. *Ginther*, 390 Mich at 442. Defendant fails to demonstrate that the failure to develop a record resulted in prejudice. The motion itself was internally inconsistent, alleging there had been no conversation between client and counsel but at the same time noting that counsel refused to take very specific actions requested by defendant. The grievances enumerated in the motion were either frivolous or not supported by the record. Defendant's motion cites the attorney's failure to secure a separate trial as a basis for substitution, but defendant was not tried jointly with any other individual. Further, it is well-established that counsel is not required to file futile motions, and defendant has failed to demonstrate that the requested motions were meritorious. *Strickland*, 293 Mich at 398. She offers no elucidation regarding what pretrial procedures could have formed the basis for a motion to dismiss and her requested motion for a directed verdict could not have been filed before trial commenced.

However, defendant's argument that the trial court abused its discretion by failing to investigate defendant's complaint that counsel failed to discuss the circumstances of the crime with defendant is slightly more persuasive. Unlike in *Strickland*, the trial court did not allow defense counsel the opportunity to rebut defendant's complaints and establish a record of client contact. It could be argued, therefore, that the trial court was not informed to the extent necessary to exercise its discretion. However, defense counsel requested, and presumptively received, discovery from the prosecutor on February 7, 2012, three days before defendant's motion was received by the court. The discovery materials included the police report, defendant's interview with the police and the statements from the two informants who testified that defendant made admissions to them. These materials contained defendant's version of the facts of the case, including her alibi and blanket denial that she made any phone call. Although defendant specifically took issue with her counsel's failure to interview her regarding her side of the story, her version of the events was available through the pretrial record and she has offered no explanation of how trial counsel's strategy suffered as a result of the alleged lack of

communication. Therefore, while the trial court should have held a hearing on this matter, defendant has failed to show harm from this non-constitutional error.

## II. SUFFICIENCY OF THE EVIDENCE

Next, defendant argues there was insufficient evidence of malice to support the felony murder conviction. We disagree. A criminal defendant is not required to take any additional steps to preserve an appeal based on the sufficiency of the evidence. *People v Cain*, 238 Mich App 95, 116-117; 605 NW 2d (1999). This Court reviews a sufficiency of the evidence challenge de novo. *People v Jackson*, 292 Mich App 583, 587-88; 808 NW2d 541, 547 (2011).

The evidence presented at trial was sufficient to support defendant's conviction for felony murder based upon the prosecution's aider and abettor theory of the case. Guilt based on a theory of aiding and abetting imposes vicarious and direct liability for an underlying offense on a person who procures, counsels, aids or abets in the commission of that crime. *People v Robinson*, 475 Mich 1, 5-6; 715 NW2d 44 (2006); *People v Jackson*, 292 Mich App 583, 589; 808 NW2d 541 (2011). In order to establish the requisite intent of the aider and abettor, a prosecutor must prove that the defendant either intended the specific consequences or was the natural and probable consequences of the underlying crime. *Robinson*, 475 Mich at 9, 15. Felony murder must be proved by showing a defendant was guilty of killing a person with the intent to (1) kill; (2) cause great bodily harm; or (3) create a high risk of death or bodily harm with the knowledge that death or bodily harm will most likely result during the commission, attempted commission or assisted commission of any one of several enumerated felonies. *People v Smith*, 479 Mich 292, 318-319; 733 NW2d 351 (2007). A jury may infer malice required for a felony murder conviction from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm or for the use of a deadly weapon. *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). The underlying felony in this case was conspiracy to commit armed robbery. "A criminal conspiracy is a partnership in criminal purposes, under which two or more individuals voluntarily agree to effectuate the commission of a criminal offense." *People v Justice (After Remand)*, 454 Mich 334, 345; 562 NW2d 652 (1997). The elements of armed robbery are: (1) an assault; (2) a felonious taking of property from the victim's presence or person; and (3) while the defendant is armed with a weapon. *People v Smith*, 478 Mich 292; 733 NW2d 351 (2007).

Here, defendant challenges the sufficiency of evidence based on the malice element required for felony murder. Defendant argues that the prosecution failed to establish malice where the victim's death was not an intended consequence of the criminal conspiracy because the victim was not supposed to be injured or killed. Defendant fails to recognize, however, that as established by the Court in *Robinson*, malice can also be inferred from the natural and probable consequences of the underlying crime. Further, malice may be inferred where the evidence demonstrates the use of a deadly weapon. Defendant was charged with conspiracy to commit armed robbery and Maria Bartee and Darcie Young both testified defendant was aware that Robinson and Payne were armed. Although it may not have been an *intended* consequence, shootings are often a natural and probable consequence of committing crimes while armed. When defendant called the victim to lure him to the motel for the armed robbery, she knowingly created a risk of great bodily harm. The trier of fact weighed and believed the witness testimony

regarding defendant's confessions. The evidence was sufficient to establish the malice requirement.

### III. IMPEACHMENT EVIDENCE

Defendant next argues that a witness was improperly impeached by admitting evidence of his inconsistent prior police statement through the testimony of the investigating officer. We disagree. Because defendant failed to preserve this issue by raising an objection, *People v Dupree*, 486 Mich 693, 703; 788 NW2d 399 (2010), it is reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The trial court did not commit plain error because the admission of extrinsic evidence of the prior inconsistent police statement was proper and did not affect defendant's substantial rights. "Extrinsic evidence of a prior inconsistent statement can be used to impeach but it cannot be used to prove the truth of the matter asserted, unless, of course, it falls within a hearsay exception." *People v Jenkins*, 450 Mich 249, 273; 537 NW2d 828, 839 (1995) (citing *Hileman v Indreica*, 385 Mich 1; 187 NW2d 411 (1971)). MRE 613(b) provides that extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is allowed to explain or deny the statement and an adverse party is given an opportunity to examine it. MRE 613(b). Generally, evidence of a prior inconsistent statement of a witness may be admitted for impeachment purposes even if the statement tends to directly inculcate the defendant. *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669, 671 (1997). A prosecutor cannot, however, use a statement that directly tends to inculcate the defendant under the guise of impeachment when there is no other testimony from the witness for which his credibility is relevant to the case. *People v Stanaway*, 446 Mich 643, 688-89; 521 NW2d 557, 579 (1994).

George Freeman, a non-party witness was impeached using extrinsic evidence of a prior inconsistent statement, which was admitted through the testimony of Officer Joseph Mahan. Freeman was called to testify by the prosecution because defendant told the police that she was with him until approximately 2:00 a.m. on the morning of the armed robbery. At trial, Freeman testified about his police interview. He confirmed he was interviewed soon after the victim's death. Freeman testified that he walked defendant to the corner near her apartment around midnight. He did not, however, clearly respond to questions of whether he originally denied walking defendant home. He clarified that when he said he walked defendant home, he meant to the corner of her block. Based on these responses, the prosecutor began questioning Freeman about his original police statement. Upon questioning him regarding whether he told police he went to a friend's apartment at 10:00 p.m., went to sleep, did not know whether defendant came over and did not walk her home, he said "No," while explaining he woke up and walked her home around midnight or later. On cross-examination, Freeman was asked if he saw defendant with anyone else after walking her to the corner, to which he replied he did not. After Freeman completed his testimony and absent any objection, the prosecution recalled Officer Mahan, who testified that during his initial questioning of this witness, Freeman denied being with defendant at 2.a.m., claiming that he went home and slept until he woke up to go to work. However, according to Officer Mahan, once Freeman was informed he had been named as defendant's alibi witness, he changed his statement to police and stated he had walked the victim home around 10 p.m.

Defendant's reliance on the *Stanaway* exception to the general rule is misplaced. In *Stanaway*, the statement in question clearly tended to directly inculcate the defendant, as the statement established that he had confessed to the accused crime. Here, Freeman's previously inconsistent statement concerned when he was with the defendant and therefore, does not directly demonstrate whether defendant was guilty of the accused offense. As a result the evidence was admissible under the rule from *Jenkins*.

Furthermore, defendant is not entitled to relief since she cannot demonstrate her substantial rights were affected. *Carines*, 460 Mich at 763-764. Defendant cannot establish that she was prejudiced by the testimony. Even without the impeachment evidence, Freeman's testimony merely established that he was with defendant around midnight. That evidence did not corroborate defendant's alibi. Given the testimony by Bartee and Young establishing that defendant confessed to her involvement in the plan to rob the victim, and Dawn Davis's testimony that the woman on the phone identified herself as "Madge," any error would not have been outcome determinative.

#### IV. PROSECUTORIAL MISCONDUCT

Next, defendant argues that the prosecutor committed misconduct by using Freeman's inconsistent statements as substantive evidence in the state's closing arguments. We disagree. Because defendant failed to preserve this issue by timely stating a specific ground of objection, review of alleged prosecutorial misconduct is precluded unless an objection could not have cured the error or where failure to review the issue would result in a miscarriage of justice. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). Where a contemporaneous objection was not made and a curative instruction was not requested, claims of prosecutorial misconduct are limited to review for plain error. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

The prosecutor did not commit misconduct in its closing argument because he argued the reasonable inferences that could be drawn from the testimonial evidence in support of his theory of the case. The test of prosecutorial misconduct is whether the defendant was denied a fair and partial trial. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate the full context of those remarks. *People v Mann*, 288 Mich App 114; 792 NW2d 53 (2010) (citing *People v Thomas*, 250 Mich App 450, 453; 678 NW2d 631 (2004)). A prosecutor may not make a statement of fact that is unsupported by the evidence, *Stanaway*, 446 Mich at 686, but is free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

In this case, the prosecutor's theory of the case was that defendant aided and abetted felony murder by luring the victim to the site of an intended armed robbery. During the prosecutor's closing argument, he detailed for the jury the inconsistencies between Freeman's various police statements and trial testimony regarding when he was with the victim, which changed when Freeman learned he had been identified as defendant's alibi witness. The prosecutor's argument regarding the weakness of defendant's alibi was supported by the testimony of Freeman and the impeachment testimony about his inconsistent statements to the police. The comments made during the prosecutor's closing argument were supported by the

evidence and the reasonable inferences drawn therefrom in support of the theory of the case. Further, even if the prosecutor's comments were improper, reversal would not be warranted because defendant was not denied a fair and impartial trial nor were her substantial rights affected. At the close of trial, the jury was instructed that the statements of the attorneys were not to be considered as evidence. Jurors are presumed to follow their instructions and instructions are presumed to cure most errors. *Chapo*, 283 Mich App at 371 (citing *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003)). Defendant has failed to establish that the prosecution's commentary on the evidence was improper or that it was considered by the jurors for an improper purpose. Consequently, she cannot demonstrate the existence of plain error that affected her substantial rights.

Defendant, in her Standard 4 brief, further asserts that the prosecutor committed misconduct during a plea bargaining meeting. We disagree. The issue regarding the prosecutor's improper conduct during a plea negotiation meeting was unpreserved because defendant never raised any objection. In her Standard 4 brief, defendant asserts that the prosecutor improperly attempted to coerce her into confessing to committing murder. Defendant's own brief acknowledges that the record is "devoid of support" for her claim. Therefore, defendant cannot show that she is entitled to relief.

#### V. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant asserts that her counsel was ineffective for failing to (1) raise an objection to the use of a witness's prior inconsistent statement to police for substantive purposes; (2) request a jury instruction limiting the use of a witness's prior inconsistent statement; and (3) raise an objection to the prosecution's closing argument where a witness's prior inconsistent statement was used as substantive proof of defendant's guilt. We disagree. Because defendant failed to request a *Ginther*<sup>2</sup> hearing or move for a new trial, the issue is unpreserved, which limits our review to errors apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Defendant's claim that she was denied effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Leblanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under professional norms and (2) that there was a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Wash* 466 US 668, 687-690; 104 S Ct 2052, 2064-2065; 80 L Ed2d 674, 693-694, 698 (1984). Defense counsel has a wide discretion regarding trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Declining to raise objections to procedures, evidence, or argument can be sound trial strategy. *Unger*, 278 Mich App at 242, 253. Counsel is not required to advocate every non frivolous defense, *Knowles v Mirzayance*, 556 US 111; 129 S Ct 1411; 173 L Ed 2d 251 (2009), or a meritless position, *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

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<sup>2</sup> *Ginther*, 390 Mich at 436.

For the reasons stated above, the extrinsic evidence of prior inconsistent evidence was properly admitted; hence, any objection would have been overruled. Defense counsel is not required to make meritless objections. *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001). Defendant cannot establish her attorney, in failing to object to Freeman's admissible testimony, performed below an objective level of reasonableness.

Similarly, defendant asserts that her counsel failed to object to the prosecutor's improper use of Freeman's testimony during his closing argument. Also as discussed above, the closing argument discussion was proper and did not warrant an objection. Consequently, defendant cannot establish that counsel's performance was objectively unreasonable.

Defendant also asserts that defense counsel was ineffective for failing to request a limiting instruction to prevent the jury from considering Freeman's prior statement for an improper purpose. As stated above, declining to raise an objection is a matter of trial strategy, to which trial counsel is granted wide discretion. Absent an evidentiary hearing regarding trial counsel's decision, this Court cannot determine that trial counsel did not refrain from requesting the instruction in question because such a request may have merely highlighted the damaging evidence. Further, even if defense counsel should have requested the instruction at issue, defendant has failed to demonstrate that the omission of the instruction impacted the outcome of the proceeding. As described above, defendant's conviction was likely the result of the testimony of Barteo, Davis and Young, as opposed to the inconsistency in Freeman's statements related to the night in question.

Defendant, next asserts in her Standard 4 brief, that her counsel failed to impeach Barteo's testimony that defendant claimed to have received drugs for payment with a prior inconsistent statement that defendant received money. There is no factual support for this assertion. Barteo's testimony was consistent that defendant claimed to have received drugs for her role in the robbery. Therefore, defendant has neither demonstrated that counsel failed to perform in an objectively reasonable manner or that his performance impacted the outcome of the trial.

In her Standard 4 brief defendant argues several issues that have no support in the record. The first is that her counsel should have argued an alternative or supplementary theory to her alibi defense that she was "set up" as a result of a stolen television. The second assertion of ineffective assistance of counsel without any record support is her claim that one of the jurors worked with defendant's former boyfriend and discussed the case with him and that counsel was ineffective for failing to address the impropriety. The final unsupported claim is that her attorney did not "preserve the record for appeal." We have rejected her numerous assertions of trial counsel error regarding motions and specific items of evidence. And defendant provides no other specific instances in which defense counsel failed to properly preserve the record. A defendant may not simply announce a position without support. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). Defendant has neither demonstrated that counsel failed to perform in an objectively reasonable manner or that his performance impacted the outcome of the trial given her numerous inculpatory statements regarding her confessions to participation in the crime.



## VI. CONFRONTATION OF WITNESSES

Defendant, in her Standard 4 brief, asserts that the prosecutor used statements by the alleged co-conspirators, Robinson and Payne, which denied her right to confrontation. The issue regarding improper admission of statements made by defendant's coconspirators was not preserved because the issue was not raised at trial. *People v Walker*, 273 Mich App 56, 65; 728 NW2d 902 (2006). This Court reviews an unpreserved issue for plain. *Carines*, 460 Mich at 763-764. Since no exhibits containing statements of either Robinson or Payne were admitted this issue is meritless.

Affirmed.

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra

/s/ Cynthia Diane Stephens