STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee	UNPUBLISHED September 21, 2010
v	No. 291527 Wayne Circuit Court
SHELTON CARTER, Defendant-Appellant.	LC No. 08-016290-FC

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84,[1] 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. He was sentenced to concurrent prison terms of four to ten years for the assault with intent to do great bodily harm conviction, and 14 to 40 years for the assault with intent to rob conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm defendant's convictions and sentences, but remand for correction of the judgment of sentence to reflect 159 days of sentence credit.

Defendant's convictions arise from his participation in an assault and attempted robbery of Kerry Oates at Oates's home in Detroit. The prosecution's theory at trial was that defendant aided and abetted his cousin, codefendant Deshawn Carter, by luring Oates out of his house, after which codefendant emerged from an alley with an assault rifle, confronted Oates on the front porch of his house, and demanded Oates's money. Oates refused to cooperate and was shot in the leg. The defense theory at trial was that codefendant went to Oates's house alone to collect a drug debt, that an argument ensued during which Oates produced a weapon, and that Oates was accidentally shot when he and codefendant fought over the weapon.

[1] Defendant was charged with assault with intent to commit murder, MCL 750.83.

I. Sufficiency of the evidence

Defendant argues that the evidence at trial showed, at most, that he was merely present in the area when codefendant allegedly assaulted Oates, and that there was insufficient evidence that he aided and abetted codefendant in committing the crimes. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court "must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Wolfe*, 440 Mich at 514. Rather, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Nowack*, 462 Mich at 400.

The elements of assault with intent to commit great bodily harm less than murder are "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). "The elements of assault with intent to rob while armed are: (1) an assault, (2) with an intent to rob or steal, and (3) the defendant's being armed." *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

At trial, the prosecutor advanced the theory that defendant was guilty as an aider or abettor. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39. "To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that 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 he gave aid and encouragement." *People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001). "Aiding and abetting" describes "all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime." *Id.* at 496. "The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime." *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). An aider or abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, and the defendant's participation in the planning or execution of the crime. *People v Carines*, 460 Mich, 750, 757; 597 NW2d 130 (1999).

Viewed in a light most favorable to the prosecution, the evidence was sufficient to show, first, that codefendant Deshawn Carter committed the crimes of assault with intent to rob and

felony-firearm by threatening the victim with an assault rifle as he demanded that the victim turn over the money in his pockets. Further, there was sufficient evidence that codefendant assaulted the victim, intending to do great bodily harm, by shooting the victim in the leg with an assault rifle.

Second, the evidence was sufficient to show that defendant assisted codefendant in the commission of the crimes: (1) by waiting and watching the victim's house from across the street while codefendant stashed the assault rifle near the victim's house; (2) by waiting for codefendant's signal to proceed with the apparent plan to lure the victim out of his house after the assault rifle was out of sight; (3) by responding to codefendant's signal to "come on" by immediately leaving the porch across the street, going directly to the victim's house, knocking on the victim's door, positioning himself in the driveway at the bottom of the porch and making a bogus request that engaged the victim in conversation, causing him to come out of his house and exposing him to codefendant (who was hiding along the side of the victim's porch with the firearm); and (4) by backing out of the way at the appropriate moment to provide codefendant with the opportunity and a clear path to approach the victim unexpectedly.

Third, the evidence was sufficient to show that defendant intended for codefendant to commit the crimes, including felony-firearm. The evidence that defendant watched and waited while codefendant stashed the firearm, and went to the victim's house only after codefendant gave him the signal to proceed, indicates that defendant was aware of the firearm and that it would be used during the planned robbery. Further, the evidence that defendant and codefendant came to the neighborhood together that day, were together on the porch across the street from the victim's residence minutes before the assault, acted in concert outside the victim's home, and were seen running from the victim's house after the shooting, considered together, was sufficient to support a finding that defendant knew and intended for codefendant to commit each crime, including felony-firearm. Accordingly, the evidence was sufficient to support defendant's convictions under an aiding and abetting theory.

II. Juror questions

Defendant next argues that the trial court violated his due process rights by permitting jurors to submit questions to witnesses during trial. We disagree. Because defendant did not object when the trial court permitted the jurors to submit questions for witnesses, this issue is not preserved. Accordingly, our review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

Defendant's reliance on *State v Costello*, 646 NW2d 204 (Minn, 2002), is misplaced because, in Michigan, jurors are expressly permitted, at the trial court's discretion, to question witnesses. MCR 6.414(E). In this case, the trial court allowed the jurors to submit questions in writing at the conclusion of the attorneys' questioning of each witness. The trial court reviewed each question for compliance with evidentiary rules and conferred with the attorneys before it asked the submitted questions. This procedure ensured that only proper questions would be asked, and afforded the parties an opportunity to object to any improper questions, consistent with the requirements of MCR 6.414(E). Further, a review of the questions presented reveals that they do not reflect juror bias or prejudice. Accordingly, defendant has not shown a plain error.

III. Jail Credit

Defendant next argues that the trial court miscalculated the amount of sentence credit to which he was entitled pursuant to MCL 769.11b. The prosecutor concedes that defendant is entitled to 159 days of credit, rather than the 140 days he was awarded. We therefore remand for the ministerial task of correcting the judgment of sentence to reflect an award of 159 days of sentence credit.

IV. Scoring of offense variable 4

In a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-4, Standard 4, defendant argues that he is entitled to resentencing because the trial court erroneously scored ten points for offense variable (OV) 4 of the sentencing guidelines. We disagree.

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id.* A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

Ten points may be scored for OV 4 where "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34. "The fact that professional treatment was not sought is not conclusive when scoring the variable." *People v Waclawski*, 286 Mich App 634, 681; 780 NW2d 321 (2009). In this case, the victim testified at trial that he believed that codefendant was going to kill him. Further, the victim was shot in the leg with an AK-47 assault rifle and his leg had to be amputated above the knee. At sentencing, the prosecutor recounted how the victim had cried when he testified at trial about the loss of his leg. According to the victim's impact statement prepared for sentencing, the loss of his leg rendered him unable to earn a living by continuing his lawn cutting business. Considering the nature of the offense, the permanent nature of the victim's injury, the effect of the injury on the victim's life, and the evidence of the victim's demeanor at trial, the trial court did not err in finding that there was adequate support for a finding that the victim sustained a serious psychological injury that may require professional treatment. Thus, the trial court did not abuse its discretion in scoring ten points for OV 4.

Affirmed and remanded for correction of the judgment of sentence to reflect an award of 159 days of sentence credit. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood