

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HENRY TYRONE CLIFTON,

Defendant-Appellant.

UNPUBLISHED
December 15, 2000

No. 210253
Genesee Circuit Court
LC No. 97-001050 FC

Before: Bandstra, C.J., and Gage and Wilder, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of two counts of armed robbery, MCL 750.529; MSA 28.797, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and carrying a concealed weapon inside a vehicle, MCL 750.227; MSA 28.424. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12; MSA 28.1084, to concurrent terms of twenty to forty years in prison for each of the armed robbery convictions, and 7½ to fifteen years in prison for the carrying a concealed weapon conviction, together with a consecutive two-year prison term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erred in instructing the jury to scrutinize the accomplice testimony of Anthony Dudley and Arcelles Garrett more closely than the testimony of other witnesses because the substance of their testimony was largely exculpatory. Because the record indicates that defense counsel explicitly approved the trial court's instructions, defendant has waived his right to appeal any alleged instructional error. *People v Carter*, ___ Mich ___; ___ NW2d ___ (Docket No. 113817, decided 6/27/00), slip op at 2, 13-15. "This waiver extinguishes any error and precludes defendant from raising the issue on appeal." *Id.* at 2.¹

¹ Even were we to assume that the asserted instructional error implicated defendant's fundamental right to present his defense and thus was not waivable without defendant's express consent, *id.* at 14, we find no plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). Because the accomplice testimony tended to exculpate defendant, the trial court plainly erred in reading the accomplice testimony instruction, which intends to protect a defendant's rights when the prosecutor calls an accomplice witness to implicate the defendant by directing the jury to more carefully scrutinize that testimony and consider the accomplice's motives for testifying. CJI2d 5.6. While the trial court instructed that the jury "should consider an accomplice's testimony more cautiously than [it] would that of an ordinary witness," we observe that during Dudley's and Garrett's examinations at trial the inconsistencies in their prior statements and trial testimony regarding the extent of defendant's involvement in the crime were adequately illustrated to the jury. Thus, it appears unlikely that the trial court's instruction increased the likelihood that the jury might more closely scrutinize any particular aspect of Dudley's or Garrett's testimony.

Moreover, the evidence against defendant was substantial. Dudley and Garrett both admitted at trial to agreeing to the robbery while they rode in the car that defendant was driving. Defendant admitted to driving Dudley and Garrett to the robbery site, after passing by other stores, and waiting in the car while Dudley and Garrett went

Defendant next argues that the prosecutor improperly implied he had special knowledge of the truth by eliciting testimony that Dudley and Garrett were allowed to plead guilty to lesser offenses in exchange for their truthful testimony at defendant's trial. Defendant also alleges that the prosecutor implied that Garrett's testimony at his second plea bargain, which testimony implicated defendant, was truthful, and that the testimony Garrett offered for his first, unsuccessful plea attempt was untruthful because it did not implicate defendant.

Issues of prosecutorial misconduct generally are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context to determine whether the defendant was denied a fair trial. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Because defendant failed to object at trial or request a curative instruction, however, appellate review of this issue is precluded unless a curative instruction could not have eliminated the prejudicial effect of the prosecutor's remarks or the failure to consider the issue would result in a miscarriage of justice. *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999).

During his direct examinations of Dudley and Garrett, the prosecutor established that each witness was charged for his participation in the armed robbery. The prosecutor then elicited that Dudley and Garrett each pleaded guilty to fewer or reduced charges in exchange for his provision of truthful testimony regarding the crime both at the entering of his plea and at defendant's trial. "[T]he simple reference to a plea agreement containing a promise of truthfulness is in *itself* [not] grounds for reversal." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995) (emphasis in original). Reversal may be warranted, however, when the prosecutor injects information regarding a plea agreement "to suggest that the government had some special knowledge, not known to the jury, that the witness was testifying truthfully." *Id.* Our review of the trial transcript reveals no improper insinuation by the prosecutor that he possessed greater knowledge than the jury regarding Dudley's or Garrett's credibility. Because (1) the prosecutor made no improper suggestion beyond Dudley's and Garrett's plea agreements to testify truthfully, and (2) the trial court instructed the jury that "[t]he lawyers' statements and arguments are not evidence," we conclude that the prosecutor's statements did not prejudice defendant. *People v Turner*, 213 Mich App 558, 585; 540 NW2d 728 (1995).

To the extent that defendant charges the prosecutor implied special knowledge concerning Garrett's credibility by establishing that he and the court rejected Garrett's first attempted plea bargain that did not implicate defendant, but accepted Garrett's subsequent plea bargain that did implicate defendant, we note that it was Garrett who volunteered the content of the rejected plea agreement and the asserted reason that the prosecutor rejected Garrett's first plea. The prosecutor established the bare facts that Garrett in September 1997 unsuccessfully sought to enter a plea, then in October 1997 successfully pleaded guilty and agreed to testify truthfully. The prosecutor apparently attempted to bring out for the jurors the fact that Garrett testified at trial pursuant to a promise of leniency in exchange for his truthful trial testimony, as well as to head off defense counsel's attempt to discredit the witness through initial disclosure of the plea bargain on cross examination. *People v Dowdy*, 211 Mich App 562, 570-572; 536 NW2d 794 (1995). When the prosecutor inquired whether Garrett gave an oath to tell the truth at the October 1997 plea proceeding, Garrett denied recalling that he swore any oath, then acknowledged that he committed perjury at the October 1997 plea proceedings, explaining that he had lied because "[w]hen I told the truth, they took my cop back, so figure if I lie about it, then they'd keep it." After the prosecutor confronted Garrett with some testimony from the October 1997 plea proceedings that incriminated defendant, Garrett admitted to so testifying against defendant, but explained that "I understood that if I didn't say that, then I wouldn't get no cop like I did the first time. When I was asked to tell the truth the first time, I did." During cross examination of Garrett, defense counsel utilized Garrett's testimony concerning the prosecutor's rejection of the first attempted plea agreement that did not implicate defendant to suggest that the prosecutor coerced Garrett into untruthfully implicating defendant to obtain the plea bargain. Because (1) the prosecutor did not elicit testimony beyond commenting that the first plea was not

inside the store. Evidence showed that Dudley and Garrett wore bandannas and a ski mask during the robbery and utilized a gun. Defendant admitted that after Dudley and Garrett exited the store and returned to the car he drove Garrett to his girlfriend's house and waited while Garrett went to the back of the house, then returned to the car. The police later recovered the bandannas, gun and ski mask from behind that house. In light of the evidence against defendant, we cannot conclude that he was "actually innocent or [that] the error seriously affected the fairness, integrity, or public reputation of [the] judicial proceedings." *Carines, supra* at 774.

accepted and (2) defendant utilized testimony concerning the substance of the rejected plea agreement in aid of his defense, we find no manifest injustice arising from the prosecutor's conduct. *Avant, supra*.

Defendant next claims that the prosecutor engaged in misconduct by using defendant's prior convictions and familiarity with the criminal justice system as character evidence to show conduct in conformity therewith. Because defendant did not preserve this issue for appellate review, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *Avant, supra* at 512.

A witness' credibility may be impeached with evidence of prior convictions, MCL 600.2159; MSA 27A.2159, if the convictions satisfy the criteria set forth in MRE 609. *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). Convictions for offenses containing an element of theft, including breaking and entering and unlawfully driving away a vehicle, that are punishable by more than one year in prison represent proper impeachment evidence on the condition that the evidence's probative value outweighs its prejudicial effect. MRE 609(a)(2), 609(b); *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992); *People v Dixon*, 175 Mich App 472, 477; 438 NW2d 303 (1989). Defendant does not challenge the trial court's ruling admitting evidence of defendant's prior convictions. We find that the prosecutor properly offered evidence of defendant's prior convictions to attack the credibility of defendant's denial that he was aware of the robbery either before or after it occurred, even though he drove his accomplices both to and from the scene of the crime. Because the prosecutor offered the evidence in the context of impeaching defendant's testimony, we find no prosecutorial misconduct.

Lastly, defendant argues that insufficient evidence supported his felony-firearm and carrying a concealed weapon in a motor vehicle convictions. When reviewing a sufficiency of the evidence claim in a criminal case, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *Avant, supra* at 505. Circumstantial evidence and the reasonable inferences arising therefrom may be sufficient to prove the elements of the crime. *Nelson, supra* at 459.

The prosecutor presented evidence indicating that while defendant was in the car he had the gun that was used in the robbery. The prosecutor offered Garrett's testimony, from his October 1997 plea agreement, that defendant provided the gun utilized during the robbery. See MRE 801(d)(1)(A). The jury apparently believed this testimony, and we will not second guess the jury's credibility determination. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Furthermore, Dudley testified at trial that while in the car Garrett gave him the gun by passing it to him in the back seat. Dudley also stated that he had known Garrett for sixteen years, but never before saw Garrett have that gun. From this testimony, the jury reasonably could have inferred that defendant gave the gun to Garrett, who then passed the gun to Dudley. *Nelson, supra*. Moreover, defendant does not challenge the sufficiency of the evidence supporting his armed robbery conviction, and uncontraverted evidence established that a gun was utilized during the robbery. Because the available evidence reasonably permitted the jury to infer beyond reasonable doubt that the gun was close enough to defendant while inside the car to find defendant guilty of carrying a concealed weapon and felony-firearm, MCL 750.227, 750.227b; MSA 28.424, 28.424(2), we conclude that sufficient evidence supported defendant's convictions.

Affirmed.

/s/ Richard A. Bandstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder