STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STARR AUSTIN,

Defendant-Appellant.

UNPUBLISHED
June 23, 2009

No. 282608
Wayne Circuit Court
LC No. 07-009462-FC

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

PER CURIAM.

A jury convicted defendant of carjacking, MCL 750.529a, armed robbery, 750.529, and unlawfully driving away an automobile, MCL 750.413. The trial court sentenced defendant to concurrent terms of 9 to 20 years in prison for both the carjacking conviction and the armed robbery conviction, and a one to five year prison term for the unlawfully driving away an automobile conviction. Defendant appeals as of right. We affirm.

Defendant first contends that insufficient evidence supported her conviction of armed robbery. We review sufficiency of the evidence challenges de novo to determine 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 Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). A reviewing court must "draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Id*. at 400 (internal quotation omitted).

The prosecutor urged the jury to convict defendant of armed robbery on the basis that she aided and abetted the commission of this crime. Michigan's aiding and abetting statute, MCL 767.39, contemplates that "[e]very person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." The three elements necessary to sustain a conviction under an aiding and abetting theory are that "(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted 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 that [the

defendant] gave aid and encouragement." *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (internal quotation omitted).

After reviewing the record, we find sufficient evidence that defendant aided and abetted the armed robbery of a cellular phone from the victim, Billy Street. Street, who worked at a used car lot, testified that he accompanied defendant, a friend and a child on a test drive of a used Cadillac. Street recalled that during the test drive, defendant conversed on a cellular phone, at one point saying "something to the effect of I'll be there when I'm finished test-driving this car." Street acquiesced to defendant's request to drive the Cadillac on the freeway. However, en route to the freeway, defendant veered off onto a side street, stopped "in the middle of the block," and unlocked the Cadillac's doors. Street recounted that a man approached the Cadillac, opened the back door where Street was seated, while brandishing a handgun directed Street out of the car, and took Street's cellular phone. According to Street, defendant did not appear startled or frightened by the gunman's appearance and actions. Defendant then drove off in the Cadillac with the gunman inside.

Street's testimony, viewed in the light most favorable to the prosecutor, supported a rational jury's reasonable determinations beyond a reasonable doubt that an armed robbery occurred,[1] and that defendant performed acts or gave encouragement that assisted the commission of the crime, namely stopping the Cadillac in the middle of the street, unlocking the doors, and then driving away with the gunman in the car after he ejected Street from the Cadillac and took Street's phone. Defendant maintains that because she could not possibly have known that Street would have a cellular phone during the test drive or that the gunman would steal it, no rational view of the evidence tended to establish the third aiding and abetting element, that she "intended the commission of the [armed robbery] or had knowledge that the principal intended its commission at the time that [she] gave aid and encouragement." *Robinson*, *supra* at 6. However, our Supreme Court reiterated in *Robinson* that the aider and abettor's intent element is satisfied by proof that the principal's crime came "fairly within the common enterprise, and . . . might be expected to happen if the occasion should arise for any one to do it." *Id*. at 9 (internal quotation omitted). The Supreme Court summarized,

> Therefore, the prosecutor must prove beyond a reasonable doubt that the defendant aided or abetted the commission of an offense and that the defendant

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[1] To sustain an armed robbery conviction, a prosecutor must prove that

> (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) 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 he or she was in possession of a dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).]

> 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 (emphasis added).]

The jury in this case reasonably could have found or inferred beyond a reasonable doubt that the armed robbery of Street's cellular phone constituted a natural and probable consequence of the carjacking, which occurred at gunpoint and with defendant's assistance.[2] In summary, ample evidence supported defendant's conviction of aiding and abetting the armed robbery of Street's cellular phone.

Defendant next contends that the trial court incorrectly scored offense variables (OV's) 1 and 2. When scoring the sentencing guidelines, "[a] sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id*. This Court reviews de novo the legal questions involved in applying and interpreting the legislative sentencing guidelines. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

The trial court assigned 15 points under OV 1, signifying that "[a] firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon." MCL 777.31(1)(c). As noted, defendant does not challenge on appeal her participation in the carjacking, during which Street testified at trial that the male assailant "opened the door . . . [and] stuck the gun to my head . . . ." Street also recounted that he got out of the car because he was "just trying to save my life. I mean I didn't want to get killed over a car that wasn't mine." In light of Street's testimony, the trial court did not abuse its discretion by scoring 15 points for OV 1 because defendant's cohort pointed a handgun at Street's head.[3]

The trial court scored OV 2 at five points on the basis that "[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." MCL 777.32(1)(d). Street described at trial that the handgun pointed at his head by the male assailant "looked like it might have been a .45, something like that." This handgun plainly fits within the statutory definition of "'[p]istol,' 'rifle,' or 'shotgun'" as "includ[ing] a revolver, semi-automatic pistol, rifle, shotgun, combination rifle and shotgun, or other firearm manufactured in or after 1898 that fires fixed ammunition . . . ." MCL 777.32(3)(c). Given Street's testimony, the trial court did not abuse its discretion by assigning five points under OV 2.

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[2] Defendant does not contest the adequacy of the proof that she aided and abetted the carjacking.

[3] Defendant asserts that because no evidence proved that she possessed a weapon, any scoring of OV's 1 and 2 in sentencing her was unlawful. However, defendant ignores that MCL 767.39 plainly provides that a convicted aider and abettor "shall be punished as if [s]he had directly committed such offense."

Defendant maintains that according to *People v Johnston*, 478 Mich 903; 732 NW2d 531 (2007), the trial court abused its discretion in assessing points for OV's 1 and 2 because no one else has been charged, tried, convicted or sentenced for the carjacking and robbery. The Supreme Court in *Johnston* reversed the trial court's scoring of Johnston's OV's 1, 2, and 3, which the court had scored identically to scores received by Johnston's codefendants. *Id*. at 903-904. The trial court had scored all the defendants' OV's 1, 2 and 3 identically because each OV envisioned that in "multiple offender cases," "all offenders shall be assessed the same number of points." *Id*. at 904, citing MCL 777.31(2)(b); MCL 777.32(2); MCL 777.33(2)(a). The Supreme Court held that because Johnston "was the only offender convicted of larceny from the person and conspiracy to commit larceny from the person," "his was not a 'multiple offender case' for either of these crimes." *Id*. *Johnston* has no applicability here because the trial court in this case did not assign points under OV's 1 and 2 on the basis that the case involved a multiple offender situation. The jury convicted defendant of armed robbery and carjacking, both offenses against the person, MCL 777.16y, and OV's 1 and 2 properly apply to these convictions. MCL 777.22(1). As discussed above, the trial court correctly scored 15 points for OV 1 and five points for OV 2 because defendant participated in the crimes, during which the unidentified gunman pointed a handgun at Street's head.[4]

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Elizabeth L. Gleicher

[4] Because the trial court correctly scored OV's 1 and 2, we reject defendant's related claim that her counsel was ineffective for failing to object to the scoring at the sentencing hearing. *People v Rodriguez*, 212 Mich App 351, 355-356; 538 NW2d 42 (1995) (observing that counsel need not make groundless objections at sentencing).