STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 9, 2000
v	No. 208949 Muskegon Circuit Court
DONTAY NICHOLAS MCMANN, Defendant-Appellant.	LC No. 97-140487 FC

Before: White, P.J., and Wilder and Meter, JJ.

PER CURIAM.

Defendant was charged with first-degree felony murder, MCL 750.316; MSA 28.548, conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1); MCL 750.529; MSA 28.797, two counts of assault with intent to murder, MCL 750.83; MSA 28.278, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Following a jury trial, defendant was convicted of second-degree murder, MCL 350.317; MSA 28.549, conspiracy to commit armed robbery, two counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 750.279, and three counts of felony-firearm. The trial court sentenced defendant to concurrent terms of 40 to 75 years' imprisonment for the second-degree murder conviction, 25 to 75 years' imprisonment for the conspiracy to commit armed robbery conviction, and 6 to 10 years' imprisonment for the assault with intent to do great bodily harm less than murder convictions, to be served consecutive to the mandatory two years' imprisonment for each felony-firearm conviction. Defendant appeals as of right. We affirm.

I Sufficiency of the Evidence

Defendant argues that the prosecution failed to present sufficient evidence to sustain his convictions of conspiracy to commit armed robbery and second-degree murder. We disagree. When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the offense were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994); *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Circumstantial evidence and reasonable inferences arising from that evidence can

constitute satisfactory proof of the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

Defendant first argues that the prosecution presented insufficient evidence to prove that he was guilty of conspiracy to commit armed robbery. A conspiracy is defined as a partnership in criminal purposes whereby two or more individuals have voluntarily agreed to effectuate the commission of a criminal offense. *People v Justice (After Remand)*, 454 Mich 334, 345, 562 NW2d 652 (1997). See MCL 750.157a; MSA 28.354(1).[1] The gist of the offense of conspiracy lies in the unlawful agreement, and thus, commission of the crime is complete upon formation of the agreement. *Id.* Direct proof of an agreement to conspire is not essential; instead, proof may be derived from the circumstances, acts and conduct of the parties. *Id.* at 347.

The predicate substantive offense with which defendant was charged, armed robbery, is embodied in MCL 750.529; MSA 28.797.[2] The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, and (3) the defendant must be armed with a weapon described in the statute. *People v Carines*, 460 Mich 750, 757; ___ NW2d ___ (1999); *People v Smielewski*, 235 Mich App 196, 207; ___ NW2d ___ (1999).

In this case, the evidence established that on the day before the commission of the robbery, defendant and Little Selma discussed robbing Bailey and Horton of their drugs, money and weapons at 1021 Kenneth. While discussing their plans for the robbery, defendant stated that in order to effectuate the robbery, he needed weapons. Defendant and Little Selma then solicited Williams, who had access to weapons, to be involved in the robbery. Shortly before the shooting, defendant confirmed that Williams had the weapons and that he was prepared to participate in the offense. Thus, the evidence shows that defendant agreed with others to execute a plan to commit armed robberies against the victims in an effort to steal drugs, money and weapons.

Defendant essentially challenges the sufficiency of the evidence on the basis that all of the testimony establishing the conspiracy was incredible because it was elicited from witnesses who were testifying pursuant to plea bargains. However, credibility contests are to be resolved by the trier of fact, and are not reviewed anew by this Court. *People v Avant*, 235 Mich App 499, 506; ___ NW2d ___ (1999). That the witnesses were testifying pursuant to plea bargains is simply one factor that the jury could consider when assessing the credibility of the witnesses. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to support defendant's conspiracy to commit armed robbery conviction. *Jaffray, supra*.

Defendant also argues that the prosecution presented insufficient evidence to prove that he was guilty of second-degree murder on an aiding and abetting theory. The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse (4). *People v Goecke*, 457 Mich 442, 463-464, 474; 579 NW2d 868 (1998); *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996). Malice is defined as the intent to kill, the intent to do great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of the defendant's actions will be to cause death or great bodily harm. *People v Kelly*, 423 Mich 261, 273; 378 NW2d 365 (1985); *People v Aaron*, 409 Mich 672,

728; 299 NW2d 304 (1980). Malice may not be inferred solely from the intent to commit another felony, but it may be inferred from the facts and circumstances surrounding the commission of the offense. *Kelly, supra* at 273.

One who procures, counsels, aids, or abets in the commission of an offense may be convicted and punished as if he directly committed the offense. MCL 767.39; MSA 28.979. The offense of aiding and abetting requires proof of the following elements: (1) the underlying crime was committed by either the defendant or some other person, (2) the defendant performed acts or gave encouragement that aided and 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 of giving aid or encouragement. *Smielewski, supra* at 207; *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995). To sustain an aiding and abetting charge, the guilt of the principal must be shown; however, the principal need not be convicted. Rather, the prosecutor need only introduce sufficient evidence that the crime was committed and that the defendant aided and abetted it. *Turner, supra* at 569; *In re McDaniel*, 186 Mich App 696, 699-700; 465 NW2d 51 (1991).

We find that the prosecution presented sufficient evidence to sustain defendant's second-degree murder conviction as an aider and abettor. The evidence in this case, and the reasonable inferences arising therefrom, establish that Timothy Horton was shot and killed as a result of the shooting in which defendant was involved. Circumstantial evidence established that Williams committed the fatal shooting of Timothy Horton, but defendant was aware that Williams was armed during the commission of the offense. The evidence further showed that defendant and the others planned to steal drugs, money, and weapons from the victims and were prepared to shoot the victims "below the knees" if they encountered any resistance. That defendant only intended to shoot the victims below the knees (a presumably non-fatal area) does not eliminate a conviction for second-degree murder because firing a weapon directly at another human demonstrates the willful disregard for the likelihood that such action will cause great bodily harm or death sufficient to establish second-degree murder.

Moreover, the record established that there were several different bullets discovered at the crime scene, and that more than one type of gun was fired. Thus, although the jury could have reasonably inferred from this evidence that defendant and/or the other accomplices also fired gunshots at the victims, even if defendant did not directly fire the weapon that inflicted the fatal shot to Horton, the evidence shows that his words and actions incited and encouraged Williams to commit the offense. In sum, defendant's conversation with Little Selma regarding the planning of the offense, his insistence that they obtain weapons to effectuate the offense, his comment that, if necessary, they were prepared to shoot below the knees, and his participation, whether directly or indirectly, in the commission of the offense, all establish that he had the requisite intent. Thus, viewing the evidence in the light most favorable to the prosecution, the prosecution presented sufficient evidence to establish that defendant committed second-degree murder, either as a principal or as an aider and abettor. *Jaffray, supra*.

II Compromise Verdict

Defendant next argues that his second-degree murder conviction constitutes an inconsistent, compromise verdict, or was the product of a misunderstanding of the jury instructions. Defendant

reasons that because felony murder is made up of second-degree murder and the underlining felony, the jury could not reasonably find him guilty of conspiracy to commit armed robbery and also find him not guilty of felony murder, but guilty of second-degree murder. Defendant contends that because the jury found him guilty of the felony, the acquittal of felony murder suggests that the jury based their verdict on the conclusion that defendant did not possess the requisite intent for murder, and thus, a conviction for second-degree murder, which requires the same element of intent as does felony murder, constituted an improper compromise verdict, or a product of misunderstanding. We disagree.

The question of whether there was an inconsistent verdict is a legal issue that this Court reviews de novo. *People v Artman*, 218 Mich App 236, 244; 553 NW2d 673 (1996). It is well settled that jury verdicts rendered on a multi-count indictment need not necessarily be consistent, and seemingly inconsistent verdicts do not warrant reversal. *People v Vaughn*, 409 Mich App 463, 465; 295 NW2d 354 (1980) citing *Dunn v United States*, 284 US 390; 52 S Ct 189; 76 L Ed 356 (1932). As our Supreme Court noted:

> Because the jury is the judge of *all* the facts, it can choose, without any apparent logical basis, what to believe and what to disbelieve.
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> ***
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> Juries are not held to any rules of logic nor are they required to explain their decisions. The ability to convict or acquit another individual of a crime is a grave responsibility and an awesome power. An element of this power is the jury's capacity for leniency. Since we are unable to know just how the jurors reached their conclusion, whether the result of compassion or compromise, it is unrealistic to believe that a jury would intend that an acquittal on one count and conviction on another would serve as the reason for defendant's release. These considerations change when a case is tried by a judge sitting without a jury. But we feel that the mercy-dispensing power of the jury may serve to release a defendant from some of the consequences of his act without absolving him of all responsibility. [*Vaughn, supra* at 466.]

Indeed, Michigan courts permit juries to render inconsistent verdicts, and a jury need not explain its decision. *Id.* See *People v Goss*, 446 Mich 587, 599; 521 NW2d 312 (1994); *People v Lewis*, 415 Mich 443; 330 NW2d 16 (1982). In the instant case, there is no reason to assume that the verdicts were a product of misunderstanding rather than leniency. Further, the underlying felony charged in the felony murder count was larceny. A finding that defendant was guilty of conspiracy to commit armed robbery is not necessarily equivalent to a finding that the murder was committed in the perpetration or attempted perpetration of a larceny. The jury could permissibly have drawn some distinction between defendant's contemplation of what would take place in the course of the larceny or attempted larceny and what actually took place, concluding that he should not be held responsible for the aggravated element of the link between the murder and the larceny, but nevertheless concluded with respect to the murder that he acted with willful and wanton disregard and aided and abetted others sufficient to find him guilty of second-degree murder.

We additionally note that if defendant was concerned that the jury rendered an improper, compromise verdict, he was free to poll the jury pursuant to MCR 6.420(C)[3] to insure that the jurors all agreed on the result reached. See *People v Echavarria*, 233 Mich App 356, 362; 592 NW2d 737 (1999); *People v Booker (After Remand)*, 208 Mich App 163, 167-168; 527 NW2d 42 (1995). Because defense counsel declined the trial court's invitation to poll the jury, and for the reasons stated above, we find no merit to defendant's claim.

III Prosecutorial Misconduct

Defendant argues that he was denied a fair trial by improper remarks by the prosecutor during trial and closing argument. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). However, because defendant did not object to any of the instances of alleged prosecutorial misconduct at trial, appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect of the remarks or failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *Paquette, supra* at 342.

Defendant first contends that the prosecutor improperly elicited testimony during trial, and argued during closing argument, that certain witnesses entered into a plea agreement with the prosecution and agreed to cooperate and testify truthfully in all proceedings related to this incident in exchange for a dismissal of certain charges and favorable recommendations at sentencing. Defendant claims that by mentioning the terms of the plea agreements, and particularly the witnesses' agreement to testify truthfully, the prosecutor relied on the prestige of his office to improperly vouch for the credibility of the witnesses, thereby minimizing the real value of the plea agreements. We disagree.

In *Bahoda*, *supra* at 276-277, the Michigan Supreme Court made the following remarks regarding prosecutorial misconduct in the context of plea agreements:

> Included in the list of improper prosecutorial commentary or questioning is the maxim that the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness. While this is generally improper, the simple reference to a plea agreement containing a promise of truthfulness is in *itself* [not] grounds for reversal. A more accurate statement of the law appears to be that, although such agreements should be admitted with great caution, admissibility of such an agreement is not necessarily error unless it is used by the prosecution to suggest that the government had some special knowledge, not known to the jury, that the witness was testifying truthfully.
>
> Generally, by simply calling a witness who testifies pursuant to an agreement requiring him to testify truthfully, the Government does not insinuate possession of information not heard by the jury and the prosecutor cannot be taken as having expressed his personal opinion on a witness' veracity. [Emphasis included.]

Further, the prosecutor is afforded much more leeway if his comments or questions are in response to defense counsel's questions or remarks on cross-examination or in closing. *Id.* See also *People v Jones*, ___ Mich App ___; ___ NW2d ___ (1999) (docket no. 208249, released June 25, 1999) (in order to protect the defendant's right to a fair trial, courts often employ certain safeguards regarding the use of plea agreements including (1) full disclosure of the terms of the agreements with the witnesses, (2) the opportunity for full cross-examination of such witnesses regarding the agreements and their effect, and (3) instructions cautioning the jury to carefully evaluate the credibility of witnesses who testify against the defendant pursuant to agreements with the prosecution.)

In this case, the prosecutor mentioned the plea agreements of each of the witnesses on direct examination simply to inform the jury of their involvement in the offense and to dispel any suspicion that their testimony was fabricated. Contrary to defendant's contention, the prosecutor's reference to the plea agreements did not convey any message that the prosecutor had some special knowledge of their testimony. Moreover, the prosecutor's reference to the "truthful testimony" requirement of the plea agreements during his rebuttal argument was in direct response to defense counsel's attempt to impugn the witnesses by suggesting that the jury consider the substantial rewards the witnesses received for their testimony when assessing their credibility. The prosecutor's remarks in this context were entirely proper. *Bahoda, supra* at 276-277.

In addition, the procedural safeguards designed to protect defendant's right to a fair trial were employed in this case. *Jones, supra* at slip op, p 4. Finally, the trial judge properly instructed the jury that the statements and arguments of the attorneys were not evidence and should not be considered when reaching a verdict. *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996). Thus, any prejudice arising from the prosecutor's comments was dispelled by the trial court's instruction. Moreover, because an objection and curative instruction could have eliminated any prejudicial effect, *People v Messenger*, 221 Mich App 171, 179; 561 NW2d 463 (1997), we conclude that defendant was not denied a fair trial.

Defendant also alleges that the prosecutor improperly vouched for the credibility of witness Carl Johnson by remarking during closing argument that " . . . we [the prosecution] would submit to you that again he [Carl Johnson] was telling you the truth" referencing Johnson's testimony that he was not involved in the shooting on March 1, 1997. In addition, defendant claims that the prosecutor improperly remarked that "I [the prosecutor] think that it shows quite – quite an exhibition of honesty" referring to Johnson's admission that he was not certain whether his friend Hewlett was carrying a gun with him on March 1, 1997, but he did not see one. We disagree.

A prosecutor may fairly comment on the evidence as it relates to his theory of the case, *McElhaney, supra* at 284, including arguing the credibility of the witnesses when there is conflicting evidence and the question of defendant's guilt or innocence turns on which witness is believed. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996); *People v Flanagan*, 129 Mich App 786, 795-796; 342 NW2d 609 (1983). Reading the challenged remarks in context, we are not persuaded that the prosecutor improperly vouched for the credibility of Carl Johnson. Rather, the record shows that the prosecutor simply indicated that the facts to which Johnson testified, as well as his demeanor at trial, demonstrated that Johnson was telling the truth. The prosecutor did not claim to have

any special knowledge regarding Johnson's credibility; the prosecutor merely pointed to facts on the record that supported his testimony. Moreover, a statement of the prosecutor's belief in the honesty of a witness does not constitute error requiring reversal where the remarks, as a whole, were fair. *Flanagan, supra*. In any case, a prompt admonishment to the jury regarding its role as the factfinder would have cured any error or possible prejudice. *Id.*; *Stanaway, supra* at 687. Accordingly, we find no miscarriage of justice.

Defendant next contends that the prosecutor denigrated defendant by "attempting to turn testimony by his employer around [that he was a good conscientious employee] to suggest that he was the go to person for criminal conspiracies." Defendant objects to the prosecutor's statement that "[w]hen you want something done, Dontay McMann [defendant] [. . . .]" Defendant argues that the prosecutor's statement was an unreasonable inference from the facts and misstated the evidence to suggest that defendant, alone, planned the robbery and solicited Williams to obtain the guns. We disagree.

The prosecutor's statement was a fair and accurate interpretation of the testimony presented at trial. Prosecutors are generally afforded great latitude regarding their arguments and conduct at trial; they are free to argue the evidence and all reasonable inferences drawn from the evidence as it relates to their theory of the case. *Bahoda, supra* at 282-283. Further, there is no requirement that the prosecutor use bland terms in making an argument because the prosecutor is, after all, an advocate who has not only the right but the duty to vigorously argue the people's case. *People v Cowell*, 44 Mich App 623, 629; 205 NW2d 600 (1973). See *People v Mischley*, 164 Mich App 478, 483; 417 NW2d 537 (1987).

Again, reading the challenged comments in context, we conclude that the prosecutor was simply arguing the evidence and drawing reasonable inferences arising from the testimony, which is permissible during closing arguments. *Bahoda, supra* at 282. A thorough review of the record reveals that the prosecutor accurately noted that Little Selma solicited defendant's assistance in committing the offense, but that it was defendant who insisted that weapons be involved in the robbery. Moreover, a reasonable interpretation of the evidence is that defendant actively participated in the planning and execution of the offense from its inception. Accordingly, the prosecutor's comments were not improper, and defendant was not denied a fair trial.

