STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 9, 2010
v DELEON SINCLAIRE NELSON, Defendant-Appellant.	No. 281567 Wayne Circuit Court LC No. 07-008327-02-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v TERANCE CORNELIUS PONDER, Defendant-Appellant.	No. 281671 Wayne Circuit Court LC No. 07-008327-01-FC

Before: Hoekstra, P.J., and Stephens and M. J. Kelly, JJ.

PER CURIAM.

Defendants Deleon Nelson and Terance Ponder were tried jointly, before a single jury. The jury acquitted both defendants of first-degree premeditated murder, MCL 750.316(1)(a), but found them guilty of the lesser offense of second-degree murder, MCL 750.317, and an additional charge of assault with intent to commit murder, MCL 750.83. The jury also found Ponder guilty of being in possession of a firearm during the commission of a felony, MCL 750.227b, and of being a felon in possession of a firearm, MCL 750.224f. The trial court sentenced Nelson to concurrent prison terms of 18 to 36 years for the murder conviction and 10-1/2 to 25 years for the assault conviction. The trial court sentenced Ponder as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of 270 to 540 months for the murder conviction, 171 to 342 months for the assault conviction, and 36 to 120 months for the felon-in-possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Both defendants appeal as of right. Because there were no errors warranting relief, we affirm.

Defendants' convictions arise from the shooting death of David Griffin, Jr., and the nonfatal shooting of Marvin McNeary, at a Detroit restaurant during the early morning hours of March 25, 2007. The shots were fired through the restaurant's windows from a vehicle parked outside the restaurant. Two restaurant employees testified that both defendants were inside the restaurant shortly before the shooting began. One of the men who was with both victims, Keith Bassett, also testified that he saw both defendants inside the restaurant and then saw them inside a black Jeep just before the shooting began. According to Bassett, Nelson drove the Jeep to a position just outside the restaurant's window and, as the traffic on the road cleared, Ponder fired an AK-47 assault rifle from the Jeep into the restaurant. Nelson testified that he was at the restaurant with Ponder, but claimed that he left and drove home before the shooting occurred. Nelson also claimed that he was driving his brother's Caprice on the night of the shooting. Ponder did not testify at trial.

I. Docket No. 281567 (Defendant Nelson)

Nelson first argues that the evidence was insufficient to establish his involvement in the charged crimes.

This Court reviews a challenge to the sufficiency of the evidence by examining whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence must be viewed in the light most favorable to the prosecution. *Id*. at 515. Circumstantial evidence and reasonable inferences drawn from the evidence may be sufficient to prove the elements of a crime. *Id.* at 526.

Nelson argues that there was insufficient evidence linking him to the offense. "The credibility of identification testimony is a question for the trier of fact that we do not resolve anew." *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). "[P]ositive identification by witnesses may be sufficient to support a conviction of a crime." *Id*.

Nelson was identified by two restaurant employees as being inside the restaurant shortly before the shooting began. Additionally, Bassett identified Nelson as the driver of the vehicle from which the shots were fired. This evidence, viewed in a light most favorable to the prosecution, was sufficient to prove Nelson's identity as a person involved in the commission of the offense.

Nelson also argues that there was insufficient evidence to prove that he aided or abetted Ponder in the shooting. To prove that a defendant aided or abetted in 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. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); see also *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006). An aider or abettor's state of mind may be inferred from all the facts and circumstances. *Carines*, 460 Mich at 757. Factors that can be considered include a close association between the principal and the defendant, the defendant's participation in the planning and execution of the crime, and evidence of flight after the crime. *Id*. at 757-758. "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).

As previously indicated, Bassett identified Nelson as the driver of the vehicle from which the shots were fired. Bassett also testified that the weapon involved in the shooting was an AK-47 assault rifle, which is a larger weapon that is not easily concealed, thereby supporting an inference that Nelson was aware that Ponder was armed with a firearm. Bassett also testified that just before the shooting began, Nelson positioned the vehicle in front of the restaurant's window and remained there for a few minutes, until the traffic on the roadway cleared, at which point Ponder began shooting. Viewed in a light most favorable to the prosecution, the testimony supported an inference that Nelson purposefully positioned the vehicle to enable Ponder to have a clear shot through the restaurant windows, and that the two defendants waited until the traffic cleared before shooting, thereby allowing for a quick escape. The evidence was sufficient to prove that Nelson knowingly assisted Ponder in the commission of the crimes.

Nelson next argues that the trial court erred in allowing the prosecutor to introduce an automatic AK-47 assault rifle as demonstrative evidence. A trial court's decision to admit evidence is reviewed for an abuse of discretion, but any preliminary questions of law are reviewed de novo. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

As this Court has explained, demonstrative evidence may be admitted when it will aid the jury in making its findings:

> Demonstrative evidence is admissible when it aids the fact-finder in reaching a conclusion on a matter that is material to the case. The demonstrative evidence must be relevant and probative. Further, when evidence is offered not in an effort to recreate an event, but as an aid to illustrate an expert's testimony regarding issues related to the event, there need not be an exact replication of the circumstances of the event. [*People v Bulmer,* 256 Mich App 33, 35; 662 NW2d 117 (2003) (citations omitted).]

"However, '[a]s with all evidence, to be admissible, the demonstrative evidence offered must satisfy traditional requirements for relevance and probative value in light of policy considerations for advancing the administration of justice.'" *People v Unger*, 278 Mich App 210, 247; 749 NW2d 272 (2008), quoting *People v Castillo*, 230 Mich App 442, 444; 584 NW2d 606 (1998).

We disagree with Nelson's argument that, because the actual murder weapon was never recovered and Bassett was not an expert in firearms identification, there was an insufficient foundation for admitting the AK-47 assault rifle as demonstrative evidence. Bassett testified that he had seen an AK-47 assault rifle before and was familiar with the weapon. He testified that he was certain that the weapon used in the shooting was an AK-47. In addition, the shell casings found by the police at the scene, and the bullets recovered from the victims, were consistent with the ammunition used in AK-47s. This evidence established a sufficient foundation to identify the weapon involved in the shooting as an AK-47 assault rifle. It was not necessary that Bassett specifically identify the weapon introduced at trial as similar to the one involved in the shooting before it could be introduced. Bassett identified the type of weapon used in the shooting by its make, and the detective's testimony that the weapon produced at trial was the same type of

weapon as that described by Bassett was sufficient to allow its introduction as demonstrative evidence.

Nelson also argues that because he did not contest that the shooting occurred, but only contested his involvement in the offense, the evidence was unduly prejudicial, intended only to excite the passions and prejudices of the jurors.

Under MRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *People v Sabin (After Remand)*, 463 Mich 43, 57-58; 614 NW2d 888 (2000). Unfair prejudice does not mean any prejudice, but refers to "the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994) (quotation omitted).

One of the defense theories at trial was that the evidence showed that the shooting was committed by the passenger of the vehicle that was parked next to the restaurant, but failed to show that the driver of the vehicle did anything to knowingly assist the passenger in committing the offense. The prosecution's theory at trial was that Nelson was the driver of the vehicle and assisted Ponder, the shooter, by knowingly maneuvering the vehicle in front of the restaurant's windows, thereby enabling Ponder to have a clear shot inside the restaurant. A primary purpose for admitting the AK-47 rifle as demonstrative evidence was to show the size and style of the weapon, i.e., that the weapon was not one that could be easily concealed. Evidence regarding the size and style of the rifle used in the shooting was probative of whether Nelson would have been aware that Ponder was armed with a weapon when Nelson maneuvered his vehicle in front of the restaurant's windows. Because the demonstrative purpose of the rifle was relevant to whether Nelson knowingly aided or abetted Ponder in the shooting, the jury properly could consider it for that purpose.

Furthermore, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The potential for unfair prejudice was minimal considering that the jury was informed that the weapon introduced at trial was not the weapon used in the offense and was being offered solely for demonstrative purposes. Further, the record does not support Nelson's argument that the purpose of the evidence was to elicit sympathy for the victims or hatred for both defendants. Accordingly, the trial court did not abuse its discretion in allowing the AK-47 rifle to be admitted as demonstrative evidence.

Nelson next argues that the trial court deprived him of his constitutional right to present a defense when it refused to instruct the jury on the offense of accessory after the fact. Whether the trial court appropriately refused to instruct the jury on accessory after the fact involves a question of law, which this Court reviews de novo. *People v Smith*, 478 Mich 64, 68-69; 731 NW2d 411 (2007). This Court also reviews de novo the constitutional question whether Nelson was denied his constitutional right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

At trial, Nelson presented alternative defenses of mere presence and alibi. He also requested that the trial court instruct the jury on accessory after the fact. When the trial court stated that it would instruct on two of these three theories, Nelson opted to have the jury instructed on mere presence and alibi.

Despite the manner in which this issue is framed on appeal, the pertinent question is whether the trial court's refusal to instruct on accessory after the fact violated Nelson's right to a properly instructed jury, and thereby violated Nelson's right to present a defense. We conclude that Nelson was not entitled to an instruction on accessory after the fact as a matter of law, and that the trial court's refusal to give the requested instruction did not violate Nelson's right to present a defense.

Accessory after the fact is not a defense, but rather a separate substantive offense that was never charged in this case. Under MCL 768.32(1), a defendant may be convicted of any offense of which he is charged, any inferior offense, or any attempt to commit the charged offense. An "inferior" offense is limited to necessarily included lesser offenses. *People v Cornell*, 466 Mich 335, 354; 646 NW2d 127 (2002); *Smith*, 478 Mich at 69. Cognate lesser-included offenses do not qualify as "inferior" offenses under MCL 768.32(1). *Smith*, 478 Mich at 73.

> [T]he common-law offense of accessory after the fact is not in the same class or category as murder. Plainly, the purpose of the murder statute is to protect human life and prohibit wrongful slayings. By contrast, an accessory after the fact is "one who, with knowledge of the other's guilt, renders assistance to a felon in the effort to hinder his detection, arrest, trial or punishment." Perkins, Criminal Law (2d ed), p 667, quoted in *People v Lucas*, 402 Mich 302, 304; 262 NW2d 662 (1978). The crime of accessory after the fact is akin to obstruction of justice. *United States v Brenson*, 104 F3d 1267 (CA 11, 1997). Laws forbidding the obstruction of justice clearly serve a different purpose than those that forbid the taking of a life. [*People v Perry*, 460 Mich 55, 62; 594 NW2d 477 (1999).]

Because accessory after the fact is not in the same class or category as murder or assault with intent to commit murder, it is not a lesser included offense of either crime. Thus, Nelson had no right to an instruction on accessory after the fact as a matter of law. Even though the trial court ostensibly gave Nelson a "choice" on whether he wanted an instruction on accessory after the fact, the trial court did not have the option of giving that instruction. Therefore, Nelson's "decision" to forego that instruction and agree to have the jury only consider his theories of mere presence and alibi (or lack of presence) did not deprive him of a valid defense theory.

II. Defendant Nelson's Standard 4 Brief in Docket No. 281567

In a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-4, Standard 4, Nelson argues that the prosecutor's conduct deprived him of a fair trial.

Preserved claims of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). In this case, however, Nelson did not object to most of the instances of alleged misconduct. Where the issue was not preserved with a timely objection at trial, we review the issue for "plain error affecting substantial rights." *Id.* at 274.

Claims of prosecutorial misconduct are decided case-by-case by reviewing the prosecutor's conduct in context to determine whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267 nn 5-7; 531 NW2d 659 (1995); *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). A prosecutor is afforded great

latitude during closing argument. He is permitted to argue the evidence and make reasonable inferences in support of his theory of the case, but he must refrain from making prejudicial remarks. *Bahoda*, 448 Mich at 282-283. While the prosecutor has a duty to see that a defendant receives a fair trial, he may use "hard language" when it is supported by the evidence, and he is not required to phrase his arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

Nelson argues that it was improper for the prosecutor to refer to the demonstrative rifle in his closing argument because the rifle was not admissible as demonstrative evidence. As explained previously, however, the rifle was admissible for this purpose. Therefore, it was not improper for the prosecutor to comment on the evidence.

Nelson next argues that the prosecutor improperly vouched for the credibility of his witnesses. A prosecutor may not vouch for the credibility of his witnesses by suggesting that he has some special knowledge of the witnesses' truthfulness. *Bahoda*, 448 Mich at 276. He may, however, argue on the basis of the facts and evidence that a witness should be believed. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). In this case, the prosecutor's comments regarding the credibility of his witnesses, including Bassett, were based on the evidence presented at trial. The prosecutor did not suggest that he had some special knowledge that the witnesses were testifying truthfully. Further, Rachel Estill testified that she observed Nelson inside the restaurant on the night of the shooting, and that she saw a black vehicle that looked like a Jeep Cherokee parked outside the restaurant just before the shooting began. In light of this testimony, there was no plain error in the prosecutor's argument that Bassett's testimony was corroborated by Estill's testimony.

We also reject Nelson's argument that the prosecutor improperly appealed to the jurors' sympathy for the victims. It is improper for a prosecutor to appeal to the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Thus, it generally is inappropriate for the prosecutor to ask the jurors to place themselves in the role of the complainant when arriving at a verdict. *People v Buckey*, 133 Mich App 158, 167; 348 NW2d 53 (1984), rev'd on other grounds 424 Mich 1 (1985). In this case, however, the prosecutor's comments did not involve an obvious plea to the jury to sympathize with the victims. Instead, the prosecutor merely urged the jury to consider all of the circumstances of the case in deciding whether the allegations against Nelson were true. The prosecutor's arguments did not invite the jurors to suspend their power of judgment and decide the case based on their sympathy for the victim. *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994).

Nelson also argues that the prosecutor improperly asked him to comment on the credibility of Bassett's testimony. "A prosecutor may not ask a defendant to comment on the credibility of prosecution witnesses because a defendant's opinion of their credibility is not probative." *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). However, it is not improper for a prosecutor to ask the defendant to comment on whether he has a different version of the facts or to question the defendant to attempt to ascertain which facts are in dispute. *Id*. Viewed in context, the prosecutor's questions did not refer to Nelson's beliefs about Bassett's credibility, but rather involved an attempt to clarify which aspects of Bassett's version of events he disagreed with. This was not improper. In addition, because the questioning was not improper, it was not improper for the prosecutor to comment on Nelson's testimony during his closing argument.

Nelson also argues that the prosecutor interjected issues broader than his guilt or innocence during closing argument by invoking the jurors' civic duty. "A defendant's right to a fair trial may be violated when the prosecutor interjects issues broader than the guilt or innocence of the accused." *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). A prosecutor may not intentionally interject inflammatory comments with no apparent justification except to arouse the jurors' prejudices. *Bahoda*, 448 Mich at 266. Civic duty arguments are considered improper where jurors are asked to decide the case based on their fears or prejudices or other issues broader than the defendant's guilt or innocence. *Id*. at 282-285.

In this case, Nelson does not explain, nor is it apparent from the record, how the challenged comments could be considered improper civic duty arguments or otherwise prejudicial. Thus, we find no plain error. Moreover, contrary to what Nelson argues, the comments did not involve the prosecutor's personal opinions without regard to the evidence. Further, the prosecutor's reference to defendants jointly producing the weapon was a fair comment on the evidence and reasonable inferences arising from the evidence.

Next, the prosecutor did not misstate the law regarding aiding and abetting. The prosecutor had earlier commented on the intent element for aiding and abetting. In the challenged comments, the prosecutor was not addressing the issue of intent, but rather explaining how Nelson's conduct assisted in the commission of the crime. There was no plain error.

Finally, the prosecutor did not shift the burden of proof in his rebuttal argument by commenting on Nelson's defense. Although a defendant does not have the burden of producing any evidence, once the defendant advances a theory or defense, the prosecutor does not shift the burden of proof by commenting on that theory or any inferences drawn from the defendant's case. *People v Reid*, 233 Mich App 457, 478; 592 NW2d 767 (1999). Attacking the credibility of the defense theory does not shift the burden of proof. *McGhee*, 268 Mich App at 635. The prosecutor commented on Nelson's own testimony at trial and his claim that he was not present when the shooting occurred. Because Nelson testified at trial, the comments cannot be interpreted as an attempt to shift the burden of proof to Nelson.

Lastly, having considered each of Nelson's individual claims of misconduct and found no error, Nelson's claim that the cumulative effect of the prosecutor's conduct denied him a fair trial likewise must fail.

Next, Nelson argues that his attorney was ineffective for not moving to quash the information on the ground that the evidence at the preliminary examination was insufficient to bind him over for trial, and for not objecting to the prosecutor's conduct.

As previously indicated, the evidence at trial was sufficient to support Nelson's convictions. "[A] magistrate's erroneous conclusion that sufficient evidence was presented at the preliminary examination is rendered harmless by the presentation at trial of sufficient evidence to convict." *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). Further, as previously explained, the prosecutor's conduct was not improper. Therefore, counsel was not ineffective for failing to pursue these matters. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Because the record is sufficient to review these claims, remand for an evidentiary hearing is not necessary.

III. Docket No. 281671 (Defendant Ponder)

Defendant Ponder argues that trial counsel was ineffective for failing to call an expert on eyewitness identification. Because Ponder did not raise this ineffective assistance of counsel issue in an appropriate motion in the trial court, our review is limited to mistakes apparent from the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To establish ineffective assistance of counsel, Ponder must show that counsel's performance fell below an objective standard of reasonableness, and that he was so prejudiced by the representation that he was denied his right to a fair trial. *Pickens*, 446 Mich at 338. Ponder must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, Ponder must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

The record discloses that trial counsel considered calling an expert witness regarding identification testimony, but could not locate one who would agree to appear at trial. On appeal, Ponder has not identified any proposed expert who was willing to testify on his behalf, or presented any offer of proof showing the proposed testimony to be offered. On this record, there is no basis for concluding that counsel's performance was deficient, or that Ponder was prejudiced by the failure to call an expert witness.

Ponder next argues that his convictions must be vacated because there was insufficient evidence to identify him as a participant in the offenses.

As previously indicated, the credibility of identification testimony is a question for the jury and positive identification may be sufficient to support a conviction. *Davis,* 241 Mich App at 700. Two restaurant employees identified Ponder as being inside the restaurant just before the shooting began. More significantly, Bassett identified Ponder as the person in the black Jeep who fired the assault rifle into the restaurant. Bassett was certain that Ponder was the shooter and later picked Ponder out of a photographic showup. This evidence was sufficient to establish Ponder's identity as the person who shot and killed Griffin, and wounded McNeary. Although Ponder makes much of the fact that the black Jeep and the murder weapon were never recovered, the jury could have inferred that Ponder disposed of these items after the offense. Viewed in a light most favorable to the prosecution, *Wolfe*, 440 Mich at 514-515, the evidence was sufficient to support Ponder's convictions.

Ponder next argues that his sentences for second-degree murder and assault with intent to commit murder are cruel or unusual punishment under the federal and state constitutions. US Const, Am VIII; Const 1963, art 1, § 16. There is no merit to this argument.

Ponder's sentence of 270 to 540 months for second-degree murder is at the low end of the sentencing guidelines range of 270 to 675 months or life. Similarly, his sentence of 171 to 342 months for assault with intent to commit murder is at the low end of the guidelines range of 171 to 427 months for that offense. A sentence within the sentencing guidelines range is presumptively proportionate, and a proportionate sentence does not amount to cruel or unusual punishment. *People v Drohan*, 264 Mich App 77, 91-92; 689 NW2d 750 (2004); see also *People*

v Powell, 278 Mich App 318, 323-324; 750 NW2d 607 (2008). Ponder, a third habitual offender who was convicted of murdering one person and wounding another in an unprovoked attack with an assault rifle, has not overcome the presumptive proportionality of his sentences. Thus, there is no merit to Ponder's argument that his proportionate sentences are either cruel or unusual.

IV. Defendant Ponder's Standard 4 Brief in Docket No. 281671

In a pro se supplemental brief, Ponder argues that "the prosecution never made a determination of who actually shot the victim," and asserts that the jury's verdict was a compromise.

Ponder's pro se argument is not clearly presented. It appears to be directed at whether the prosecution presented sufficient evidence to identify him as the shooter. As discussed previously, the evidence at trial, principally Bassett's testimony, was sufficient to establish Ponder's identification as the shooter, and to prove that Nelson aided or abetted in the offense by positioning the vehicle to enable Ponder to get a clear shot into the restaurant and quickly escape after the shooting. The evidence also showed that the weapon used in the offense was an AK-47 assault rifle, not a .38 caliber gun as Ponder suggests.

There were no errors warranting relief.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly