# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 20, 2009 |
| v | No. 286265<br>Oakland Circuit Court |
| RANDY RALPH WEAVER, JR.,<br><br>Defendant-Appellant. | LC No. 2007-214393-FC |

Before: Davis, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

Defendant Randy Weaver, Jr. appeals as of right his jury conviction of armed robbery[1] and third-degree fleeing and eluding a police officer.[2] The trial court sentenced Weaver to 3-1/2 to 20 years' imprisonment for the armed robbery conviction and 40 months to 5 years' imprisonment for the third-degree fleeing and eluding a police officer conviction. We affirm.

## I. Basic Facts And Procedural History

This case arises out of a robbery outside the Comerica Bank branch at Nine Mile Road and Hilton Road in Ferndale, Michigan, on April 22, 2007. That day, Weaver's brother drove Weaver to his friend's house at East Davison Street and Conant Street in Hamtramck, Michigan around 2:00 p.m. While there, Weaver smoked marijuana between 4:00 p.m. and 4:30 p.m. Afterward, Weaver tried to call his brother for a ride home. When his brother did not answer, he asked Andrea Cummings, who was also present at the house, for a ride. Cummings agreed to drive Weaver home.

As Cummings drove Weaver in her mother's car, they smoked marijuana. She then told Weaver that she was going to "hit a lick." Weaver testified on direct examination that he understood the phrase "hit a lick" to mean to win money or to do something bad, but did not know that it meant to steal from someone. On cross-examination, however, Weaver testified that he realized that Cummings was going to commit a crime, but did not know the specifics.

[1] MCL 750.529.

[2] MCL 257.602a(3)(a).

However, Lieutenant Gary Whiting testified that during an interview he conducted with Weaver on the evening of the robbery, Weaver told him that he understood "hit a lick" to mean to take things from people. Additionally, in Weaver's statement to police, which he made the evening of the robbery, he said that when Cummings said she going to "hit a lick," he asked "on what?"

Cummings parked the car outside the Comerica Bank at Nine Mile Road and Hilton Road and exited, saying that she would be right back. It is not clear from the lower court record where exactly Cummings parked the car. Weaver testified that Cummings did not ask him to do anything, and he did not see if she had a weapon at this time.

Earlier that day, Deanna Savaria had been working as an assistant manager at a McDonald's restaurant in Hazel Park. Between 5:00 p.m. and 5:30 p.m., Savaria's boyfriend, Ray Ramirez, drove her to the same Comerica Bank Nine Mile Road and Hilton Road to deposit approximately $8,000 from the McDonald's in the bank's drop box. Ramirez parked his car in front of the bank. Savaria and Ramirez both noticed a woman standing at the ATM. Savaria exited the car and walked to the drop box. At that point, Ramirez saw the woman who had been standing at the ATM rush towards Savaria. Savaria heard Ramirez call out to her and turned to see him. As she did so, the woman struck Savaria in the head with a hard object and grabbed her face, turning it so that she could not see her attacker. Ramirez saw the attacker holding a gun. Savaria dropped her deposit bags and ran to the middle of the parking lot. Savaria's attacker picked up the deposit bags and ran around the back of the bank.

Weaver testified that meanwhile he had moved to Cummings's driver's seat. He testified that he thought about leaving, but did not because it was not his car. He turned the car around and drove towards Cummings. He testified that he wanted to stop her from doing something wrong and was not attempting to help her. Cummings ran towards the car, holding a gun. She entered the back seat of the car and told Weaver to "go." He asked her what she had done, but she did not give him an answer. He testified that he did not know at that point that she had confronted someone with a gun or had stolen money. Weaver drove away from the bank.

As Weaver drove, he noticed a blue truck behind him and testified that he believed that he was being followed because of something Cummings had done. When he heard police sirens, he asked her again what had happened, but she responded by saying, "go." Weaver continued to press for an answer, and Cummings eventually said she had "hit a lick."

Officers Jenessa Schalk, Lowell Phillips, and Matthew Goebel were dispatched to the armed robbery incident at approximately 5:30 p.m. They participated in a police chase involving Cummings's car along I-75, between Nine Mile Road and Seven Mile Road. At the Seven Mile Road exit, Weaver went over the grass embankment on the side of the freeway and continued onto Seven Mile Road, turning into a residential area. Weaver and Cummings then both jumped out of the car, leaving it in drive. The car eventually stopped when it ran into a fence at the rear of a residence. Officer Schalk continued to pursue Weaver on foot and observed him enter a backyard. A canine unit alerted at the front porch of a residence. Several officers gave verbal commands to Weaver to show his hands and exit from under the porch. Weaver moved away from the officers, at which point Officer Goebel and another officer physically removed him from the area under the porch. Weaver was not armed. Officer Phillips subsequently recovered Weaver's cell phone and a box of ammunition from the same area under the porch.

## II. Sufficiency Of The Evidence

### A. Standard Of Review

Weaver argues that there was insufficient evidence to support his armed robbery conviction and that, at best, the evidence only showed him to be an accessory after the fact. We review de novo sufficiency of the evidence claims.[3] We review the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.[4]

### B. Analysis

"The elements of armed robbery are: (1) an assault; (2) a felonious taking of property from the victim's presence or person; and (3) while the defendant is armed with a weapon."[5] The jury convicted Weaver of this offense under the aiding and abetting theory. The elements of aiding and abetting are: "'(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 he gave aid and encouragement.'"[6] The issue on appeal is whether Weaver intended the commission of armed robbery or knew that Cummings, the principal, intended to commit armed robbery at the time he gave aid or encouragement.

The distinction between an aider and abettor and an accessory after the fact depends on when the defendant's intent was formed.[7] An aider and abettor knows about or intends the commission of a crime before it is committed, whereas an accessory after the fact simply helps the person who has committed the crime only after the crime has ended.[8]

Here, Weaver admitted at trial that he knew Cummings was going to commit a crime, but claimed that he did not know the specifics. To the contrary, during the car ride just prior to the robbery, Cummings said she was going to "hit a lick," and Weaver asked, "on what?" Weaver told police that he understood "hit a lick" to mean to take things from people, even though he later denied such knowledge. Following their conversation, Cummings parked the car at a Comerica Bank, told Weaver that she would be right back, and exited the car. This evidence

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[3] *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

[4] *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

[5] *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007).

[6] *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999), quoting *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995), overruled in part on other grounds *People v Mass*, 464 Mich 615 (2001).

[7] *People v Usher*, 196 Mich App 228, 233; 492 NW2d 786 (1992), overruled in part on other grounds *People v Perry*, 460 Mich 55 (1999).

[8] *Id*.

supports that Weaver had knowledge that Cummings intended the commission of armed robbery during the ride to the bank.

The evidence also supports that Weaver was aware of Cummings's intent to commit armed robbery at the time he gave aid and encouragement. "An aider and abettor's state of mind may be inferred from all the facts and circumstances."[9] "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."[10]

Weaver claims that when Cummings exited the car, he did not know that she was going to commit armed robbery or that she had a gun. However, Weaver moved to the driver's seat and turned the car around, allowing Cummings to quickly leave the bank parking lot once the armed robbery had been committed. He also admitted that he saw Cummings had a gun when she returned to the car. The facts show Weaver continued his aid and encouragement by subsequently fleeing the crime scene with Cummings and engaging in a police chase. In light of these facts, there was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Weaver performed acts that assisted in the commission of the armed robbery with knowledge of Cummings's intent to commit the crime.

Weaver urges that, because the facts of the case would support his conviction as an accessory after the fact, they are insufficient to convict him as an aider and abettor. To support his contention, Weaver points to his trial testimony that he did not know Cummings was about to commit armed robbery. However, we will not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses.[11] It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences.[12] Because we defer to the trier of fact's credibility determinations and all conflicts in the evidence must be resolved in favor of the prosecution, Weaver's argument fails.[13]

## III. Prosecutorial Misconduct

### A. Standard Of Review

Weaver argues that the prosecutor committed prosecutorial misconduct because his statements during closing argument suggesting that Weaver may have been armed amounted to statement of facts unsupported by the evidence. "Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could

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[9] *Turner*, *supra* at 568.

[10] *Id.* at 569.

[11] *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992).

[12] *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

[13] *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

not have cured the error, or failure to review the issue would result in a miscarriage of justice."[14] Because there was no contemporaneous objection and request for a curative instruction, our review is for plain error.[15] To find plain error, we must decide whether there was error, if it was plain, and if it affected the defendant's substantial rights.[16]

B. Analysis

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial."[17] A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence.[18] However, the prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case.[19] "The prosecutor has wide latitude in arguing the facts and reasonable inferences, and need not confine argument to the blandest possible terms."[20]

During his closing argument, the prosecutor said the following:

> Now, it's interesting, they pull him out of the porch, and under the porch they find the defendant's cell phone, which he readily admits was his. But just coincidentally, ladies and gentleman, they find some relatively brand new .38 caliber rounds strewn out. Whether it was in a box, there was some confusion whether it was in a box or whether they were out loose; in the same area that the cell phone was in, in the same area that the defendant was in. What kind of coincidence is that, ladies and gentlemen?
>
> I asked Mr. Weaver, and I submit to you, ladies and gentlemen, where did the other gun go? Bullets were under the porch. The defendant's cell phone was under the porch, the very cell phone that he told you the police returned to him, and he was under the porch.
>
> I think it's reasonable to presume that the defendant played a much bigger part in this armed robbery than just having been in the wrong place at the wrong time.
>
> This is not a matter of being a victim of the circumstance. This is a matter of taking an active part.

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[14] *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

[15] *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

[16] *Id.*

[17] *People v Rice*, 235 Mich App 429, 434; 597 NW2d 843 (1999).

[18] *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994).

[19] *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

[20] *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

He later continued in his rebuttal:

> And I want you to ask yourself, what are the odds? If I went to Las Vegas and I were to put money down, what are the odds that a man from Detroit who goes out to Ferndale, hops in a car, flees from the police, jumps out of the car, runs several blocks over, runs under porch where he is at and his cell phone at, what are the odds that you're going to also find these pristine bullets right where the defendant was located? Right where his cell phone was located? Where did they come from? What are the odds?
>
> I tell you, I want to be able to meet the man to get the lottery ticket because that is an astronomical number.
>
> You can draw any inference from any of the evidence that has been presented in this case. And I think it was a fair question of myself to Mr. Weaver: Where is the gun that goes with these particular bullets? Because you know what, ladies and gentlemen, you can surmise from the evidence that's been presented to you, the defendant took more of a part than just being mere presence. Maybe they went out both together, both of them armed.

Here, the prosecutor did not argue facts that were unsupported by the evidence. Rather, the prosecutor argued that the jury should draw reasonable inferences from the evidence. Following the police chase that occurred after the robbery, Officer Lowell Phillips removed Weaver from under a residential porch. Officer Phillips subsequently recovered Weaver's cell phone and a box of ammunition from the same area under the porch. Officer Phillips testified that the ammunition was in pristine condition. At trial, Detective John Thull testified that this ammunition would tarnish very quickly if exposed to outdoor conditions, but showed no such sign of outdoor exposure. He also testified that the bullets would not fit the firearm that was found in Cummings's purse. Given these facts, the prosecutor did not commit prosecutorial misconduct when he argued the inferences that Weaver possessed the ammunition and may have been independently armed. Regardless, even if the prosecutor committed prosecutorial misconduct in his closing argument and rebuttal, this error was cured when the trial court instructed the jury that the statements of lawyers are not evidence.[21] Therefore, there is no plain error affecting Weaver's substantial rights.

Affirmed.

/s/ Alton T. Davis
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro

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[21] *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001) (stating that a miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could be cured by a timely instruction).