

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DUANE JOHNSON,

Defendant-Appellant.

UNPUBLISHED

September 18, 2008

No. 278741

Wayne Circuit Court

LC No. 07-004771-01

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, and sentenced to a prison term of 20 to 35 years. He appeals as of right. For the reasons set forth in this opinion, we affirm defendant's conviction but pursuant to *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003) and *People v Hendrick*, 472 Mich 555; 697 NW2d 511 (2005), we vacate defendant's sentence and remand for resentencing.

Defendant's conviction arises from his involvement in a robbery during which two people were shot, one fatally. Defendant led the victims, brothers Gerald and Dwight Bush, and their cousin Teron Bush, to a check-cashing store where Teron Bush cashed a tax refund check. After cashing the check, Teron and Gerald Bush were both shot by Steven Johnson. Teron later died. Steven Johnson and his brother William Johnson both pleaded guilty to second-degree murder and testified against defendant at trial. They both claimed that they were involved with defendant as part of a plan to lead the victims to the check-cashing store, where Steven was waiting, and then rob them after they cashed their check. Defendant gave a statement to the police in which he admitted setting up Teron to be robbed. Defendant was charged with first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), two counts of assault with intent to commit murder, MCL 750.83, and armed robbery. He was convicted of armed robbery, but acquitted of all other counts.

Defendant first argues that the trial court erred by failing to instruct the jury on the necessarily included lesser offense of unarmed robbery. At trial, however, defense counsel informed the trial court that defendant did not want any lesser offense instructions other than second-degree murder. By affirmatively declining any other lesser offense instructions, and contending that he was satisfied with the jury instructions provided by the court, defendant waived any claim of error associated with the trial court's refusal to instruct on unarmed robbery. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). See also, *People v Unger*, 278

Mich App 210, 234; 749 NW2d 272 (2008). Even if we considered this issue, however, the failure to instruct on unarmed robbery was not plain error. *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999). An instruction on unarmed robbery would have been appropriate only if supported by a rational view of the evidence. *People v Reese*, 466 Mich 440, 446-447; 647 NW2d 498 (2002). In this case, there was no dispute that the charged robbery involved the use of a gun. Indeed, two victims were shot. Moreover, defendant denied any involvement in the plan to set the victims up for a robbery. Thus, a rational view of the evidence did not support an instruction for unarmed robbery.

Defendant next argues that the trial court erred by failing to properly instruct the jury on the requisite intent necessary to convict him as an aider or abettor. Defendant's failure to object to the trial court's jury instructions limits our review to plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764.

Defendant incorrectly argues that an aider and abettor must share the same intent as the principal. The Supreme Court rejected this notion of shared intent in *People v Robinson*, 475 Mich 1, 13-14; 715 NW2d 44 (2006). Instead, as explained in *Robinson*:

[A] defendant must possess the criminal intent to aid, abet, procure, or counsel the commission of an offense. A defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet. Therefore, the prosecutor must prove beyond a reasonable doubt that the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense. [*Id.* at 15.]

"Armed robbery is a specific intent crime for which the prosecutor must establish that the defendant intended to permanently deprive the owner of property." *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). In this case, the trial court instructed the jury that armed robbery is a specific intent crime, which meant that the prosecution was required to prove that defendant intended to deprive Teron Bush of his property. The court also instructed the jury that to be convicted as an aider or abettor, defendant must have intended to help someone else commit the crime at the time he gave his assistance. These instructions properly conveyed the intent necessary to convict defendant as an aider or abettor. Accordingly, there was no plain error.

Defendant also argues that he was denied a fair trial when the trial court allowed the late endorsement of Tiara Davis, an unendorsed witness, who testified at trial that defendant had access to a cell phone, which was contrary to the testimony of another prosecution witness.

A prosecutor may add witnesses to the list of witnesses he or she intends to call "at any time upon leave of the court and for good cause shown or by stipulation of the parties." MCL 767.40a(4). The decision whether to permit the late endorsement of a witness is within the trial court's discretion. *People v Callon*, 256 Mich App 312, 325-326; 662 NW2d 501 (2003).

Here, Davis was not endorsed as a witness because she was not present during the offense. The value of her testimony became apparent during trial when other prosecution witnesses testified that they did not see defendant use a cell phone, and defendant's mother testified that defendant did not possess or have access to a cell phone, or have access to her tax records, thereby suggesting that he could not have known that Teron would be receiving a tax refund and would not have been able to communicate with the other codefendants to set up the robbery. Davis testified that she had seen defendant handle tax files while working at his mother's store, and that both defendant and his mother had cell phones.

Considering that the value of Davis's testimony was not fully apparent until trial, and that it was probative of a disputed factual issue at trial, we conclude that the trial court did not abuse its discretion. We also disagree with defendant's argument that it was improper to allow Davis to testify because she was present during opening statements and during a portion of the first witness's testimony in violation of a sequestration order. The order was not issued until after opening statements and it applied only to anticipated witnesses. Because Davis was not an anticipated witness at that point, her presence during a portion of the first witness's testimony did not violate the court's order. Furthermore, the trial court gave defense counsel the opportunity to interview Davis before she testified to determine if her testimony might be tainted by her earlier presence. Defense counsel was unable to make a persuasive showing of taint or prejudice.

Defendant also argues that the cumulative effect of several errors denied him a fair trial. Because we have found no errors, there can be no cumulative effect. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Next, defendant raises several sentencing issues and argues that he is entitled to resentencing.

Defendant argues that it was improper for the trial court to score 100 points for offense variable (OV) 3 when he was not convicted of murder. MCL 777.33(1)(a) provides that 100 points should be scored for OV 3 if "[a] victim was killed." Contrary to what defendant argues, it is not necessary that defendant caused the victim's death, only that a victim was killed. Indeed, the instructions for OV 3 specifically provide that 100 points should *not* be scored for OV 3 if homicide is the conviction offense, MCL 777.33(2)(b), thereby indicating that it would not have been proper to score this variable if defendant was being sentenced for murder. The instructions also state that in multiple offender cases, if one offender is assessed points for a victim's death, all offenders shall be assessed the same number of points, MCL 777.33(2)(a), thereby indicating that a codefendant may receive points for a victim's death even if the codefendant was not convicted of murdering the victim. Because homicide was not the sentencing offense and it is undisputed that a victim was killed during the commission of the crime, 100 points were properly scored for OV 3.

Defendant also argues that it was improper for the trial court to rely on facts not found by the jury at sentencing. In *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and the other cases cited by defendant, the United States Supreme Court held that it is a violation of the Sixth Amendment for a sentencing court to increase a defendant's *maximum* sentence by relying on facts not found by a jury. Our Supreme Court has held that these decisions do not apply to Michigan's indeterminate sentencing scheme, in which a defendant's maximum sentence is fixed by statute, and the sentencing guidelines affect only the minimum

sentence. *People v Drohan*, 475 Mich 147, 159-160; 715 NW2d 778 (2006). “As long as the defendant receives a sentence within the statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury’s verdict.” *Id.* Thus, there is no merit to this issue.

Defendant also argues that he is entitled to resentencing because the trial court departed from the sentencing guidelines range without a substantial or compelling reason for departure.

A trial court must impose a minimum sentence within the sentencing guidelines range unless it has “substantial and compelling reasons for that departure and states those reasons on the record.” *People v Lowery*, 258 Mich App 167, 169-170; 673 NW2d 107 (2003); MCL 769.34(3). However, “[t]he court shall not base a departure on an offense characteristic . . . already taken into account in determining the appropriate sentence range unless the court finds . . . that the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b); *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003).

In this case, the trial court departed from the sentencing guidelines range of 108 to 180 months and imposed a sentence of 20 to 35 years. The trial court explained that it was departing from the sentencing guidelines range because the guidelines, which were scored for defendant’s conviction of armed robbery involving Teron, did not consider that Dwight and Gerald Bush were also victims who were affected by the offense. However, the number of victims was reflected in the scoring of OV 9, for which defendant received ten points because there were “2 to 9 victims.” MCL 777.39(1)(c). Additionally, defendant received ten points for OV 4 because of the serious psychological injuries to Dwight and Gerald Bush that required professional treatment. MCL 777.34(1)(a). Thus, the trial court departed from the guidelines on the basis of offense characteristics that were already taken into account in the scoring of the guidelines.

Plaintiff argues that a departure was appropriate because defendant received 160 total offense variable points, well in excess of the 100 points necessary to place him in the highest category of offense severity. MCL 777.62. Although there is merit to plaintiff’s rationale, it remains that the trial court did not make any finding that the offense characteristics that it considered were given inadequate or disproportionate weight under the guidelines. Instead, it improperly stated that the characteristics were not considered by the guidelines at all. This Court may not affirm a sentence on the basis that, although the trial court did not articulate a substantial and compelling reason for a departure, one nonetheless exists in this Court’s judgment. *Babcock*, *supra* at 273. Accordingly, we vacate defendant’s sentence and remand for resentencing. On remand, the trial court shall sentence defendant within the appropriate guidelines range or state on the record a substantial and compelling reason for a departure from that range in accordance with MCL 769.34(3) and *Babcock*, *supra*.

Affirmed in part and remanded for resentencing. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood