STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2004
v LARON TRAMAINE HARPER, Defendant-Appellant.	No. 246109 Wayne Circuit Court LC No. 02-000628-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v CAMERON WILLIAMS, Defendant-Appellant.	No. 246111 Wayne Circuit Court LC No. 02-000628-02

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v TRANDELL ESTERS, a/k/a TRANDELL ESTHER, Defendant-Appellant.	No. 246112 Wayne Circuit Court LC No. 02-000628-03

Before: Cavanagh, P.J., and Jansen and Fort Hood, JJ.

PER CURIAM.

In these consolidated cases, defendants Laron Harper, Cameron Williams, and Trandell Esters were each charged with first-degree felony murder, MCL 750.316(1)(b), and armed

robbery, MCL 750.529. They were tried jointly, defendants Harper and Williams before separate juries, and defendant Esters before the trial court. Defendants Harper and Williams were each found guilty of felony murder and armed robbery, and defendant Esters was found guilty of armed robbery. Defendants Harper and Williams were each sentenced to life imprisonment without the possibility of parole for the murder conviction and eighteen to thirty years' imprisonment for the armed robbery conviction. Defendant Esters was sentenced to a term of twenty-five to fifty years' imprisonment for his conviction. All three defendants appeal as of right. We vacate the armed robbery convictions and sentences for defendants Harper and Williams, but affirm in all other respects.

Defendants' convictions arise from the December 14, 2001, robbery of the Three J's Party Store in Detroit, during which the store's owner, Yousif Yono, and his son, Jack, were both fatally shot. All three defendants frequented the neighborhood where the store was located and were familiar with the Yonos. Witnesses observed defendants Harper and Williams at the store shortly before the shooting. One witness identified defendant Harper as one of two men who ran from the store after gunshots were fired. The two men ran to a red or burgundy Neon. Witnesses observed defendant Harper driving such a vehicle before the shooting. Afterward, defendant Williams helped hide a gun that was later identified as having been used in the shooting. Defendant Esters was convicted of aiding and abetting an armed robbery for his role in acting as a lookout person both before and during the robbery, knowing that defendants Harper and Williams were armed and planned to rob the store.

I. Docket No. 246109

Defendant Harper argues that the trial court erroneously admitted as substantive evidence a written statement made by Evan Howard to the police. In the statement, Howard identified defendant Harper as one of the two men who ran from the store after the shooting. At trial, Howard denied making this statement.

We review a trial court's decision to admit evidence for an abuse of discretion, but preliminary questions of law are reviewed de novo. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). Defendant Harper argues that Howard's written statement was inadmissible under MRE 803(6) and (8), both of which generally bar police reports prepared in anticipation of litigation or in a setting that is adversarial to the defendant. *Id*. at 413-414. But even if the portion of the police investigator's report containing the statement was erroneously admitted, it is not more probable than not that the error affected the outcome of this case. See *People v Phillips*, 469 Mich 390, 396; 666 NW2d 657 (2003). The statement was cumulative of the investigator's own testimony concerning Howard's statement. See *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003). Howard's prior out-of-court statement was one of identification of a person made after perceiving the person, and Howard, the declarant, testified at trial and was subject to cross-examination concerning the statement. Therefore, the statement was admissible under MRE 801(d)(1)(C). Accordingly, reversal is not warranted.

Defendant Harper also argues that the trial court erred in admitting the preliminary examination testimony of Larry Evans.[1]

At trial, the prosecutor was permitted to read Larry Evans' preliminary examination testimony because of his unavailability. Under MRE 804(b)(1), the former testimony of a witness is not excluded if the witness is unavailable and the party against whom the testimony is offered "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." A witness is unavailable for purposes of MRE 804(b) when he "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." MRE 804(a)(5).

Defendant challenges the trial court's determination that Larry Evans could not be produced for trial despite the exercise of due diligence. We review the trial court's finding of due diligence for clear error. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995).

To establish due diligence,

> [t]he party wishing to have the declarant's former testimony admitted must demonstrate that it made a reasonable, good-faith effort to secure the declarant's presence at trial. *People v James (After Remand)*, 192 Mich App 568, 571; 481 NW2d 715 (1992). The test does not require a determination that more stringent efforts would not have procured the testimony. *Id*. [*Briseno*, *supra* at 14.]

The record discloses that the police investigated Larry Evans' last known address, checked with the post office and people living in that area to see if Evans left a forwarding address, attempted to contact Evans' grandmother and other family members, and attempted to locate his girlfriend. The police also checked the morgues, hospitals, and county jails on a regular basis, and checked the Secretary of State's records, the Detroit Police Department's arrest register, and the LEIN system. This record demonstrates that the police made diligent, good-faith efforts to locate Larry Evans for trial.

We disagree with defendant Harper's argument that due diligence was not shown because the police waited too long before attempting to locate Larry Evans. The record establishes that the police began looking for Evans approximately a month before trial, and only four months after Evans testified at the preliminary examination. This was not such a long period of time that it was unreasonable for the prosecution not to maintain regular contact with the witness before attempting to locate him, or a case where the police did not begin looking for the witness until the eve of trial. See *James (After Remand)*, *supra* at 571-572. We find no merit to defendant Harper's claim that the police should have known that Larry Evans had a motive to hide. Further, it is pure speculation to conclude that Antonio Evans, Larry Evans' cousin, who was in

[1] Although defendant Harper did not join in codefendant Williams' objection to the prosecution's motion to admit the preliminary examination testimony, codefendant Williams' objection was sufficient to preserve this issue for defendant Harper. See *People v Griffin*, 235 Mich App 27, 41 n 4; 597 NW2d 176 (1999).

police custody in Ohio, knew where Larry Evans was at or, if so, that he would have willingly disclosed Larry Evans' location, especially considering that Antonio Evans was also charged in this crime. The trial court did not clearly err in finding that due diligence was shown.

We also disagree with defendant Harper's argument that the previous cross-examination of Larry Evans at the preliminary examination was insufficient to admit his former testimony under MRE 804(b)(1) or the Confrontation Clause. Larry Evans was subject to cross-examination about his criminal record at the preliminary examination and defendant Harper has failed to demonstrate what new information existed that was not previously explored during the cross-examination of Larry Evans. In sum, the trial court did not abuse its discretion in admitting Larry Evans' preliminary examination testimony.

Defendant Harper next argues that reversal is required because, during the prosecutor's rebuttal argument, the prosecutor argued that defendant Harper failed to present a defense and failed to show that he was innocent. Because defendant Harper failed to preserve this issue with an objection to the challenged remarks at trial, our review is limited to plain error affecting defendant Harper's substantial rights. See *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999).

Claims of prosecutorial misconduct are decided case by case and the challenged comments must be considered in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Defendant Harper's theory at trial was that the victims were killed as part of a drug dispute, not a robbery, and that he had nothing to do with it. In his closing argument, defense counsel argued that the Yonos were not operating a legitimate business and attempted to suggest that they were involved in selling drugs. The prosecutor's rebuttal remarks were responsive to defense counsel's argument. Where defense counsel advances a defense or theory to exonerate the defendant, the prosecutor's comments on the validity of that theory or defense generally do not shift the burden of proof. *People v Reid*, 233 Mich App 457, 478; 592 NW2d 767 (1999). Here, the prosecutor's comments were directed at refuting the defense theory and urging that there was no evidence to support it. Considered in the context of defense counsel's closing remarks and the defense theory, the prosecutor's remarks did not amount to plain error. See *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Further, the prosecutor's remarks were directed at the evidence; they were not aimed at shifting the jury's focus from the evidence to defense counsel's personality. See *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984). Therefore, plain error has not been shown.

II. Docket No. 246111

Defendant Williams also challenges the trial court's decision to admit Larry Evans' preliminary examination testimony. For the most part, defendant Williams' arguments echo those made by defendant Harper, which we previously rejected. Although defendant Williams additionally argues that the police should have done more to attempt to locate other family members, especially Larry Evans' grandmother, there is no basis in the record to conclude that the police efforts in this regard were inadequate. Defendant Williams has failed to establish that the police could have done more, within reason, to locate Larry Evans. We also reject defendant Williams' reliance on *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). In *Crawford*, the United States Supreme Court held that testimonial statements of witnesses not previously subject to cross-examination are inadmissible under the Sixth

Amendment. Here, Larry Evans was previously subject to cross-examination during the preliminary examination. Accordingly, *Crawford* does not control this case. We therefore reject this claim of error.

Next, defendant Williams argues that there was insufficient evidence to convict him of armed robbery or felony murder. We disagree.

An appellate court's review of the sufficiency of the evidence to sustain a conviction should not turn on whether there was any evidence to support the conviction, but 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; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence must be viewed in a light most favorable to the prosecution. *Id*. at 514-515.

As our Supreme Court observed in *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000):

> The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [the statute, including (arson)]. [Citation and internal quotations omitted.]

Robbery is an enumerated felony in MCL 750.316(1)(b).

Armed robbery involves (1) an assault, (2) a felonious taking of property from the victim's person or presence, (3) while the defendant is armed with a dangerous weapon or "any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon." MCL 750.529; *Carines*, *supra* at 757.

To show that a defendant aided and abetted in a crime, the prosecution must prove 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. *Carines*, *supra* at 757. An aider and abettor's state of mind may be inferred from all of 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).

To establish a defendant's guilt of felony murder under an aiding and abetting theory, the defendant need not participate in the actual killing. However, he must have possessed the requisite intent, i.e., malice, for felony murder. *Carines*, *supra* at 769-771. "[I]f an aider and abettor participates in a crime with knowledge of the principal's intent to kill or to cause great bodily harm, the aider and abettor is acting with 'wanton and willful disregard' sufficient to

support a finding of malice." *People v Riley (After Remand)*, 468 Mich 135, 141; 659 NW2d 611 (2003).

In this case, a witness observed defendant Williams at the store where the victims were killed just before the shooting. There was also evidence that, after the shooting, defendant Williams was involved in hiding a gun that was later identified as having been used in the shooting. Additionally, Larry Evans testified that, after the shooting, defendant Williams told him that he could not loan Evans any money because he did not have any money left after the robbery, thereby supporting an inference that defendant Williams shared in the robbery proceeds. When the police subsequently stopped a car in which defendant Williams was riding, he fled from the police, thus demonstrating a consciousness of guilt. More significantly, defendant Williams gave a statement to the police in which he admitted his involvement in discussing and planning the crime with defendant Harper and Antonio Evans.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant Williams aided and abetted his codefendants in the robbery of the Three J's Party Store, and that, at the time of his participation, he was aware that his codefendants possessed the requisite state of mind for felony murder. Thus, there was sufficient evidence to support defendant Williams' convictions for felony murder and armed robbery.

Defendant Williams also argues that his dual convictions for both armed robbery and felony murder violate double jeopardy protections. We agree.

Under the state constitution, a defendant may not twice be placed in jeopardy for a single offense. Const 1963, art 1, § 15. *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995). It is well established that convictions and sentences for both felony murder and the predicate felony constitute multiple punishments for the same offense and thereby violate double jeopardy protections under the state constitution. *Id*. See, also, *People v Wilder*, 411 Mich 328, 345-347; 308 NW2d 112 (1981) (the underlying felony is a necessary element of every conviction of felony murder).

Although we agree with the prosecution that a defendant's convictions for both felony murder and armed robbery may be upheld where the crimes were committed against different persons, *People v Wilson*, 242 Mich App 350, 360-362; 619 NW2d 413 (2000), in this case the jury verdict form indicates that the jury convicted defendant Williams of a single count of felony murder for causing the deaths of both Yousif and Jack Yono. Further, the trial court instructed the jury that it could convict defendant Williams of felony murder if it found that the elements of armed robbery were proven in relation to "the death of Yousif Yono and/or Jack Yono." Thus, it is not apparent from either the trial court's jury instructions or the jury's verdict form that defendant Williams' convictions for felony murder and armed robbery were based on two different victims. Under these circumstances, we agree that defendant Williams' conviction and sentence for armed robbery must be vacated. See *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2001).

This analysis is equally applicable to defendant Harper's conviction and sentence for armed robbery. Although defendant Harper has not raised this double jeopardy issue, we hold as

a matter of law and judicial economy that his conviction and sentence for armed robbery should also be vacated.

III. Docket No. 246112

Defendant Esters argues that the trial court erred in admitting his statements to the police.

> This Court reviews de novo a trial court's ultimate decision on a motion to suppress evidence. *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001). Although this Court engages in a review de novo of the entire record, this Court will not disturb a trial court's factual findings with respect to a *Walker*[2] hearing unless those findings are clearly erroneous. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). "A finding is clearly erroneous if it leaves us with a definite and firm conviction that the trial court has made a mistake." *People v Manning*, 243 Mich App 615, 620; 624 NW2d 746 (2000). [*People v Akins*, 259 Mich App 545, 563-564; 675 NW2d 863 (2003).]

This Court addressed the voluntariness of a confession in *Akins*, *supra* at 564:

> A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *Daoud*, *supra* at 632-639. A confession or waiver of constitutional rights must be made without intimidation, coercion, or deception, *id*. at 633, and must be the product of an essentially free and unconstrained choice by its maker. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). The burden is on the prosecution to prove voluntariness by a preponderance of the evidence. *Daoud*, *supra* at 634.

The voluntariness of a defendant's statement is determined by the conduct of the police. *People v Shipley*, 256 Mich App 367, 373; 662 NW2d 856 (2003). The following factors are considered:

> "[T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse."

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

> "The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." [*Shipley*, *supra* at 373-374, quoting *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988) (citations omitted).]

At the *Walker* hearing, defendant Esters testified that he agreed to cooperate with the police and give the statements because he was assured he was only a witness and also because he was trying to obtain a cash reward for his assistance. Although he claimed that he fabricated the statements to obtain a cash reward, he stated that he learned about the reward "on the streets," not from the police. To the extent defendant Esters' statements may have been motivated by this cash reward, suppression was not warranted on this basis because this incentive was neither offered or promised by the police. Although defendant Esters further claimed that he fabricated the statements because he wanted to be released from custody so he could go home, each of the officers who took defendant Esters' statements denied telling him that he would only be a witness or could go home after he gave a statement. In this regard, the trial court's decision turned on credibility, and the court found that defendant Esters' version of events was not credible. This Court gives deference to the trial court's superior opportunity to assess the credibility of the witnesses. *Shipley*, *supra* at 373; *Daoud*, *supra* at 629. Giving deference to the court's credibility determination, the totality of the circumstances indicate that defendant Esters' statements were freely and voluntarily made.

Next, defendant Esters argues that there was insufficient evidence to convict him of armed robbery. We disagree.

In his statements to the police, defendant Esters admitted that he agreed to go into the Three J's Party Store to see who was there, knowing that codefendants Harper and Williams were armed with a gun and planned to rob the store. In addition, while codefendants Harper and Williams were inside the store, defendant Esters admitted that he stood outside to "watch their backs." Defendant Esters stayed there until the codefendants ran out and left in the Neon. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant Esters aided and abetted an armed robbery. See *People v Petrella*, 424 Mich 221, 269-270; 380 NW2d 11 (1985); see, also, *Carines*, *supra* at 757; *Wilson*, *supra* at 614.

Defendant Esters also claims that trial counsel was ineffective for not calling additional alibi witnesses. Because defendant Esters did not raise this issue in an appropriate motion in the trial court, our review is limited to mistakes apparent from the record. *Wilson*, *supra* at 612.

At trial, defense counsel informed the trial court that there were additional alibi witnesses, but he was not calling them because their testimony would be cumulative to Tonya Lawson's alibi testimony. Although Lawson testified that she spoke to defendant Esters on the telephone shortly after 3:00 p.m. on the day of the charged crimes, a witness testified that she heard the gunshots at the store closer to 2:30 p.m. Another witness saw codefendants Harper and Williams at the store closer to 2:00 p.m. The house at which Lawson spoke to defendant Esters was only a five to ten minute walk from the store. In light of this evidence, it is not apparent that Lawson's testimony provided an alibi and, accordingly, it is not apparent that the additional

witnesses, whose testimony would have been cumulative to Lawson's testimony, would have provided an alibi. Therefore, defendant Esters has failed to show that counsel was ineffective for not calling the additional witnesses. See *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

Defendant Esters also argues that offense variables 1, 2, and 3 of the sentencing guidelines were erroneously scored, because the trial court scored those variables on the basis of conduct attributed to the codefendants, not himself. We disagree. The instructions for each of these offense variables state that, in multiple offender cases, if one offender is assessed points for the variable, all offenders shall be assessed the same number of points. MCL 777.31(2)(b), MCL 777.32(2), and MCL 777.33(2)(b). Therefore, the trial court properly considered the conduct of the codefendants for purposes of scoring defendant Esters' offense variables. *People v Morson*, 471 Mich 248, 256-260; 685 NW2d 203 (2004).

In Docket Nos. 246109 and 246111, we vacate defendant Harper's and defendant Williams' convictions and sentences for armed robbery, but affirm their convictions and sentences for felony murder. In Docket No. 246112, we affirm defendant Esters' conviction and sentence for armed robbery.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood