

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MICHAEL WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

June 7, 2002

No. 225992

Wayne Circuit Court

LC No. 99-004033

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions for two counts of assault with intent to murder, MCL 750.83, one count of felonious assault, MCL 750.82, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to ten years and six months to twenty years' imprisonment for each of the assault with intent to murder convictions, one to four years' imprisonment for the felonious assault conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant's convictions arise from a shooting incident during the late evening of April 5, 1999 and the early morning of April 6, 1999. Around midnight on April 5, Officers Issacson, Green and Dickson, three plain-clothes Detroit Police officers identified as such by badges displayed from chains around their necks, were dispatched to the area near Algonquin, Kercheval and Essex on a report of shots fired. The three officers drove to the area, observed four to five black males standing on the southeast corner of Algonquin and Essex, and approached to investigate when one of the officers observed one of the individuals, later identified as Jerrod Allen, attempt to hide a rifle he was holding in his left hand behind his legs. The officers directed the men to get down on the ground, and Allen raised the rifle and pointed it at one of the officers. Shortly thereafter, both Allen and defendant shot at one of the officers. Allen dropped the rifle and fled from the scene, but defendant continued to fire a number of shots at the officers and the officers returned fire. Eventually, the other individuals including defendant and Larjuan Pannell also fled from the scene.

Dispatch was asked to check area hospitals for gunshot victims, since one of the officers believed he might have shot someone. Dispatch notified the officers that a gunshot victim was then being treated at Henry Ford Hospital. After arriving at the hospital and being escorted by hospital security to the victim, two of the officers immediately recognized the gunshot victim as

defendant. Defendant was then placed under arrest. During the investigation of this crime, Homicide Investigator Adams interviewed Pannell. Pannell told Adams that defendant had a .38 caliber revolver in his waistband, and that he had pulled out the revolver, pointed it at the police, and started shooting.

Defendant first claims on appeal that the trial court erred by instructing the jury that during deliberations they could consider the evidence as to defendant under an aiding and abetting theory, in addition to the principal charges against him. We disagree. This Court reviews jury instructions in their entirety to determine whether there is error requiring reversal. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996). The instructions must include all elements of the charged offense; however, material issues, defenses and theories that are supported by the evidence must not be excluded. *Id.* Even if the instructions are found to be somewhat imperfect, no error will be found if they fairly presented the issues to be tried and the defendant's rights have been sufficiently protected. *Id.*

We find no error in the jury instructions. Defendant and Allen were each charged with the same crimes, and their cases were tried before the same jury. There was evidence that Allen fired at the officers first, and that defendant subsequently fired, supporting the theory that defendant's actions were intended to aid and abet Allen. More importantly, however, Allen was acquitted on all charges whereas defendant was convicted of multiple felonies. Since it is apparent that the jury found defendant acted as a principal and not as an aider and abettor to Allen, any error arising out of the instructions was harmless.

Defendant also claims that the trial court did not properly instruct the jury on the intent the prosecution was required to prove in order to establish that defendant had aided and abetted a specific intent crime. This issue was not preserved for appellate review; therefore, we only review this issue to determine whether an error occurred that affected the outcome of the trial. *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999). While the jury instructions were erroneous, we find no plain error because, as noted above, it is apparent from Allen's acquittal on all charges that defendant was convicted as a principal and not as an aider and abettor.

Defendant's next claims that the prosecutor committed misconduct by improperly vouching for the credibility of a witness. During the trial, Adams testified that when he interviewed Pannell, Pannell told him that defendant pulled a .38 caliber revolver from his waist and began shooting at the police. When Pannell initially testified, he claimed that the only reason he told Adams he saw defendant with a gun was because Adams had threatened him. However, Pannell later admitted that he had lied to the jury about whether he had seen defendant with a gun on the night in question, although he continued to assert that he never saw defendant fire the weapon.

During closing argument, the prosecutor asserted that Adams was more believable than Pannell on this issue, and defendant objected. Defendant now claims that this argument by the prosecutor constituted an improper vouching for Adams credibility. We disagree. First, it is apparent from a review of the record that when defendant objected to the prosecution's closing argument about Adams credibility, the objection asserted that the prosecution was improperly treating Pannell's admission that he had lied about whether defendant had a gun as substantive evidence rather than impeachment evidence. Defendant did not challenge the prosecutor's

comments as an improper vouching for the witness. Thus, the issue has not been preserved, and we review this issue only for plain error. *Carines, supra* at 766-767.

Defendant is unable to establish a plain error that affected his substantial rights. *Carines, supra* at 761-764. A prosecutor may comment on a witness' credibility, and is free to argue from the evidence and inferences presented at trial. *People v Stacy*, 193 Mich App 19, 37; 484 NW2d 675 (1992). In this case, it is clear that the prosecutor's closing argument was based on the evidence presented at trial and permissible inferences, and there was no error affecting the outcome of the trial.

Defendant's final claim on appeal is that the trial court improperly instructed the jury on the elements of felony-firearm. We disagree. This issue is not preserved so our review is for plain error. *Carines, supra* at 766-767. Specifically, defendant argues that the felony-firearm jury instruction was incomplete because the trial judge did not fully define the term firearm. Specifically, defendant wanted the jury to be instructed that "[a] firearm does not include smooth bore rifles or handguns designed and manufactured exclusively for shooting BBs not exceeding .177 caliber by means of spring, gas, or air." See CJI2d 11.34(9).

Defendant has failed to demonstrate a plain error affecting his substantial rights. In order to obtain a jury instruction on a particular element, issue, defense, or theory, the instruction must be supported by the evidence presented at trial. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). In this case, several witnesses described the item in defendant's possession as a .38 caliber revolver. There was no evidence that the item would have fit under the requested definition. Additionally, the defense was based on defendant's intent, and not on the identification of the item in defendant's hand.

Affirmed.

/s/ Michael J. Talbot
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder