STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 26, 2000
v	No. 220079 Muskegon Circuit Court
TAWON PIGGEE, Defendant-Appellant.	LC No. 98-042817-FC

Before: Talbot, P.J., and Hood and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a),[1] and possession of a firearm during the commission of a felony, 750.227b; MSA 28.424(2). He was sentenced to life without parole for the murder conviction and to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in submitting the murder charges to the jury on the theory that he aided and abetted Renardo May in the offense. Defendant contends that the aiding and abetting instruction should not have been given because the evidence was insufficient to establish that May fired a weapon, let alone the fatal shot. We disagree. This Court reviews claims of instructional error based on insufficiency of the evidence de novo. *People v Bartlett*, 231 Mich App 139, 157; 585 NW2d 341 (1998).

Instructions on the defendant's guilt both as a principal and as an aider and abetter are proper where the prosecution presents sufficient evidence to support both theories. See *People v Smielewski*, 235 Mich App 196, 206-209; 596 NW2d 636 (1999) (holding that a jury need not reach unanimity with regard to whether the defendant was a principal or an aider and abettor as long as the prosecution presents sufficient evidence to support both theories); see also *People v Benevides*, 71 Mich App 168, 172; 247 NW2d 341 (1982). One who procures, counsels, aids, or abets in the commission of an offense may be convicted and punished as if he committed the offense directly. MCL 767.39; MSA 28.979; *People v Turner*, 213 Mich App 558, 568; 540

[1] Defendant was charged with open murder, MCL 750.316; MSA 28.548.

NW2d 728 (1995). An aiding and abetting instruction is proper where there is sufficient evidence that "(1) more than one person committed the crime, and (2) defendant's role in the incident amounts to something less than the direct commission of the offense." *People v Brown*, 120 Mich App 765, 770; 328 NW2d 380 (1982); see also *Bartlett*, *supra* at 157-158; *People v Head*, 211 Mich App 205, 211; 535 NW2d 563 (1995).

In addition to the ample evidence establishing defendant's role as the principal in the offense, there was also sufficient evidence from which a rational jury could have alternatively concluded that defendant aided May in committing the offense. *Smielewski*, *supra* at 207; *Bartlett*, *supra* at 158. The prosecution presented the following evidence regarding May's initial involvement in the offense: on the night in question both defendant and May came to Jason Walton's aid during a severe beating by a member of the Mason Street group; Walton later picked up defendant and May on a street corner; both defendant and May had guns; upon entering the car, defendant and May reminded Walton that he "got his ass beat" earlier that night; as they drove toward Mason Street defendant and May sang an inflammatory song; when they reached Mason Street, defendant and May identified the person who had fought with Walton earlier that night; and after Walton drove into an alley, May put down the window and May and defendant stuck their guns out the window.

There was also evidence from which the jury could reasonably conclude that May shot his weapon and was successful in killing the victim. Although Walton testified that it was defendant who fired his gun, that May's gun would not fire, and that he heard May say "Damn, its locked . . . it won't shoot," he admitted that he was in the front seat and only saw part of the shooting. Further, a detective testified that defendant told her he fired two to three shots, and defendant testified that he fired three or four shots from the car. All but two of sixteen witnesses, however, testified that they could have heard a total of more than four shots. While several of those witnesses stated that the shots they heard sounded the same, one witness who was standing on the street at the time of the shooting testified that she was certain she heard two different types of shots coming from the car. Moreover, five bullet cores from at least three different weapons and numerous unidentified bullet holes were found in the abandoned house near where the victim was standing. While much of the evidence hinged upon the credibility of the witnesses, issues concerning credibility and the weight to be given the witnesses' testimony are appropriately left to the trier of fact. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201; 489 NW2d 748 (1992); *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). We conclude that the prosecution presented sufficient evidence from which a reasonable jury could find that more than one person was involved in the shooting, and that May and not defendant may have fired the fatal shot. *Brown*, *supra* at 770; see also *Bartlett*, *supra* at 157-158. Consequently, the trial court did not err in giving the aiding and abetting instruction.[2]

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[2] In a related argument, defendant contends that a general verdict of guilt must be set aside where, as here, the case was submitted to the jury on two different theories and one of those theories was not supported by the evidence. Because there was sufficient evidence to support defendant's guilt as either a principal (which defendant does not contest) or as an aider and abetter, defendant's argument lacks merit. See *Smielewski*, *supra* at 206-209.

Defendant next argues that two of the trial court's instructions require reversal. Because defendant did not object to either instruction and expressed his satisfaction with the instructions given, our review is limited to determining whether he has demonstrated a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000).

First, defendant argues that the trial court erred in reading to the jury the sentence from CJI2d 16.21, which provides "[y]ou may infer that the Defendant intended to kill if he used a dangerous weapon in a way that was likely to cause death." Defendant contends that the instruction erroneously allowed the jury to find intent for first-degree murder based solely on facts that establish intent for second-degree murder, thereby confusing the elements of the two offenses. We disagree.

This Court reviews jury instructions as a whole to determine if the trial court made an error requiring reversal. *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000). The instructions must not be extracted piecemeal to establish error, *id.*, and the general tenor of the instructions in their entirety must be balanced against the potential misleading effect of a single isolated sentence. *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989). Instructions must cover each element of the offense charged and must not omit material issues, defenses, and theories if there is evidence to support them. *Bartlett, supra* at 143. Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

Assuming without deciding that the isolated sentence which defendant extracts from the instruction was erroneous or misleading, the instructions as a whole fairly presented the issues to be tried, correctly stated the law, and sufficiently protected defendant's rights. Before the court gave the contested instruction, it properly instructed the jury that first-degree premeditated murder required an "inten[t] to kill," "that this intent to kill was premeditated," and that the "killing was deliberate." *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 460 (1998) (elements of first-degree premeditated murder). The court then instructed on the requisite states of mind for second-degree murder, and provided an additional instruction that distinguished the elements of first-and second-degree murder, which again indicated that first-degree murder required the additional elements of premeditation and deliberation. The court also instructed the jury that it "must think about all the evidence in deciding what the defendant's state of mind was at the time of the alleged killing," and that first-degree murder required the specific intent to kill. Given these instructions, the jury was clearly informed that even if it found that defendant used a weapon in a way likely to cause death it could not convict him of first-degree murder unless the evidence established that he acted with premeditation and deliberation. Accordingly, defendant has failed to demonstrate a plain error that affected his substantial rights.

For the same reasons, defendant has not established that his trial counsel's failure to object to the contested sentence was objectively unreasonable or prejudicial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); see also *People v Pollick*, 448 Mich 376, 388, n 16; 531 NW2d 159 (1995) (the failure to object did not represent ineffective assistance of

counsel because the disputed instruction would not provide a basis for reversal even if there had been an objection).

Defendant also argues that the trial court's instruction regarding the proper order of deliberation was erroneous because it did not comport with the holding of *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982). Defendant contends that the instruction improperly conveyed to the jury the impression that it had to unanimously agree to acquit defendant of the principal offense before deliberation could take place on the lesser offenses. We disagree.

Again, even assuming that the omission of the phrase "or if you cannot agree about that crime" was erroneous because it did not conform with the instructional language set forth in *Handley*, defendant has failed to a demonstrate plain error that affected his substantial rights. During closing argument, defense counsel properly explained the instruction to the jury, specifically noting that they may proceed to the lesser offenses if they were unable to agree with respect to the principal charge. Further, when viewed as a whole, we are not convinced that the instruction improperly conveyed the impression that there *must* be a unanimous acquittal on the principal charge before consideration of the lesser offenses as in the pre-*Handley* cases that found reversible error. Compare *People v West*, 408 Mich 332, 341-342; 291 NW2d 48 (1980), *People v Hurst*, 396 Mich 1, 10; 238 NW2d 6 (1976), and *People v Harmon*, 54 Mich App 393, 394-397; 221 NW2d 176 (1976) with *People v James*, 51 Mich App 777, 786; 216 NW2d 473 (1974) (instruction was not erroneous because there was no "requirement of unanimous agreement on defendant's innocence of the greater charge before discussion of the lesser charge was permitted"). Before giving the contested instruction, the court told the jury that defendant "is charged with two counts; that is, open murder and felony-firearm," that count one included "first-degree murder, second-degree murder, involuntary manslaughter, assault with intent to do great bodily harm less than murder, or assault with a dangerous weapon," and that "as to Count One, you may find the defendant guilty, not guilty, *or guilty of a less serious crime*." *People v Allen*, 90 Mich App 128, 141-142; 282 NW2d 255 (1979) (when read in the context of the entire charge, the order of deliberation instruction was not erroneous).

Further, and contrary to defendant's contention, the instruction was not prejudicial on the basis that it "could have" resulted in a compromise verdict. See *People v Graves*, 458 Mich 476, 479; 581 NW2d 229 (1988) (rejecting the "harsh and unrealistic position that actual prejudice may be presumed by the mere possibility of a compromise verdict"). Moreover, there is no basis on this record to assume that the jury's verdict was a product of compromise: (1) the jury was instructed that "if you all agree that the defendant is guilty of [first-degree murder], you may stop your discussions and return your verdict"; (2) there is a presumption that the jury followed the lengthy instructions that it not compromise, *Graves*, *supra* at 486; (3) the jury did not render an inconsistent verdict; and (4) when defense counsel polled the jury they all agreed on their verdict. See *People v Ramsey*, 422 Mich 500, 516; 375 NW2d 297 (1985) ("[p]arties who are concerned that the jury has compromised are free to poll the jury pursuant to MCR 2.512(B)(2)"). For the foregoing reasons, defendant has failed to demonstrate a plain error that affected his substantial rights.

Defendant next argues that the prosecutor's conduct throughout the trial denied him a fair trial. The three alleged instances of misconduct are not preserved because defendant either failed

to object at trial or did not object at trial on the same grounds asserted on appeal. *Avant, supra* at 512. Consequently, our review is limited to determining whether defendant has demonstrated a plain error that affected his substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *Carines, supra* at 763-764. Prosecutorial misconduct issues are decided case by case and the reviewing court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *Id.*

Defendant first contends that the prosecutor did not merely elicit testimony that accomplice Walton's plea agreement contained a promise to testify truthfully, but impermissibly used the circumstances of his plea proceedings to suggest that he had special knowledge that Walton was telling the truth.[3] We disagree.

The prosecutor has a duty to disclose promises made to obtain an accomplice's testimony. *People v Rosales*, 160 Mich App 304, 310; 408 NW2d 140 (1987). While it is generally improper for the prosecutor to "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness," *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), the simple reference to a plea agreement containing a promise of truthfulness is in itself not, without more, grounds for reversal. *Id.*; *Rosales, supra* at 310-311. Such an agreement "should be admitted with great caution" and constitutes error if it is "used by the prosecution to suggest that the government has some special knowledge, not known to the jury, that the witness was testifying truthfully." *Bahoda, supra* at 276; *People v Enos*, 168 Mich App 490, 492; 425 NW2d 104 (1998); *Rosales, supra* at 310-311.

In this case, the brief and vague questioning on direct-examination regarding the fact that Walton spoke with his attorney and the prosecutor when he did not fully implicate defendant during his plea did not impermissibly bolster Walton's testimony. Rather, a contextual review of the record indicates that the questions were merely an attempt by the prosecutor (1) to show that when Walton began to provide the basis for his plea, the proceedings were stopped because he was not testifying in a manner consistent with the statements he gave to the police, and (2) to preempt defense counsel's subsequent attempt to vigorously impeach Walton on grounds that he had previously lied under oath. The record also reveals that it was defense counsel who actually elicited the actual content of the conversation for the first time on cross-examination, that the prosecutor did not mention the promise to testify truthfully or the contested conversation during his closing argument, and that defense counsel used the circumstances of the plea proceeding and conversation during his closing argument to vigorously attack Walton's credibility. A defendant is not permitted to assign error on appeal to something his own counsel deemed proper at trial because to do so would allow a defendant to harbor error as an appellate parachute. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998); see also *Schutte, supra* at 720 (comments must be evaluated in light of defense arguments).

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[3] Defendant specifically refers to testimony elicited by the prosecutor on direct-examination that when Walton did not fully implicate defendant during his plea, the proceeding was stopped to allow Walton to speak with his attorney and the prosecutor.

Finally, any prejudice resulting from defendant's comments was dispelled by the trial court's lengthy instruction that testimony of an accomplice should be viewed with skepticism. That instruction included statements that the jury should consider whether the accomplice testified falsely in order to place guilt upon defendant and whether the accomplice was offered an award or promised anything that might lead him to give false testimony. *People v Buschard*, 109 Mich App 306, 318; 311 NW2d 759 (1981), vacated 417 Mich 999, reaff'd 129 Mich App 160; 341 NW2d 260 (1983); see also *Schutte, supra* at 721 (no error requiring reversal will be found if the prejudicial effect of the prosecutor's conduct could have been cured by a timely objection and instruction). Defendant has therefore failed to demonstrate outcome-determinative plain error.

Defendant next contends that the prosecutor repeatedly elicited testimony that accomplice Walton was accompanied by two ministers when he gave his subsequent statements (in which he implicated defendant) for the impermissible purpose of enhancing the credibility of those statements by reference to religion. Again, we disagree.

A witness may not be questioned with regard to the subject of religious beliefs or opinions for the purpose of bolstering or disparaging the witness's credibility. MCL 600.1436; MSA 27A.1436 ("[n]o witness may be questioned in relation to his opinions on religion before or after he is sworn"); MRE 610 ("[e]vidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced"); see also *People v Vasher*, 449 Mich 494, 500; 537 NW2d 168 (1995); *People v Hall*, 391 Mich 175, 179-182; 215 NW2d 166 (1974); *People v Sommerville*, 100 Mich App 470, 485-486; 299 NW2d 387 (1980), nullified in part on other grounds, 432 Mich 931 (1989). The rule that a witness may not be questioned concerning his opinions on religion does not prohibit questions concerning religion where the questions are part of a relevant inquiry about the witness' activities at the time of the crime. *People v Calloway (On Remand)*, 180 Mich App 295, 298; 446 NW2d 870 (1989).

In this case, the prosecutor elicited the fact that Walton was accompanied to the police station by his parents and two ministers at the time he gave his second statement from Walton himself and two police officers. The questions were not designed to and did not elicit responses that revealed Walton's opinions or beliefs regarding the subject of religion. Compare *People v Bouchee*, 400 Mich 253, 261-265; 253 NW2d 626 (1977); *Hall*, *supra* at 180-182; *People v Blair*, 82 Mich App 719, 720; 267 NW2d 164 (1978); *People v Wells*, 82 Mich App 543, 545-546; 267 NW2d 448 (1978). Nor were the contested questions preceded or followed by express questioning which suggested that defendant knew what it was to tell the truth or that he was apt to be more truthful because he was accompanied by ministers. Compare *Wells*, *supra* at 546; *Hall*, *supra* at 180-181. Rather, a fair reading of the witnesses' testimony indicates that the questions were part of the relevant inquiry regarding the circumstances surrounding the additional statements Walton gave to the police after the homicide. *Calloway*, *supra* at 298-299. Because the prosecutor did not question the witnesses with regard to the subject of Walton's religious beliefs or opinion in the first place, defendant's improper bolstering argument lacks merit.

Defendant next argues that the prosecutor improperly introduced the detectives' own editorialized versions of defendant's statement in an effort to convict him, contrary to *People v*

McGillen #1, 392 Mich 251; 220 NW2d 677 (1974). We disagree. The fact that a defendant's statement is not substantiated by a contemporaneous record does not render it inadmissible; a police officer's edited version of the defendant's statement goes to the question of the officer's credibility, not its admissibility. See *People v Eccles*, 141 Mich App 523, 524-525; 367 NW2d 355 (1984), distinguishing *McGillen #1*, *supra*. Defendant has therefore failed to demonstrate plain error and his prosecutorial misconduct argument is without merit. For the same reasons, defendant has not established that his trial court's failure to object to the statements was objectively unreasonable or prejudicial. *Pickens*, *supra* at 302-303.

Lastly, defendant asserts that he was denied his right to a fair trial by the cumulative effect of the alleged errors. In view of our resolution of the preceding issues, this claim is without merit. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998); *People v Duff*, 165 Mich App 530, 539; 419 NW2d 600 (1987).

Affirmed.

/s/ Michael J. Talbot
/s/ Harold Hood
/s/ Michael R. Smolenski