

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 8, 2012

v

NATHANIEL PITTS,

Defendant-Appellant.

No. 301545
Wayne Circuit Court
LC No. 10-007170-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LATOYA SIMMONS,

Defendant-Appellant.

No. 301661
Wayne Circuit Court
LC No. 10-007170-FC

Before: WHITBECK, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM.

Defendants Nathaniel Pitts and Latoya Simmons were tried jointly before a single jury. Defendant Pitts was convicted of armed robbery, MCL 750.529, possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 13 to 30 years for the armed robbery conviction and 2 to 7 ½ years for the felon-in-possession conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant Simmons was convicted of armed robbery, MCL 750.529, and felony-firearm, MCL 750.227b. She was sentenced to consecutive prison terms of 7 to 30 years for the armed robbery conviction and two years for the felony-firearm conviction. Defendant Pitts appeals as of right in Docket No. 301545, and defendant Simmons appeals as of right in Docket No. 301661. We affirm in both cases.

Defendants' convictions arise from the robbery of Thomas Rea, who was robbed after he arrived at a house to meet a woman he had met on a telephone "chat line." Rea stated that after

he arrived at the house, he was locked inside by the woman, whom Rea identified as defendant Simmons, after which the woman locked a security gate at the front door. Thereafter, two men emerged from a room, one armed with a handgun and the other armed with a metal bar. Rea identified defendant Pitts as the man with the gun. The men robbed Rea of his money and then allowed him to leave.

I. FAILED PLEA AGREEMENT

Both defendants raise issues concerning a failed plea agreement. The record indicates that both defendants were charged with a series of offenses in two separate cases. Before trial, they appeared before the court and announced that they were prepared to enter pleas pursuant to an agreement whereby both defendants would plead guilty to armed robbery and felony-firearm in one case, in exchange for a sentence agreement and dismissal of the remaining charges in that case and a dismissal of all charges in the other case.

At the plea proceeding, the trial court questioned the parties concerning the terms of the plea agreement. The court's inquiries led to the discovery of several discrepancies concerning the terms of the purported agreements. For example, defendant Pitts's attorney expressed that it was his understanding that an habitual offender charge was to be dismissed, but the prosecutor stated that this was not part of the plea agreement. In addition, a plea agreement form indicated that a charge of felon-in-possession against defendant Simmons was to be dismissed even though she had not been charged with that offense and she did not have a prior criminal record. Lastly, when attempting to establish a factual basis for defendants' pleas, the trial court discovered that there were discrepancies concerning which of the two cases would proceed with defendants' guilty pleas and which of the two cases was to be dismissed. Because of these discrepancies, the trial court directed the parties to leave the courtroom "until you have everything straight." Thereafter, neither defendant pleaded guilty. Instead, both defendants proceeded to trial.

A. DEFENDANT PITTS

In his only issue on appeal, defendant Pitts argues that his attorney was ineffective for (1) failing to investigate his prior criminal record, and (2) failing to ensure that the paperwork for the plea agreement was accurate. Because defendant Pitts did not raise a claim of ineffective assistance of counsel in the trial court, our review of this issue is limited to errors apparent from the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To establish prejudice, the defendant 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 decision whether to plead guilty is the defendant's, to be made after consultation with counsel and after counsel has explained the matter to the extent reasonably necessary to allow the defendant to make an informed decision. *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995). When a defendant decides to go to trial instead of accepting a plea agreement, counsel is not ineffective if he or she sufficiently informs the defendant of his plea

options, including the implications of those options. *People v McCrady*, 213 Mich App 474, 479-480; 540 NW2d 718 (1995). In determining whether counsel was ineffective, the question is not whether counsel's advice was right or wrong, but whether the advice was within the range of competence demanded of attorneys in criminal cases. *People v Thew*, 201 Mich App 78, 89-90; 506 NW2d 547 (1993).

In this case, the record does not support defendant Pitts's argument that defense counsel's failure to ascertain the accuracy of the terms of the plea agreement precluded him from accepting a plea offer. While defense counsel may have failed to verify certain terms of the plea agreement before the plea proceeding, defendant cannot establish prejudice because any deficiency in that regard was discovered by the trial court before any plea was ever accepted. Ultimately, defendant Pitts was not entitled to plead guilty pursuant to a plea agreement unless the parties agreed on all terms of the agreement. The record does not reflect that any such agreement ever arose.

At the plea proceeding, the trial court was required to confirm the terms of any plea agreement with the lawyers and defendant Pitts before accepting a plea. MCR 6.302(C)(2). The court was also required to determine whether any plea was understanding, voluntary, and accurate. MCR 6.302(A). When the court questioned the parties at the plea proceeding, it became apparent that the terms of their agreement were not fully settled. Accordingly, the court properly refused to accept any plea and appropriately directed the parties to leave the courtroom "until you have everything straight." There is no indication that the trial court thereafter refused to accept a plea pursuant to a proper agreement by the parties.

The record is silent regarding why a final agreement was never reached. The record does indicate that after the problems with the initial plea agreement were discovered, defendant Simmons no longer wanted to plead guilty. It is possible that defendant Pitts likewise decided not to plead guilty, that the prosecution and defendant Pitts were not thereafter able to agree on all terms of a plea deal, or that the prosecution was no longer willing to extend a plea offer to defendant Pitts.¹ At any rate, there is no basis in the record for concluding that any deficiency by defense counsel denied defendant Pitts the opportunity to plead guilty pursuant to a valid plea agreement acceptable to all parties. Therefore, this ineffective assistance of counsel claim cannot succeed.

Defendant Pitts also claims that he was prejudiced because the plea-based sentence agreement was not accepted by the trial court. However, because the parties never reached a plea agreement on terms acceptable to all parties, no sentence agreement ever arose.

Lastly, defendant Pitts argues that defense counsel was ineffective for failing to adequately investigate his prior criminal record for purposes of determining whether he was properly charged as a fourth habitual offender. The record supports defendant Pitts's argument that his attorney was not fully aware of his criminal record at the time of the plea negotiations.

¹ The prosecution had previously indicated that it was not willing to make a plea offer unless both defendants decided to plead guilty.

However, defendant Pitts cannot establish prejudice because it is undisputed that he was ultimately sentenced on the basis of accurate information. At sentencing, in response to defense counsel's arguments, the trial court reduced the scoring of defendant Pitts's prior record variables and also agreed that defendant Pitts should only be sentenced as a second habitual offender under MCL 769.10. Accordingly, defense counsel was not ineffective in this regard.

B. DEFENDANT SIMMONS

Defendant Simmons argues that the trial court improperly refused to accept the plea agreement based solely on a "scrivener's error." We find no merit in this claim.

The trial court's decision to accept or reject a plea is reviewed for an abuse of discretion. *People v Plumaj*, 284 Mich App 645, 648; 773 NW2d 763 (2009). MCR 6.302(A) precludes a trial court from accepting a guilty plea "unless it is convinced that the plea is understanding, voluntary, and accurate." When there is a plea agreement, the terms of the agreement must be confirmed on the record with both lawyers and the defendant. MCR 6.302(C)(2). While defendant Simmons argues that the exclusive authority for charging a defendant is with the prosecutor, the trial court here did not infringe on that authority. The court's refusal to accept a plea from defendant Simmons was not based on any disagreement with the prosecutor's charging authority, but rather the discrepancies in the parties' understanding of the terms of the plea agreement, particularly those concerning which case would proceed with defendant Simmons's guilty plea and which case would be dismissed. The trial court properly exercised its discretion by refusing to accept defendant Simmons's guilty plea when the parties had not fully agreed on all terms of the plea agreement.

Moreover, defendant Simmons was not foreclosed from subsequently entering into a plea agreement on terms agreeable to all parties. The trial court never indicated that it would not accept a plea. It merely directed the parties to leave the courtroom "until you have everything straight." Defendant Simmons's attorney later advised the trial court that defendant Simmons no longer wanted to enter a guilty plea, and instead wanted to go to trial. For these reasons, there is no merit in defendant Simmons's argument that the trial court improperly refused to accept her guilty plea.

II. SUFFICIENCY OF THE EVIDENCE

Defendant Simmons also argues that the evidence was insufficient to support her convictions on a theory of aiding and abetting. We disagree.

When reviewing the sufficiency of the evidence in a criminal case, we must determine whether the evidence, viewed in a light most favorable to the prosecution, was sufficient to enable a rational trier of fact to conclude that all elements of the offense were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and any reasonable inferences that can be drawn from the evidence may be sufficient to prove the elements of the crime. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses."

People v Williams, 268 Mich App 416, 419; 707 NW2d 624 (2005). All conflicts in the evidence must be resolved in favor of the prosecution. *Id.*

The elements of armed robbery are (1) an assault and (2) a felonious taking of property from the victim's presence or person (3) while the defendant is armed with a weapon. *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007). A conviction of felony-firearm requires proof that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

A person who aids or abets the commission of a crime may be punished as if he or she directly committed the offense. MCL 767.39. To find that a defendant aided or abetted the commission of 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). An aider and abettor's state of mind may be inferred from all the facts and circumstances of the crime. *Id.* 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).

We disagree with defendant Simmons's argument that the evidence failed to show that she aided and abetted the commission of the crimes. The evidence showed that defendant Simmons assisted in the commission of the offenses by inviting the victim to the house where he was robbed while knowing that at least one of her accomplices was armed with a gun. The victim described defendant Simmons as very friendly and the house as very inviting, with lighted candles inside, which caused him to let his guard down. After the victim entered the house, defendant Simmons locked the security door to the house, thereby preventing the victim from leaving or escaping. The fact that two armed men were present inside defendant Simmons's house, which was secured with a security gate, and that the men emerged from a room and confronted the victim only after defendant Simmons lured the victim inside and locked the security gate, supports an inference that defendant Simmons was working in association with the two armed men and that defendant Simmons assisted in the offenses by luring the victim to the secluded location and preventing his escape. We conclude that the evidence was sufficient to support defendant Simmons's convictions of armed robbery and felony-firearm² on an aiding and abetting theory.

² "All that is required to prove aiding and abetting felony-firearm is that the defendant aided and abetted another in carrying or having in his possession a firearm while that other commits or attempts to commit a felony." *People v Moore*, 470 Mich 56, 68; 679 NW2d 41 (2004).

Affirmed.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Kirsten Frank Kelly