STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 20, 2007
v LEWIS HARRIS, Defendant-Appellant.	No. 271929 Wayne Circuit Court LC No. 06-000456-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DAVID RIGGINS, Defendant-Appellant.	No. 272070 Wayne Circuit Court LC No. 06-000456-02

Before: Schuette, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

Following a joint bench trial, defendants Lewis Harris and David Riggins were both convicted of armed robbery, MCL 750.529, two counts of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b.[1] Harris was also convicted of felon in possession of a firearm, MCL 750.224f. Harris was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 11 to 22 years for the robbery conviction, one to six years for each assault conviction, and 1 to 7-1/2 years for the felon in possession conviction, to be served consecutively to a five-year term of imprisonment for the felony-firearm, second offense, conviction. Riggins was sentenced to concurrent prison terms of seven to 15 years for the robbery conviction and one to four years for each assault

[1] Harris was convicted of felony-firearm, second offense.

conviction, to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction. Both defendants appeal as of right. We affirm.

Defendants' convictions arose from the armed robbery of Peter Sibinovski, a motel desk clerk, and the subsequent assaults on police officers John McCleod and James Johnson, who pursued defendants immediately after the robbery; gunshots were fired at the officers during the chase.

I. Docket No. 271929

Harris first argues that the trial court's verdict was against the great weight of the evidence.[2] This Court reviews a trial court's findings of fact and conclusions of law in a bench trial under the clearly erroneous standard. MCR 2.613(C). "In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *Id.* "[C]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v McCray*, 245 Mich App 631, 637-638; 630 NW2d 633 (2001) (internal citation and quotation marks omitted).

The trial court found that Harris aided or abetted an armed robbery. Armed robbery involves "(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 Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (internal citation and quotation marks omitted); MCL 750.529. To find that a defendant aided or abetted a crime, the prosecution must show that

> (1) the crime charged was committed by the defendant or another person, (2) the defendant performed acts or gave encouragement that assisted in 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. [*Carines*, *supra* at 757 (internal citation and quotation marks omitted).]

An aider and abettor's state of mind may be inferred from all the facts and circumstances of the crime. *Id*. "Factors that may be considered include 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." *Id*. at 757-758 (internal citation and quotation marks omitted). "Mere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to show that a person is an aider and abettor." *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992).

Although we agree that Harris was not identified as an occupant of the Dodge Intrepid in which two other suspects were seen arriving at the motel, there was other evidence connecting him to that vehicle. An unidentified person was observed driving the Intrepid. The Intrepid

[2] We note that in cases "tried without a jury, the appellant need not file a motion for remand to challenge the great weight of the evidence in order to preserve the issue for appeal." MCR 7.211(C)(1)(c).

belonged to Harris's girlfriend, who testified that Harris had possession of the vehicle on the night of the charged offenses and who also testified that Harris's cellular telephone was on the seat of the Intrepid in a picture of the vehicle shown to her by the prosecutor.

Additionally, shortly after Sibinovski was robbed, two police officers arrived at the motel and observed Riggins and Harris exiting the motel. According to McCleod, the men were armed with blue steel automatic handguns. The officers pursued the two defendants on foot and both officers testified that one of them fired a gun toward the officers during the pursuit. Harris was later found hiding in a yard one or two blocks from the motel. A residue test was performed on Harris and tested positive for the presence of gunshot residue on his hands.

In light of this evidence, the trial court's conclusion that Harris was guilty of aiding and abetting in the robbery of Sibinovski was not against the great weight of the evidence.

Similarly, the trial court's conclusions with respect to Harris's felonious assault convictions were not against the great weight of the evidence. The crime of felonious assault contains the following elements: "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v John Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996) (internal citation and quotation marks omitted). In light of the evidence that Harris was observed leaving the motel with Riggins, that Harris was observed to be armed with a handgun, that shots were fired at the two officers as they were pursuing Harris and Riggins, and that Harris subsequently tested positive for the presence of gunshot residue on his hands, the trial court's finding that Harris was guilty of feloniously assaulting McCleod and Johnson was neither clearly erroneous nor against the great weight of the evidence.[3]

We reject Harris's argument that the trial court's verdict was against the great weight of the evidence because spent shell casings were not recovered from the alley and because there could be other explanations for the presence of gunshot residue on his hands. Neither of these factors renders the officers' testimony so inherently implausible, or so patently incredible, that it could not be believed. *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998). As the trial court also observed, the fact that Harris was found hiding in a backyard in the vicinity of the robbery, during the early hours of a cold December morning, was evidence of his consciousness of guilt.

In a pro se supplemental brief, Harris also argues that the evidence was insufficient to support his convictions. We disagree.

> [A] challenge to the sufficiency of the evidence in a bench trial is reviewed by considering the evidence presented in a light most favorable to the prosecution

[3] Harris also suggests that his convictions of felony-firearm and felon in possession of a firearm were against the great weight of the evidence. In light of the evidence supporting his robbery and assault convictions, and in light of the fact that Harris stipulated that he had previously been convicted of a felony that prohibited him from carrying or possessing a firearm on the date of the instant offenses, we reject Harris's argument.

> and determining whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. [*People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988).]

As previously discussed, the evidence showed that one of the suspects in the robbery arrived in a Dodge Intrepid, and there was evidence linking Harris to that vehicle. Additionally, Harris and Riggins were both identified fleeing from the motel while armed with weapons. Two uniformed police officers directed them to stop, but they ignored the command and started running through an alley. When the officers chased after the two men, one of them turned and fired a gun at the officers. Harris was later found hiding in a nearby backyard, and he subsequently tested positive for the presence of gunshot residue on his hands. Viewed in the light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Harris participated in the robbery of Sibinovski, that he feloniously assaulted the two officers during the foot chase, and that he possessed a firearm during the offenses.[4] Thus, there was sufficient evidence to support Harris's convictions.

Next, Harris argues that the trial court erroneously denied his motion for an in camera review of McCleod's Internal Affairs file relating to McCleod's having been indicted by a federal grand jury for allegedly falsifying reports in other cases.[5] We disagree.

The decision whether to conduct an in camera review of information to determine if it is discoverable is discretionary with the trial court, and this Court reviews that decision for an abuse of discretion. *People v Laws*, 218 Mich App 447, 455; 554 NW2d 586 (1996); see also *People v Stanaway*, 446 Mich 643, 677; 521 NW2d 557 (1994).

There is no right to the discovery of information protected from disclosure by constitution, statute, or privilege. MCR 6.201(C)(1).[6] Instead, where privileged information is requested, the trial court may conduct an in camera hearing to determine whether there is a reasonable probability that the records are likely to contain material information necessary to the defense. *Laws*, *supra* at 455. However, a hearing is required only if the defendant first shows that he has a "good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense." *Stanaway*, *supra* at 677; see also MCR 6.201(C)(2) and *People v Fink*, 456 Mich 449, 455; 574 NW2d 28 (1998).[7]

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[4] As indicated in footnote 3, Harris stipulated that he was previously convicted of a felony that prohibited him from carrying or possessing a firearm on the date of the instant offenses.

[5] We note that the trial court did grant Harris's and Riggins's motions for discovery of the Internal Affairs file relating to the instant case.

[6] We note that neither Harris nor Riggins argues that the file was not privileged.

[7] Harris urges this Court to follow *United States v Henthorn*, 931 F2d 29 (CA 9, 1991), and hold that the prosecution was required to produce the file without a showing of its materiality. We decline to do so. Other federal courts have declined to follow *Henthorn*, see *United States v Quinn*, 123 F3d 1415, 1421-1422 (CA 11, 1997), and that decision is inconsistent with the

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Harris failed to demonstrate any articulable facts establishing the materiality of the Internal Affairs records, assuming they exist. There was no evidence that McCleod had falsified his reports or planted evidence in the instant case. Moreover, and significantly, it is undisputed that the federal charges against McCleod were dismissed. On appeal, Harris simply argues that the file might reveal information related to McCleod's credibility. Such a claim amounts to a mere "fishing expedition," which is insufficient to justify an in camera hearing. For these reasons, the trial court did not abuse its discretion in denying Harris's request for an in camera review of the records.

II. Docket No. 272070

Riggins also argues that the trial court erroneously refused to conduct an in camera review of McCleod's Internal Affairs file related to his federal indictment. Riggins did not identify any basis for an in camera review that had not been raised by Harris. Accordingly, for the reasons previously explained in our discussion of this issue with respect to Harris, the trial court did not abuse its discretion in refusing to conduct an in camera hearing.

Riggins next argues that the on-the-scene identifications by Johnson and McCleod were unduly suggestive and, therefore, should have been suppressed.

> This Court will not reverse a trial court's decision to admit identification evidence unless it finds the decision clearly erroneous. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. [*People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).]

This Court has recognized the benefits of prompt on-the-scene identifications to ensure reliability in apprehending suspects; the procedure allows the police to apprehend the right suspect and release improperly detained individuals. See *People v Libbett*, 251 Mich App 353, 361-363; 650 NW2d 407 (2002). However, an on-the-scene identification procedure can violate a defendant's right to due process if it is "so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). The fairness or suggestiveness of an identification procedure is reviewed in light of the total circumstances. *Hornsby*, *supra* at 466. Relevant factors to consider include: (1) the witness's opportunity to view the suspect at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of a prior description from the victim, (4) the witness's level of certainty at the time of the pretrial identification, and (5) the amount of time between the crime and the confrontation. *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998). A statement suggesting or telling a victim that the police have apprehended the right person, or somehow singling out one person, can lead to an impermissibly suggestive identification. *Gray*, *supra* at 111. If a procedure is found to be impermissibly suggestive, an in-court identification by the witness is inadmissible unless the prosecution can demonstrate, by clear and convincing evidence, that the witness had an independent basis for the identification. *Id*. at 114-115.

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established law in this state that requires a defendant to show materiality before the government has an obligation to provide discovery.

The trial court did not clearly err in denying Riggins's motion. There was no substantial likelihood of misidentification here. Riggins does not contend that he did not match the general descriptions of the suspects provided by the officers before he was apprehended. Riggins was wearing a hat, fashioned into a ski mask, at the time of his arrest. He also had clothing and gloves consistent with the description provided by the robbery victim. He was found hiding under a vehicle at approximately 5:30 a.m. on a cold, snowy December morning, and a handgun was found in close proximity to this location. Because Riggins was apprehended under circumstances indicating that he was not simply an innocent bystander, there was no substantial likelihood that the on-the-scene identification led to his misidentification.

Moreover, although Riggins was handcuffed and placed in a police vehicle for viewing by both officers, and other officers told the victims that they had apprehended the "guy" who shot at them, considering that the victims were trained police officers, we conclude that the procedures and comments in this case were not so impermissibly suggestive as to lead to a substantial likelihood of misidentification.

Furthermore, the trial court did not err in failing to conduct an evidentiary hearing concerning this issue. A trial court is not required to conduct an evidentiary hearing to determine the constitutional validity of an identification procedure. *People v James Johnson*, 202 Mich App 281, 285-287; 508 NW2d 509 (1993). Here, an evidentiary hearing was requested because defendant did not have the benefit of complete discovery at the time the motion to suppress was made. The prosecutor agreed to provide the requested discovery materials, which Riggins's counsel appeared to agree would be satisfactory. Counsel never subsequently indicated that an evidentiary hearing was necessary. Under the circumstances, there has been no showing that an evidentiary hearing was necessary.

Riggins next argues that the evidence was insufficient to support his convictions. We disagree.

Although Sibinovski could not identify the gunman involved in the robbery, Riggins was observed running from the motel by McCleod while armed with a weapon. During his escape, either Riggins or Harris fired at the officers who were pursuing them. Riggins was later discovered hiding underneath a car. He was wearing a cap made into a ski mask, dark clothing, and gloves, consistent with Sibinovski's description of the gunman who robbed him, and a handgun was found nearby.

Viewed in the light most favorable to the prosecution, the evidence was sufficient to allow a rational trier of fact to find beyond a reasonable doubt that Riggins participated in the robbery of Sibinovski. Additionally, the evidence that he was armed with a gun during the offense supports his conviction of felony-firearm.

The evidence also supports Riggins's felonious assault convictions. Even though the evidence generally pointed to Harris as the person who fired the shots at the two officers as they were chasing both defendants, Riggins properly could be convicted under an aiding and abetting theory based on his participation in the armed robbery with Harris and their joint escape from the police, given that Harris's conduct in attempting to escape from the scene was a natural and probable consequence of that crime. *People v Robinson*, 475 Mich 1, 3; 715 NW2d 44 (2006). Thus, the evidence was sufficient to support Riggins's convictions.

Affirmed.

/s/ Bill Schuette
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter