STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY DARCEL BROOKS,

Defendant-Appellant.

UNPUBLISHED
May 28, 2009

No. 271831
Wayne Circuit Court
LC No. 05-011254-01

Before: Borrello, P.J., and Murphy and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, two counts of armed robbery, MCL 750.529, and a single count of assault with intent to rob while armed, MCL 750.89. He was sentenced to 16 to 30 years' imprisonment on the armed robbery and assault convictions and 1 to 5 years' imprisonment on the conspiracy conviction. We affirm.

This case arises out of a violent armed robbery that took place at the Iowa Steak Company in Livonia on September 16, 2005. Defendant formerly worked at Iowa Steak. The police and prosecution theorized that defendant, Billy Bingham, and Raynard Duncan were all involved in perpetrating the robbery. Three Iowa Steak employees were in the company's building when they were accosted by robbers. These employees were manager Marshal Cooper, salesperson-assistant manager Jeff Kosmyna, and Mathew Griffen. During the robbery, Cooper was beaten and pistol-whipped, Kosmyna had a gun put to his head before he was able to make an escape, and Griffen physically struggled with a robber before being subdued. The perpetrators stole a briefcase, cash, checks, a $339 money order, a wallet, cell phone, keys, and a company pickup truck. The two armed robbery counts pertained to victims Cooper and Kosmyna, while the charge of assault with intent to rob concerned Griffen. Cooper and Kosyma testified at trial but not Griffen, who had moved to Colorado. The prosecution of Bingham culminated in him accepting a plea agreement, which required Bingham to testify truthfully against defendant and codefendant Duncan. The testimony of Cooper, Kosmyna, and Bingham was the only evidence providing an eyewitness account of the robbery. Defendant and Duncan were tried together by a single jury. The jury acquitted Duncan of two counts of armed robbery, which were the only charges that went to the jury on Duncan; the court had earlier granted Duncan's motion for a directed verdict on a charge of assault with intent to rob while armed. Defendant, however, was convicted on all charges as reflected above.

Defendant first raises a series of arguments related to testimony concerning a polygraph examination that was taken by defendant. In response to defense counsel's query whether defendant informed the lead investigator that he was not involved in the robbery, defendant answered the question, but then also proceeded to testify that he took and passed a lie detector test. The prosecutor immediately requested a bench conference, which took place, followed by the trial court excusing the jury. The prosecutor, noting defendant's improper remarks and that "you can't unring the bell," asked the trial court to remedy the error by allowing testimony that defendant took and failed the polygraph examination. Defense counsel moved to strike defendant's testimony; however, the court did not believe that "you can strike your witness's answer." The trial court ruled that it would allow the prosecution to call a rebuttal witness to counter defendant's assertion that he passed the polygraph test. But the court made clear that "[w]e are not going to go into all the questions and all the answers. I will let him state his opinion that he did -- he was not being truthful." Subsequently, on rebuttal, a police officer testified that he gave defendant a polygraph examination and that the test revealed deception, which conclusion was communicated to defendant. Consistent with the trial court's directive, no further details of the polygraph examination were testified to by the officer. In instructing the jury, the trial court stated in pertinent part:

> You have heard evidence that defendant Terry Brooks took a polygraph test. The results of polygraph tests are unreliable and cannot be used in the determination of defendant Terry Brooks' guilt. However, you may use the discrepancy between the defendant Terry Brooks' testimony and the *actual test results* in deciding if you believe defendant Terry Brooks' testimony in court. [Emphasis added.]

Following the giving of instructions, the trial court asked counsel, "Anything about jury instructions?" Defense counsel replied, "No, Your Honor."

Defendant first argues that the trial court erred in ruling that defense counsel could not seek to strike the testimony of her own witness, defendant. According to defendant, had the court struck the reference to the polygraph examination, the court could have then instructed the jury to pay no heed to defendant's polygraph testimony, as polygraph evidence is inherently unreliable. Defendant contends that, because the jury is presumed to follow the court's instructions, proceeding in such a manner would have sufficed to protect all parties. Defendant, relying on *People v Jones*, 468 Mich 345; 662 NW2d 376 (2003), argues that the trial court erred in remedying defendant's unresponsive reference to a polygraph test by allowing rebuttal testimony that defendant took and failed the polygraph examination. Defendant further maintains that the cautionary or limiting instruction regarding the polygraph effectively bolstered the rebuttal testimony by referring to the "actual test results," which suggested to the jury that defendant indeed lied and that the officer spoke the truth about the test results. And defense counsel was ineffective for not challenging the improper instruction.

In *People v Kahley*, 277 Mich App 182, 183-184; 744 NW2d 194 (2007), this Court discussed polygraph examinations, stating:

> It is well established that testimony concerning a defendant's polygraph examination is not admissible in a criminal prosecution. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). It is plain error for the jury to be presented with

> the results of a polygraph examination. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005); *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000). . . . However, not every reference to a polygraph examination requires reversal. *Id.* at 98; *People v Rocha*, 110 Mich App 1, 8; 312 NW2d 657 (1981).

Even where a defendant takes and passes a polygraph test, the test results are not admissible at trial. *People v Phillips*, 469 Mich 390, 397; 666 NW2d 657 (2003), citing *People v Ray*, 431 Mich 260, 265; 430 NW2d 626 (1988), and *People v Barbara*, 400 Mich 352, 364; 255 NW2d 171 (1977).

In general, the decision to admit rebuttal evidence falls within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). Rebuttal evidence is admissible to explain, contradict, repel, or disprove evidence produced by the other party, and it tends to directly weaken or impeach the other party's evidence. *Id.* at 399. The test for error with respect to rebuttal evidence is whether it is justified by the evidence it is offered to rebut. *People v Leo*, 188 Mich App 417, 422; 470 NW2d 423 (1991). Here, defendant proclaimed that he took and passed a polygraph examination, and the rebuttal evidence contradicted and disproved defendant's claim, directly and justifiably impeaching his testimony. If a polygraph examination was not the subject matter of the rebuttal testimony, there could be no dispute whatsoever that the testimony was proper rebuttal. It is true that the trial court could have struck defendant's nonresponsive testimony and provided a curative instruction, although it is somewhat difficult to imagine that an instruction to disregard the testimony in this situation would have effectively unrung the bell. Further, to limit the court to this response could provide a motive to defendants in other cases to testify, accurately or not, that they passed a polygraph exam, realizing that the prosecution would be left with an arguably inadequate remedy should there be no desire to seek a mistrial. Even in the context of an approach in which a mistrial is declared, a defendant could essentially manipulate the judicial system by halting a trial just for the sake of creating havoc or to stop a case that has taken a turn for the worse from the defendant's perspective. We conclude that the trial court's handling of the situation, which was created by defendant's own doing, was fair under the circumstances of this case and does not call for reversal.

Assuming, without deciding, that the doctrine of invited response and the principles espoused in *Jones, supra*, are implicated in this case, reversal is still not required, as defendant received a fair trial. There would have been no issue about the polygraph examination had defendant not provided the unresponsive testimony that he passed the test. The jury clearly understood that the prosecutor and the court were responding to defendant's remarks, and the response was tempered and limited, with no dissection of the polygraph questions. This mitigated the potential harm to defendant's right to a fair trial. *Jones, supra* at 356-357. Moreover, there was compelling evidence of defendant's guilt, which included evidence of the perpetrators' apparent familiarity with the warehouse trucks and Cooper's handling of the property that was taken,[1] as well as the incriminating testimony of Bingham, Toni Kinchen, and

[1] Defendant previously worked at Iowa Steak and was familiar with Cooper's practices in handling cash and receipts at the end of the day.

Lloyd Dorsey. See *id.* There was also the discovery of the stolen money order at a home clearly lived in by defendant, and even if it was not his residence, defendant certainly spent considerable time at the house. Further, a vehicle matching the description of defendant's Blazer was observed at the crime scene. Also, defendant's alibi defense and the innocent explanations given for the money order's presence in the Minock St. home were effectively shredded by the prosecution; inconsistencies abounded. Finally, the trial court also provided a cautionary instruction with respect to consideration of the polygraph testimony, which leads us to defendant's challenge of the wording of that instruction.

We find that the instruction was simply meant to convey to the jury that the polygraph evidence could only be considered for purposes of judging the credibility of defendant's testimony, and not as substantive evidence of guilt. To the extent that the court's instruction referencing the "actual test results" was poorly worded and may have suggested that the police polygraph examiner had told the truth, we see no need to reverse. Any error was harmless, MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999), and, for purposes of the accompanying claim of ineffective assistance of counsel, any deficient performance by counsel was not prejudicial, *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). We reach that conclusion because of the compelling evidence of guilt discussed above and the innocuous nature of the instruction.

Defendant next argues that the trial court abused its discretion when it denied his motion to sever his trial from codefendant Duncan's trial. Defendant maintains that he was denied a fair trial because of the failure to sever, where the evidence showed that only two perpetrators were involved, one of which was Billy Bingham, and where the jury was thus forced to believe one defendant at the expense of the other defendant.

We review the trial court's decision to sever or join the trials of codefendants for an abuse of discretion. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). MCR 6.121 provides, in pertinent part:

> (C) Right of Severance; Related Offenses. On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.
>
> (D) Discretionary Severance. On the motion of any party, the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence, the convenience of witnesses, and the parties' readiness for trial.

In general, a defendant does not have a right to a separate trial. *People v Hurst*, 396 Mich 1, 6; 238 NW2d 6 (1976). Indeed, a strong policy favors joint trials in the interest of justice, judicial economy, and administration. *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). Severance is mandated under MCR 6.121(C) only when a defendant clearly and affirmatively demonstrates through an affidavit or offer of proof that his substantial rights will be prejudiced by a joint trial and that severance is the necessary means of rectifying the potential

prejudice. *Hana*, *supra* at 345-346. "Incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice." *Id.* at 349 (citation omitted). "The use of separate juries is a partial form of severance[.]" *Id.* at 351.

Although he was represented by counsel, defendant filed a pro per motion for severance to prevent direct and potential prejudice of his substantial rights. At the time of the hearing, Bingham had not yet pled guilty, and the trial court agreed that, in light of a statement made by Bingham to police incriminating defendant, it would be necessary to try defendant with a separate jury. But the court had not yet decided whether Bingham's statement to police was admissible; therefore, the court did not find it necessary to make an immediate severance ruling. The court said nothing with respect to severance and Duncan. Defendant himself then stated that even sitting at the same table with his codefendants would prejudice him. The court responded that this was not a valid reason to sever trials, but the court assured defendant that separate juries would be ordered if evidentiary conflicts arose. Defendant did not point out any such conflicts as to Duncan. In our opinion, the court's ruling put the onus on defendant to raise severance in the future if potential conflicts became apparent, especially relative to Duncan after Bingham pled guilty. However, severance was never again raised as an issue. We find that the issue was effectively forfeited, and thus we review the matter for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We conclude that the failure to sever did not amount to plain error affecting defendant's substantial rights.

Had defendant been tried separately, all of the same damaging evidence would have been admissible, except for Duncan's statement to Kinchen that defendant was at the crime scene beating guys. That testimony, along with Kinchen's testimony that Duncan had a cell phone and wallet that were fruits of the robbery, formed the grounds of the prosecutor's case against Duncan. We fail to see prejudice being incurred by defendant on the basis of Duncan's statement to Kinchen, where the jury acquitted Duncan, suggesting rejection of some of Kinchen's testimony, and where *defendant's own admissible statements* to Kinchen regarding Duncan readily reflected that defendant and Duncan participated in the crime. A separate trial or jury would have made little if any difference. At most, there was incidental spillover prejudice, which does not suffice. Defendant's argument is that the jury was essentially forced to choose between convicting defendant or convicting Duncan; however, the jury could have convicted both of playing a role in the robbery. It cannot be soundly concluded that Duncan was immune from being convicted, especially given Kinchen's testimony, simply because Bingham did not implicate Duncan, assuming that driving Bingham to a prearranged meeting point would not suffice, or because Cooper only spoke of two robbers. And it would be entirely illogical to conclude that had the jury convicted Duncan, it could not have convicted defendant. Furthermore, and importantly, acquitting Duncan did not mean that the jury was somehow forced into rendering a guilty verdict against defendant. The trial court instructed the jury to consider each defendant separately and to decide the case on the basis of the evidence that applied to each defendant. There was nothing to prevent the jury from doing as instructed. Severance was not necessary to avoid prejudice, and reversal is unwarranted.

Defendant next argues that the trial court erred in scoring offense variable (OV) 1 and OV 2 at sentencing, which if corrected results in a lower recommended minimum sentence range. A sentencing court has discretion in determining the number of points to be scored for each offense if record evidence adequately supports a particular score. *People v Leversee*, 243

Mich App 337, 349; 622 NW2d 325 (2000). "'Scoring decisions for which there is any evidence in support will be upheld.'" *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (citation omitted); see also *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

OV 1 is to be scored at 15 points if defendant pointed a firearm at or toward a victim, MCL 777.31(1)(c), and at five points if "[a] weapon was displayed or implied," MCL 777.31(1)(e). The trial court scored OV 1 at 15 points. Defendant argues that only five points should have been scored because a toy gun was used in the robbery. In further support, defendant points out that he was never charged with a firearm crime, such as felony-firearm or felon in possession.

There was evidence that a firearm was used in the commission of the crime, with the weapon being put to Kosmyna's head and later used to pistol-whip Cooper. While there was testimony that toy guns were found at the Minock St. address, alleged to be defendant's residence, there was no evidence suggesting that these guns were used in the crime.[2] Further, it can reasonably be inferred from the testimony of Cooper, Kosmyna, Bingham, Dorsey, Kinchen, and police officers that defendant was the gunman and that a real gun was used. See discussion infra regarding sufficiency of armed robbery evidence for further support. The fact that defendant was not charged with a firearm offense is completely irrelevant. We conclude that there was sufficient evidence to score OV 1 at 15 points.

OV 2 is to be scored at five points if the offender possessed or used various weapons, including a pistol. MCL 777.32(1)(d). Defendant was assessed five points for OV 2. On appeal, defendant contends that OV 2 should have been scored at zero, raising the identical arguments made in challenging OV 1. For the same reasons that OV 1 was properly scored, OV 2 was correctly scored. We conclude that there was sufficient evidence to score OV 2 at five points.

Defendant has additionally presented a number of arguments for our review in a Standard 4 brief, Administrative Order No. 2004-6.

Defendant first argues that there was insufficient evidence to convict him of conspiracy to commit armed robbery. He contends that there was no evidence establishing the requisite intent. Defendant further maintains that, because codefendant Duncan was acquitted of armed robbery and Billy Bingham pled guilty to simple robbery, there could be no criminal conspiracy, given that defendant would be the lone person said to have engaged in a conspiracy, which is not legally possible. Defendant relies on the "no one man conspiracy rule."

We review claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489

[2] Forensic testing did not show the presence of any blood on the toy guns, and Cooper sustained serious injuries from being beaten and pistol-whipped, resulting in blood loss and a puddle of blood forming on the floor at Iowa Steak.

NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id.* at 514-515. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *Carines, supra* at 757. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry,* 224 Mich App 447, 452; 569 NW2d 641 (1997).

Under MCL 750.157a, "[a]ny person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy[.]" Conspiracy is a partnership in a criminal purpose, the gist of which lies in an unlawful agreement between two or more persons with the specific intent to combine with others to accomplish illegal objectives. *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). In regard to the crime of armed robbery, the prosecution must establish that the defendant, in the course of committing a larceny of any money or other property, used force or violence against any person who was present or assaulted or put the person in fear. *People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007). Additionally, the prosecution must show that the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that a dangerous weapon was possessed. *Id.* at 7-8. With respect to the larceny aspect of armed robbery, a larceny requires proof of the following elements: (1) an actual or constructive taking of goods or property belonging to another without the consent and against the will of the owner; (2) a carrying away or asportation; and, (3) felonious intent. *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999). To establish the crime of armed robbery, there must be proof of a specific intent to permanently deprive the owner of his or her property. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995).

We conclude that there was more than sufficient evidence to support the conviction for conspiracy to commit armed robbery. Billy Bingham testified that he and defendant met several times before the robbery to discuss the plans to carry out the crime. Defendant told Bingham that Iowa Steak was an easy target to rob. Defendant and Bingham even planned to meet at a rendezvous point after commission of the crime, which involved the two leaving the scene in separate vehicles; defendant in his Blazer and Bingham in a stolen company pickup truck.[3] According to Bingham, defendant called him on the day of the robbery indicating that it was a good day to commit the previously discussed and planned crime, and the two agreed to meet at a separate location before carrying out the robbery. At this location, defendant gave Bingham a mask, sweatpants, and a shirt to wear. Defendant and Bingham then proceeded to drive to Iowa Steak in defendant's vehicle and commit the planned robbery. There was also testimony from Toni Kinchen about defendant planning the robbery with Bingham. Defendant even asked Kinchen to assist in the robbery as a lookout by pretending to be an Iowa Steak secretary in order to divert persons who might enter the building while defendant and Bingham committed the

[3] Police pursued the pickup truck directly after the robbery, used an immobilization technique to ram the truck, causing it to crash, and apprehended Bingham, who was found to be in possession of incriminating evidence, aside from the truck itself.

crime. She initially agreed, but ultimately never participated in the robbery. There was additional testimony from Lloyd Dorsey, Bingham's brother, who asserted that it was his gun that was used in the robbery. Dorsey indicated that he had given the gun to Bingham, and defendant told Dorsey that Bingham had provided the gun to defendant. Contrary to defendant's contention, there was sufficient evidence showing that defendant specifically intended to combine with Bingham to commit the unlawful act of armed robbery.

We reject defendant's argument with respect to the "no one-man conspiracy" rule. Under the conspiracy statute, MCL 750.157a, "the common-law 'no one-man conspiracy' rule is applicable." *People v Anderson*, 418 Mich 31, 36; 340 NW2d 634 (1983) (citation omitted). The rule "provides that 'if two are tried together for a conspiracy in which no additional persons are implicated, a verdict finding one guilty and the other not guilty requires a judgment of acquittal of both.'" *Id.* (citation omitted); see also *People v Rodriquez*, 251 Mich App 10, 24-25; 650 NW2d 96 (2002); *People v Jemison*, 187 Mich App 90, 93; 466 NW2d 378 (1991). The rule's purpose is to prevent enforcement of inherently defective or inconsistent verdicts in conspiracy cases. *Anderson, supra* at 36.