Defendant next argues that the prosecutor vouched for the police investigation by stating that "they [police] did a very good job in this case, and they found who was involved in this murder and who those persons were, and they presented those persons to you here today. And again Dontay McMann [defendant] was in fact one of those individuals and is responsible for this crime." Any overreaching in these statements could have been cured by a cautionary instruction had an objection been made. We therefore find no reversible error. Defendant further contends that the prosecutor denigrated defense counsel by stating that a defense challenge to the police investigation was a "red herring" injected by defense counsel. We disagree. The prosecutor was not attacking defense counsel personally, but was simply challenging the argument raised by defense counsel that the police were derelict in their duties and investigation, and suggesting to the jury that a challenge to the manner in which the police conduct

their investigation is a common method by which defense counsels detract jurors from the real issue. This was permissible argument under the facts of the case.

Lastly, defendant contends that the prosecutor made an improper civic duty argument and appealed to the sympathy and emotions of the jurors by stating that "[t]he people of the state and the people of this county . . ." ask that the jury return a guilty verdict on all charges. Generally, prosecutors are accorded great latitude regarding their arguments and conduct. *Bahoda, supra* at 282. However, a prosecutor may not appeal to the fears and prejudices of jurors, request that a jury sympathize with a victim, or invite the jury to place themselves in the position of the victim to reach their verdict. *People v Schmitz*, 231 Mich App 521, 533; 586 NW2d 766 (1998). Further, a prosecutor may not resort to civic duty arguments because to do so unnecessarily injects into the trial issues broader than and unrelated to the guilt or innocence of the accused. *Id.*

We are not persuaded that the prosecutor was appealing to the jury's sympathy or emotions when he remarked that the people of the state and the county wanted a guilty verdict. The people are, indeed, represented by the prosecutor during a criminal trial. In any event, the remark occurred at the end of a lengthy review of the evidence, the comment was isolated and the prosecutor's argument was otherwise proper. *Messenger, supra* at 179. Moreover, the jury was advised by the trial court that the attorneys' arguments are not evidence, *McElhaney, supra* at 284, and an objection and curative instruction could have eliminated any prejudicial effect. *Messenger, supra* at 180-181.

In sum, we find no merit to defendant's allegations of prosecutorial misconduct. The challenged remarks did not deny defendant a fair and impartial trial and we find no miscarriage of justice.

IV Sentencing

Defendant's final argument is that the trial court failed to articulate valid reasons for imposing sentence on defendant and that his concurrent sentences of 40 to 75 years for the second-degree murder conviction, 25 to 75 years for the conspiracy to commit armed robbery conviction, and 6 to 10 years for the assault with intent to do great bodily harm less than murder convictions violated the principle of proportionality. We disagree.

We review a trial court's imposition of sentence for an abuse of discretion. *People v Houston*, 448 Mich 312, 319; 532 NW2d 508 (1995). A trial court abuses its discretion when it violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). The principle of proportionality is violated when the sentence is not proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.*

Our review of the sentencing transcript reveals that the trial court properly considered the relevant sentencing factors and sufficiently articulated its reasons for sentencing defendant at the high end of the guidelines. Further, defendant's sentence is within the sentencing guidelines' recommended minimum sentence range, and is therefore presumptively proportionate. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Finally, given defendant's extensive criminal history both as a juvenile and as an adult, his previous unsuccessful attempts at rehabilitation, and the assaultive and

serious nature of the offenses committed, we conclude that defendant's sentences are proportionate to the circumstances surrounding the offense and the offender. *Milbourn, supra* at 635-636.

Affirmed.

/s/ Helene N. White
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter

[1] The conspiracy statute, MCL 750.157a; MSA 28.354(1), which simply prescribes the punishment for conspiring to commit the substantive offense, provides:

> Any person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy punishable as provided herein:
>
> [T]he person convicted under this section shall be punished by a penalty equal to that which could be imposed if he had been convicted of committing the crime he conspired to commit and in the discretion of the court an additional penalty of a fine of $10,000 may be imposed.

[2] MCL 750.529; MSA 28.797, the armed robbery statute, provides in pertinent part:

> Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years.

[3] MCR 6.420(C) provides:

> Before the jury is discharged, the court on its own initiative may, or on the motion of a party must, have each juror polled in open court as to whether the verdict announced is that juror's verdict. If polling discloses the jurors are not in agreement, the court may (1) discontinue the poll and order the jury to retire for further deliberations, or (2) either (a) with the defendant's consent, or (b) after determining that the jury is deadlocked or that some other manifest necessity exists, declare a mistrial and discharge the jury.

The staff comment to MCR 6.420 relates that subrule (C) is consistent with the jury polling procedure set forth in MCR 2.512, but is modified to address constitutional concerns applicable in criminal jury trials.