STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 29, 2004
v	No. 248651 Saginaw Circuit Court
STEPHAN ANTONIO BELVIN, Defendant-Appellant.	LC No. 02-021767-FC

Before: Fitzgerald, P.J., and Bandstra and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157(a), and possession of a firearm during the commission of a felony, 750.227(b), which arise out of his involvement in the robbery of a McDonald's restaurant. We affirm.

Defendant first argues that the trial court erred in denying his motion for a directed verdict based on the prosecution's failure to present sufficient evidence to support the conspiracy to commit armed robbery count. We disagree. When determining whether sufficient evidence has been presented to sustain a conviction, we view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Our Supreme Court has held that to establish guilt under an aiding and abetting theory, the prosecution must proffer evidence 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 at the time he gave aid and encouragement. *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999). Our Supreme Court recently explained that "the phrase 'aids or abets' is used to describe any type of assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite the commission of that crime." *People v Moore*, 470 Mich 56; 679 NW2d 41 (2004).

In the instant case, the prosecution presented evidence that hours before the robbery, defendant asked Kyle Bingham if he wanted to participate in robbing a local McDonald's restaurant. When Bingham declined the offer, defendant asked his co-conspirator, Jeremy

Paulson, who agreed. Defendant told Paulson that the plan was to rob the restaurant between 9:30 and 10:00 p.m., and showed him a hand-drawn diagram of the restaurant. Defendant and Paulson planned that at 10:00 p.m., Paulson would wait in the restaurant until all of the customers left, order the employees into the deep freezer, and order the manager to take money from the safe and put it into a bag. Defendant told Paulson the robbery would yield $16,000. Defendant supplied Paulson with a walkie-talkie so that Paulson could summon defendant to pick him up after the robbery. Defendant also purchased a gun[1] which he provided to Paulson, in addition to a bag in which to carry away the cash. The robbery was carried out according to plan, and after being arrested and charged, Paulson pleaded guilty to armed robbery, conspiracy to commit armed robbery, felony-firearm, and carrying a concealed weapon, and admitted that defendant was the lookout for the crime. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that defendant "encourage[d], support[ed], [and] incite[d]" Paulson to commit the armed robbery by providing the plan to rob McDonald's, drawing a diagram of the restaurant's layout, and by supplying Paulson with a gun, bag, and walkie-talkie to use to carry out the armed robbery. *Moore*, *supra*. Therefore, defendant is not entitled to relief on this basis.

Defendant next argues that he was denied his right to a fair and impartial trial when the trial court failed to investigate an allegation of juror misconduct. We disagree. Before we will order a new trial because of juror misconduct, "some showing must be made that the misconduct affirmatively prejudiced the defendant's right to a trial before an impartial and fair jury." *People v Provost*, 77 Mich App 667, 671; 259 NW2d 183 (1977), rev'd on other grounds 403 Mich 843; 271 NW2d 777 (1978). Before closing arguments, defendant's sister apprised the trial court that she overheard one of the jurors say "that's what he get [sic] for having a court-appointed lawyer." The trial court questioned defendant's sister regarding the incident: she identified the juror who made the statement, testified that she did not know to whom the statement was made, and admitted that she did not hear any other statements. After closing arguments, defendant challenged the juror who made the statement, and the parties agreed to excuse the juror as an alternate.

Defendant now argues that the trial court should have conducted a sua sponte investigation of the other jurors. However, defendant's sister's testimony did not suggest that the juror's statement affected the jury's impartiality: her testimony concerning the context of the statement and its impact on the other jurors, if any, was vague, and did not provide a basis for the trial court to question the other jurors. Defendant agreed to have the juror excused, in

[1] Defendant argues that evidence he purchased the gun was contradicted by the testimony of a detective that he was unable to find a receipt of purchase for the gun in any of the K-Mart stores in the area. However, "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 those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). A rational trier of fact could have found that the absence of the receipt of sale did not negate the testimony by two other witnesses who stated that defendant provided Paulson with the gun used in the armed robbery.

defendant's own words, "without going further with it." Because defendant has failed to make a showing that the juror misconduct affirmatively prejudiced his right to a trial before a fair and impartial jury, he is not entitled to relief on this basis.

Finally, defendant argues that prosecutorial misconduct deprived him of a fair trial. Specifically, defendant argues that the prosecutor improperly appealed to the jury's sympathy for the victims and improperly vouched for the credibility of his witnesses. We disagree. We review unpreserved claims of prosecutorial misconduct for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Defendant takes issue with the prosecutor's comments during closing argument that although the gun used in the armed robbery was not real, the victims of the armed robbery believed it to be real, and his related reference to one of the employees' reaction of crying upon being shown the gun at trial, and to one of the employees' statement that she had not been back to work since the incident, where the robber held the gun to her head. It is true that "[a]ppeals to the jury to sympathize with the victim[s] constitute improper argument." *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). However, the prosecutor's comments were not a blatant appeal to the jury's sympathy. Rather, the comments were relevant to show an element of the offense of armed robbery, i.e., that the assailant was armed or that he used an instrument "in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon." MCL 750.529. The prosecutor was arguing from the testimony adduced at trial that despite the fact that the gun was not real, the victims indeed believed it to be real during the armed robbery. Further, the trial court instructed the jury not to be influenced by sympathy or prejudice. Because the prosecutor's remarks were not improper, defendant failed to show plain error; therefore, he is not entitled to relief on this basis.

Defendant next argues that the following comment constitutes improper vouching: "Therefore, there's no doubt that the map, the notebook, which Kyle Bingham threw away because he didn't want the evidence at his home, and which was found by Detective Sergeant Rauschenberger, were once a whole and were used in the planning of this." While it is true that it is improper for a prosecutor to vouch for the credibility of his witnesses, *Schutte*, *supra* at 722, the prosecutor here was merely arguing that the evidence showed that the notebook once contained the diagram of the restaurant's layout, and we fail to see for whom this comment constitutes improper vouching. Because the prosecutor's remarks were not improper, defendant failed to show plain error; therefore, he is not entitled to relief on this basis.

Finally, defendant claims that the cumulative effect of the various instances of prosecutorial misconduct requires reversal. However, because none of the contested statements were improper, defendant's argument that their cumulative effect deprived him of a fair trial is likewise without merit. *Watson*, *supra* at 594.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Bill Schuette