Here, the rule is not implicated because defendant was the only person who was "tried" for conspiracy. There was no trial, let alone an acquittal, on a conspiracy charge involving Bingham, and Duncan did not face a conspiracy charge. The acquittal of Duncan on armed robbery charges does not necessarily mean that the jury would have acquitted him on conspiracy charges had they been leveled at Duncan. Defendant does not cite any authority that suggests that the rule would be implicated on the basis that Bingham did not plead guilty to conspiracy to commit armed robbery.[4] The dropping of Bingham's conspiracy charge in the plea agreement does not equate to an acquittal for purposes of the "no one-man conspiracy" rule. Contrary to defendant's argument, the rule, as enunciated in *Anderson*, did not require that another person be convicted of conspiracy to commit armed robbery before defendant's conspiracy conviction could be deemed legally sound.

Defendant next argues that there was insufficient evidence to support the armed robbery conviction. We disagree. We preface our discussion with the notation that the jury was instructed on aiding and abetting armed robbery, and not just a principal theory.

Bingham's testimony put defendant at the scene of the crime, indicated that only defendant was armed with a gun, and reflected that defendant gave Bingham a bag of money and then directed him to take a company pickup truck. The testimony of victims Cooper and Kosmyna indicated that a gunman stuck a gun to Kosmyna's head and that this gunman beat and pistol-whipped Cooper. It can reasonably be inferred that defendant was the gunman when the victims' testimony is considered in conjunction with other evidence. This other evidence includes Bingham's testimony about defendant carrying a gun, Dorsey's testimony about defendant turning over the gun used in the robbery to Dorsey, Cooper's testimony that a robber, other than the gunman who beat Cooper, wore black combat boots, and police testimony that

[4] Bingham had been charged with conspiracy to commit armed robbery.

Bingham was wearing boots comparable to those described by Cooper when Bingham was arrested.

Additionally, following the police pursuit of Bingham right after the robbery that led to a crash and Bingham's apprehension, Bingham was found only to be carrying the money Kosmyna had been turning over to Cooper when the robbery occurred. However, also taken during the robbery was a briefcase, credit card slips, checks, a $339 money order, a wallet, a cell phone, keys, and cigarettes. Thus, it can reasonably be inferred that defendant took those items, although there was evidence that codefendant Duncan ended up in possession of the stolen wallet and cell phone. Moreover, the stolen money order was found in a home in which the police collected credible evidence showing that defendant resided in the home. Defendant himself testified that he spent time at the home, which is where his girlfriend, Denise Queen, and child resided. Furthermore, in the garage of that home was a dark green Blazer, which matched Kosmyna's description of the vehicle he saw outside of Iowa Steak when he made his daring escape shortly after the robbery commenced. Bingham also testified that such a vehicle was used by defendant and Bingham when committing the robbery. Additionally, there was testimony by Dorsey and Kinchen regarding confrontations or meetings with defendant following the crime in which defendant expressly acknowledged direct participation in the robbery. Moreover, there was much inconsistency between defendant's and Queen's alibi testimony and statements given to the police by those two shortly after the robbery.

Wholly lacking in merit and unsupported by any recitation of authority is defendant's argument that, because he was not separately charged with a firearm crime, he could not be convicted of armed robbery. Defendant's focus on the credibility of Bingham's testimony is equally unavailing, given that credibility determinations were for the jury to make, not this Court. Also, defendant's argument that Bingham's testimony required independent corroboration does not reflect the state of the law, and, regardless, there was corroborating testimony. As the trial court correctly instructed the jury here, the jurors were free to convict defendant solely on accomplice testimony if they believed that it proved defendant's guilt beyond a reasonable doubt. See CJI2d 5.6.

In sum, and under either a principal or an aider and abettor theory, there was sufficient evidence showing that defendant, in the course of committing a larceny of money and other property, used force and violence against the victims, assaulted them, and placed them in fear, while possessing a dangerous weapon and with the specific intent to permanently deprive the victims of their property.

Defendant next argues that the evidence was insufficient to support the crime of assault with intent to rob while armed, which conviction was based on the assault of Matthew Griffen. With respect to the crime of assault with intent to rob while armed, the elements are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) proof that the defendant was armed. *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). Because the crime is a specific-intent offense, there must be evidence that the defendant intended to rob or steal. *Id.*

Although there was not a great deal of evidence regarding an assault with intent to rob relative to Griffen, and Griffen himself did not testify, we find the evidence sufficient to support the conviction under an aiding and abetting theory. Cooper's and Kosmyna's testimony placed Griffen in the building when the robbery commenced, and Cooper testified that he observed

Griffen engaged in a physical struggle with one of the perpetrators as the robbery unfolded. According to Cooper, Griffen ended up on the ground next to Cooper. Therefore, there was evidence of an assault with force and violence directed at Griffen. Further, the perpetrators were clearly driven by an intent to rob or steal as can be gleaned from the totality of the circumstances, including the evidence of all that was stolen during the crime. It matters not that there was an absence of evidence that the robbers actually stole property from Griffen's person. Finally, there was evidence that defendant was armed. Viewing the evidence in a light most favorable to the prosecution, and resolving all factual conflicts in favor of the prosecution, we conclude that there was sufficient evidence to support the conviction of assault with intent to rob while armed. Defendant's argument that Griffen's appearance at trial was necessary in order to obtain a conviction and to satisfy the Confrontation Clause, US Const, Am VI, lacks merit. Cooper's testimony, along with other evidence, sufficed to establish the elements of the crime, without the need to call Griffen to the stand. And the Confrontation Clause was not offended because the prosecution did not rely on any statements or observations made by Griffen. See *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). We find misguided defendant's contention that reversal is warranted on the assault charge because the trial court granted a directed verdict on a similar charge pursued against Duncan. The evidence against defendant was far more damaging than the evidence against Duncan, and defendant never even moved for a directed verdict on the charge.

Defendant next argues that the more appropriate charge that should have been brought against him, at the very most, was receiving or concealing stolen property (money order), rather than the charges of conspiracy, armed robbery, and assault with intent to rob. First, the actual charges were appropriate and supported by the evidence, and, regardless, decisions concerning whether to bring a charge and what charges to bring lie within the sound discretion of the prosecutor. *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998). When a court determines under which statute a defendant will be prosecuted, the court intrudes on the power of the executive branch, violating the separation of powers doctrine. Const 1963, art 3, § 2; *People v Jones*, 252 Mich App 1, 6; 650 NW2d 717 (2002). Unless the prosecutor's actions are unconstitutional, illegal, or ultra vires, none of which are the case here, the charging decision made by the prosecutor is exempt from judicial review. *Id.* at 6-7. Defendant incorrectly surmises that this whole case was about a stolen money order and that the only evidence against defendant entailed his possession of the money order. Although important, the discovery of the stolen money order was but a piece in the puzzle that pointed to defendant's guilt on the charged crimes.

Defendant next argues that his Fifth Amendment right against double jeopardy was violated when he was "charged for multiple punishment for the same offense, [and] when the elements and evidence did not support the statutory charge." The substance of this argument is virtually impossible to decipher as drafted, but it appears that it is predicated on sufficiency claims that we have already rejected and tied to the argument that receiving or concealing stolen property was the more appropriate charge, which we have likewise rejected. There were no double jeopardy violations in this case.

Defendant next argues that his constitutional rights were violated, entitling him to a reversal, where he was only charged with conspiracy under MCL 750.157a(d), but where

defendant was actually tried for conspiracy under MCL 750.157a(a). MCL 750.157a provides in pertinent part:

> (a) Except as provided in paragraphs (b), (c) and (d) if commission of the offense prohibited by law is punishable by imprisonment for 1 year or more, the person convicted under this section shall be punished by a penalty equal to that which could be imposed if he had been convicted of committing the crime he conspired to commit and in the discretion of the court an additional penalty of a fine of $10,000.00 may be imposed.
>
> * * *
>
> (d) Any person convicted of conspiring to commit a legal act in an illegal manner shall be punished by imprisonment in the state prison for not more than 5 years or by a fine of not more than $10,000.00, or both such fine and imprisonment in the discretion of the court.

These are sentencing provisions, and clearly susbsection (d) is not applicable, given that armed robbery is not a legal act. We have carefully scrutinized the lower court record and find no support whatsoever for defendant's claim that he was charged under MCL 750.157a(d). The warrant, complaint, bindover, and felony information all indicate a charge under §157a for conspiring to commit an offense prohibited by law, armed robbery. For this same reason, we also reject defendant's argument that the armed robbery convictions should be reversed because the conspiracy charge under §157a(d), referencing legal acts, would not allow an underlying conviction for an illegal act, i.e., armed robbery.

Defendant next alleges constitutional error for allowing amendment of the information to add a charge under §157a(a), thereby deleting the charge under §157a(d), but we rejected this argument above and there was no "amendment" to add a charge pursuant to §157a(a). Defendant further alleges constitutional error for allowing amendment of the information to add armed robbery charges and the charge of assault with intent to rob while armed, which were never charged or addressed by the district court. First, defendant was in fact charged with, from the very beginning, two counts of armed robbery, one pertaining to victim Marshal Cooper and the other concerning victim Jeff Kosmyna, and a single count of assault with intent to rob while armed, which count pertained to victim Matthew Griffen. In support of his position, defendant cites a hearing conducted on November 18, 2005, in which, according to defendant, the prosecution was permitted to amend the information, adding these three charges. This hearing was a calendar conference in the circuit court. Our review of the transcript of the hearing reveals that the amendment of the information regarding armed robbery charges solely concerned codefendant Billy Bingham, who had not yet pled guilty. The amendment of the information with respect to the assault charge was not a matter of adding the charge, but simply giving some factual particulars as to the crime. Reversal is unwarranted.

Defendant next argues that his constitutional rights were violated when perjured testimony by Billy Bingham, in violation of MCL 750.422, was used to sway the jury. In *People v Aceval*, 282 Mich App 379; __ NW2d __ (2009), this Court recently observed:

> It is well settled that a conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment. If a conviction is obtained through the knowing use of perjured testimony, it "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Stated differently, a conviction will be reversed and a new trial will be ordered, but only if the tainted evidence is material to the defendant's guilt or punishment. Thus, it is the "misconduct's effect on the trial, not the blameworthiness of the prosecutor, [which] is the crucial inquiry for due process purposes." The entire focus of our analysis must be on the fairness of the trial, not on the prosecutor's or the court's culpability. [Citations omitted; alteration in original.]

While by his own concession, Bingham lied on the first day of trial after receiving perceived threats supposedly communicated to him by defendant, there is no evidence definitively establishing that his subsequent testimony implicating defendant was false, nor is there any evidence whatsoever that the elicitation of his testimony by the prosecutor constituted the knowing use of perjured testimony. Defendant's reliance on the note signed by Bingham indicating that he did not know defendant and that defendant played no part in the robbery is misplaced, where Bingham stated that his fear of defendant led to execution of the note. The jury was left to carry out its role to determine the credibility of the witnesses, including Bingham, and to weigh the evidence. We will not interfere with that role, and reversal is entirely unwarranted.

Defendant next argues that fabricated testimony was presented to the jury that arose out of a coerced plea deal in exchange for leniency. Again, there is no evidence definitively establishing that Bingham's testimony implicating defendant was fabricated. Moreover, there is no record support for defendant's contention that the plea deal was coerced. The jury was thoroughly instructed on accomplice testimony and in regard to the evidence concerning the plea deal between Bingham and the prosecution. The jury was instructed that it could consider the plea deal in evaluating Bingham's credibility. Defendant wishes us to tread on grounds generally reserved for the jury, and we will not do so in this case.

Defendant next presents a litany of challenges to various actions taken by the trial court, accusing the trial court of repeatedly abusing its discretion. Defendant asserts that the trial court abused its discretion in allowing testimony that defendant failed a polygraph examination; however, we determined earlier in this opinion that reversal is unwarranted on the polygraph issue. Defendant maintains that the trial court violated the Confrontation Clause in permitting the charge of assault with intent to rob to go to the jury absent testimony by Griffen. Again, we have already addressed and rejected this argument. Defendant also contends that the trial court abused its discretion when it knowingly and wantonly allowed Bingham to take the stand and commit perjury. We touched on this issue previously, but now defendant is accusing the court of engaging in suborning perjury. As stated previously, there is no definitive proof that Bingham committed perjury by implicating defendant. Further, there is no proof whatsoever that the trial court knowingly allowed the presentation of perjured testimony. The jury was fully aware of the change in Bingham's testimony, it was fully aware of the plea agreement, and it was fully aware of the notes and alleged threats. Defendant is ultimately displeased that the jury found Bingham credible and not defendant, and that does not serve as a basis for reversal.

Defendant additionally argues that the trial court abused its discretion by denying defendant the opportunity to make a factual record through an evidentiary hearing with respect to the money order. Defendant refers to a motion hearing conducted on March 3, 2006, at which numerous motions were heard. Although represented by counsel, defendant filed numerous pro per motions throughout the proceedings; the lower court record is flooded with them. At the March 3 hearing, the court first addressed motions brought by counsel, and it then stated that it was happy to also read and consider defendant's pro per motions.[5] One motion argued by defendant himself was based on the claim that the search warrant of the house on Minock St. was defective; therefore, the incriminating Iowa Steak money order found at that address during the search should be suppressed. Defendant has maintained throughout these proceedings that he did not live on Minock St., although trial testimony suggested quite strongly that defendant did indeed reside at that location. The trial court informed defendant that, if he did not live on Minock, he lacked standing to challenge the warrant, but he could still argue at trial that the money order should be inadmissible. On appeal, defendant does not present any argument regarding the validity of the warrant, nor is there any challenge to the court's ruling on standing, so we need not pass judgment on those matters. Instead, the gist of defendant's complaint is that the money order should never have been admitted into evidence because he did not live at the house where it was found. We see absolutely no valid reason that would support holding a pretrial evidentiary hearing on the subject of defendant's concern. Even if he did not "reside" or "live" at the Minock St. address, it was completely undisputed that he spent time at the address. The money order was admissible, and it was for the jury to give whatever weight it wished to this piece of evidence based on all of the surrounding circumstances. We also note that, while defendant raised an overruled objection below when the money order was admitted during Cooper's testimony, the objection related to Cooper sufficiently identifying the money order as the one that he had at the time of the robbery, but there was no challenge predicated on a claim that defendant had an inadequate connection to the money order's place of discovery.

Defendant also argues that the trial court abused its discretion in allowing Lloyd Dorsey to testify, where he was never listed as a witness for the state and sat in on earlier proceedings without being sequestered. The record reflects that Dorsey was not listed on any pretrial witness lists submitted by the prosecutor. According to the prosecution, it only became aware of Dorsey and pertinent information known by Dorsey following the first day of trial. On the second day of trial, the prosecutor moved to amend his witness list, adding Dorsey. Defendant did not dispute that the prosecution had just learned of Dorsey, but he objected to the proposed amendment. The trial court granted the prosecutor's motion to amend. The court also ordered the prosecution to make Dorsey available to speak with defense counsel before he testified. During Dorsey's testimony, he indicated that he had been in the courtroom on the first day of trial, but he left after jury selection. Dorsey also stated that he had attended the preliminary examination. Defense counsel aggressively attacked Dorsey's credibility on the basis of him coming forward so late, his knowledge of testimony and witness accounts, and his closeness to his brother Bingham, which suggested that he was attempting to protect Bingham and corroborate his story.

[5] Defendant's blanket statement that the court refused to consider his pro per motions is simply not supported by the record.

Under MCL 767.40a(4), the "prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." We review for an abuse of discretion a trial court's decision to allow a late endorsement of a witness. *People v Gadomski*, 232 Mich App 24, 32; 592 NW2d 75 (1998). In *Gadomski*, the trial court allowed a late endorsement where the identity and involvement of a witness did not come to light until after trial commenced. This Court affirmed, stating that "good cause" is shown for purposes of MCL 767.40a(4) when there is an unavoidable late discovery of a witness. *Id.* at 36. Here, we likewise find no abuse of discretion. There is no dispute that Dorsey stepped forward only after trial commenced, and there is no indication that the prosecution was previously aware of, or should have been aware of, Dorsey. Defendant complains that Dorsey did not have "good cause" for withholding the information for such a long period of time; however, our focus is not on whether Dorsey had good cause, but whether the prosecutor had "good cause" for adding the witness so late in the proceedings. Also, defense counsel was provided an opportunity to speak with Dorsey before his testimony. Defendant's argument on this issue mainly attacks Dorsey's credibility, but defense counsel attacked Dorsey's credibility below and, again, credibility is a matter for the jury to determine, not us. Defendant does not argue that the late endorsement prevented him from adequately preparing a challenge to Dorsey's testimony. Reversal is unwarranted.

Defendant also asserts that the trial court abused its discretion by refusing to allow testimony to be read back to the jury, despite a specific request by the jurors. In a note from the jurors, they made a request to examine certain documents admitted into evidence and to see the "testimony of Mr. Cooper." The court responded by sending a note back to the jury. The response indicated that it was sending in the requested exhibits. As to Cooper's testimony, the court informed the jury that the testimony was taken down by the court reporter and had not yet been transcribed into written form. The court stated that the testimony could be transcribed, but it would take some time to accomplish. The court then wrote, "You should rely on your memories as to all of the testimony." We find no error in the court's handling of the jury's request. And even if we assume that the court's approach constituted error, the issue was waived when defense counsel expressly and specifically indicated that it had no objection to the response note crafted by the trial court. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant finally argues that his constitutional rights were violated, where the prosecutor committed the crime of bribery and violated the rules of professional conduct when a plea deal was made with Bingham in exchange for truthful testimony. There is simply no evidence in the record that supports this contention. Reversal is unwarranted.

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Michael J. Kelly