STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN HARRIS,

Defendant-Appellant.

UNPUBLISHED
January 10, 1997

No. 182602
LC No. 94-003617

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERNEST MCREYNOLDS,

Defendant-Appellant.

No. 182603
LC No. 94-003617

Before: Taylor, P.J., and Gribbs and R. D. Gotham,* JJ.

PER CURIAM.

The instant case arose out of a shooting incident on March 7, 1994. Defendants were tried before separate juries in a single trial.

In Docket No. 182602, defendant Kevin Harris appeals as of right his conviction for two counts of assault with intent to rob while armed, MCL 750.89; MSA 28.284. He was sentenced to concurrent terms of 80 to 180 months in prison. We affirm.

In Docket No. 182603, defendant Ernest McReynolds appeals as of right his convictions for two counts of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA

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

28.279, and one count of receiving and concealing stolen property with a value exceeding $100, MCL 750.535; MSA 28.803. He was sentenced to concurrent terms of 80 to 120 months in prison for assault with intent to do great bodily harm less than murder and to a concurrent term of forty to sixty months in prison for receiving and concealing stolen property. We affirm.

I

In Docket No. 182602, defendant Harris first argues that the trial court's denial of his motion to suppress his statement was error requiring reversal. We disagree.

When determining the admissibility of a defendant's statement to the police, the ultimate test is whether the totality of the circumstances indicates that the statement was freely and voluntarily made. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). In the instant case, the evidence presented at the *Walker*[1] hearing proved by a preponderance of the evidence that Harris' statement was voluntary.

Defendant Harris also argues that the trial court erred when it denied his motion for a directed verdict on the charge of assault with intent to rob while armed. We disagree.

When reviewing a denial of a motion for directed verdict, this Court must consider the evidence presented by the prosecution up to the time the motion was made in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994). When deciding a motion for directed verdict, the court may not determine the weight of evidence or the credibility of witnesses. *People v Herbert*, 444 Mich 466, 474; 511 NW2d 654 (1993).

To support a finding that a defendant aided and abetted a crime, the prosecution must show that (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 the defendant gave the aid or encouragement. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). The elements of an assault with intent to rob while armed are (1) an assault with force and violence, (2) an intent to rob or steal, and (3) the defendant's being armed. *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991).

Defendant Harris claims that no evidence was presented to prove that he intended the commission of the crime or had knowledge that the principal, McReynolds, intended its commission. However, we find that defendant's statement that "[w]e were riding around in the white Mustang looking to hit a lick," coupled with Officer White's testimony that the expression "hit a lick" meant to commit a robbery or larceny, was sufficient to establish defendant's intent. In the instant case, the evidence was sufficient to prove beyond a reasonable doubt that defendant Harris was guilty of aiding and abetting the assault with intent to rob while armed.

Defendant Harris' final argument is that the trial court erred by admitting codefendant McReynolds' out-of-court statement that "we started following this car because we tried to rob them," as evidence against defendant Harris.

Defendant Harris first argues that the statement was inadmissible hearsay. We disagree because the statement was used to impeach codefendant McReynolds' in-court testimony concerning his reason for following complainants' car. Furthermore, we find that the trial court's failure to sua sponte instruct the jury that McReynolds' prior statement could not be used as substantive evidence of guilt was not error requiring reversal because (1) there was no request for a limiting instruction, (2) there was no demonstration or likelihood of prejudice, and (3) neither the court nor the prosecutor suggested to the jury that the prior statement could be used as substantive evidence. *People v Kohler*, 113 Mich App 594, 599; 318 NW2d 481 (1982); MCL 768.29; MSA 28.1052; MCR 2.516(C).

Defendant also argues that the admission of McReynolds' statement violated MRE 613(b). However, defendant failed to preserve this issue by not objecting on the same ground at trial. *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994). Furthermore, we find no violation of MRE 613(b) because the witness was afforded an opportunity to explain or deny the statement and an opportunity to interrogate the witness thereon was provided.

II

In Docket No. 182603, defendant McReynolds argues that the evidence presented at trial was insufficient to support the jury's verdict of guilty beyond a reasonable doubt of receiving and concealing stolen property with a value exceeding $100. We disagree.

When reviewing a challenge to the sufficiency of the evidence, an appellate court is required to view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). Specifically, defendant argues that the prosecution failed to prove that defendant bought, received, possessed, or concealed the stolen car.

MCL 750.535(1); MSA 28.803(1) provides, in part:

> A person who buys, receives, possesses, conceals, or aids in the concealment of stolen, embezzled, or converted money, goods, or property knowing the money, goods, or property to be stolen, embezzled, or converted, if the property purchased, received, possessed, or concealed exceeds the value of $100.00, is guilty of a felony, punishable by imprisonment for not more than 5 years, or by a fine of not more than $2,500.00, or both.

The elements of receiving and concealing stolen property with a value exceeding $100 are that (1) the property was stolen, (2) the property has a fair market value over $100, (3) the defendant bought, received, possessed, or concealed the property with knowledge that the property was stolen,

and (4) the property was identified as being previously stolen. *People v Gow*, 203 Mich App 94, 96; 512 NW2d 34 (1993).

Although the act of being a passenger in a stolen car does not constitute possession of the car, it is factually possible for a defendant to aid a principal in possessing a car the defendant knew to be stolen. *People v Botzen*, 151 Mich App 561, 563; 391 NW2d 410 (1986). "To aid and abet possession, one must be more than present. There must be criminal intent and direct or indirect acts or encouragement which aid in the perpetration of the crime." *People v Doemer*, 35 Mich App 149, 152; 192 NW2d 330 (1971).

Defendant's testimony indicated that he knew the car was stolen and that he directed the driver of the stolen car to follow the victims' car because he thought the driver of the victims' car was someone with whom he had a conflict. Defendant further testified that he intended to shoot the person with whom he had a conflict and only decided not to shoot when he did not recognize the victims. Defendant's testimony indicates that he encouraged the driver of the stolen car to use the car to further defendant's own criminal purposes. Therefore, we find sufficient evidence that defendant aided the driver in the possession of the stolen car.

Defendant McReynolds' final argument is that his sentence was disproportionate. We disagree.

The recommended minimum sentencing guidelines' range was forty-eight to eighty months. Defendant was sentenced to a minimum of eighty and a maximum of 120 months in prison. A sentence within the guidelines range is presumed to be proportionate. *People v Dukes*, 189 Mich App 262, 266; 471 NW2d 651 (1991). Under the facts of the instant case, defendant's sentence reflected the seriousness of the crime. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995).

Furthermore, the trial court did not consider improper factors when determining defendant's sentence. Where there is record support that a greater offense has been committed by a defendant, it may constitute an aggravating factor to be considered by the judge at sentencing. *People v Purcell*, 174 Mich App 126, 130; 435 NW2d 782 (1989).

Affirmed.

/s/ Clifford W. Taylor
/s/ Roman S. Gribbs
/s/ Roy D. Gotham

[1] *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).