STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERICO J. THOMPSON,

Defendant-Appellant.

UNPUBLISHED
February 10, 2004

No. 237602
Wayne Circuit Court
LC No. 00-008732-02

Before: Smolenski, P.J., and Saad and Kelly, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b.[1] The trial judge sentenced defendant to a prison term of 427 months to 80 years for the armed robbery conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals, and we affirm.

I. Facts

On July 12, 2000, shortly after midnight, defendant Thompson, along with codefendant Anthony Bradley, stole a large amount of marijuana from the thirty-year-old victim, who was shot and killed during the robbery.

II. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to support his conviction for armed robbery. He also argues that the verdict is against the great weight of the evidence. The trial court denied defendant's motion for a directed verdict, and a new trial. We agree with the trial court.

To determine if sufficient evidence was presented at trial to support a conviction, this Court will view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the

[1] Defendant was acquitted of first-degree felony murder, MCL 750.316.

weight of evidence or the credibility of witnesses. *Id*. at 514. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

In evaluating whether a verdict is against the great weight of the evidence, the question is whether the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998); *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). Conflicting testimony and questions regarding the credibility of witnesses are not sufficient grounds for granting a new trial. *Lemmon, supra* at 643. A verdict may be vacated only when it "does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence." *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993) (citation omitted).

The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute. *People v Rodgers*, 248 Mich App 702, 707; 645 NW2d 294 (2001).

At trial, the prosecutor advanced alternative theories that defendant was guilty either as a principal or as an aider and abettor. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39. To support a finding that a defendant aided and abetted a crime, "the prosecution 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 Izarraras-Placante*, 246 Mich App 490, 496-497; 633 NW2d 18 (2001) (citation omitted).

"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 Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991). "The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime." *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). Further, an aider and abettor's state of mind may be inferred from all the facts and circumstances, including 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. *Carines, supra* at 758.

Viewed in a light most favorable to the prosecution, the evidence is sufficient for a rational trier of fact to conclude that defendant, along with codefendant Bradley, committed the crime of armed robbery. In other words, the evidence, if believed, showed that defendant was an active participant in the planning and execution of the robbery. The evidence showed that defendant and codefendant Bradley were friends and co-workers. There was evidence, through defendant's admissions to Anthony Carr and Ernest Ford, that he and codefendant Bradley planned to rob the victim of a large amount of marijuana and that, during the robbery, a struggle ensued and he lost his wristwatch. Testimony revealed that, on the following morning,

marijuana was observed "all over" the back of the car the defendants used during the crime. Further, the victim's autopsy revealed evidence of a physical struggle, including multiple abrasions on the victim's knuckles, knees, and left shoulder. A wristwatch was found at the scene, and DNA testing revealed that defendant could not be excluded as an owner of the watch. Defendant's girlfriend identified the watch found at the scene as being similar to one she previously purchased for defendant. Also, according to Carr and Crystal Rickman, while in jail, defendant sent messages to Brown instructing her to deny buying him a watch. Brown confirmed that she received a message from defendant. Additionally, Ford testified that defendant said that the victim was shot four or five times and that, after the crime, codefendant Bradley painted the car blue. Independent physical evidence corroborated these statements.

Although defendant asserts that the evidence connecting him to the crime was weak, the jury was entitled to accept or reject any of the evidence presented. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999), and *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989). Moreover, this Court will not interfere with the jury's determination of the weight of the evidence or the credibility of the witnesses. *Wolfe, supra.* In sum, the evidence is sufficient to enable a rational jury to reasonably conclude beyond a reasonable doubt that defendant participated in the armed robbery as either a principal or an aider and abettor.

Furthermore, the verdict is not against the great weight of the evidence. The evidence does not clearly preponderate so heavily against the verdict that a miscarriage of justice would result if the verdict was allowed to stand. *Lemmon, supra*. Accordingly, the trial court did not abuse its discretion by denying defendant's motion for a new trial on this basis.

In a related argument, defendant contends that the general verdict of guilty of armed robbery must be set aside where, as here, the case was submitted to the jury on alternative theories. But a prosecutor may properly proceed on alternative theories that a defendant is guilty either as a principal or as an aider and abettor. See, e.g., *Gadomski, supra* at 30-31. Moreover, as plaintiff correctly notes in its brief, where the prosecutor presents sufficient evidence of the defendant's guilt as either a principal or an aider and abettor, the defendant's right to a unanimous verdict is not violated by a general verdict of guilty without the jury's specification on which alternative theory it relied. *People v Smielewski*, 235 Mich App 196, 201-202; 596 NW2d 636 (1999). Consequently, reversal is not warranted on this basis.

III. Prosecutorial Misconduct

Defendant argues that he was denied a fair trial by numerous instances of prosecutorial misconduct.[2] We disagree.

A. Standard of Review

This Court reviews preserved issues of prosecutorial misconduct case by case, examining the challenged remarks in context to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267, 282; 531 NW2d 659 (1995); *Truong*

[2] Following trial, defendant moved for a new trial on this basis, which the trial court denied, stating "I thought [the prosecutor] was commenting on the evidence."

(After Remand), *supra* at 336. When a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error affecting the defendant's substantial rights, i.e., affecting the outcome of the proceedings. *Carines*, *supra* at 752-753, 763-764; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

B. Improper Vouching for Ernest Ford

Defendant argues that, during trial and closing argument, the prosecutor improperly vouched for Ford's credibility by referencing the truthfulness requirements of his plea agreement. Specifically, in response to the prosecutor's questions during direct-examination, Ford stated that, in exchange for an agreement to testify truthfully and in accordance with his statements to the police, his probation violation would be closed out. During closing argument, the prosecutor discussed the plea agreement and argued that Ford was credible. Because defendant did not preserve this claim of alleged misconduct by specific objection and a request for a curative instruction,[3] *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998), this Court reviews this claim for plain error affecting defendant's substantial rights. *Carines*, *supra*.

A prosecutor may not vouch for the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully, or express his personal opinion about the defendant's guilt. *Bahoda*, *supra* at 276-277; *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). But the mere disclosure of a plea agreement with a prosecution witness, which includes a provision for truthful testimony, does not constitute improper vouching or bolstering by the prosecutor. *Bahoda*, *supra*; *People v Enos*, 168 Mich App 490, 492; 425 NW2d 104 (1988).

Defendant has failed to demonstrate plain error. When questioning Ford on direct examination regarding the scope of the plea agreement under which he testified, the prosecutor did not state or imply that he had some special knowledge regarding the truthfulness of Ford's testimony. Rather, a review of the testimony shows that the prosecutor merely recounted the details of the witness' plea agreement. This was not improper. *Id.*

Furthermore, viewed in context, the prosecutor did not improperly vouch for Ford's credibility during closing argument, but rather permissibly advanced his theory that the evidence supported a finding that Ford's testimony was believable. Before discussing Ford's credibility, the prosecutor told the jurors that they were to evaluate and judge the witnesses' credibility. He asserted that, although the fact that Ford testified under a plea agreement may be damaging, there were several reasons to conclude that he was credible. The prosecutor discussed Ford's demeanor and attitude during his testimony, noted the great detail in his statements, and then examined Ford's statements. The prosecutor's argument was not improper. A prosecutor may argue from the facts that a witness is credible. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996); *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996).

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[3] During the prosecutor's examination of Ford, defense counsel only generally challenged the inquiry, stating that it was "not proper."

Moreover, the trial court instructed the jurors that they were the sole judges of the witnesses' credibility and that the lawyers' comments are not evidence, which was sufficient to cure any perceived prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001), citing *Bahoda*, *supra* at 281. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, this claim does not warrant reversal.

C. Improper Vouching for Quiana McKay's Credibility

Defendant also argues that the prosecutor impermissibly vouched for McKay's credibility when he stated, "the police knew that [she] wasn't involved with this homicide."

Although the challenged comment was improper, it does not warrant reversal. Defense counsel immediately objected to the prosecutor stating, "what the police knew." The trial court sustained the objection, struck the remark, and contemporaneously instructed the jury to disregard it. The prosecutor did not pursue the matter further. Moreover, in its final instructions, the court directed the jury not to consider any excluded evidence or stricken testimony, and to decide the case based only on the properly admitted evidence. Under these circumstances, the prosecutor's comment did not deny defendant a fair trial.

D. Rebuttal Argument

We also reject defendant's claim that, during rebuttal argument, the prosecutor impermissibly opined that Brown, McKay, Rickman, and Carr were telling the truth. Because defendant did not object to the remarks, they are reviewed for plain error affecting substantial rights. *Carines*, *supra*.

Viewed in context, the prosecutor did not improperly vouch for the witnesses' credibility, but rather permissibly advanced his theory that the evidence would demonstrate that defendant committed the crimes. The prosecutor discussed the evidence at length, and specifically drew inferences from the testimony to support his assertion that the witnesses were credible. *Fisher*, *supra*. For example, the prosecutor noted that, although Carr and Rickman did not know each other, both testified that defendant sent a message to Brown instructing her to deny buying him a watch. Likewise, the prosecutor suggested that, although Ford did not know the other individuals, his rendition of events was consistent. With regard to Brown, the prosecutor stated that defense counsel "vouch[ed] for the fact that this woman is telling the truth," and that he agreed with defense counsel. He then discussed the fact that Brown was unable to definitely account for whether defendant had left home on the night of the incident, and that she identified the watch found at the scene as being similar to one that she previously bought defendant. The prosecutor's argument was not improper. As previously indicated, a prosecutor may argue from the evidence that a witness is credible, or that the defendant, or another witness, is not worthy of belief. *Launsburry*, *supra*; *Fisher*, *supra*.

Moreover, the prosecutor's comments, which were made during rebuttal argument, were focused on refuting defense counsel's closing argument that defendant was not guilty, and his assertion that any testimony supporting guilt of defendant was problematic. Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989). Further, the trial court's instructions that it was the jury's sole duty

to determine the credibility of the witnesses, and that the lawyers' statements and arguments are not evidence were sufficient to cure any perceived prejudice. *Long*, *supra*. Accordingly, this claim does not warrant reversal.

IV. Admission of Codefendant Bradley's Statements

Defendant argues that the trial court abused its discretion by admitting the hearsay statements made by codefendant Bradley, wherein he implicated defendant, because they did not constitute declarations against Bradley's penal interest and violated defendant Thompson's constitutional right of confrontation. The trial court concluded that codefendant Bradley's statements were admissible as statements against his penal interest.

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *Bahoda*, *supra* at 290. To the extent that this issue implicates the Confrontation Clause of the federal and state constitutions,[4] the constitutional issue is reviewed de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000). Also, this Court reviews the trial court's findings of fact regarding the trustworthiness of a hearsay statement for clear error. *People v Barrera*, 451 Mich 261, 268-269; 547 NW2d 280 (1996).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v Bartlett*, 231 Mich App 139, 159; 585 NW2d 341 (1998). Hearsay is not admissible as substantive evidence unless an exception applies. MRE 802. MRE 804(b)(3) provides that when a declarant is unavailable as defined in MRE 804(a), the declarant's out-of-court statement against interest may avoid the hearsay rule if

> At the time of its making [the statement was] so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Whether a statement is admissible under MRE 804(b)(3) depends on: "(1) whether the declarant was unavailable, (2) whether the statement was against penal interest, (3) whether a reasonable person in declarant's position would have believed the statement to be true, and (4) whether corroborating circumstances clearly indicated the trustworthiness of the statement." *Barrera*, *supra*; see also *Schutte*, *supra* at 715-716.

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[4] US Const, Am VI; Const 1963, art 1, § 20.

A declarant's hearsay statement against penal interest that also implicates another person may be admissible as substantive evidence against the other person (1) if the statement is admissible as a matter of the law of evidence, and, (2) its admission would not violate the defendant's right of confrontation. *People v Poole*, 444 Mich 151, 162; 506 NW2d 505 (1993). The first inquiry focuses on the reliability of the hearsay statement and takes into consideration its content and the circumstances under which the statement was made. *Id*. at 160-161. With regard to the second inquiry, the statement must be examined to determine whether it contains "particularized guarantees of trustworthiness" considering the totality of the circumstances to allow its admission as substantive evidence although the defendant is unable to cross-examine the declarant. *Schutte, supra* at 717-718, quoting *Poole, supra* at 165. In this regard, our Supreme Court has stated:

> The presence of the following factors would favor admission of such a statement: whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates—that is, to someone whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener.
>
> On the other hand, the presence of the following factors would favor a finding of inadmissibility: whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth.
>
> Courts should also consider any other circumstance bearing on the reliability of the statement at issue. While the foregoing factors are not exclusive, and the presence or absence of a particular factor is not decisive, the totality of the circumstances must indicate that the statement is sufficiently reliable to allow its admission as substantive evidence although the defendant is unable to cross-examine the declarant. [*Poole, supra* (citation omitted).]

Here, the statements attributed to codefendant Bradley, although hearsay, were admissible as statements against his penal interest under MRE 804(b)(3). First, insofar that he implicated himself in the crime of armed robbery, the statements were clearly against his penal interest. Also, a reasonable person in codefendant Bradley's position would not have made the incriminating statements unless he believed they were true, especially considering his admission that both he and defendant were involved in the crime. Additionally, his statement that both he and defendant robbed the victim of marijuana comported with the evidence that, after the incident, marijuana was found in his girlfriend's car and that defendant's watch was found at the scene.

Furthermore, considering the totality of the circumstances in this case, codefendant Bradley's statements possessed sufficient indicia of reliability to be admitted against defendant, despite his inability to cross-examine him. Codefendant Bradley made the statements to McKay, his live-in girlfriend, when he returned home after being shot. Although McKay asked codefendant Bradley what happened, arguably prompting the discussion, he voluntarily answered

in a narrative form, while in a non-custodial environment. Also, the statements did not minimize codefendant Bradley's role in the armed robbery or shift the blame solely onto defendant. Additionally, there is nothing in the record suggesting that the statements were made to avenge codefendant Bradley or to curry favor, or that codefendant Bradley had a motive to lie or distort the truth when talking to McKay. Also, the statements were made within hours of the incident. To hold that the statements were not sufficiently trustworthy would require this Court to conclude that codefendant Bradley was attempting to deceive McKay, even though he implicated himself in the crime, and there was no factual support for that conclusion.

In sum, the trial court did not abuse its discretion by concluding that codefendant Bradley's statements were within the scope of MRE 804(b)(3), and contained "particularized guarantees of trustworthiness" considering the totality of the circumstances to allow their admission as substantive evidence against defendant without violating his right of confrontation. See *Poole*, *supra*; *Schutte*, *supra*.[5]

V. Sentence

We reject defendant's claim that he is entitled to resentencing because his minimum sentence of 427 months for armed robbery is disproportionate to the circumstances of the offense and the offender. Defendant's minimum sentence is within the applicable statutory sentencing guidelines range of 171 to 427 months. Under the sentencing guidelines statute,[6] this Court must affirm sentences within the applicable sentencing guidelines range absent an error in the scoring of the guidelines or reliance on inaccurate information in determining the sentence. MCL 769.34(10)[7]; *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). On appeal, defendant has not alleged that the guidelines were erroneously scored or that the trial court relied on inaccurate information in determining his sentence. Therefore, defendant is not entitled to resentencing.

We decline to address defendant's claim that MCL 769.34(10) is unconstitutional because it violates the separation of powers and due process, and is in derogation of the right to appeal. The Supreme Court has already thoroughly addressed and settled the question of the

[5] At trial, defendant relied on *Lilly v Virginia*, 527 US 116; 119 S Ct 1887; 144 L Ed 2d 117 (1999). But this Court has held that *Poole, supra,* remains binding precedent because *Lilly* was a plurality opinion and a majority of the U.S. Supreme Court did not hold that the Confrontation Clause imposes a blanket ban on the use of accomplice statements. See *Beasley*, *supra* at 558-559.

[6] Because defendant committed the offenses after January 1999, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

[7] MCL 769.34(10) provides, in pertinent part:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.

constitutionality of MCL 769.34(10) in *People v Garza*, 469 Mich 431; 670 NW2d 662 (2003) and *People v Hegwood*, 465 Mich 432, 436-437; 636 NW2d 127 (2001).

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kirsten Frank Kelly