

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRANDON SAMIR BAZZI,

Defendant-Appellant.

UNPUBLISHED

January 22, 2009

No. 280423

Wayne Circuit Court

LC No. 07-007723-03

Before: Fort Hood, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 5 to 15 years' imprisonment for the assault with intent to rob while armed conviction and to two years' imprisonment for the felony-firearm conviction. For the reasons set forth in this opinion, we affirm defendant's convictions but remand to the trial court for a finding of whether it relied on the disputed information in the PSIR for sentencing.

Defendant's convictions arise from an attempted robbery and non-fatal shooting that occurred on July 12, 2004, on Cabri Lane in Dearborn Heights, Michigan. That night, around 10:00 p.m. the victim, Yasser Kalkas, a part owner of a pizzeria in Detroit with 30 to 35 employees and gross revenues of \$35,000 to 45,000 a week, went to dinner with an employee and friend of his, Atef Hamad. After dinner, Kalkas dropped Hamad off at the pizzeria, and from there Kalkas drove home.

Kalkas testified that at the time of the assault, his partner was out of the country vacationing, which meant he was responsible for taking the money from the pizzeria home and putting it in a safe until the weekly banking was done. When he arrived home he parked his Hummer in the driveway, got out and walked to the front door. He unlocked the door, walked in, and tried to push it closed, but it did not shut because a masked assailant had pushed it open and put a gun to the back of Kalkas's head, telling him to "get the (expletive) down." Kalkas turned to hit the male, who had an Arabic accent, and saw a gun pointing at him. Kalkas swung at the assailant, the assailant shot him in his right arm. Kalkas then pushed his assailant with his left shoulder and ran through the front door screaming as he headed toward the street. As he was running away, a second shot was fired hitting him in his buttocks, travelling through his stomach and out his right leg. Neighbors came out to help, police and an ambulance arrived shortly

thereafter. Kalkas did not see what happened to his assailant or see any others involved. He was taken to Garden City hospital and underwent surgery.

A mask and glove that were found at the scene of the shooting were submitted to the Michigan State Police crime lab for analysis. The glove had insufficient DNA, while the mask had enough of a sample for testing. On April 22, 2005, Detective Serwatowski of the Dearborn Heights Police Department, learned that the DNA from the mask had been submitted into the CODIS system and matched an African-American male named James Gulley. Detective Serwatowski testified that he located Gulley in the Oakland County Jail on domestic violence charges, and obtained a buccal swab from Gulley, which was later confirmed to be a match to the mask in September 2005.

Meanwhile on August 8, 2005, over a year after the assault, Sergeant Anthony Mencotti of the Dearborn Police Department, who has known defendant since he was 14 or 15 years old, stopped defendant for speeding. Sergeant Mencotti testified he smelled marijuana when he approached the car and noticed that defendant was not wearing a seatbelt. Defendant admitted that he had just smoked a "blunt" and then turned over a dime bag of marijuana to Sergeant Mencotti. Defendant asked that he not be arrested and for his car not to be towed, offering information in return. Sergeant Mencotti testified that he drove to a secluded area and talked with defendant for 30 to 45 minutes, taking notes on a manila envelope.

Sergeant Mencotti testified that defendant informed him he had information about the "pizza guy" who got shot when he came home. Defendant told him that when he was getting high with Hamad, Khalid Jaber and Jihad Jaber, Hamad, who worked for the "pizza guy," told them it would be easy to rob "the pizza guy." Defendant told Sergeant Mencotti that he wanted to be involved but the rest of the group had refused to let him. The day of the robbery, defendant was riding in Khalid's white Explorer while getting high with Khalid, Jihad, and an African-American male. They drove to Dearborn Heights and parked on a dark side street. Defendant said he stayed in the vehicle and continued to get high while the others got out. A few minutes later, the three of them ran back to the car with Khalid laughing about how he shot the guy and thought he killed him.

In exchange for the information, Sergeant Mencotti only wrote defendant a seatbelt ticket and another fictitious ticket in case any of his friends asked any questions. Sergeant Mencotti testified that he did not prepare a police report based on this information. He told Corporal Richard Conrad of the Dearborn Police Department the information, and Corporal Conrad passed it on to the Dearborn Heights Police Department. Sergeant Mencotti testified that he no longer has the manila envelope in which he took notes because he threw it away six months after speaking with defendant.

In August 2005, Detective Serwatowski learned that defendant had spoken with Sergeant Mencotti. Detective Serwatowski testified that he tried to contact defendant, but was not successful until December 2005, when defendant called him to set up an interview. At that interview, defendant wrote out a statement in which he indicated that in the summer of 2004, he smoked a "blunt" with Khalid Jaber and an African-American male at Khalid's house. He wrote that Khalid and the other male were preparing to commit a robbery, but did not want defendant involved. They left after awhile and defendant then left separately. A couple of hours later Khalid, Jihad, and the other male all returned to Khalid's house, and defendant also went back to

Khalid's where he learned from Jihad that the three of them had been hiding out in front of the pizza owner's house when the owner came home. The pizza owner had reached for the gun when Khalid jumped out so Khalid shot him in the hand, and then the buttocks when the guy started to run. After the shots were fired everyone ran back to the car.

Defendant told Detective Serwatowski he was providing the statement because Khalid and Jihad had set him up to get beat up so badly he ended up in the hospital. He was no longer friends with them and, as a result, wanted to turn them in. When Detective Serwatowski asked defendant about the inconsistencies with the earlier statement that he had given to the Dearborn police, defendant said the Dearborn officer was lying. Detective Serwatowski testified that in January 2006, a warrant was issued for James Gulley. Gulley was arrested and agreed to plead guilty and testify as a part of a plea bargain deal.¹ At defendant's trial, Gulley testified that on the night of July 11, 2004, he met Khalid, Jihad, and defendant at a gas station and got into a white Explorer. Khalid received a call from Hamad in which Hamad informed them that he was at dinner with Kalkas and that they should head over to Kalkas's house. Gulley testified that he had a .44 revolver, defendant had a small handgun, and that Khalid and Jihad also had guns. Each of them also had a nylon stocking mask. He testified they drove around smoking marijuana and then drove to the street behind Kalkas's house, pulling into a driveway. Jihad went to the back of the house, defendant and Gulley went to the side and hid in the bushes, and Khalid hid near the porch. When Kalkas pulled into his driveway and went up to his front door, defendant and Gulley started to run up to the door, but as soon as they heard a gun shot, they started running back to the car. Gulley testified that he threw his mask out of the car after a couple blocks, and then a couple blocks after that, defendant threw his mask out. On cross-examination Gulley admitted to having used eight different aliases and five different birthdates.

Defendant argues on appeal that there is insufficient evidence to support his convictions. When reviewing a claim of insufficient evidence, this Court reviews the record de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). This Court must “view the evidence in a light most favorable to the prosecution and determine if any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.” *Id.*, quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). All conflicts in the evidence must be resolved in favor of the prosecution, *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999), and it is solely the trier of fact's role to weigh the evidence and judge the credibility of witnesses, *Wolfe, supra* at 514.

Defendant argues that there is no physical or DNA evidence linking him to the crime or any eyewitness testimony other than James Gulley. He argues that Gulley is not credible because he has had previous felony convictions and has used five different birth dates and eight different aliases to escape law enforcement. Gulley also made a plea agreement in which he

¹ James Gulley pleaded guilty to two of the seven counts he was charged with, assault with intent to rob while armed and felony-firearm, and was sentenced to 5 to 15 years' imprisonment for the assault with intent to rob while armed conviction and two years' imprisonment for the felony-firearm conviction.

pleaded guilty to two out of seven charges and made inconsistent statements to police about defendant's involvement, not mentioning defendant's presence in one statement to police. As a result of these alleged deficiencies in the case against him, defendant argues that there is insufficient evidence that he aided or abetted the commission of the crimes or that he was armed.

“The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed. Because this is a specific-intent crime, there must be evidence that the defendant intended to rob or steal.” *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003), quoting *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). “The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony.” *Id.*

Defendant was charged as an aider and abettor. Anyone who aids and abets in the commission of a felony can be tried as principal. *People v Robinson*, 475 Mich 1, 8; 715 NW2d 44 (2006). To establish aiding and abetting, a prosecutor must show that: (1) the charged crime was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement which assisted 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 that the defendant gave the aid and encouragement. *Id.* at 6. The state of mind of an aider and abettor may be inferred from all of the facts and circumstances. *People v Carines*, 460 Mich 750, 758; 597 NW2d 130 (1999). These include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Id.*

Viewing, the evidence in the light most favorable to the prosecution, it shows that defendant was hiding armed in the bushes outside of the victim's house with Gulley, while Jihad Jaber hid behind the house and Khalid Jaber hid near the front porch. Defendant was present for the suggestion of and planning of the crime, and his job was to rush the door with Gulley. Defendant also fled with the other participants when the robbery failed and Khalid shot the victim twice.

Defendant does not challenge that either crime occurred; instead, he argues that his actions did not make him an aider and abettor to the crime of assault with intent to rob while armed. Defendant, in his initial statements to police, indicated that he wanted to be involved in the robbery. Gulley testified that defendant was present for the planning of the robbery and was at the scene of the crime armed and ready with the other perpetrators to aid in the robbery. Moreover, defendant fled with the rest of the perpetrators. These facts and circumstances show that defendant gave encouragement and aided the commission of the crime. These facts and circumstances also show that defendant intended the commission of the crime. Regarding the felony-firearm conviction, the evidence showed that defendant had a weapon at the time of the commission of the attempted robbery. Finally, defendant's argument challenging Gulley's credibility fails because this Court relies on the trier of fact to determine the credibility of witnesses and the weight to give to their testimony. Accordingly, there is sufficient evidence to support defendant's assault with intent to rob while armed and felony-firearm convictions.

Next, defendant argues that the trial court abused its discretion by allowing Sergeant Mencotti's testimony because it violated the discovery order. Sergeant Mencotti had taken notes on a manila envelope when interviewing defendant, but then destroyed those notes six months

after the interview. The discovery order included the request that all written notes of interviews of defendant be turned over. To obtain reversal for this violation, defendant must prove that the missing evidence was exculpatory and that law enforcement personnel acted in bad faith. *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007).

The prosecution did not violate the discovery order. Defendant was given all of the information that the prosecution knew existed and there is no evidence that the prosecution withheld any evidence. The information received from Sergeant Mencotti was summarized in the investigator's report, which was turned over to defendant. Moreover, the missing notes from Sergeant Mencotti do not warrant vacating defendant's convictions. Mencotti testified he threw away the notes he took from his conversation with defendant after six months. He had already passed along the information verbally to another Dearborn police officer, who then informed the Dearborn Heights Police Department. There is no evidence that the notes taken by Sergeant Mencotti would have been exculpatory evidence for defendant. Also, there is no evidence that Sergeant Mencotti acted in bad faith when he threw the notes away. Therefore the trial court did not abuse its discretion by allowing Sergeant Mencotti's testimony. We also note that even if allowing Sergeant Mencotti's testimony was an abuse of discretion, that error is harmless. There is no general constitutional right to discovery in a criminal case. *People v Stanaway*, 446 Mich 643, 664; 521 NW2d 557 (1994). Because defendant made no showing that the notes would have been exculpatory, any error would be nonconstitutional. See *People v Elston*, 462 Mich 751, 766 n6; 614 NW2d 595 (2000). Given the evidence against defendant from other sources, there is no indication that allowing Sergeant Mencotti's testimony was outcome determinative.

Lastly, defendant argues that he is entitled to a hearing because the trial court failed to respond to objections regarding the accuracy of his PSIR. During the sentencing hearing defendant objected to the accuracy of two pieces of information in the PSIR. Defendant argues that the trial court did not respond to either of his objections. Specifically, defendant objected to the language in the PSIR section headed "Defendant's Description of the Offense," which he contends incorrectly quoted him as saying:

My lawyer promised me a not guilty verdict if I don't testify and that I had nothing to worry about. I wasn't there and I had witnesses and they didn't bring them in. I wanted to testify but my lawyer didn't let me. She promised me a not guilty verdict. I'm not guilty, but if it takes one innocent man to have four guilty men be convicted then I'm willing to take it. I hope the judge will be lenient with me.

Defendant contends these statements were mischaracterizations and he did not talk about these things with the interviewer. Defendant also objected to the portion of the report indicating he attended Michigan State University, arguing it should be stricken because it was not true. Defendant argues that the trial court's failure to respond, requires the case to be remanded for a finding of whether the contested information was considered in imposing the sentence.

A trial court must respond to a defendant's challenge of the accuracy of the information contained in a presentence report. In its response, the court may make a finding of the accuracy of the information, accept the defendant's version, or disregard the challenged information. *People v Uphaus (On Remand)*, 278 Mich App 174, 182; 748 NW2d 899 (2008). Whenever a sentencing court either disregards the allegations of inaccurate information or determines that the

information was in fact inaccurate, it must strike or correct the disputed information before sending the PSIR to the Department of Corrections. *People v Spanke*, 254 Mich App 642, 649; 658 NW2d 504 (2003); MCL 771.14(6); MCR 6.425(E)(2).

Here, the trial court's response to defendant's objections was simply, "all right." There is no indication from the record that the trial court made a finding of accuracy, accepted the defendant's version, or disregarded the challenged information. When the trial court fails to adequately respond to a defendant's challenge to the accuracy of the PSIR, the case must be remanded for a finding of whether the disputed information was involved in the trial court's sentencing decision. *People v Landis*, 197 Mich App 217, 219; 494 NW2d 865 (1992). If the trial court determines that they did rely on the disputed information, then the defendant is entitled to resentencing. *Id.* However, if it is determined that the trial court did not rely on the disputed information, then the sentence must be affirmed, and a corrected PSIR must be sent to the Department of Corrections. *Id.*; see also *People v Grove*, 455 Mich 439, 452, 477; 566 NW2d 547 (1997).

The trial court's failure to adequately respond to defendant's objections and the arguable use of some of the disputed information in his sentencing report, make it necessary to remand this case for the trial court to make a finding on whether the disputed information in "Defendant's Description of the Offense" was relied on for sentencing. If it was, then defendant should be resentenced. If the trial court determines that it did not rely on that information, it should strike the disputed language as well as the disputed educational history and send a corrected copy to the Department of Corrections. Additionally, the trial court should correct any errors in the PSIR, even if they would be construed as "harmless error,"² because "[c]ritical decisions are made by the department of Corrections based upon the contents of a PSIR." *Uphaus, supra* at 182 quoting *People v Norman*, 148 Mich App 273, 275; 384 NW2d 147 (1986).

Affirmed but remanded to the trial court for a finding of whether it relied on the disputed information in the PSIR for sentencing. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello

² See *People v McAllister*, 241 Mich App 466. 473-474; 616 NW2d 203 (2000), remanded on other grounds 465 Mich 884 (2001).