STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN ALEXANDER GREYERBIEHL,

Defendant-Appellant.

UNPUBLISHED
December 20, 2002

No. 233472
Huron Circuit Court
LC No. 00-004134-FH

Before: Bandstra, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction, following a jury trial, of first-degree home invasion, MCL 750.110a(2), for which the trial court sentenced defendant to a term of imprisonment of six to twenty years. We affirm, but remand for correction of the sentencing information report.

I. Prosecutorial Misconduct

Defendant first argues that the trial court erred in denying his motion for a new trial predicated on prosecutorial misconduct. Defendant asserts that the prosecutor engaged in misconduct by vouching for the credibility of certain witnesses, urging the jury to convict out of civic duty, and arguing facts not in evidence. We disagree and conclude that the trial court correctly denied defendant's motion for a new trial on these grounds.

A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998). When reviewing preserved issues of prosecutorial misconduct, this Court evaluates the prosecutor's comments in context to determine if the defendant was denied a fair and impartial trial. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996). However, "[a]bsent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Consistent with this principle is the general principle that unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*.

A. Vouching

"Included in the list of improper prosecutorial commentary or questioning is the maxim that the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, where the jury is faced with a credibility question, the prosecutor is free to argue credibility from the evidence. *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987). The critical inquiry is whether the prosecutor urged the jury to suspend its own judgment powers out of deference to those of the prosecutor or police. *People v Whitfield*, 214 Mich App 348, 352-353; 543 NW2d 347 (1995).

In arguing that the prosecutor improperly vouched for the credibility of certain witnesses, defendant cites several remarks during closing argument wherein the prosecutor asserted that the witnesses against defendant had testified truthfully. Defendant contends that defense counsel objected to these remarks, but we find no such objection in the trial transcripts. Accordingly, we find this issue to be unpreserved.

Among the statements challenged by defendant, the only one that hints at personal knowledge on the part of the prosecutor is that in which the prosecutor stated, "in my mind, that's what occurred on this date, there was a conspiracy on December 21st." The context of that statement, however, reveals that the prosecutor was explaining his decision to charge defendant with conspiracy, not suggesting that he had personal insights to add to the evidence. This argument was not plain error. *Carines, supra.* To the extent that the prosecutor may have invoked the authority of his office in the matter, a timely objection could have produced a cautionary instruction in that regard. *Launsburry, supra.* Further, because defendant was not convicted of conspiracy, this argument cannot be considered to have affected defendant's substantial rights. *Carines, supra.*

The other statements of which defendant makes issue are plainly arguments from the evidence, with no implication that the prosecutor was offering personal guidance on how to interpret the testimony. Because credibility was very much at issue in this case, the prosecutor was free to argue it from the evidence. *Smith, supra.* Defendant has thus failed to show that any improper prosecutorial vouching took place.

B. Civic Duty

"Civic duty arguments are generally condemned because they inject issues into the trial that are broader than a defendant's guilt or innocence and because they encourage the jurors to suspend their own powers of judgment." *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991). In arguing that the prosecutor engaged in improper civic-duty argument in this case, defendant points to the prosecutor's repeated reminders that he was serving as a "minister of justice," and his statement implying that the defense was concerned only with "saving one of God's creatures." None of these statements drew a defense objection, leaving this issue unpreserved.

Although "[a] prosecutor may not . . . place the weight of his office behind the prosecution," *People v Foster*, 77 Mich App 604, 612; 259 NW2d 153 (1977), the prosecutor's reminders that he was a minister of justice came in the context of expressing respect for the

system of justice generally, explaining the decision to ask for only one conviction where two offenses were charged, and explaining some of the considerations behind the various plea agreements reached with some of the witnesses. In none of these situations did the prosecutor directly stake his case on the prestige of his office. Further, the trial court instructed the jury to decide the case only on the evidence, that the statements of counsel are not evidence, and that "[t]he fact that the defendant is charged with a crime and is on trial is not evidence." To whatever extent the jury may have developed a heightened sensitivity for the prestige of the prosecutor's office, or of the prosecutor's noble duty to pursue justice, these instructions should have cured any error. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993) (improper civic-duty arguments may be cured where the trial court instructs the jury that arguments of counsel are not evidence).

Of greater concern is the passage of argument where the prosecutor appeared to place the defense attorney's role in a poor light:

> [The witnesses against defendant] are scumbags, that's what [defense counsel] says. There is a lawyer that defended this Terry Nichols gentleman down here from Decker, Michigan, and he has defended on a lot of capitol [sic] offense cases. And what he tells the jury in closing, when I go home tonight and my daughter asks me, daddy, what did you do today? I'm gonna tell her, dear, I did my level best to save one of God's creatures.

Although the error may have been inadvertent, in that the prosecutor was seemingly attempting to rehabilitate his own witnesses in the eyes of the jury with this commentary, we nonetheless conclude that this argument too directly contrasts defense counsel's duty to advocate zealously for the accused with the prosecutor's ostensibly nobler duty to promote justice. However, had there been an objection, a curative instruction could have remedied the improper argument, and so appellate relief is not warranted. *Launsburry*, *supra*. Further, the trial court's general instructions not to regard the statements of counsel as evidence, and not to infer guilt merely because defendant was on trial, should have cured any prejudice in any event. For these reasons, defendant's civic-duty challenge fails.

C. Facts Not in Evidence

"Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Defendant first takes issue with the following prosecutorial remark: "I felt a duty to provide you with where the events started out in Detroit during the morning of December 21st, 1999, and where they ended up back in Detroit, or Knoxville, Tennessee, wherever they picked up [codefendant] Cossey some time later." Defendant complains that there was no evidence to suggest that Cossey was picked up in Tennessee.

As an initial matter, we note that the prosecutor did not unequivocally assert that Cossey ended up in Tennessee, but first hedged between Detroit and Tennessee, then said "wherever," indicating that the prosecutor thought the actual location unimportant and thus was satisfied to

guess at it. Further, defendant leaves us to guess how he was prejudiced by this statement, which drew no objection at trial. A party's mere assertion that the party's rights were violated, unaccompanied by cogent argument or supporting authority, is insufficient to present an issue for consideration by this Court. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). Because defendant does not explain how the asserted misstatement affected his substantial rights, *Carines*, *supra*, or why an objection and appropriate instruction would not have cured any prejudice, *Launsburry*, *supra*, we deem this claim of error waived for failure of presentation.

Defendant also takes exception to the prosecutor's rebuttal argument concerning the defense's role in the failure of several persons implicated in the crime after the fact to testify at trial. Defense counsel waited until the jury was excused, then pointed out that the defense had successfully moved to have "certain testimony" of these persons excluded as hearsay, but did not ask to have the witnesses stricken entirely. The court acknowledged the objection, but decided against saying anything further to the jury about it.

The record reveals that when defense counsel brought the pretrial motion, the prosecutor agreed that hearsay was a problem, and stated, "we will stipulate to all four of those witnesses to excluding them and probably striking them as witnesses for this defendant's trial." The resulting order excluded certain testimony from the witnesses in question, not the witnesses themselves. The prosecutor's second amended witness list retained the names of those witnesses, but none were called at trial.

This record makes plain that hearsay problems caused the witnesses in question to be of no use to the prosecutor. Although we recognize defendant's argument that moving to limit testimony is not the same as moving to strike a witness, we nonetheless conclude that characterizing the former as the latter in this instance was but the smallest of exaggerations. Because defense counsel had implied during closing argument that it was a matter of some significance that these persons had not appeared at trial, the prosecutor was free to point out that this was in part because of the machinations of the defense. Although a more fastidious prosecutor may have taken pains to better describe what had occurred, the minor mischaracterization that resulted here was of no consequence. The trial court did not abuse its discretion in declining to instruct the jury on the matter, and no appellate relief is warranted. The prosecutor's comments did not deny defendant a fair trial. *Truong*, *supra*.

D. Cumulative Error

Defendant suggests that if no single instance of prosecutorial misconduct warrants reversal, such relief is nonetheless required in the face of the cumulative effect of all such errors. We conclude that the minor and/or curable nature of the actual errors that defendant has brought to light does not add up to prosecutorial misconduct warranting reversal. See, e.g., *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987).

II. Double Jeopardy

Defendant next argues that his right against double jeopardy was violated when the prosecutor charged him with both conspiracy to commit first-degree home invasion and aiding and abetting first-degree home invasion in connection with a single home invasion. We disagree.

This Court reviews double jeopardy issues de novo as questions of law. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995).

The Double Jeopardy Clauses of the federal and state constitutions prohibit a criminal defendant from being placed twice in jeopardy for a single offense. *People v Booker (After Remand)*, 208 Mich App 163, 172; 527 NW2d 42 (1994). Defendant argues that although he was convicted on only the aiding and abetting theory, he was nonetheless prejudiced by the conspiracy charge because, by asking for conviction on only one theory, the prosecutor made it appear to the jury that "he was giving the Defendant a break," and that this "discouraged the jurors from acquitting on the one remaining conviction." Defendant cites authority for neither the proposition that a defendant can suffer a double-jeopardy violation when convicted of just one offense, nor that a jury may not be asked to select between two theories of prosecution. We need not concern ourselves with those particulars, however, because there was no impropriety in charging defendant with the home invasion both as a conspirator and as an aider and abettor.

As explained in *People v Carter*, 415 Mich 558, 580; 330 NW2d 314 (1982), overruled in part on other grounds *People v Robideau*, 419 Mich 458, 483-485; 355 NW2d 592 (1984), although conspiracy and aiding and abetting have common elements, it is possible to accomplish each without the other. Thus, a person may be convicted of both, stemming from the same completed offense, without violating the rule against double jeopardy. *Carter*, *supra* at 577-582.

Defendant acknowledges *Carter*, including its plain statements that charges of conspiracy and aiding and abetting in connection with the same substantive offense do not offend double jeopardy principles. However, defendant emphasizes factual distinctions between *Carter* and the present case, arguing that *Carter* should not apply only because the evidence of defendant's participation in the completed crime in this case is less compelling than was the case in *Carter*. This argument is unpersuasive. *Carter* nowhere suggests that its holding applies only to cases where the evidence is overwhelming, and we can envision no logical basis for any such proposition. For these reasons, we reject this claim of error.

III. Sentencing

Defendant argues that the trial court erred in crediting implications that he was a drug dealer, and in its scoring of four of the offense variables under the applicable guidelines.[1] This Court reviews a trial court's sentencing decisions for an abuse of discretion. *People v Cain*, 238 Mich App 95, 129-130; 605 NW2d 28 (1999).

A. Information

A criminal defendant has a due process right to be sentenced on the basis of accurate information. *People v Hoyt*, 185 Mich App 531, 533; 462 NW2d 793 (1990), citing US Const, Am XIV, § 1, and Const 1963, art 1, § 17. This Court defers to the trial court's factual findings attendant to sentencing. *People v Coles*, 417 Mich 523, 537; 339 NW2d 440 (1983), overruled

[1] Because the conduct for which defendant was convicted occurred after January 1, 1999, the legislative sentencing guidelines, enacted pursuant to MCL 769.34, were used to determine the recommended range of defendant's minimum sentence.

in part on other grounds *People v Milbourn*, 435 Mich 630, 635-637, 642-650; 461 NW2d 1 (1990).

In this case, at sentencing, defense counsel objected to indications in defendant's presentence investigation report that he was known to local law enforcement personnel as a drug dealer. However, the trial court's conclusion that certain aspects of defendant's lifestyle suggested that defendant had been dealing marijuana is supported by the record. Moreover, as the trial court observed, other participants in the crime had testified that defendant had encouraged them to purchase marijuana from him. Because the record supports the conclusion that defendant had acted as a dealer of marijuana, the trial court's reliance on such inferences at sentencing was not error.

B. Scoring

Defendant challenges the trial court's scoring of offense variables 1, 2, 16, and 17. "This Court will uphold the trial court's scoring of the guidelines if there is evidence to support it." *People v Phillips*, 251 Mich App 100, 108; 649 NW2d 407 (2002).

Subsection (1)(a) of MCL 777.31, which concerns aggravated use of a weapon, directs a sentencing court to assess twenty-five points for OV 1 if a "firearm was discharged at or toward a human being . . . ." Subsection (2)(b) in turn requires that "[i]n multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points."

Defendant protests that there was no evidence that he ever saw the gun used in the crime, but admits that he heard "loose talk" of such a thing on that occasion. However, defendant cites no authority for the proposition that an aider and abettor must actually anticipate every action of the principal in order to share in criminal liability for each. To the contrary, the aiding and abetting statute, MCL 767.39, provides that "[e]very person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." The statute thus imputes to an aider and abettor full responsibility for another's criminal actions. The same is true of MCL 777.31(2)(b). In light of the plain wording of both statutes, defendant is entitled to no insulation from the consequences of one of the participant's use of a firearm.

Defendant additionally argues that the evidence suggested that the gun used during the crime was fired into the ceiling, not "at or toward" a person. However, the victim testified that the shooter fired his gun "into the wall . . . [o]ver top my bed, over my head." Although this evidence does not suggest that the shooter intended to hit the victim, neither does it suggest that the shooter shot straight up or otherwise not "at or toward" the victim. The trial court had a sound evidentiary basis for concluding, for purposes of OV 1, that the shooter chose to shoot in the victim's general direction – in other words, *toward* him – in order to threaten him.

With respect to OV 2, Subsection (1)(d) of MCL 777.32, which concerns the lethal potential of the weaponry involved, directs a sentencing court to assess five points if the offender "possessed or used a pistol . . . ." Subsection (2) in turn duplicates the requirement applicable to OV 1, in that where there is more than one offender, if one receives points for this variable all others receive the same number of points. Defendant challenges the trial court's scoring of this

variable simply by referring to his argument concerning OV 1. Because we have rejected the challenge to OV 1, the challenge to OV 2 must share its fate.

MCL 777.46 governs the scoring of OV 16, which, as subsection (1) indicates, concerns "property obtained, damaged, lost, or destroyed." Subsection (1)(c) prescribes five points if the property was worth between $1,000 and $20,000, and subsection (1)(d) prescribes one point if the value is between $200 and $1,000. Defendant argues that he should have been assessed no more than one point, asserting that this provision requires that, in multiple-offender situations, "the total loss should be apportioned among the offenders." However, the provision concerning multiple offenders states that "the appropriate points may be determined by adding together the aggregate value of the property involved, including property involved in uncharged offenses or charges dismissed under a plea agreement." MCL 777.46(2)(a). This suggests not that the point total under this subsection should be divided and distributed among multiple offenders, but rather something approaching the opposite, that a court "may" arrive at the total by taking into account the sum of all property involved. Because, as defendant admits, the property involved in the instant crime was valued at over $1,000 (but under $20,000), the trial court did not abuse its discretion in scoring five points for OV 16.

Finally, defendant takes issue with the trial court's scoring of OV 17, which concerns the degree of negligence exhibited. MCL 777.47(1). The trial court scored ten points, which is what subsection (1)(a) prescribes where the offender "showed a wanton or reckless disregard for the life or property of another person." We agree with the trial court that the evidence in this case, which included that defendant was told that the other participants envisioned burning the house and killing the occupants, suggested that defendant exhibited a reckless disregard for persons and property. However, MCL 777.22(1) authorizes the scoring of OV 17 only under circumstances where "an element of the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive." The elements of home invasion do not involve such instrumentality. Therefore, we conclude that the trial court erred in assessing points for OV 17.

Subtracting those ten points from defendant's offense variable score, however, does not change the recommendation under the guidelines for defendant's minimum sentence. MCL 777.63.[2] "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10). Correcting the single scoring error in the trial court's evaluation of the offense variables does not affect the prescribed minimum sentence range under the guidelines, leaving defendant's original sentence within that range. Thus, resentencing is unnecessary. However, defendant's records should reflect a score of zero for OV 17, and we remand this case to the trial court for the ministerial task of issuing an amended sentencing information report reflecting that adjustment.

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[2] For purposes of the guidelines, first-degree home invasion is a class B offense. MCL 777.16f. Defendant's prior record variable score of ten places him at prior record level C (10-24 points), and the corrected offense variable score of thirty-five places him at offense variable level IV (35-49 points), the same as with the forty-five points originally assessed. The combination of these two totals produces the same recommended minimum sentence range of forty-five to seventy-five months' imprisonment.

We affirm, but remand for correction of the sentencing information report. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Patrick M. Meter