STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 21, 2010
v	No. 284499 Saginaw Circuit Court
JERRY WILLISON LONG, Defendant-Appellant.	LC No. 07-029124-FC

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

GLEICHER, J. (*concurring*).

I concur with the majority in result, but write separately to express my disagreement with one aspect of the majority opinion. The majority holds that the trial court did not abuse its discretion when it declined to instruct the jury regarding accomplice testimony. In my view, the evidence supported the accomplice instructions requested by defendant, and the trial court's refusal to give them amounts to an abuse of discretion. But because this error did not undermine the reliability of the verdict, I join the affirmance of defendant's convictions.

The events culminating in the tragic murder of Stacy Evans, Jr., began in defendant's basement on the afternoon of March 2, 2007. Cameron Youngblood, the prosecutor's primary witness, testified that he visited defendant's basement "almost every day" and went there "between three and 4:30 p.m." on March 2, 2007. Youngblood and several other young men regularly gathered in defendant's home to socialize, play dice, and smoke marijuana.

Youngblood's friend, Jhirnea Harris, arrived in the basement that afternoon and reported that he "just got in a fight" with Cruz Hinds at a Saginaw High School athletic event. Youngblood recalled that Harris seemed angry and wanted to return to the school. According to Youngblood, after the group in the basement heard Harris's account of his fight with Hinds, "then we all was like, okay, so we going to go up there. And we all started shooting dice a little bit more." When the group eventually decided to find Hinds, defendant advised that "he didn't have no gas money." Youngblood additionally recounted the following relevant details:

> *Youngblood*: I told him that I would was [sic] going to give him some gas money if he was to take us up to Saginaw High.

Prosecutor: Okay. And that was for the purpose of going to get Cruz Hinds?

Youngblood: Yes.

Prosecutor: And for want of a better word, it . . . was basically everybody okay with that idea to go back and find Cruz Hinds?

Youngblood: Yes.

Prosecutor: And now you said that [defendant], he wanted some money for his Hummer, to pay for gas?

Youngblood: Yes.

Prosecutor: And once that was done, he was okay to take you guys?

Youngblood: Yes.

Prosecutor: Did you offer to give him $20?

Youngblood: Yes.

Defendant and four others, including Youngblood, boarded defendant's Hummer and set out to locate and harm Hinds.

Youngblood explained, "Our plan was to—when the game was out, to be back up there so we can see if we can catch Cruz Hinds out there in the parking lot." The group's first foray proved unsuccessful because Hinds was still inside the school attending the game. Defendant drove the group to a store, and Youngblood went inside with Shaquille Harris, Jhirnea's brother. Shaquille attempted to buy bullets, but the clerk refused to sell any to him, so defendant agreed to purchase the bullets. As defendant and Youngblood left the store, defendant asked Youngblood for the previously promised gas money, which Youngblood retrieved from his "pocket and gave . . . to [defendant] . . . ." Youngblood observed defendant give the bullets he had purchased to Shaquille.

On the way back to defendant's house, Jhirnea saw someone walking down a sidewalk that he believed resembled Hinds. Youngblood described that defendant pulled into a driveway, Jhirnea "jumped out the truck" with a loaded gun, "walked up the sidewalk, and . . . just started shooting." Youngblood estimated that Jhirnea fired "about 30" shots at his intended victim before returning to defendant's Hummer. The group made a second stop for bullets before heading back to defendant's basement, where Youngblood witnessed Jhirnea reloading the gun and Shaquille loading a second firearm.

After spending another period of time in defendant's basement, the group reentered the Hummer and embarked on a second hunt for Hinds. Defendant claimed that after the first shooting, he initially refused to take the group back to the school:

> … I told him [Jhirnea] what he just did in my car, I wasn't going to take him to no Saginaw High game. And I told him out straight.
>
> And he said, we gave you money. I didn't at that time say, well, Cameron gave me gas money, because Cameron helped him pitch—after I told him no, Cameron helped him pitch in to change my decision of taking them to the game. So I just felt like they was all in it together.

On the way to the school the Hummer stopped at a market, and Youngblood told Shaquille "to bring me something back." Shaquille complied. As the Hummer pulled out of the market's parking lot, one of the occupants spotted a nearby truck that looked like one owned by "this dude named Zoe." Youngblood noticed that the truck actually belonged to his mother, and implored, "[N]o, no don't shoot my momma truck up." The group agreed to forebear, but came across another target a few minutes later. In the second shooting of the evening, a passenger in the Hummer shot at some people on a porch, who returned fire. The Hummer and its occupants again stopped at a market, where Youngblood got out of the truck, bought something, and returned to the truck. Youngblood recalled that "sooner or later" the Hummer encountered a vehicle in which Joseph Ball was a passenger. The Hummer chased the vehicle until one of Hummer's occupants shot at Ball's through the other vehicle's passenger window. This shooting, the third of the evening, killed Stacy Evans, Jr.

The majority opines that "there is no record evidence to suggest that there was any agreement between Youngblood and defendant or anyone else to shoot anyone, nor is there any evidence to suggest that Youngblood encouraged, helped, aided, or supported defendant or the others involved at any point during the shootings." *Ante* at 2-3. This conclusion ignores both direct and circumstantial evidence placing Youngblood firmly among the conspirators. First and most compellingly, the evidence establishes that Youngblood volunteered to help finance defendant's transportation of the roving band of armed men. Youngblood proffered the gas money *after* witnessing defendant purchase bullets, and pursuant to his own testimony unquestionably knew that the purpose of the Hummer's journey was to find and harm Hinds. Furthermore, Youngblood made no effort to distance himself from the other occupants of the Hummer, despite having been presented with several opportunities to do so, even after the first two shootings. Throughout Youngblood's testimony, he included himself within the group of armed marauders by consistently referring to the collection of men as "we." Moreover, the prosecutor applied for and received a grant of testimonial immunity for Youngblood. Had no evidence implicated Youngblood in the shootings, the prosecutor's application for immunity would have been unnecessary. The prosecutor's immunity application for Youngblood serves as a powerful recognition that Youngblood faced potential criminal liability for his conduct that evening.

This Court has adopted the definition of "accomplice" set forth in CJI2d 5.5; an accomplice is "a 'person who knowingly and willingly helps or cooperates with someone else in committing a crime.'" *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993), quoting CJI2d 5.5. In my view, Youngblood knowingly and willingly helped and cooperated with defendant's commission of the crime of conspiracy to commit first-degree murder. The essence of a criminal conspiracy consists of the conspirators' agreement to commit an unlawful act, "where one or more of the coconspirators do any act to effect the object of the conspiracy." *People v Wilson*, 454 Mich 421, 429; 563 NW2d 44 (1997) (opinion by Brickley, J.) (internal

quotation omitted). The instant conspiracy began when the group decided to find and wreak retribution on Hinds, and, in the words of the prosecutor, "envelope[d] the entire series of events." Youngblood furnished gas money for the conspirators' journey. Furthermore, Youngblood knowingly cooperated with his companions by remaining in the Hummer throughout the night of terror and by failing to notify the police to warn of the Hummer's deadly mission. The prosecutor's closing argument implicitly acknowledged that Youngblood aided and abetted the others:

> We have a situation in which a group of young men, all of them young men ranging in age from 14 years to 23 years, got together and went out on a hunting expedition with a single purpose in mind, to take human life; and apparently, for little more than some degree of entertainment value, to make a point that their group, their neighborhood is tougher than individuals from a different neighborhood, perhaps to even up a score with an individual that was involved in a fistfight on a basketball court that evening.

In light of the record evidence and Youngblood's grant of immunity, Youngblood undisputedly behaved as an accomplice to defendant. Consequently, the trial court should have read the jury CJI2d 5.4, which applies to undisputed accomplice testimony.[1]

Even assuming that Youngblood's status as an accomplice reasonably remained in question, ample evidence supported defendant's request that the trial court read CJI2d 5.5, the disputed accomplice instruction:

> (1) Before you may consider what [name witness] said in court, you must decide whether [he/she] took part in the crime the defendant is charged with committing. [Name witness] has not admitted taking part in the crime, but there is evidence that could lead you to think that [he/she] did.
>
> (2) A person who knowingly and willingly helps or cooperates with someone else in committing a crime is called an accomplice.
>
> (3) When you think about [name witness]'s testimony, first decide if [he/she] was an accomplice. If, after thinking about all the evidence, you decide that [he/she] did not take part in this crime, judge [his/her] testimony as you judge that of any other witness. But, if you decide that [name witness] was an accomplice, then you must consider [his/her] testimony in the following way: [in conformity with CJI2d 5.6.]

[1] Pursuant to CJI2d 5.4, a grant of immunity permits a trial court to conclude that a witness qualifies as an undisputed accomplice. The instruction reads, "[Name witness] says [he / she] took part in the crime that the defendant is charged with committing," and provides that the judge should select among additional statements, including that "[Name witness] has been promised that [he / she] will not be prosecuted for the crime the defendant is charged with committing."

The evidence that Youngblood bought gas money, remained with his friends throughout the evening, and plainly understood that they would continue to load and fire their weapons at Hinds or other unfortunate human targets "could lead . . . [a reasonable juror] to think that" Youngblood took part in the charged conspiracy to commit first-degree murder. CJI2d 5.5(1). The majority observes that "there was scant evidence suggesting that Youngblood acted as an accomplice," and that "[o]ther than offering defendant gas money, there is nothing in the record to suggest that Youngblood knowingly and willingly helped or cooperated with anyone in the shootings." *Ante* at 2. In my view, the majority improperly disregards the evidence that Youngblood funded the Hummer's fatal journey, incorrectly characterizes the evidence of Youngblood's cooperation with the Hummer's occupant's as "scant," and fails to heed our Supreme Court's admonition that when *some* evidence supports an instruction, the instruction *must* be given. "[W]hen a jury instruction is requested on any theories or defenses and is supported by evidence, it must be given to the jury by the trial judge. A trial court is required to give a requested instruction, except where the theory is not supported by evidence." *People v Mills*, 450 Mich 61, 81; 537 NW2d 909, mod 450 Mich 1212 (1995) (footnote omitted). Whether properly characterized as "scanty" or "ample," some evidence reasonably tended to establish that Youngblood knowingly and willingly helped and cooperated with defendant and the other conspirators. On this record, the trial court abused its discretion by declining to read the jury an accomplice testimony instruction.

However, this error does not mandate reversal of defendant's convictions. Defendant bears the burden of establishing that a preserved nonconstitutional error more than likely affected the outcome of the proceedings. *People v Young*, 472 Mich 130, 142; 693 NW2d 801 (2005). "An error is deemed to have been 'outcome determinative' if it undermined the reliability of the verdict." *Id*. (internal quotation omitted). Here, the trial court's failure to give the requested instruction neither determined the outcome of the trial nor undermined the reliability of the verdict in any respect. Defense counsel aggressively and extensively questioned Youngblood and elicited that Youngblood had received immunity from prosecution. Furthermore, defendant admitted that he purchased bullets that his passengers fired on March 2, 2007, drove the shooters around in his car despite knowledge that they were armed, and chased the vehicle in which Ball rode when the Hummer's occupants directed him to do so. Although defendant insisted that he lacked the intent to kill anyone, overwhelming evidence established that defendant twice voluntarily reentered his Hummer after the first shooting to make additional journeys with a group of armed men. Even had the jury discounted most of Youngblood's testimony, defendant himself admitted to virtually every fact described by Youngblood. Notwithstanding my disagreement with the majority's analysis, I believe that precisely the same result would have obtained if the trial court had read an accomplice testimony instruction. Therefore, I concur in affirming defendant's convictions.

/s/ Elizabeth L. Gleicher