STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2002
V ANOUPHONE HOY SABANDITH, Defendant-Appellant.	No. 226567 Ottawa Circuit Court LC No. 99-023425-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
V DARA KET, Defendant-Appellant.	No. 226568 Ottawa Circuit Court LC No. 99-023429-FC

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

PER CURIAM.

Defendants Anouphone Hoy Sabandith and Dara Ket appeal as of right from their convictions of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b, entered following a joint jury trial. We affirm.

I. Facts and Proceedings

Defendants' convictions arise out of an incident that occurred very early in the morning of July 21, 1999, at the Traditions apartment complex in Holland Township. Camerino Hiracheta and his friend Pricilla Rodriguez were talking under a carport at the complex around 12:30 a.m. when they began hearing gunshots. Rodriguez felt a breeze as something passed her ear, and she started to run. Hiracheta also started to run, but when he started running, his foot gave out. He also felt a hot and cold breeze go through his left foot and right thigh. He shouted, "I am hit. I got shot." He managed, though, to make his way with Rodriguez to a friend's apartment. Just as he and his friends were leaving for the hospital, the police arrived and called

an ambulance. Prior to the shooting, Hiracheta saw three people standing in the darkness, but did not know who they were.

Deputy Ryan Huizenga of the Ottawa County Sheriff's Department, who was responding to a call at another apartment complex at the time of the incident, heard a rapid succession of gunfire and saw the light from the muzzle flashes as the shots were fired. He got back into his car and immediately went to the scene. As he got closer to the scene, two Asian males ran in front of his vehicle. He then found Hiracheta being helped to a car by his friends. Once he confirmed that there was a victim from the shooting, he called for an ambulance.

Michael Jones was outside one of the apartments at the Traditions complex when he heard shots fired from the area by the dumpsters. He saw a glow from a gun barrel and then saw two males run across the road and through the playground area. Timothy Palomo was also outside of an apartment at the complex when he heard shots being fired and saw flashes by the dumpster. He started running, but stopped to look at a male he saw running in the corner of the parking lot. He believed that person was defendant Ket, whom he knew from a break-dancing class. Nicole Granlund was outside of her apartment not long before the shooting. She saw two people talking under a carport and saw two Asian males "wandering around" by the dumpster, pacing back and forth, peeking around the dumpsters and through the fence at the people talking under the carport.

Police officers recovered six 9 mm brass shell casings by the dumpster near the carport where Hiracheta and Rodriguez were standing. They also found three entry bullet holes in the right front fender above the wheel of a 1988 Oldsmobile that was parked in the carport parking space next to the one where Hiracheta and Rodriguez had been standing. They removed a slug from the vehicle and found two slugs under the car. Additionally, police officers found two slugs in the bedroom of one of the apartments at the complex. The slugs had entered the outside of the building close to eye level.

Peter Manikham, who testified at trial as part of a plea agreement, said that on the night of the shooting, he was at Douang Keorathspradith's apartment playing cards with defendants and eleven or twelve other members of the TRG (The Rascals Gang). Defendants were talking to another person known as "Naughty Boy" about the Latin Kings gang and how "sick" they were of the Latin Kings "messing with" their families.

Manikham said that defendant Ket called Bin Nu, Ket's cousin and the second in command of the TRG, and, over the speaker phone, Manikham heard them discussing retaliating against the Latin Kings. Part of this conversation was in Cambodian, which Manikham did not understand. However, by the end of the conversation, he understood that Bin Nu did not want them to do anything. After the call ended, Sabandith said, "F--- it, let's do it anyway." They waited for approximately two hours, and then Sabandith snapped his fingers and said, "Let's go." The group then left in five cars, with Manikham, "Naughty Boy," and defendants in the lead car. While they were at Keorathspradith's apartment, Manikham saw Ket give Sabandith a gun.

Manikham further testified that they drove to the Traditions apartments and stopped in a parking lot. Sabandith gave Ket the gun, and then Ket went to "scope everything out." Ket returned in about five minutes and the four drove off, followed by the other four cars. Sabandith waved off the other four cars and then directed Manikham to back the car into a dirt "two-track"

road that leads to the apartment complex. Manikham stopped the car, and defendants got out. Sabandith told Manikham to open the hood of the car, which he did, and Sabandith propped it open. Manikham saw Ket give Sabandith the gun, and saw Sabandith loading and cocking it. Defendants then walked down the dirt road toward the Traditions apartment complex, leaving Manikham and "Naughty Boy" in the car listening to music. Manikham then heard a series of gunshots. Sabandith and Ket ran back to the car about one minute later and told him to start the car. Sabandith put the gun under the hood of the car, closed the hood, and got in the front seat of the car. Ket sat behind him in the rear passenger's seat, and Manikham took off, driving fast. As they were driving, Sabandith said something to the effect of "I think I got him." Ket said, "I heard him scream."

Six days after the shooting, Deputy Sheriff John Scarbrough recognized Ket as a passenger in a car during a routine traffic stop. He had prior information that Ket was carrying a handgun with a laser site. He ordered Ket out of the car, frisked him, and found a loaded 9 mm semi-automatic Ruger P 89 with a laser site in Ket's waistband. He then arrested Ket. Later, the bullets taken from the crime scene were positively identified as having been fired by the Ruger handgun found in Ket's possession.

Sabandith was arrested for the shooting on September 21, 1999, and while he was incarcerated, Deputy Chris Koster listened to some of Sabandith's taped telephone conversations from the jail.[1] During these conversations, Sabandith said that he could "get away from" the charges because all Asians look alike and the police had no evidence against him. He also told his girlfriend to tell everyone on the street to keep quiet and make sure everyone had the same story.

Sabandith presented no witnesses at trial. Ket presented the testimony of several friends and relatives who said that they were with Ket at his home on the evening of the shooting. The jury convicted both defendants of assault with intent to commit murder and possession of a firearm during the commission of a felony. Defendant Sabandith was sentenced as a second habitual offender, MCL 769.10, to twenty to forty years' imprisonment for the assault conviction and a consecutive two-year term for the felony-firearm conviction. Defendant Ket was sentenced to fifteen to thirty years' imprisonment for the assault conviction and a consecutive two-year term for the felony-firearm conviction.

On appeal, both defendants claim that the evidence was insufficient to support their convictions. Defendant Sabandith also argues that he was denied effective assistance of counsel and that his due process rights were violated as a result of the prosecution's failure to call a res gestae witness. Defendant Ket argues that the trial court erred in denying his pre-trial motion to sever the trials of the two defendants and that he is entitled to resentencing because of guideline scoring errors.

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[1] Inmates at the jail were advised that their calls may be monitored.

II. Standards of Review

To determine whether the evidence is sufficient to support defendants' convictions, this court reviews the evidence de novo, *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999), to decide "whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). The evidence is viewed in a light most favorable to the prosecution. *Id.* "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded to those inferences." *Id.* at 428.

Our review of defendant Sabandith's ineffective assistance of counsel claim is limited to mistakes apparent on the record because he did not move for a *Ginther*[2] hearing or a new trial. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

Defendant Sabandith failed to preserve the issue whether his due process rights were violated because the prosecution failed to call a res gestae witness to testify at trial. Accordingly, in order to avoid forfeiture of this issue, defendant must demonstrate that a plain error was committed that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

We review the trial court's decision not to sever the trial for abuse of discretion. *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994).

If there is evidence to support the trial court's scoring of sentencing guidelines, this court will uphold the trial court's scoring. *People v Phillips*, 251 Mich App 100, 108; 649 NW2d 407 (2002).

III. Analysis

Both defendants claim that the evidence was insufficient to prove beyond a reasonable doubt that either of them intended to kill the victim. We disagree.

The elements of assault with intent to commit murder are "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999). Defendants challenge the sufficiency of the evidence to prove the second element.

An "intent to kill may be proven by inference from any facts in evidence," *Abraham, supra* at 658, and may be inferred where the natural tendency of the defendant's behavior is to cause death or great bodily harm. *People v Anderson*, 112 Mich App 640, 649; 317 NW2d 205 (1981). "A person may have that state of mind without directing it at any particular victim." *Abraham, supra* at 658.

Here, the evidence showed that Sabandith and Ket, both members of the TRG gang, planned to retaliate against a rival gang, the Latin Kings. Although Hiracheta was not a member

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

of the Latin Kings, he had attended their meetings, and several of his relatives were members. After defendants exited the car at the complex and Ket, while armed, surveyed the premises, Sabandith carried the weapon, loaded and cocked, toward the apartment buildings. Approximately six gunshots were then fired in the direction of two people standing in the light of the carport. Hiracheta was struck by two of the gunshots, and Rodriguez heard a bullet go by her head. The fact that the victim was hit in the thigh and foot rather than in a vital organ does not negate an intent to kill, especially considering that the victim was hit while running away. Additionally, the fact that the other bullets entered the apartment building at eye level permits an inference that the shooter did not intend to merely hit the victim in the foot. Viewed in the favor of the prosecution, the evidence was sufficient to enable a rationale trier of fact to find beyond a reasonable doubt that the shooter, which the evidence showed was Sabandith, acted with the requisite intent to kill.

Ket argues that the evidence of his intent to kill was also insufficient because there was no testimony supporting a finding that he was the shooter. However, the jury in this case was instructed that it could convict either of the defendants as an aider and abettor. As stated in *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995):

> 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; *In re McDaniel*, 186 Mich App 696, 697; 465 NW2d 51 (1991). "Aiding and abetting" describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991).
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> A defendant may be charged as a principal but convicted as an aider and abettor. *People v Clark*, 57 Mich App 339, 343-344; 225 NW2d 758 (1975). To support a finding that a defendant aided and abetted a crime, the prosecutor must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that 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 he gave aid and encouragement. *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993). An aider and abettor's state of mind may be inferred from all the facts and circumstances. *People v Hart*, 161 Mich App 630, 635; 411 NW2d 803 (1987), (After Remand) 170 Mich App 111; 427 NW2d 557 (1988); *People v Eggleston*, 149 Mich App 665, 668; 386 NW2d 637 (1986). Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *People v Spearman*, 195 Mich App 434, 441; 491 NW2d 606 (1992), overruled on other grounds in *People v Veling*, 443 Mich 23, 43; 504 NW2d 456 (1993). [*Turner, supra* at 568-569.]

The evidence showed that both Ket and Sabandith agreed to retaliate against the Latin Kings. Also, Ket gave Sabandith the gun that was used in the crime and he accompanied Sabandith to the apartment complex where the shooting occurred, scouted the area, and then went back to the complex with Sabandith, who was carrying a loaded weapon. Viewed in a light

most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Ket assisted Sabandith, intending that Sabandith would shoot and kill a rival gang member as a means of retaliation. Accordingly, the evidence was sufficient to support defendant Ket's conviction for assault with intent to commit murder.

Next, defendant Sabandith argues that his trial attorney was ineffective for eliciting testimony from Detective Craig Bosman that codefendant Ket had implicated him in the crime. Because he did not raise this issue in a motion for new trial or evidentiary hearing in the trial court, our review is limited to mistakes apparent from the record. *Rodgers, supra* at 713-714.

The standard for reviewing an ineffective assistance of counsel claim was summarized by this Court in *Rodgers*:

> To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996) (emphasis in original). [*Rodgers, supra* at 713-714.]

Actions appearing erroneous from hindsight do not constitute ineffective assistance of counsel if taken for reasons that would have appeared at the time to be sound trial strategy to a competent criminal attorney. *People v Pickens*, 446 Mich 298, 344; 521 NW2d 797 (1994) (Mallet, J., concurring in part and dissenting in part).

Here, even if there was no sound basis for defense counsel's questioning of Detective Bosman, defendant has not demonstrated that there is a reasonable likelihood that the jury would have acquitted him if it had not heard that Ket had implicated him. The jury's verdict of guilt as to both defendants shows that it believed that Ket was equally involved in the shooting and that it did not find Ket's denials, implication of Sabandith, or alibi credible. Accordingly, Sabandith was not denied the effective assistance of counsel.

Next, Sabandith argues that he was denied a fair trial because the prosecutor failed to produce and call Richard Sherman, a res gestae witness. We find that Sabandith has failed to demonstrate plain error. *Carines, supra*. Apart from his bald assertion, there is no indication that Sherman would have provided testimony favorable to Sabandith. More significantly, Sabandith has not demonstrated that the prosecution failed to comply with any duty under the res gestae statute, MCL 767.40a. Under the amended version of the statute, the prosecutor's former duty to produce res gestae witnesses has been replaced with an obligation to provide notice of known witnesses and to give reasonable assistance in locating witnesses at the defendant's request. *People v Kevorkian*, 248 Mich App 373, 441-442; 639 NW2d 291 (2001). Here, the record establishes that the prosecution fulfilled its continuing duty of advising the defense of Sherman's identity as a potential witness for trial. Sabandith does not allege that Sherman was listed as a trial witness by the prosecution or that he requested assistance in locating Sherman. Thus, defendant has not demonstrated that the prosecutor violated any duty under MCL 767.40a. *Kevorkian*, *supra*.

Sabandith also argues that his trial counsel was ineffective for failing to call Sherman as a witness or request the assistance of the prosecutor in producing him. Like Sabandith's other ineffective assistance claim, this claim was not raised below, and our review is limited to mistakes apparent on the record. *Barclay*, *supra*. The decision whether to call a witness is presumed to be trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). Ineffective assistance of counsel can take the form of a failure to call witnesses or present other evidence only if the failure deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), modified on other grounds 453 Mich 902 (1996). A substantial defense is one that might have made a difference in the outcome of the trial. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999).

Here, it is not apparent from the record whether counsel considered calling Sherman as a witness and, if he did consider it, why he ultimately did not call him to testify. Furthermore, because the substance of Sherman's testimony is not known, defendant cannot show that the failure to call Sherman deprived him of a substantial defense. Thus, he has not overcome the presumption of sound trial strategy.

Finally, Sabandith argues that his trial counsel was ineffective for failing to request jury instructions on the lesser included offenses of assault with intent to do great bodily harm and felonious assault. We find no merit to this issue. The record reveals that the jury was instructed on these lesser offenses, which were also listed as available options in the jury verdict form.

In addition to his claim that the evidence was not sufficient to support his conviction, defendant Ket argues that the trial court erroneously denied his motion for a trial separate from codefendant Sabandith. We find that the trial court did not abuse its discretion by refusing to sever the trials. *Hana*, *supra* at 331. As the Court in *Hana* stated:

> Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision.
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> While we recognize that a joint trial of codefendants presenting antagonistic defenses has serious negative implications for the accused, the standard for severance is not lessened in this situation. . . .
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> Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be "mutually exclusive" or "irreconcilable." . . . The "tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other." [*Hana*, *supra* at 346-347, 349; citations omitted.]

See also *People v Perez-DeLeon*, 224 Mich App 43, 59; 568 NW2d 324 (1997).

Here, Ket did not provide the court with a supporting affidavit or make an offer of proof demonstrating that his substantial rights would be prejudiced by a joint trial. Instead, he merely suggested that there was "a possibility of inconsistent defenses," which would occur only if both defendants testified at trial *and* implicated each other in the commission of the crime. Based on such a minimal showing, the trial court did not abuse its discretion by denying the motion for severance.

Nonetheless, Ket argues that reversal is required because "the requisite prejudice in fact occurred at trial." *Hana, supra*. He asserts that the requisite prejudice occurred because the jury heard prejudicial evidence against Sabandith that it could weigh when determining his own guilt or innocence. None of this evidence inculpated Ket, however. Ket has also failed to show that any of these statements would have been inadmissible in a severed trial. His reliance on both *Bruton v United States*, 391 US 123, 135-136; 88 S Ct 1620; 20 L Ed 2d 476 (1968), and *People v Poole*, 444 Mich 151; 506 NW2d 505 (1993), is misplaced. *Bruton* addressed how a facially incriminating unredacted confession of a nontestifying codefendant that is introduced in a joint trial affects the defendant's Sixth Amendment rights. *Bruton, supra.* The statements Manikham and Deputy Koster attributed to Sabandith do not amount to facially incriminating evidence against Ket. *Poole* is inapplicable because it anticipates a situation where a declarant tells a third person about both the declarant's and an accomplice's involvement in a crime and that "third person" then testifies. *Poole, supra* at 161. Here, however, no one testified that Sabandith made any statements inculpating Ket. The mere fact that Sabandith's statements vaguely suggested that Ket was in Sabandith's company when Hiracheta was shot is insufficient to render those statements inadmissible as to Ket. Accordingly, we conclude that defendant Ket has failed to demonstrate that he was prejudiced by being tried jointly with defendant Sabandith.

Finally, defendant Ket argues that he is entitled to be resentenced because the trial court erroneously scored offense variables 3 and 10 of the statutory sentencing guidelines.[3] Ket's sentence falls within the range recommended under the guidelines. Therefore, absent a scoring error or inaccurate information relied on by the trial court, we must affirm the sentence. MCL 769.34(10); *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000). See also *Phillips, supra* at 108.

The trial court scored OV 3 at twenty-five points. Although defendant Ket argues that there was no life-threatening injury to warrant a score of twenty-five points, the statute provides that twenty-five points may be scored where a "[l]ife threatening *or* permanent incapacitating injury occurred to a victim." MCL 777.33(c). Hiracheta's orthopedic surgeon's testified that the cut through a major artery in his heel "could potentially have been life threatening." Even if this is insufficient to support finding a life threatening injury, the surgeon also testified that there "may be some permanent nerve damage on the sole of his foot where he would have no sensation, and he may have some muscle paralysis of the muscles of his foot." Further, at the time of trial, the victim was using a cane, had at least another year of rehabilitation, and the prognosis was not good for a full recovery. This evidence was sufficient to support a score of twenty-five points for OV 3 under the incapacitating injury prong of the statute.

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[3] The statutory guidelines apply to this case because the crime was committed after January 1, 1999. MCL 769.34(1).

The trial court scored OV 10 at fifteen points, concluding that predatory conduct was involved. MCL 777.40(1)(a). The statute defines "predatory conduct" as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). Here, the evidence showed that, just before the commission of the crime, Ket took the gun and went over to the apartment complex to check things out. Ket and Sabandith arrived at the apartment complex late at night, under a cloak of darkness, and began sneaking around the area, peeking over the dumpsters and through the fence. The victim and a friend were standing in a lighted carport area having a conversation when the shots were fired. The evidence also showed that defendants intended to retaliate against the Latin Kings. The evidence supports the trial court's determination that defendant Ket's behavior fits the definition of "predatory conduct." Thus, the court did not err in scoring fifteen points for OV 10, and resentencing is not warranted.

Affirmed.

/s/ Kathleen Jansen
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder