STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 9, 2011
v	No. 298287 St. Clair Circuit Court
LORENZO VONN BUCKLES, Defendant-Appellant.	LC No. 09-002401-FC

Before: CAVANAGH, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by jury for felony murder, MCL 750.316(b), and two counts of armed robbery, MCL 750.529. We affirm.

Defendant argues that his due process rights were violated and he was denied a fair trial when the prosecutor impeached a witness, codefendant Aaron Florence, with his post-*Miranda*[1] silence. At trial, a prosecutor is not allowed to comment on a defendant's post-*Miranda* silence. *Doyle v Ohio*, 426 US 610, 618-619; 96 S Ct 2240; 49 L Ed 2d 91 (1976). The privilege against self-incrimination, however, is a personal privilege. *People v Safiedine*, 152 Mich App 208, 212; 394 NW2d 22 (1986). Defendant cannot assert Florence's privilege against self-incrimination on his own behalf. *Id.* Defendant's privilege against self-incrimination was not violated. *People v Jones*, 15 Mich App 543, 547; 321 NW2d 723 (1982).

Next, defendant argues that the danger of unfair prejudice caused by the prosecutor's impeachment of Florence substantially outweighed the probative value of Florence's post-*Miranda* silence, under MRE 403. At trial, defendant objected that the prosecutor's impeachment violated his due process rights. This objection did not preserve an MRE 403 objection. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Thus, the error is unpreserved and will be reviewed for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* Substantial rights are affected if the error is outcome

[1] *Miranda v Arizona*, 384 US 436, 467-473; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

determinative. *Id.* Defendant bears the burden of showing his substantial rights were affected. *Id.*

The general rule is that a "witness may be attacked by showing that he failed to speak or act when it would have been natural to do so if the facts were in accordance with his testimony." *People v Martinez*, 190 Mich App 442, 446; 476 NW2d 641 (1991). Defendant nevertheless argues that Florence's testimony should have been excluded because it would not have been natural for Florence to speak after he received his *Miranda* warnings and thus, Florence's silence was of very little probative value.

The Supreme Court has held that post-*Miranda* silence is of very little probative value, and its use for impeachment causes a "significant potential for prejudice." *United States v Hale*, 422 US 171, 180; 95 S Ct 2133; 45 L Ed 2d 99 (1975). This same principle has been applied to a nondefendant witness who testifies at a trial. *United States v Zaccaria*, 240 F3d 75, 79 (CA 1, 2001). These decisions interpreting the Federal Rules of Evidence are not binding but may be persuasive authority in Michigan. *People v Beasley*, 239 Mich App 548, 556; 609 NW2d 581 (2000). Nevertheless, we cannot conclude that the trial court's failure to apply these decisions constituted plain error where a general rule of evidence allowed the evidence. *Martinez*, 190 Mich App at 446. Furthermore, defendant has failed to demonstrate that even if the trial court erred in allowing this testimony, that this alleged error affected the outcome of the trial. Therefore, reversal is inappropriate. *Carines*, 460 Mich at 763.

Next, defendant contends that the prosecutor committed misconduct when she argued that defense counsel misled the jury. Additionally, defendant argues that defense counsel was ineffective for failing to object to the prosecutor's remarks. Defendant did not object to the prosecutor's remarks at trial, so the error is unpreserved. *Carines*, 460 Mich at 761. Unpreserved errors are reviewed for plain error affecting substantial rights. *Id.* at 763. Prosecutorial misconduct is reviewed on a case-by-case basis. *People v Kelly*, 231 Mich App 627, 637; 588 NW2d 480 (1998). A prosecutor can undermine defendant's presumption of innocence by arguing that defense counsel misled the jury. *People v Wise*, 134 Mich App 82, 102; 351 NW2d 255 (1984). The prosecutor's remarks must, however, be viewed in their context. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

When viewed in context, the prosecutor's comments were in response to defendant's trial strategy. For example, one witness said that the two assailants wore earrings. Defendant did not wear earrings. Defendant asked a copious amount of questions at trial relating to who was wearing earrings. The prosecutor posed the following question during closing argument: "How do you defend a case that's indefensible?" The prosecutor argued that defense counsel's strategy was to "muddy the waters" and that defense counsel was offering "red herrings." The prosecutor argued: "The hope is that if you talk about an earring or you talk about hair you'll forget that Devin Sapp knows who shot Matthew Rogel. And if you talk about a T-shirt, maybe you'll forget that this Defendant knows and told Detective Georgia what he did and who shot Matthew Rogel." We find no plain error. The prosecutor may respond to defense counsel's arguments. *People v Watson*, 245 Mich App 572, 593; 629 NW2d 411 (2001). The prosecutor need not restrict her arguments to the blandest possible terms. *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005). The prosecutor did not deny defendant a fair trial and did not commit

misconduct on this record. *Kelly*, 231 Mich App at 627. Further, defense counsel was not ineffective for not objecting. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Next, defendant argues that insufficient evidence was presented to support his armed robbery and felony-murder convictions. Sufficiency of the evidence is reviewed de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any 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 441 Mich 1201 (1992). Armed robbery has three elements: "(1) an assault, (2) a felonious taking of property from the victim's person or presence, and (3) the defendant must be armed with a weapon described in the statue." *People v McConnell*, 124 Mich App 672, 678; 335 NW2d 226 (1983).

Defendant did not personally commit the armed robberies of Rogel and Sapp. Therefore, he must have been convicted as an aider and abettor. Aiding and abetting has three elements: (1) defendant or someone else committed the crime; (2) defendant performed acts, encouraged, or assisted in the commission of the crime, and (3) "defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement." *People v Plunkett*, 485 Mich 50, 61; 780 NW2d 280 (2010).

There was sufficient evidence to support both of defendant's armed robbery convictions based on an aiding and abetting theory. Aiding and abetting includes all forms of assistance, including actions. *People v Jackson*, ___ Mich App___; ___ NW2d ___ (Docket No. 285532, issued May 17, 2011). Defendant saw Florence take out a gun as they rode in the car. Defendant asked Florence if he was going "to hit a lick," which meant to commit a robbery. Florence replied "yes." As soon as the car stopped, Florence put his gun against Rogel's neck, demanded money, and then took Rogel's money. Defendant aided Florence by tacitly approving his plan to rob the men and by asking both men for money after Florence brandished his weapon. Defendant continued to ask Sapp for money even after Florence had shot Rogel. Florence got out of the car and continued to shoot into the front seat of the car through the window. These facts were sufficient to establish that defendant knew Florence intended to commit an armed robbery of Rogel and Sapp, assisted in the robbery of both men by asking for money, and that Florence did indeed commit armed robbery of both men. Minimal circumstantial evidence is sufficient to show that defendant possessed the requisite intent. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

Defendant also argues that there was insufficient evidence that he possessed the requisite intent to be convicted of felony murder. The intent to commit felony murder includes "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." *Kelly*, 231 Mich App at 642-643 (citations omitted). "One who aids and abets a felony murder must have the requisite malice to be convicted of felony murder, but need not have the same malice as the principal." *People v Robinson*, 475 Mich 1, 14; 715 NW2d 44 (2006). Circumstantial evidence can be used to prove defendant possessed the requisite intent as an aider and abettor. *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992).

Sufficient evidence was also introduced to convict defendant of aiding and abetting felony murder. Defendant saw Florence had a gun and thereafter actively participated in the armed robbery. Florence shot Rogel twice. This was sufficient circumstantial evidence to support the inference that defendant, at the very least, intended to create a very high risk of Rogel's death. *Kelly*, 231 Mich App at 642-643.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder
/s/ Donald S. Owens