# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK JAMES MCLEMORE,

Defendant-Appellant.

UNPUBLISHED
December 20, 2002

No. 225562
Genesee Circuit Court
LC No. 99-004795-FC

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, carjacking, MCL 750.529a, and first-degree home invasion, MCL 750.110a(2). The trial court sentenced him to concurrent terms of life imprisonment for the first-degree murder conviction, 18 ¾ to 50 years' imprisonment for both the armed robbery and carjacking convictions, and ninety-five months to twenty years' imprisonment for the first-degree home invasion conviction. The trial court subsequently vacated the armed robbery and first-degree home invasion convictions and sentences on double jeopardy grounds. We affirm.

Defendant's conviction arose from the fatal beating of the victim during a break-in of the victim's home, during which defendant and a codefendant, Nathan Reid, stole the victim's car and other property. Before defendant's arrest, he allegedly made statements to acquaintances implicating himself in the murder of the victim. At trial, defendant admitted being in the victim's home with Reid but claimed that he did not enter the home until after Reid killed the victim.

On appeal, defendant first argues that the prosecutor impermissibly shifted the burden of proof by eliciting from a police witness testimony that the witness had interviewed defendant.[1] Defendant concedes on appeal that he did not properly preserve this issue for review. Accordingly, we review this issue for plain error. *People v Schutte*, 240 Mich App 713, 720; 613

[1] The trial court had earlier granted defendant's motion to suppress the statements resulting from this interview.

NW2d 370 (2000). Reversal is warranted only if a clear or obvious error occurred that affected the outcome of the trial. *Id.*; *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

We discern no clear or obvious error. Indeed, it is not apparent from the prosecutor's full line of questioning that the prosecutor attempted to elicit from the police witness that defendant was interviewed. The prosecutor did not ask whether the officer had interviewed defendant but instead asked whether the officer had interviewed "witnesses in regards to what they might have seen or known or knew of." Accordingly, it is not plainly apparent that the prosecutor violated the general principle that a prosecutor may not imply that a defendant must prove something or present a reasonable explanation for damaging evidence. See *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). Moreover, although the officer's testimony amounted to error in the sense that it was unresponsive, see *People v Barker*, 161 Mich App 296, 305-306; 409 NW2d 813 (1987), the record, examined in context, does not plainly support defendant's claim that the burden of proof was shifted to him to supply evidence of his statement to the police. Any perceived prejudice was cured by the court's instructions that "the prosecutor must prove each element of the crime beyond a reasonable doubt" and that "defendant is not required to prove his innocence or to do anything." See, generally, *Schutte*, *supra* at 720-721 (discussing effect of trial court's instructions). Moreover, the reference to an interview was so fleeting that we conclude it did not affect the outcome of the trial. Defendant has not met his burden under the plain error standard for review, and appellate relief is unwarranted.

Next, defendant argues that the trial court erred by excluding the testimony of a proposed defense witness, Blake Copeland, regarding alleged exculpatory statements made to him by codefendant Reid.[2] We disagree. We review a trial court's decision to exclude evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Defendant contended below that Blake's testimony about Reid's out-of-court statement was admissible as a statement against penal interest under MRE 804(b)(3). In *People v Barrera*, 451 Mich 261, 268; 547 NW2d 280 (1996), the Court stated that the following subissues are to be considered when evaluating the hearsay exception for statements against penal interest:

> (1) whether the declarant was unavailable, (2) whether the statement was against penal interest, (3) whether a reasonable person in the declarant's position would have believed the statement to be true, and (4) whether corroborating circumstances indicated the trustworthiness of the statement.

The *Barrera* Court further stated:

> In exercising its discretion, the trial court must conscientiously consider the relationship between MRE 804(b)(3) and a defendant's constitutional due process right to present exculpatory evidence. See *United States v Barrett*, 539 F2d 244, 253 (CA 1, 1976). Likewise, appellate review necessarily requires a review of the importance of the statement to the defendant's theory of defense in

[2] Copeland testified that Reid stated, "I just got in this motherf----er's house and killed him. . . ." At another point, however, Copeland used the pronoun "we" instead of "I" when repeating Reid's statement.

> determining whether the trial court abused its discretion by excluding the evidence. [*Barrera, supra* at 269.]

We initially note that defendant, as the proponent of the evidence, had the burden of showing that the foundational prerequisites for admission under MRE 804(b)(3) were satisfied. See *People v Burton*, 433 Mich 268, 304 n 16; 445 NW2d 133 (1989). Because defendant does not address the foundational requirement that the declarant be unavailable, we deem this issue abandoned. See, generally, *People v Kent*, 194 Mich App 206, 210-211; 486 NW2d 110 (1992).

However, even assuming that Reid was unavailable, we would still affirm the trial court's ruling on the basis of its determination that the foundational requirement of trustworthiness was not established. Trustworthiness involves two distinct elements: (1) whether the statement was actually made and (2) whether the statement affords a basis for believing the truth of the matter asserted. *Barrera, supra* at 273-274. Although we review the trial court's ruling to exclude the evidence for an abuse of discretion, the question whether there was sufficient indicia of trustworthiness depends in part on the trial court's findings of fact, which we review for clear error. *Barrera, supra* at 269.

The trial court's ruling reflects that it rested on the first element of trustworthiness, i.e., whether the statement was actually made. In light of the evidence before the trial court concerning Copeland's delay in reporting Reid's alleged statements and Copeland's inconsistent use of "we" and "I" when reporting what Reid said, we find no basis for disturbing the trial court's finding that the statements lacked sufficient indicia of trustworthiness for admission under MRE 804(b)(3). The trial court did not abuse its discretion by excluding Copeland's proposed testimony.[3]

Next, defendant argues that the trial court erroneously denied his motion to quash the carjacking charge. Because defendant has not briefed the magistrate's bindover decision, which was the subject of the motion to quash, we deem this issue abandoned. See, generally, *Kent, supra* at 209-210, and *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). In any event, a preliminary examination is not a constitutionally-based procedure, *People v Hall*, 435 Mich 599, 603; 460 NW2d 520 (1990), and an error in the sufficiency of the evidence at the preliminary examination may be deemed harmless if the evidence at trial was sufficient to support the conviction. *People v Moorer*, 246 Mich App 680, 682; 635 NW2d 47 (2001).

Viewed most favorably to the prosecution, the evidence at trial was sufficient to establish that the victim's vehicle was within the victim's control because it was parked inside a garage,

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[3] Moreover, even assuming that Copeland's testimony was admissible and that the trial court erred, we would *still* find no basis for reversal. Indeed, considering the prosecution's aiding and abetting theory of guilt, Copeland's proposed testimony would not have exonerated defendant from criminal responsibility, regardless of whether Reid's statements contained the references to "we" or "I." A person who aids and abets the commission of a crime is punished as if he directly committed the offense. See MCL 767.39; *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001). Accordingly, we conclude that any error in excluding the testimony would have been harmless. See, generally, *People v Toma*, 462 Mich 281, 301; 613 NW2d 694 (2000).

which was attached to the victim's house, and, if not overcome by violence in his own home, the victim could have retained possession of the vehicle. Thus, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that the vehicle was taken in the presence of the victim. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Raper*, 222 Mich App 475, 482; 563 NW2d 709 (1997).

Next, defendant argues that the trial court deprived him of due process by failing to instruct the jury that the verdict must be unanimous with regard to each offense. However, defendant did not object to the jury instructions on unanimity. Therefore, we review this unpreserved issue under the plain error standard from *Carines, supra* at 763. Examining the jury instructions in their entirety, see *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001), defendant has not established a clear or obvious error that affected the outcome of the case. *Carines, supra* at 763.

The jury was given a specific instruction that unanimity was required with regard to the type of first-degree murder, as well as a verdict form requiring identification of the particular type of first-degree murder. The jury was also instructed that "a verdict in a criminal case must be unanimous" and that "when you have agreed on your verdict make sure there is some verdict as to each count." Moreover, a polling of the jury after the verdicts were read reflect unanimity for each count. Accordingly, defendant has not met his burden for relief under *Carines, supra* at 763.

Next, defendant argues that the trial court erroneously denied his motion for a new trial based on newly-discovered evidence.[4] However, because defendant has not filed a supplemental brief addressing the remand proceedings with regard to this issue and does not otherwise address the relevant motion for a new trial,[5] we deem this issue abandoned. See, generally, *Kent, supra* at 210-211, and *Wilson, supra* at 243. Even if the issue had not been abandoned, giving due deference to the trial court's factual finding on remand that there was no evidence of perjured testimony at trial,[6] we would find no basis for disturbing the court's decision denying defendant's request for a new trial.[7] *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000); *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998); MCR 2.613(C).[8]

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[4] Defendant contends that a cellmate of Reid's, Jesse Camper, stated that Reid told him he (Reid) killed the victim but that defendant would be punished for the killing.

[5] We consider defendant's reference in his appellate brief to an initial statement at sentencing regarding the newly-discovered evidence to be inadequate briefing.

[6] Defendant presented an affidavit in which Camper stated that Reid had made allusions to offering perjured testimony at trial.

[7] We review for an abuse of discretion a trial court's denial of a motion for a new trial. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

[8] We note that defendant has not established that Reid would be unavailable as a witness, so the purported statement by Reid that "he, Reid, committed [the murder]" would not have been admissible as direct evidence. Moreover, the statement would have been cumulative to defendant's testimony. See *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998) (for

(continued…)

Finally, defendant argues that his dual convictions and sentences for first-degree felony-murder and carjacking violate the constitutional protections against double jeopardy. Because defendant failed to raise this issue at trial or move to vacate the carjacking conviction on this basis, we once again review this issue under the plain error standard from *Carines, supra* at 763; *People v Wilson*, 242 Mich App 350, 360; 619 NW2d 413 (2000).

We find no plain error because the record discloses that the trial court vacated defendant's convictions for armed robbery and home invasion as the predicate offenses for the felony-murder conviction. See *People v Bigelow*, 229 Mich App 218, 221-222; 581 NW2d 744 (1998). Although carjacking may serve as a predicate offense for first-degree felony-murder, MCL 750.316(1)(b), here, carjacking was not named as a specific predicate offense to the felony-murder charge in this case. Furthermore, it was not improper to convict defendant of both armed robbery (based on the taking of a VCR), and carjacking (based on the taking of the victim's vehicle). See *People v Parker*, 230 Mich App 337; 584 NW2d 336 (1998). Because the jury verdict reflects unanimity as to the armed robbery, home invasion, and carjacking convictions and because carjacking was not charged as a specific predicate felony to the felony-murder charge, we conclude that defendant has failed to show a plain double jeopardy violation. Accordingly, we uphold defendant's convictions and sentences for both felony-murder and carjacking.

Affirmed.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter

(…continued)

new trial to be properly granted because of newly-discovered evidence, the evidence must not be cumulative).