STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 19, 2002
v	No. 224957 Wayne Circuit Court
DAVID JAMES EDDLEMAN, Defendant-Appellant.	Criminal Division LC No. 97-000801

Before: Owens, P.J., and Holbrook, Jr., and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. Defendant was sentenced to thirty to sixty years' imprisonment for the murder conviction and a consecutive two-year term for the felony firearm conviction. We affirm.

Defendant's convictions stem from the shooting death of 16 year-old Joane Georgescu. Georgescu was killed when a bullet fired at the car, in which she was riding, struck her in the heart. The bullet entered through the trunk and passed through the back seat before striking Georgescu. The shooting was allegedly ordered by the leader of a street gang to which defendant belonged.

Defendant first argues that the trial court erroneously allocated the burden of proof at the hearing on his motion to suppress his police confession. We review this issue de novo on the entire record. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). Defendant argued below that the police fabricated the confession and then coerced him to sign it. Where

> a defendant claims that he involuntarily signed a statement and that the statement was fabricated by police, the trial court must hold a *Walker*[1] hearing prior to introduction of the statement at trial. At the hearing the trial court must determine, assuming the defendant made the statement, whether he did so voluntarily. If it is found that the defendant voluntarily made the statement, the

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

> defendant is free to argue to the jury that the police fabricated it. However, if the trial court at the hearing finds the statement was involuntarily made, the statement is inadmissible, regardless of the defendant's claim that he actually never made it. [*People v Neal*, 182 Mich App 368, 372; 451 NW2d 639 (1990).]

As defendant correctly observes, the prosecution must prove by a preponderance of the evidence that there was a valid waiver of the right against self-incrimination. *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992). We agree with defendant that the trial court erred because it refused to suppress the statement, despite concluding that defendant and the interrogating officer were equally credible in their diametrically opposing versions of what happened with regard to the voluntariness issue. The necessary implication of the trial court's conclusion is that the prosecutor had not sustained its burden of proving a voluntary confession by a preponderance of the evidence.

Nonetheless, we conclude that reversal is not warranted because the error was harmless. *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994). The testimony of several witnesses clearly implicated defendant in the crime. Brian Babbitt, also a member of defendant's street gang, was in a car traveling behind the car defendant was riding in on the night of the shooting. Babbitt testified that he witnessed shots coming from the passenger side of defendant's car, where defendant was seated. Two other gang members, Brian Weaver and Thomas Valastek, testified that they heard defendant admit to being the shooter. Defendant also told a fellow inmate that he had shot and killed Georgescu. Given the weight of this evidence, we conclude that the erroneous admission of the confession was harmless beyond a reasonable doubt. *Id.*

Next, defendant argues that reversal is required because the trial court erred in failing to fully instruct the jury on the various concepts of accessory culpability when responding to a jury question. We disagree.

An accessory after the fact is someone "'who, with knowledge of the other's guilt, renders assistance to a felon in the effort to hinder his detection, arrest, trial or punishment.'" *People v Lucas*, 402 Mich 302, 304; 262 NW2d 662 (1978), quoting Perkins, Criminal Law (2d ed.), p 667. In this case, there was absolutely no evidence that defendant played such a role. Therefore, the trial court did not err in failing to instruct the jury on accessory after the fact.

Further, there is no longer any distinction between an accessory before the fact, and an aider and abettor. *People v Smielewski*, 235 Mich App 196, 202-203; 596 NW2d 636 (1999). An aiding and abetting instruction is appropriate when there is evidence that more than one person was involved in committing the crime, and that the defendant's role may have been less than direct participation. *People v Bartlett*, 231 Mich App 139, 157; 585 NW2d 341 (1998). Here, however, there was no evidence that defendant's role in the crime was anything less than direct participation. Therefore, the trial court did not err in refusing to instruct on aiding and abetting.

Defendant next argues that the trial court erred in finding that the prosecution exercised due diligence in assisting the defense in attempting to locate two res gestae witnesses, and further erred in refusing to give a missing witness instruction. We disagree. The prosecutor's former

duty to exercise due diligence in producing res gestae witnesses "has been replaced with an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request." *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). We are satisfied from our review of the record that the trial court did not err in finding that the prosecution provided reasonable assistance in attempting to locate the two missing witnesses. *People v Long*, 246 Mich App 582, 586; 633 NW2d 843 (2001). Thus, the trial court properly concluded that defendant was not entitled to a missing witness instruction.

Defendant next argues that the trial court erred when, in responding to a jury question concerning the felony-firearm charge, it essentially instructed the jury on the uncharged crime of carrying a concealed weapon in a vehicle. We agree with defendant that the trial court erred when it responded to the jury's question by reading a hornbook passage that essentially paralleled the instruction for the offense of carrying a weapon in a vehicle,[2] CJI2d 11.1(4)-(6), which was not charged in this case. However, we find this error to be harmless. See *People v Duncan*, 462 Mich 47, 54; 610 NW2d 551 (2000) (observing that "an instructional error regarding one element of a crime, whether by misdirection or omission, is subject to a harmless error analysis").

The trial court initially correctly instructed the jury on the elements of felony-firearm, using as its paradigm the standard instruction found at CJI2d 11.34. When the jury asked to be re-instructed on the charge during the second day of deliberations, the court re-read the correct instruction it originally gave. Later, the jury sent out a note asking whether a person can be guilty of felony-firearm if that person was only in the car at the time of the shooting. It was in response to this question that the court read the following hornbook passage:

> To support a conviction for carrying a weapon in an automobile, the prosecution must show (1) the presence of a weapon in a vehicle operated or occupied by the defendant, (2) that the defendant knew or was aware of its presence, and (3) that he or she was "carrying" it. [3 Gillespie, Michigan Criminal Law & Procedure (2001 Revision), § 80:21, p 645.][3]

Pursuant to CJI2d 11.34, the jury was instructed that in order to convict defendant of felony-firearm, the prosecution must prove that defendant knowingly carried or possessed a firearm at the time of the murder. The second and third elements in the hornbook passage essentially mirror this element of felony-firearm. Further, in the context of a felony-firearm charge, the first element in the hornbook passage can be reasonably read as correctly pointing out that possession of the firearm can be actual or constructive. See *People v Hill*, 433 Mich 464, 469-471; 446 NW2d 140 (1989). While not perfect, we conclude that taken as a whole the instructions fairly presented the issue to be tried and sufficiently protected defendant's rights. *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000). Additionally, given the weight of the evidence adduced at trial, we conclude that failure to reverse defendant's felony-firearm conviction would not be "inconsistent with substantial justice." MCR 2.613(A).

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[2] MCL 750.227(2).

[3] The format of this quote is taken from the Gillespie text and not from the trial transcript. The language, however, is identical.

Lastly, in a supplemental pro se brief, defendant argues that the prosecutor's comments during rebuttal closing argument erroneously shifted the burden of proof and improperly impinged on his right not to testify, thus depriving him of a fair trial. We disagree. Claims of prosecutorial misconduct are reviewed on a case-by-case basis, and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

The first challenged remarks concern defendant's ex-girlfriend. It is clear from the record that the prosecutor's remarks were made in response to allegations raised during defendant's closing argument. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Defense counsel posed a series of rhetorical questions concerning the taking of the woman's statement. The clear implication of these questions was that the police were not really interested in uncovering the truth, and that they had therefore created a situation in which defendant's ex-girlfriend was pressured to overstate the extent to which defendant allegedly made self-incriminating statements to her. The prosecutor responded that defendant was the person running from the truth. The prosecutor suggested that the better question for the jury to consider was why defendant and his brother had tried to get defendant's ex-girlfriend to lie about the police threatening to take her children away. We conclude that the prosecutor's remarks were not improper because they were made to rebut charges raised by defendant. *Id.*

Defendant also argues that he was denied a fair trial when the prosecution stated that while defendant "has no burden of proof" and no duty "to bring in any witnesses," common sense dictates that a reasonable person would have produced the two alleged res gestae witnesses, who were characterized as being "very close" to defendant, if they could "blow" the prosecution's case "out of the water." These remarks were made in response to defense counsel's questioning why the two witnesses had not been produced. "Otherwise improper prosecutorial remarks generally do not require reversal if they are responsive to issues raised by defense counsel." *Id.* Given the context and the fact that the trial court sustained defendant's objection to these remarks, we conclude that the defendant was not denied a fair and impartial trial by these remarks. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Affirmed.

/s/ Donald S. Owens
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage