STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 16, 2005
v VIRGIL RAY GREEN, Defendant-Appellant.	No. 252045 Wayne Circuit Court LC No. 03-005631-02

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DEMETRIUS DARNELL MCBRIDE, Defendant-Appellant.	No. 252505 Wayne Circuit Court LC No. 03-005631-01

Before: Cooper, P.J., and Hood and R. S. Gribbs,* JJ.

PER CURIAM.

Defendants Virgil Green and Demetrius McBride were tried before a single jury. Defendant Green was convicted of armed robbery, MCL 750.529, and sentenced as an habitual offender-fourth, MCL 769.12, to a term of 23 years and nine months to fifty years. Defendant McBride was convicted of armed robbery, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during commission of a felony, third or subsequent conviction, MCL 750.227b. Defendant McBride was sentenced to a ten-year consecutive term for felony firearm, and to concurrent terms of 23 years and nine months to fifty years, and two to five years. Both defendants appeal as of right, and both raises issues through counsel and in propria persona. Their cases have been consolidated on appeal. We affirm in both cases.

In Docket No. 252045, defendant Green argues that the evidence was insufficient to convict him. This Court reviews the evidence de novo in a light most favorable to the

* Former Court of Appeals Judge, sitting on the Court of Appeals by assignment.

prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). The prosecutor need not negate every reasonable theory consistent with innocence. *Id.* The standard of review is deferential and this Court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). *People v Griffin*, 235 Mich App 27, 31; 597 NW2d 176 (1999).

"To sustain a charge of aiding and abetting, the guilt of the principal must be established. The evidence must have been sufficient to show beyond a reasonable doubt that the defendant's activity constituted aiding and abetting the crime." *People v Turner*, 59 Mich App 589, 592; 229 NW2d 861 (1975). Here there was evidence from which the jury could infer beyond a reasonable doubt that the two defendants met at a nearby location and drove together to CVS, talked to one another outside the store, entered the store together, and that defendant Green distracted the front-store employees while defendant McBride conducted the robbery. The evidence was sufficient to support a finding that defendant Green aided and abetted defendant McBride in the crime. MCL 767.39.

Defendant Green also argues that the verdict was against the great weight of the evidence. A new trial may be granted on some or all issues if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e); *Domako v Rowe*, 184 Mich App 137, 144; 457 NW2d 107 (1990). However the trial court must not substitute its judgment for that of the factfinder, and the jury verdict should not be set aside if there is competent evidence to support it. *Ellsworth v Hotel Corp*, 236 Mich App 185, 194; 600 NW2d 129 (1999). The jury and trial court are accorded substantial deference because both were in a better position to determine credibility and weigh the testimony. *Id.* Here, as in the previous issue, while the jury could have accepted defendant Green's version of events, the jury instead concluded that defendant Green was involved in the armed robbery and that the two defendants were acting in concert. The two defendants were seen together before entering the store, they came into the store together, and it appeared to employees that they were acting as a unit. The verdict was not against the great weight of the evidence.

Defendant Green asserts that he was denied a fair trial because the trial court foreclosed the possibility of having the transcript provided to the jury during deliberations. There is no merit to this issue. When the jury asked for a transcript, the trial court instructed the jurors – with the approval of counsel - to use their collective memory but said that, if it became necessary, a transcript would be prepared. The decision whether to provide the jury with a transcript is discretionary. MCR 6.414(H). Defendant Green waived this issue when his attorney agreed to the trial court's instruction below and, in any event, we find no abuse of discretion.

Defendant Green also argues that trial court should have sua sponte ordered a mistrial when the jury sent a note criticizing the prosecutor. After reaching a verdict, the jury gave a note to the trial judge that said,

> It is the general consensus of the jury that the pejorative, condescending behavior of the prosecutor was both unnecessary and offensive. The ethnic mocking and use of colloquial terms of derision did little to further his case and much to

> alienate a group of people who were sincerely trying to maintain objectivity. It would be our hope that this note would cause the prosecutor to reflect on the difference between presenting a case and demeaning those involved including defendants, witnesses and the jury.

The note was signed by nine of the jurors. With the approval of counsel, the trial court advised the jury that the note did not request any action by the trial court. The trial court asked the jury foreperson if the jury had reached a verdict and, on hearing an affirmative answer, the court asked if the verdict was "based solely on your determination of the facts of this case and the law that applies to this case?" The foreperson answered, "yes," and the court again asked counsel if they were satisfied with its "voir dire." Counsel for all parties indicated their satisfaction. Defendant Green agreed to the trial court's method of handling the jury note, and the jury rendered a verdict that was based on the facts of the case and relevant law. The jury was polled and each individual juror affirmed his or her verdict. There was no error here that affected "the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence," and reversal is not required. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). The trial court did not abuse its discretion in denying defendant Green's motion for a mistrial.

Next, defendant Green argues that he was deprived of a fair trial because the prosecutor asked improper questions during voir dire, misstated the law, and behaved badly at trial. Prosecutorial issues are decided case by case. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). This Court considers alleged prosecutorial misconduct in context to determine whether it denied defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Schutte, supra.* Even presumptively improper conduct by counsel during voir dire does not require reversal if it is harmless. *Phillips v Mazda Motor Mfg*, 204 Mich App 410, 411; 516 NW2d 502 (1994). "Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; this Court will only review the defendant's claim for plain error." *Id.*, citing *Carines, supra*, 460 Mich 763.

Here, although many of the prosecutor's questions were not particularly pertinent to the voir dire, in light of the overwhelming evidence in this case, we cannot say that the line of questioning deprived defendant Green of a fair and impartial trial. Nor was defendant Green prejudiced by the prosecutor's comments that you "can't judge a book by its cover," or his lengthy attempt to impress upon the jurors that it was important to pay attention during the trial.

Defendant Green also argues that the prosecutor's explanations of circumstantial evidence, aiding and abetting, and elements of a crime, were "simplistic," did not explain the requisite intent, and "improperly imprinted a concert of action into the potential jurors' minds before they heard any evidence." The trial court instructed the jurors regarding the law and the evidence that could be considered, and told them that the comments of counsel were not law. The jury is presumed to follow the instructions of the court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Defendant Green was not deprived of a fair and impartial trial on this basis.

Defendant Green also says he was denied a fair trial because of the prosecutor's "behavior," and cites the jury note indicating that the prosecutor had been offensive. Defendant Green does not specify what behavior was offensive and argues only that the jury was tainted by the prosecutor's mannerisms, tone of voice, mimicry and pattern of condescending and demeaning actions. It is clear from some portions of the transcript that the prosecutor was sometimes sarcastic, with comments such as, "Oh my. You're a terribly innocent person just wrongfully accused, aren't you sir?," and "oh my heavenly days, that's terrible." We do not condone this behavior, but find, from the jury's note, that the prosecutor's behavior reflected negatively on the prosecutor rather than on defendant Green in the jury's eyes. Defendant Green was not deprived of a fair and impartial trial. *Reid, supra,* 233 Mich App 466.

Defendant Green argues that he was denied a fair trial because of ineffective assistance of counsel. To establish a claim of ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance so prejudiced the defense as to deprive defendant of a fair trial. *People v Mitchell,* 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel's conduct was reasonable. *Id.* This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy. *People v Avant,* 235 Mich App 499, 508; 597 NW2d 864 (1999). Nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand),* 235 Mich App 429, 445; 597 NW2d 843 (1999). "The phrase 'ineffective assistance of counsel' does not refer merely to lawyering that is not optimal. Rather it refers to representation that has sunk to a level at which it is a problem of constitutional dimension." *People v Davidovich,* 463 Mich 446, 453 n 7; 618 NW2d 579 (2000). Judicial scrutiny "must be highly deferential," because "there are countless ways to provide effective assistance." *People v Reed,* 449 Mich 375, 384; 535 NW2d 496 (1995), citations omitted. Defendant raises numerous claims in this issue, none of which have merit. The fact that different trial decisions could have been made does not constitute ineffective assistance of counsel, and defendant has not met the burden of showing that he was deprived of a fair trial. *Mitchell, supra.*

Defendant Green contends that he was denied a fair trial because of the cumulative effect of the alleged errors. Because no significant errors have been found with regard to any of defendant's challenges, there can be no cumulative effect. *People v LeBlanc,* 465 Mich 575, 591-592 n 12; 640 NW2d 246 (2002).

Defendant Green also argues in propria persona that he is entitled to resentencing because his guidelines were improperly scored. Defendant does not challenge any specific information, but argues that the scoring is precluded by the United States Supreme Court opinion in *Blakely v Washington,* 524 US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004), involving determinate sentencing systems. This claim has already been rejected by our Supreme Court. *People v Claypool,* 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Unlike the sentencing system reviewed in *Blakely, supra,* Michigan "has an indeterminate sentencing system in which the defendant is given a sentence with a minimum and a maximum." *Id.* "Accordingly, the Michigan system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by the jury in violation of the Sixth Amendment." *Id.* Moreover, factual scenarios involving habitual offenders, such as defendant

Green, were specifically excluded from the holding in *Blakely*. *Id.* Defendant Green is not entitled to resentencing on this ground.

Defendant Green also argues in propria persona that he was denied a fair trial when the trial court erred in sustaining the prosecutor's objection to defendant Green's closing argument. We agree that the trial court, relying on the prosecutor's recollection of the testimony, erred. In fact, and contrary to the representation of the prosecutor, the challenged statement that defense counsel repeated during closing argument was elicited, without objection, by the prosecutor on direct examination of witness West. However, on the facts of this case, we cannot say that it is it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Although defense counsel argued during closing that defendant Green did not even know that the robber was in the store, eyewitnesses saw defendant Green and defendant McBride talking before the robbery, both in a car and outside the store, saw them enter the store together, identified defendant McBride as the person with the gun, and testified that they appeared to be acting in concert. The trial court's error in sustaining the prosecutor's objection to the argument was harmless in light of the evidence presented at trial.

Nor was counsel ineffective because he did not continue challenging the trial court's ruling regarding the prosecutor's objection to his closing statement. Defense counsel did raise an objection and argued on the record, a bench conference was held, and the trial court ruled. Defense counsel's decision whether to continue his objection in the presence of the jury under these circumstances was "a quintessential example of trial strategy." *People v Reed*, 449 Mich 375, 400; 535 NW2d 496 (1995). Counsel was not ineffective for failing to continue to argue after the trial court ruled.

In Docket No. 252505, defendant McBride challenges the admission into evidence of binoculars, gloves, a hat and a ski mask found during an inventory search of his car. Evidence about the contents of defendant McBride's car had already been placed – without objection – before the jury, and defendant was arrested with the stolen money and CVS checks in a bag next to him. It cannot be said that it is more probable than not that the admission of the items themselves was outcome determinative. *Lukity, supra*, 460 Mich 495-496.

Defendant McBride also contends that counsel was ineffective because he was convicted on the basis of inadmissible evidence and counsel failed to more strenuously object to the evidence or to challenge identification evidence prior to trial. There is no merit to this issue. Defense counsel is not required to make futile motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Next, defendant McBride argues in propria persona that his convictions for felon in possession and felony firearm are violative of double jeopardy. Convictions for both felony firearm and felon in possession do not violate protections against double jeopardy. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003).

Defendant McBride contends in propria persona that appellate counsel was ineffective for failing to investigate his claim of actual innocence or make other arguments on appeal. Defendant McBride has not shown that appellate counsel's performance "fell below an objective standard of reasonableness" or established that there was "a reasonable probability that but for the unprofessional errors the result of the proceeding would have been different." *Mitchell,*

supra, 454 Mich 157-158. "[A]ppellate counsel's decision to winnow out weaker arguments and focus on those more likely to prevail is not evidence of ineffective assistance." *Pratt, supra, People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002), citations omitted. Further, where, as here, defendant himself raises the issues he claims counsel should have argued, there is no possible prejudice. *Id.*

Next, defendant McBride argues in propria persona that he was denied a fair trial because the prosecutor improperly questioned him about his religion. Unpreserved constitutional error is subject to the plain error rule. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). We agree that it was improper and irrelevant for the prosecutor to ask defendant McBride whether he was Islamic. The jury also found the prosecutor's conduct at trial offensive. However, because there is nothing in the record to indicate that defendant McBride's substantial rights were affected by the improper question, reversal is not required. *Id.*

Defendant McBride asserts that reversal is required because he was illegally arrested and brutally beaten by police so that the evidence against him should have been suppressed, he claims that no one positively identified him as the robber, and that it was clear from the videotape that he was not the man in the store. These claims were never raised below, and there is no record to review on appeal. Defendant McBride has not established the existence of a plain error that deprived him of a fair trial. *Carines, supra,* 460 Mich 764.

Defendant McBride also argues in propria persona that reversal is required because he is actually innocent of the offense. Defendant McBride enjoyed the presumption of innocence throughout his trial, the jury was instructed to that effect, and the jury rejected his claim of innocence. He is not entitled to a new trial.

Finally, defendant McBride argues in propria persona that he was deprived of a fair trial because the trial court did not instruct the court that it could remain deadlocked and, because he did not know that such a thing was possible until after he was in prison, he was unable to inform the jury. The jury requested certain exhibits and a transcript, and gave the court a note regarding its criticism of the prosecutor, but did not report any difficulty reaching a verdict. Defendant McBride offers no authority requiring the trial court to instruct the jury on the issue of deadlock. The jury was properly instructed and expressed no difficulty in reaching a verdict, and the evidence was sufficient to support the verdict they reached. Defendant McBride is not entitled to a new trial.

The convictions and sentences of both defendants are affirmed.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Roman S. Gribbs