STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 1, 2012
v	No. 297743 Wayne Circuit Court
TARRANISHA DAVIS, Defendant-Appellant.	LC No. 09-028032-FC

Before: K. F. KELLY, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right from her convictions by a jury of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced her to 22 ½ to 40 years' imprisonment for the second-degree murder conviction and to two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant argues that she was denied a fair trial when the court allowed Ricky Jackson to assert his Fifth Amendment right not to testify. Defendant's counsel did not raise an objection to Jackson's assertion of the right or the trial court's procedures in handling the issue; thus, this issue was not properly preserved. We review an unpreserved claim of error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only if plain error (1) prejudiced the defendant and (2) seriously affected the fairness, integrity, or public reputation of the judicial proceedings or resulted in the conviction of an actually innocent defendant. *Id*. at 763.

Defendant argues that the trial court erred by failing to hold a hearing regarding the validity of Jackson's invocation of his Fifth Amendment privilege. Defendant relies on *People v Poma*, 96 Mich App 726; 294 NW2d 221 (1980), in support of her assertion of error. However, *Poma* does not provide that a hearing must be held to determine the validity of a witness's proposed assertion of the Fifth Amendment privilege. Rather, *Poma* deals with whether a witness will claim a Fifth Amendment privilege in front of the jury. *Id*. at 733. Recognizing the inherent prejudice to a defendant when a witness asserts the privilege from the witness stand, *Poma* instructs that once the trial court determines that the witness will assert the privilege, the judge "must not allow [the] . . . witness to be called to the stand." *Id*.

Here, there appears to be no question that Jackson would have asserted his Fifth Amendment privilege in front of the jury if he were called to the stand. Jackson's counsel made it clear that he met with Jackson in jail and that Jackson decided he would invoke his Fifth Amendment right to not testify. In addition, the trial court correctly noted that Jackson held a valid privilege. The trial court stated, "the reason being is [that] potentially [Jackson]—albeit a misdemeanor potentially for the assault on [the codefendant], anything he says—for example, if somebody asked him, 'Isn't it true that you punched—unprovoked, you know, punched [the codefendant]?', I mean that opens him up." The record reflects that the court determined that Jackson had a valid Fifth Amendment privilege, that Jackson elected to invoke his privilege, and that Jackson refused to testify after consultation with his counsel. Thus, having determined that Jackson would assert his Fifth Amendment right not to testify,[1] under *Poma* the trial court was required to prohibit Jackson from being called to the stand. Further, a party may not call a witness who he knows will assert his Fifth Amendment right not to testify. *People v Avant*, 235 Mich App 499, 514; 597 NW2d 864 (1999). The trial court did not commit plain error by precluding defendant from calling Jackson as a witness.

In defendant's statement of questions presented on appeal, she asserts that her right to confront Jackson was violated. "A defendant has the constitutional right to confront witnesses against him, primarily secured by the right to cross-examination." *People v Gearns*, 457 Mich 170, 185; 577 NW2d 422 (1998), overruled on other grounds by *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). However, "[i]mplicit in the Supreme Court's Confrontation Clause jurisprudence is that a witness must put forth *some testimony* before the defendant's right of confrontation comes into play. A defendant has no right to confront a witness who does not provide any evidence at trial." *Gearns*, 457 Mich at 186-187 (emphasis in original). Jackson never gave any testimony at trial; thus, defendant's right of confrontation was not violated. Defendant has failed to establish any plain error affecting her substantial rights with regard to Jackson's invocation of his right to refuse to testify.

Next, defendant argues that the trial court abused its discretion when it admitted the letter written by the codefendant to his sister, Bisa Davis. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). This Court reviews for clear error the trial court's findings of fact regarding the trustworthiness of a hearsay statement. See *People v Barrera*, 451 Mich 261, 268-269; 547 NW2d 280 (1996).

The trial court admitted the letter under MRE 804(b)(3), an exception to the hearsay rule. Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v Bartlett*, 231 Mich App 139, 159; 585 NW2d 341 (1998). Hearsay is not admissible as substantive evidence unless an exception applies. MRE 802. MRE 804(b)(3) provides that,

[1] The court was not required to "probe [Jackson] further on the propriety of asserting the Fifth Amendment privilege." See, e.g., *People v Lawton*, 196 Mich App 341, 346-347; 492 NW2d 810 (1992).

when a declarant is unavailable,[2] the declarant's out-of-court statement against interest may avoid the hearsay rule if certain thresholds are met:

> *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Whether a statement is admissible under MRE 804(b)(3) depends on: "'(1) whether the declarant was unavailable, (2) whether the statement was against penal interest, (3) whether a reasonable person in the declarant's position would have believed the statement to be true, and (4) whether corroborating circumstances clearly indicated the trustworthiness of the statement.'" *People v Ortiz-Kehoe*, 237 Mich App 508, 517-518; 603 NW2d 802 (1999), quoting *Barrera*, 451 Mich at 268. In *People v Taylor*, 482 Mich 368, 379; 759 NW2d 361 (2008), quoting *People v Poole*, 444 Mich 151, 161; 506 NW2d 505 (1993), overruled in part on other grounds by *Taylor*, the Court stated:

> "[W]here, as here, the declarant's inculpation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement—including portions that inculpate another—is admissible as substantive evidence at trial pursuant to MRE 804(b)(3)."

The trial court did not abuse its discretion in admitting the letter under MRE 804(b)(3). The codefendant was unavailable because he exercised his right not to testify. The statements in the letter were against his penal interest. In his letter, the codefendant discussed the day of the shooting and made inculpatory statements. The codefendant wrote:

> I wasn't doing nothing [sic] but acting my age . . . . But those low-lifes [sic] got into the—and the dumbest person in our family ruined my life. I should have listened to myself that day. I thought family was supposed to lead you away from trouble, not toward it. I used half of my first mind and I got on the bus about to go home. I was even calm, wasn't even thinking about what happened. Damn, I hate this shit. I already had my future planned. I hope I can get a second chance.

These statements were inculpatory because they tended to show his involvement in the shooting.

[2] Neither party challenges the trial court's ruling that the codefendant was unavailable because he waived his right to testify.

In fact, defendant does not challenge whether the statements were in fact inculpatory; instead, defendant asserts that the statements in the letter were not trustworthy, i.e., had no indicia of reliability. The proper inquiry is whether a reasonable person in the codefendant's shoes would have believed the statements to be true and whether the circumstances of the statements sufficiently established their trustworthiness. *Ortiz-Kehoe*, 237 Mich App at 517-518. The codefendant wrote the letter to his sister, with whom he was close. In it, he encouraged her to go to college, discussed the day of the shooting, and expressed regret over his actions. The record supports that the codefendant would likely speak the truth to his sister, Bisa. Moreover, there was no evidence to suggest that the codefendant was prompted to write the letter by his sister, counsel, or any external force. In fact, Bisa asserted that she received numerous letters from her brother while he was in jail awaiting his trial, thus supporting a finding that the codefendant wrote the letter voluntarily. Additionally, the letter tended to subject the codefendant to criminal liability, and "a reasonable person in the declarant's position would have not made the statement unless believing it to be true." MRE 804(b)(3). "[T]he statement's reliability flows from the postulate that a reasonable person will not incriminate himself by admitting a damaging fact unless he believes that fact to be true." *Barrera*, 451 Mich at 271–272. The surrounding circumstances clearly suggest that the statements were trustworthy because the codefendant wrote the letter voluntarily, without being prompted, and he wrote the letter to his sister, someone to whom he was very close and to whom he was likely to be truthful. Accordingly, the codefendant's statements in the letter were admissible under MRE 804(b)(3).

Defendant also argues that it was an error to admit the letter against her because there was no evidence that the pertinent passage in the letter was about her. In the letter, the codefendant wrote, "[T]he dumbest person in our family ruined my life." Although the letter did not *directly* refer to defendant and Bisa later testified that the letter referred to another person, Duane Henry, there nevertheless was adequate evidence that the letter referred to defendant such that the letter was admissible. Indeed, the evidence tended to show that defendant instigated the murder. It was then up to the jury to ultimately decide the weight to be afforded the evidence.[3] *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005) (the weight of evidence and the credibility of witnesses are questions for the jury). Given the testimony regarding defendant's involvement, i.e., her driving to the recreation center, instigating the codefendant to fight, and popping the hood of her van to allow the codefendant to access a gun, a reasonable jury could infer that the reference in the letter was to defendant.

Moreover, even if the letter was erroneously admitted, the error was harmless and no relief would be warranted. This Court has held that the standard of review for preserved nonconstitutional error places the burden on the defendant to establish a miscarriage of justice under a "more probable than not" standard in order to obtain reversal. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). This requires a showing of prejudice, i.e., a showing that it is more probable than not that the error affected the outcome of the lower court proceedings.

[3] The trial court specifically noted, "you're free to cross Bisa [about] who is the recipient of this letter."

Id. As discussed below, there was substantial evidence in support of defendant's guilt. Defendant cannot show that the alleged error affected the outcome of the trial.

Defendant also argues that the trial court denied her a fair trial because it improperly instructed the jury with regard to false exculpatory statements. We find, however, that defendant has waived this issue. Generally, "[a] party must object or request a given jury instruction to preserve [an] error for review." *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). At trial, the prosecutor requested an instruction on false exculpatory statements. Defendant's counsel objected and stated, "Judge, I would certainly object to that [the instruction on false exculpatory statements] because the false exculpatory statement is I don't know the person. That has no bearing on whether this particular crime—" The prosecutor clarified that the instruction would relate to defendant's statement to the police wherein she said, "Why are you stopping me? I need to pick up my kids." Defendant's counsel did not then object to the prosecutor's request for an instruction regarding this exculpatory statement. Following the prosecution's clarification, the trial court took the matter under advisement. Without further discussion, the trial court later instructed the jury concerning false exculpatory statements. After the instructions were read, defendant's counsel stated that she had "[n]o objections" to the instructions as given. Defendant's counsel did not object to the jury instructions as given and did not request additional jury instructions with regard to the issue of false exculpatory statements; instead, defendant's counsel affirmatively stated that she was satisfied with the instructions as read. Defendant waived the present issue by expressly approving the instruction. *People v Lueth*, 253 Mich App 670, 688, 660 NW2d 322 (2002).

Even if we *were* to review this issue, we would find no basis for reversal. A trial court may properly instruct a jury that false exculpatory statements made by a defendant may be considered as evidence of a defendant's guilt. See *People v Seals*, 285 Mich App 1, 5-6; 776 NW2d 314 (2009); see also *People v Dandron*, 70 Mich App 439, 442-443; 245 NW2d 782 (1976). "Defendant has no claim to be protected against the exposure of . . . falsehood where [s]he indulges in it for [her] own exculpation." *Id*. at 443 (internal citation and quotation marks omitted). In *Dandron*, *id*. at 442-445, this Court held that exculpatory statements that are made by a defendant to a law enforcement officer may be circumstantial evidence of guilt if they are shown to be false. If the statement relates to the crime and there is evidence establishing that the statement was false, the false exculpatory statement "may be used as probative evidence of guilt." *Id*. at 443.[4]

The trial court instructed the jury as follows:

> Evidence has been introduced that the defendant may have made a false exculpatory statement about her involvement in this case. Evidence that a criminal

[4] The *Dandron* Court did not restrict its holding by stating that such statements may only be used to show *consciousness* of guilt, and we decline defendant's invitation to reinterpret prior Michigan case law and federal, nonbinding case law in order to put forth such a restriction. At any rate, it is hard to fathom a substantive, practical distinction between "circumstantial evidence of guilt" and "circumstantial evidence of consciousness of guilt."

> defendant has lied about the—her involvement in this case may be considered by you as circumstantial evidence of guilt.
>
> In deciding what, if any, weight to give the evidence, you must be guided by the following considerations. You must decide whether the defendant did, in fact, make any such statement. If you decide the defendant did make such a statement, you should determine whether the statement was, in fact, false.
>
> If you do decide that the defendant did make a statement about his—her involvement in this case, you should consider all the circumstances surrounding the making of that statement in deciding what, if any, weight you attach to it. And if you decide the defendant made a false statement, you may also use this evidence as consciousness of guilt.

The trial court's instruction was proper and supported by the evidence. At trial, Officer Darryl Cross testified that, immediately following the shooting, defendant fled the scene in a van with the codefendant. As he followed defendant, she drove in reverse and disregarded traffic lights and the speed limit. Cross observed the codefendant throw the gun used in the shooting out the window. He subsequently pulled defendant over, and she said, "Why you stopping me? I'm trying to go get my kids." Defendant's statements communicating that she should not be stopped and needed to go pick up her kids were exculpatory statements that were proven false by the testimony presented by the prosecution. It was clear that defendant was driving erratically because she was fleeing the scene of the shooting. In other words, she was not driving erratically because she was in a hurry to pick up her kids. Based on the foregoing, the trial court did not err in instructing the jury regarding false exculpatory statements.

Finally, defendant contends that the prosecutor presented insufficient evidence to convict her. When reviewing a claim of insufficient evidence, this Court reviews the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Defendant argues that there was insufficient evidence to convict her of second-degree murder under an aiding and abetting theory. The conviction of a defendant for second-degree murder requires the prosecution to show "(1) a death, (2) caused by an act of the defendant, (3) absent circumstances of justification, excuse, or mitigation, (4) done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm." *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996) (internal citation and quotation marks omitted). Further, a conviction of a defendant as an aider and abettor requires the prosecution to show "that the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense." *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006). "[E]vidence of [a] defendant's specific intent to commit a crime or knowledge of the accomplice's intent constitutes sufficient *mens rea* to convict under" an aiding and abetting theory. *Id*. at 6. "An aider and abettor's state of mind may be inferred from all the

facts and circumstances. Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in planning or executing the crime, and evidence of flight after the crime." *Carines*, 460 Mich at 758 (internal citations and quotation marks omitted).

Viewing the evidence in the light most favorable to the prosecution, a reasonable jury could have found defendant guilty of second-degree murder as an aider and abettor. The codefendant was punched in the face by Jackson, and Bisa informed defendant of the incident. According to Tomika Johnson, the codefendant instructed Johnson to drive him to the gas station near the Considine Recreation Center to meet defendant. Johnson drove the codefendant to the gas station. The codefendant went to defendant's van and they briefly chatted. He then walked across the street to the recreation center with Henry. Meanwhile, defendant got out of van, went to the front of it, and then reentered and immediately drove across the street. She positioned the front of the van near the front of the recreation center and near the codefendant.

The codefendant and the various young men argued outside the recreation center. Henry suggested that Jackson and the codefendant fight one-on-one, but the codefendant refused. Meanwhile, defendant sat in the van parked nearby. According to Michael Guyton, the codefendant stated, "I don't want to fight, I want to kill him." Defendant then unbuckled her seatbelt, reached down under the steering wheel, and got out of the van. According to Shawn Bembry, the hood of the van popped up only after defendant reached under the steering wheel. The codefendant then lifted the hood, reached inside, pulled out a gun, and started shooting. The victim died from a gunshot wound.

There was evidence that defendant was angry and provoked the codefendant's actions. Christopher Warren testified that defendant was "very upset, angry, just about as much as anybody that was deep into an argument," and she was "basically antagonizing" the situation. Defendant was into the argument and conflict "just as much as [the codefendant]." A passerby observed defendant screaming and yelling and saw defendant "snatch" the codefendant and bring him towards the recreation center. After the shooting, defendant and the codefendant fled in her van. Along the way, the codefendant tossed the gun out of the window.

This evidence was sufficient for a reasonable jury to conclude that defendant performed acts and gave encouragement that aided or assisted the commission of the second-degree murder, i.e., defendant encouraged the codefendant to fight Jackson and she pulled the release lever inside the van that popped the hood, thereby facilitating the codefendant's access to the gun. She also allowed the codefendant in her van and fled the scene. Moreover, a reasonable jury could have concluded that defendant intended the commission of the crime or had knowledge that the codefendant intended its commission because she was present when the codefendant stated, "I don't want to fight him, I want to kill him." From the facts, the jury could have inferred that defendant knew of the codefendant's intent and that she assisted the codefendant in carrying out his intent.

Defendant next argues that there was insufficient evidence that she aided and abetted the codefendant in the commission of felony-firearm. "Under the aiding and abetting statute, MCL 767.39, the correct test for aiding and abetting felony-firearm in Michigan is whether the defendant procures, counsels, aids, or abets in [another carrying or having possession of a

firearm during the commission or attempted commission of a felony]." *People v Moore*, 470 Mich 56, 70; 679 NW2d 41 (2004) (internal quotation marks omitted). Further,

> [e]stablishing that a defendant has aided and abetted a felony-firearm offense requires proof that a violation of the felony-firearm statute was committed by the defendant or some other person, that the defendant performed acts or gave encouragement that assisted in the commission of the felony-firearm violation, and that the defendant intended the commission of the felony-firearm violation or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement. [*Id*. at 70-71.]

The evidence supports a finding that defendant procured, counseled, aided, or abetted in the possession of a firearm during the commission of a felony, i.e., the murder of the victim. Although defendant did not pull the trigger, her actions and words facilitated and even encouraged the codefendant to grab the gun and shoot the victim. When viewed in the light most favorable to the prosecution, the evidence reveals that defendant encouraged the codefendant to fight and pushed him into the conflict. The gun used in the shooting was under the hood of defendant's van. Defendant drove her van to the recreation center and positioned that van in a way that facilitated the codefendant's access to the hood and the gun. She then pulled the release lever inside the van that popped the hood. The codefendant then lifted the hood, grabbed the gun, and shot the victim. Applying the general aiding and abetting standard to the facts of this case, we hold that there was sufficient evidence in the record to establish that defendant committed felony-fiream.

Defendant argues that there was no evidence that defendant knew that there was a gun under the hood of her van. We disagree. The prosecutor presented sufficient evidence from which the jury could infer that defendant had knowledge that a gun was under the hood of her van. Johnson testified that defendant was alone in her van when Johnson and the codefendant arrived at the gas station. The codefendant walked over to defendant's van and subsequently walked across the street to the recreation center where he saw Jackson. Defendant then got out of her van, walked to the front of it, got back into her van, and immediately drove across the street to the recreation center. There was also testimony that defendant reached under the steering wheel and pulled the hood release lever. The hood subsequently popped open. The codefendant then walked to the front of the van and pulled out a gun. These facts allowed a reasonable jury to infer that defendant knew that there was a gun under the hood of her van.

There was sufficient evidence to convict defendant, as an aider and abettor, of second-degree murder and felony-firearm.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher