STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2007
v	No. 268494 Ingham Circuit Court
TERMAINE SKIP LINDSEY, Defendant-Appellant.	LC No. 05-000503-FC

Before: Jansen, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

The case stems from the robbery and shooting death of Martell Coker. Defendant appeals as of right his jury-trial convictions of first-degree felony murder, MCL 750.316(1)(b), and conspiracy to commit armed robbery, MCL 750.157a; MCL 750.529. He was sentenced to life in prison for the felony murder conviction and 171 to 400 months in prison for the conspiracy conviction. We affirm.

I

Defendant first asserts that there was no evidence that he knew a gun would be involved in the robbery. As a result, he contends that there was insufficient evidence to suggest that he committed the underlying felony of armed robbery[1] or to support his conviction of conspiracy to commit armed robbery. We disagree.[2]

Due process requires that the evidence show guilt beyond a reasonable doubt in order to sustain a conviction. See *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). We

[1] Defendant's first-degree felony murder conviction was based on the underlying felony of armed robbery. Armed robbery is an enumerated predicate felony of first-degree felony murder. MCL 750.316(1)(b); *People v Akins*, 259 Mich App 545, 547; 675 NW2d 863 (2003).

[2] It is unclear whether defendant is also attempting to argue that there was insufficient evidence to support his conviction of first-degree felony murder. Any such argument is not properly presented for review because it is not included in defendant's statement of the questions presented. MCR 7.212(C)(5); *People v Albers*, 258 Mich App 578, 584; 672 NW2d 336 (2003). Nonetheless, this argument is briefly addressed in the discussion of Issue II, below.

review sufficiency of the evidence claims de novo, determining whether the evidence, viewed in the light most favorable to the prosecution, warrants a rational trier of fact in finding that all the elements of the charged crime have been proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). We must afford deference to the factfinder's special ability to assess the credibility of the witnesses. *Id.* at 514-515. "It is the jury's task to weigh the evidence and decide which testimony to believe." *People v Jones*, 115 Mich App 543, 553; 321 NW2d 723 (1982).

To establish the existence of a conspiracy, the prosecution must provide evidence that a defendant had the "specific intent to combine with others to accomplish an illegal objective." *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). The individuals involved in the partnership "must have voluntarily agreed to effectuate the commission of a criminal offense." *People v Justice*, 454 Mich 334, 345; 562 NW2d 652 (1997). The prosecutor must establish "that the individuals specifically intended to combine to pursue the criminal objective of their agreement . . . ." *Id.* "[D]irect proof of the conspiracy is not essential," and proof of the offense "may be derived from the circumstances, acts, and the conduct of the parties." *Id.* at 347.

In this case, the prosecution charged defendant with conspiracy to commit armed robbery and based the felony murder charge on the predicate felony of armed robbery. The prosecution did not allege that defendant was involved in the armed robbery as a principal, but rather that he was involved in the robbery as an aider and abettor. "'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 was armed with a weapon described in statute.'" *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (citation omitted); see also MCL 750.529. At issue is whether defendant had the requisite knowledge that a weapon would be used in the robbery. Generally, circumstantial evidence and the reasonable inferences that arise from it can constitute sufficient proof of the elements of a crime. *Carines*, *supra* at 757.

We conclude that there was sufficient circumstantial evidence adduced at trial from which a rational jury could have found that defendant was aware that a weapon was going to be used to rob Coker. According to one of the co-conspirators who testified at trial, defendant knew that several guns were supposedly kept at Coker's residence. In fact, the evidence tended to show that the object of the planned robbery was to take not only substantial quantities of marijuana, but also Coker's firearms. There was also evidence that defendant had previously owned the gun that was used to kill Coker, and that he had given or sold it to one of his co-conspirators only weeks before the robbery. From these facts, the jury could have reasonably inferred that defendant knew that another co-conspirator would be in possession of a firearm at the time of the robbery. See *id.*

Viewing this evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found beyond a reasonable doubt that defendant was aware that a firearm would be used in the robbery. We reject defendant's argument that he was unaware that a firearm would be used in the commission of the robbery and that there was accordingly insufficient evidence from which he could be convicted of conspiracy to commit armed robbery or aiding and abetting armed robbery.

II

Defendant next argues that his conviction of first-degree felony murder was against the great weight of the evidence because there was insufficient evidence that he acted with malice. Again, we disagree.[3]

Defendant moved for a new trial on this basis. We review for an abuse of discretion the trial court's grant or denial of a new trial on the ground that the verdict was against the great weight of the evidence. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

"The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). Mere discrepancies in the evidence are not sufficient grounds for granting a new trial. *McCray*, *supra* at 638. If the testimony conflicts, it is the jury's function to determine the inferences to be drawn and the weight to be given to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). It is also the province of the jury to determine the credibility of the witnesses. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998).

The elements of first-degree felony murder are:

> "(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically included in [MCL 750.316], including armed robbery." [*Carines*, *supra* at 758-759 (citation omitted).]

Generally, the facts and circumstances of a killing may give rise to an inference of malice. *Id.* A jury may infer malice from evidence that the defendant intentionally set into motion a force likely to cause either death or great bodily harm. *Id.* In particular, malice may be inferred from the use of a deadly weapon. *Id.* Thus, the evidence of Coker's shooting death was sufficient evidence of the occurrence of the first two elements of first-degree felony murder, i.e., a killing done with malice. *Id.*

As to the third element, the trial court instructed the jury that the predicate felony for the felony murder charge was armed robbery.[4] Testimony at trial established that defendant was involved in the plan to rob Coker. Again, there was sufficient evidence adduced to support a finding that defendant knew that the planned robbery would involve a weapon. The evidence

[3] To the extent that defendant may be attempting to argue that his conspiracy conviction was also against the great weight of the evidence, any such argument is inadequately briefed on appeal. We therefore decline to address it. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

[4] As noted above, armed robbery is an enumerated predicate felony of first-degree felony murder. MCL 750.316(1)(b); *Akins*, *supra* at 547.

also established that Coker was shot during the robbery. Therefore, the evidence adequately established that the shooting death of Coker occurred during "the commission of [one] of the felonies specifically included in [MCL 750.316], including armed robbery." *Id*.

However, it was undisputed at trial that defendant did not personally shoot Coker. Accordingly, defendant's first-degree felony murder conviction was necessarily predicated on an aiding and abetting theory. "The general view taken is that a person who does not actually commit the homicidal act may be regarded as a participant in the homicide and, if the person encourages, assists or advises another so as to induce the unlawful act, then the person may be held criminally responsible as an aider and abettor." *People v Daniels*, 172 Mich App 374, 383; 431 NW2d 846 (1988). An aider and abettor's state of mind may be inferred from the facts and circumstances, such as a close association between the defendant and the principal, and the defendant's participation in the planning or execution of the crime. *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995), overruled in part on other grounds *People v Mass*, 464 Mich 615, 627-628 (2001).

To prove felony murder on an aiding and abetting theory, the prosecution must prove that the defendant:

> (1) performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of the predicate felony. [*People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003).]

As noted above, there was sufficient evidence of the commission of first-degree felony murder by someone in this case. A rational jury could have found beyond a reasonable doubt that Coker was killed with malice during the commission of the predicate felony of armed robbery. There was also sufficient evidence that defendant aided and assisted in the commission of the underlying armed robbery. The evidence at trial established that defendant aided in the procurement of at least one of the firearms involved by giving or selling it to one of the co-conspirators sometime before the incident, and that defendant knew that one or more firearms would be used during the commission of the robbery. Thus, a rational jury could have found that in addition to assisting in the commission of the underlying felony, defendant at least minimally "performed acts or gave encouragement that assisted the commission of the killing of a human being," and that he did so "with knowledge that death or great bodily harm was the probable result." *Id*. "In criminal law the phrase 'aiding and abetting' is used to describe all forms of assistance rendered to the perpetrator of a crime. This term comprehends all words or deeds which may support, encourage or incite the commission of a crime. It includes the actual or constructive presence of an accessory, in preconcert with the principal, for the purpose of rendering assistance, if necessary." *People v Palmer*, 392 Mich 370, 378; 220 NW2d 393 (1974). The particular amount of advice, aid, or encouragement rendered by the defendant is immaterial as long as it had the effect of inducing or encouraging the commission of the crime. *Id*.

By voluntarily choosing to join a group of individuals that was intent on committing the crime of armed robbery with firearms, defendant took action that supported, encouraged and

incited not only the commission of armed robbery, but also the commission of felony murder. See, e.g., *People v Smock*, 399 Mich 282, 284-285; 249 NW2d 59 (1976). Defendant aided and abetted the commission of armed robbery, and one of the natural and probable consequences of such a crime is death. See *People v Robinson*, 475 Mich 1, 3; 715 NW2d 44 (2006). Accordingly, there was sufficient evidence to support the jury's determination that defendant was guilty of first-degree felony murder on an aiding and abetting theory. Moreover, the evidence did not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Musser*, *supra* at 218-219. Therefore, the trial court did not abuse its discretion by denying defendant's motion for a new trial on the ground that the verdict was against the great weight of the evidence. *McCray*, *supra* at 637.

III

Defendant next asserts that he was denied his due-process right to a fair trial when the trial court admonished defense counsel and expressed impatience with his trial tactics in front of the jury. We disagree.

> Michigan case law provides that a trial judge has wide discretion and power in matters of trial conduct. This power, however, is not unlimited. If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed. The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments "were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." [*People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988) (citations omitted).]

We acknowledge that "[a] defendant has a right to be represented by an attorney who is treated with the consideration due an officer of the court. Belittling observations aimed at defense counsel are necessarily injurious to the one he represents." *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989). Further, "[t]rial judges who berate, scold, and demean an attorney, so as to hold him up to contempt in the eyes of the jury, destroy the balance of impartiality necessary for a fair hearing." *Id.* However, "[a]lthough unfair criticism of defense counsel in front of the jury is always improper, reversal is necessary only where the court's conduct denied a fair and impartial trial by unduly influencing the jury." *Id.* Moreover, "[p]ortions of the record should not be taken out of context in order to show trial court bias against defendant; rather, the record should be reviewed as a whole." *Collier*, *supra* at 697-698.

In this case, viewed in context, the record does not demonstrate that the trial court's conduct pierced the veil of judicial impartiality. Although it appears from the record that the trial court did express annoyance and frustration with defense counsel's repeated objections, our Supreme Court has noted that displays of annoyance, anger, frustration, impatience or dissatisfaction, if "within the bounds of what imperfect men and women . . . sometimes display," do not generally establish bias or partiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996). In addition, the record reveals that the trial court took specific steps to limit any prejudicial effect of its comments, stating to the jury:

> Just a comment to you. Just because you hear me and [defense counsel] battling a little bit here, don't be concerned about that. That's part of this business. And don't take that against me. Don't take it against [the prosecutor]. And certainly don't take it against [defense counsel] or his client. It's part of the process we go through in these matters, and I want you to understand that. At least we are not all falling asleep. So I mean, look at the other side of that. [Defense counsel], did I cover that?

We perceive no error requiring reversal in this regard because the trial court's comments did not deny defendant a fair and impartial trial by unduly influencing the jury. *Ross, supra* at 91.

IV

Defendant next argues on appeal that the trial court erred by allowing a co-conspirator to testify that (1) the co-conspirator's girlfriend had stated that Coker had a substantial quantity of marijuana, and (2) someone told the co-conspirator that Coker would be a "good lick." Defendant claims that these statements constituted inadmissible hearsay. We disagree.

This testimony was not "offered in evidence to prove the truth of the matter[s] asserted." MRE 801(c). Rather, the statements were offered to explain the co-conspirator's actions following his receipt of the information. Because the challenged statements were offered merely to show their effect on the listener—i.e., the co-conspirator—they did not constitute inadmissible hearsay. *People v Eggleston*, 148 Mich App 494, 502; 384 NW2d 811 (1986).

V

Defendant next argues that the trial court erred by admitting defendant's telephone records into evidence at trial because the records were not properly authenticated under MRE 901 and because police testimony based on the records was inadmissible hearsay. Again, we disagree.

Generally, the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. MRE 901(a). In the instant case, the prosecutor proffered the testimony of a Lansing police detective to authenticate the records. The detective then offered testimony interpreting the telephone records, which the trial court permitted under MRE 803(6), the business records exception to the hearsay rule. The prosecution did not call anyone from the telephone company to testify concerning the accuracy or veracity of the records.

Even assuming arguendo that the trial court erroneously admitted the records and the subsequent police testimony interpreting those records, any error was harmless. The prosecutor indicated at trial that the records were being admitted for the purpose of establishing that defendant called Coker on the night of the murder. However, defendant personally testified that he had, indeed, called Coker that night. Any erroneous introduction of the telephone records was therefore harmless because it was not determinative of the outcome. *People v Bauder*, 269 Mich App 174, 180; 712 NW2d 506 (2005).

VI

Defendant lastly argues that because his felony murder conviction was predicated on the underlying felony of armed robbery, his convictions for both felony murder and conspiracy to commit armed robbery violate double jeopardy. We disagree.

"It is a settled principle of black-letter law that conspiracy is a crime separate and distinct from the substantive crime that is its object." *People v Carter*, 415 Mich 558, 569; 330 NW2d 314 (1982), overruled in part on other grounds *People v Robideau*, 419 Mich 458; 355 NW2d 592 (1984). Although conspiracy to commit armed robbery and aiding and abetting the commission of armed robbery have common elements, it is possible to accomplish each without committing the other. See *id*. at 577-582. Thus, a person may be convicted of both crimes, stemming from the same underlying transaction, without violating the rule against double jeopardy. *Id.* In other words, defendant could have been properly convicted of both conspiracy to commit armed robbery and the underlying felony of armed robbery on which his felony murder conviction was predicated. Defendant's convictions of both felony murder and conspiracy to commit armed robbery do not violate double jeopardy.

Affirmed.

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey