STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 1, 2002
v	No. 226951 Oakland Circuit Court
AKIL LAMAR LOGAN, Defendant-Appellant.	LC No. 99-166201-FC

Before: Cooper, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to mandatory life imprisonment for felony murder, twenty to forty years' imprisonment for conspiracy to commit armed robbery, and a consecutive two years' imprisonment on two felony-firearm convictions. The armed robbery conviction and one felony-firearm conviction were vacated at sentence because they merged into the felony murder conviction. *People v Harding*, 443 Mich 693, 714; 506 NW2d 482 (1993); *People v Wilder*, 411 Mich 328, 347; 308 NW2d 112 (1981). Defendant appeals as of right. We affirm.

I

Defendant argues that the prosecutor's case rested on the credibility of accomplice witness Jaream Tidwell and that the trial court committed error warranting reversal by not sua sponte cautioning the jury concerning such testimony because the credibility of this key prosecution witness was "closely drawn." *People v McCoy*, 392 Mich 231; 220 NW2d 456 (1974). Moreover, defendant argues *McCoy*, *supra*, controls over the "plain error" rule "reaffirmed" in *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We disagree.

A party that accedes to jury instructions at trial waives appellate review of alleged error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987). In this case, defendant waived alleged error when defense counsel expressed satisfaction with the trial court's instructions. Moreover, even if the alleged instructional error was only forfeited, plain error requiring reversal did not occur because the instructions given by the trial court provided adequate guidance to the jury to determine

credibility and, together with argument of counsel, defendant's rights were protected. *Carines*, *supra* at 763; *People v Perry*, 218 Mich App 520, 526; 554 NW2d 362 (1996), aff'd 460 Mich 55; 594 NW2d 477 (1999).

Although defendant waived alleged instructional error, the issue merits further discussion. First, the prosecutor's argument that Tidwell was "merely present" and could not have been convicted as an aider and abettor is without merit. To establish criminal liability as an aider and abettor it must shown that (1) the crime was committed by someone, (2) the accused performed acts or gave encouragement that assisted the commission of the crime, and (3) the accused 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 Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). While "mere presence" is insufficient to establish criminal liability, *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992), assistance sufficient for criminal liability "includes the actual or constructive presence of an accessory, in preconcert with the principal, for the purpose of rendering assistance, if necessary." *People v Palmer*, 392 Mich 370, 378; 220 NW2d 393 (1974).

In the present case, Tidwell admitted that he agreed to help steal a car and with knowledge that defendant was armed with a gun, willingly accompanied three others to assist them in stealing a car in mid-afternoon on the day in question. Although Tidwell denied knowledge of defendant's intent to commit robbery and murder, there was evidence from which the jury could have concluded otherwise. In fact, Tidwell testified he expected to be charged for the crime, but was not, and the prosecutor argued that Tidwell was credible because he had exposed himself to criminal liability. Thus, had a defense request been made for an accomplice witness cautionary instruction, defendant would have been entitled to one. *McCoy*, *supra* at 240.

However, defendant's argument that *McCoy*, *supra*, presciently carved an exception out of the plain error analysis developed in *Carines*, *supra*, whenever the credibility of an accomplice witness is at issue in a "closely drawn" case, is also without merit. In *McCoy*, *supra* at 240, our Supreme Court held that several errors, including a denigrating alibi instruction, failure to give a cautionary instruction on the credibility of an accomplice's testimony, and improper argument by the prosecutor, combined to deny the defendant a fair and balanced trial. Further, the Court held, prospectively, that it would be error warranting reversal "to fail upon request to give a cautionary instruction concerning accomplice testimony and, if the issue is closely drawn, it may be reversible error to fail to give such a cautionary instruction even in the absence of a request to charge." *Id.*

While *McCoy*, *supra*, requires a cautionary instruction for accomplice witness testimony when requested and substantiated by the evidence, it otherwise leaves the fashioning of instructions to the discretion of the trial court, where it has always reposed. *Perry*, *supra* at 526. Furthermore, *McCoy*, *supra*, rather than being an exception to the plain error rule espoused in *Carines*, *supra*, is consistent with the long line of its progenitor cases. As our Supreme Court noted in *People v Reed*, 453 Mich 685, 692-693; 556 NW2d 858 (1996):

> *McCoy* requires a court to give a cautionary instruction on accomplice testimony when requested, but it does not require automatic reversal when a case is "closely drawn" and a judge fails to give such an instruction sua sponte.[9]

> Rather, *McCoy* states that such a failure to instruct *may* be error requiring reversal. This Court has never established standards for evaluating when the failure to instruct sua sponte requires reversal. . . . Rather, *McCoy* stands for the proposition that a judge should give a cautionary instruction on accomplice testimony sua sponte when potential problems with an accomplice's credibility have not been plainly presented to the jury.
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> [9] See *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994). In *Grant*, the trial court failed to give a preliminary instruction before an offer of testimony on insanity, as required by MCL 768.29a(1). We held that this failure to instruct was not error requiring automatic reversal. *Grant* is consistent with *McCoy* in that both opinions decline to create a broad rule of automatic reversal when a court fails to give an appropriate instruction sua sponte. [*Id*. at 692-693.]
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Moreover, even instructional error of omitting an element of the offense is subject to forfeiture. *People v Mass*, 464 Mich 615, 622-623; 628 NW2d 540 (2001); *Carines, supra* at 765-766. Specifically, in *Carines, supra* at 769-770, the Court held that the defendant failed to establish prejudice from a missing element on aiding and abetting because the instructions the trial court gave, the evidence at trial, and the jury's verdict demonstrated that the error was not outcome determinative.

In the present case, the potential problems with Tidwell's credibility were plainly and effectively presented to the jury. *Reed, supra* at 693. Thus, a special cautionary instruction on accomplice testimony was not required absent a defense request. *Id.*; *McCoy, supra* at 240. Instead, this Court must review the instructions that were given as a whole, *People v Kelly*, 423 Mich 261, 270-271; 378 NW2d 365 (1985), and determine whether, even if imperfect, the instructions fairly presented the issues tried and sufficiently protected defendant's rights. *Perry, supra* at 526. Moreover, unpreserved instructional error warranting reversal must be plain and affect substantial rights. *Carines, supra* at 761-763; *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000).

The credibility of Tidwell was fully explored by both counsel at trial, including inquiry into "actual or implied threats or promises of leniency by the prosecutor," *Reed, supra* at 692. Moreover, the trial court's instructions, including CJI2d 3.6(3)(e), (f), and (g) (apprising the jury to consider any bias, prejudice, personal interest, promise, threats, special reasons to tell the truth or lie, or other influences that might have affected the witness' testimony), adequately informed the jury on how to discern witness credibility. The jury was also instructed that it was the sole determiner of which witnesses to believe and was free to accept some, none, or part of a witness's testimony, and further, the fact a prosecution was brought was not evidence. See *People v Wilson*, 119 Mich App 606, 621-623; 326 NW2d 576 (1982). Thus, the instructions provided by the trial court regarding witness credibility were broad enough to cover concerns regarding accomplice witness testimony and sufficiently protected defendant's rights. *Perry*,

supra at 526; *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). Therefore, plain error requiring reversal did not occur. *Carines, supra* at 763, 773.

II

Defendant next claims he was denied a fair trial because his trial counsel's performance fell below an objective standard of reasonableness in failing to request a cautionary instruction concerning the testimony of the prosecutor's main witness, an accomplice. Defendant asserts he was prejudiced by the alleged error and thus was denied effective assistance of counsel. We disagree.

In *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994), our Supreme Court ruled that the Michigan Constitution does not provide a higher standard for effective assistance of counsel than the United States Constitution and adopted the test formulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The two-pronged test to determine if counsel's performance fell below the constitutional standard requires that the defendant overcome the strong presumption that counsel was effective. *Strickland, supra* at 689. First, the defendant must show that counsel's performance was deficient as measured against objective reasonableness under the circumstances according to prevailing professional norms. *Id.* at 687-688; *Pickens, supra* at 312-313. Second, counsel's deficiency must have been so prejudicial that the defendant was deprived of a fair trial. *Strickland, supra* at 687-688; *Pickens, supra* at 309. To prove prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional error(s) the trial outcome would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Pickens, supra* at 312.

Defendant bears a heavy burden of overcoming the presumption that his trial counsel provided effective assistance. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Judicial review of alleged errors by counsel must be differential, undistorted by hindsight, and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland, supra* at 689 (internal punctuation omitted). Because no *Ginther*[1] hearing was held in the instant case, our review is limited to errors apparent in the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Defendant claims that although defense counsel effectively cross-examined Tidwell and counsel's closing argument "was a paean regarding the pitfalls of accomplice testimony," nonetheless counsel seriously erred by not requesting a specific cautionary instruction concerning such testimony. However, this was not a case in which a defendant and an accomplice each testified to an equally plausible uncorroborated version of events. Rather, in this case defendant chose not to testify and the accomplice witness' testimony concerning where and when the murder happened was corroborated in many important respects by other evidence and the

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

testimony of other witnesses. For instance, according to Tidwell's testimony, defendant, armed with a .22-caliber revolver, entered the right side of the victim's Blazer and fired one shot; this testimony was corroborated both by the pathologist's testimony that the victim died from a single small-caliber bullet being fired through the victim's right temple at very close range and by a state police firearms expert who testified that the fatal bullet was a brass-washed .22-calliber bullet. Moreover, a security guard testified that the victim's Blazer was parked at the Pinewood apartment complex within four or five hours of the murder and that within twenty-six hours after the victim disappeared, he identified defendant as a passenger in the victim's Blazer being driven by Brian Grandion. This was consistent with Tidwell's testimony that Grandion drove the Blazer from the crime scene with defendant as a passenger.

Defendant concedes on appeal that defense trial counsel effectively pursued a strategy of attacking Tidwell's credibility through cross-examination and closing argument. The conclusion of our Supreme Court in *People v Atkins*, 397 Mich 163, 172; 243 NW2d 292 (1976) is pertinent:

> [The] [d]efense strategy from the outset was to put [the accomplice witness] on trial. In the face of this clear strategy, we cannot assume that defense counsel lightly disregarded the possibility of requesting a cautionary instruction or that such an instruction would have been refused if requested.

In any event, as previously concluded, the trial court's instructions thoroughly informed the jury of factors to review in judging a witness' credibility, including any personal interest, bias, promises, threats, suggestions, or other influences.

On the facts and circumstances of this case, with no record in the trial court overcoming the presumption that the challenged omission might have been sound trial strategy, defendant has failed to meet his burden of proving the requisite first-prong of ineffective assistance — an unprofessional error. *Strickland, supra* at 689. The fact that the strategy that counsel pursued was unsuccessful does not mean he was ineffective. *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000). This Court will not second-guess counsel concerning trial strategy with the aid hindsight or on the basis that the strategy was unsuccessful. *People v Rice* (*On Remand*), 235 Mich App 429, 445; 597 NW2d 843 (1999); *People v Wise*, 134 Mich App 82, 97-98; 351 NW2d 255 (1984).

While the failure to prove either prong of the test for ineffective assistance is fatal to defendant's claim, *Strickland, supra* at 687, 697; *Toma, supra* at 302-303, defendant has also failed to establish prejudice from the alleged error. As noted above, the trial court adequately instructed the jury on witness credibility and based on the instructions given, the jury could have, but did not, find Tidwell's testimony incredible. Absent exceptional circumstances, the determination of witness credibility rests with the jury who heard and saw the witness testify. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). In this case, where defendant on appeal concedes that defense trial counsel effectively cross-examined the accomplice witness and effectively argued that the witness was not credible in closing argument, and further, where the trial court provided adequate guidance to the jury on determining credibility, there is no basis to conclude that the outcome of the trial is "unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland, supra* at 696. Thus,

defendant has not overcome the strong presumption of effective assistance and has failed to prove his claim of prejudicial error on the part of trial counsel. *Toma, supra* at 302-303.

III

Finally, defendant argues he was denied a fair trial because the prosecutor improperly bolstered his key witness by eliciting prior consistent statements. We disagree. Defendant's argument, whether viewed as forfeited or waived alleged evidentiary error, or viewed as alleged prosecutorial misconduct, is without merit.

Defendant argues that testimony of Tidwell at the grand jury and before the district court was inadmissible under MRE 801(d)(1) as a prior consistent statement. Generally, such consistent statements are inadmissible, except to rebut a charge of recent fabrication if made before the motive to fabricate existed. *People v Washington*, 100 Mich App 628, 633-634; 300 NW2d 347 (1980). However, it was defendant who first elicited from Tidwell that his grand jury testimony was the "same thing I said today." Therefore, defendant has waived any alleged error concerning prior consistent grand jury testimony. *People v Riley*, ___ Mich ___; ___ NW2d ___ (Docket No. 117837, issued 12/7/2001); *Carter, supra* at 215-216.

Even if not waived, no prejudice occurred as a result of this alleged error. Defendant's theory was that Tidwell was a liar who could not be trusted and who lied to save himself. Specifically, the defense suggested that Tidwell lied about defendant's involvement in the murder to keep from being charged himself; once he presented his "lie" to the grand jury, he had to maintain the same story to keep from being charged and gave the authorities who they wanted — defendant. Tidwell's prior consistent grand jury and district court testimony was thus consistent with the defense theory of the case that Tidwell lied to keep from being charged and then had to continue the "lie" for the same reason. Any alleged error in admitting the complained of evidence was therefore not outcome determinative and cannot constitute error warranting reversal. *Carines*, *supra* at 763; *People v Coy*, 243 Mich App 283, 287; 620 NW2d 888 (2000). Moreover, the testimony does not warrant reversal because it did not result in the conviction of an actually innocent defendant or seriously affect the fairness, integrity, or public reputation of judicial proceedings independent of defendant's innocence. *Carines*, *supra*.

Defendant's argument framed as prosecutorial misconduct is equally without merit. A prosecutor may not vouch for the credibility of a witness by implying that he has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). However, a prosecutor is free to argue the evidence and all reasonable inferences arising from the evidence as it relates to his theory of the case and may argue credibility based on the facts in evidence or reasonable inferences drawn from the evidence. *Bahoda, supra* at 276; *People v Schutte*, 240 Mich App 713, 722; 613 NW2d 370 (2000). That is what occurred in the case at bar.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Review of the record here shows that defendant was not denied a fair trial.

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Henry William Saad