STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2016
v	No. 327834 Wayne Circuit Court
JESSIE PERRY, Defendant-Appellant.	LC No. 14-010838-FC

Before: FORT HOOD, P.J., and GLEICHER and O'BRIEN, JJ.

PER CURIAM.

Defendant, Jessie Perry, was convicted by a jury of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and sentenced to a prison term of 12 to 30 years for the murder conviction and a consecutive prison term of two years for the felony-firearm conviction. He appeals as of right his May 20, 2015 judgment of sentence. We affirm.

This case arises out of the shooting death of Raymond Cantu. According to Stephen Lemley, he, defendant, Jon Hodges, Steven Tolley, and Jose Ruiz were at David Earls' house when they became aware that Cantu was outside. Lemley testified that Cantu "had beef" with him, that Cantu wanted to kill him, and that the group went outside. Lemley continued, testifying that when Cantu pointed what he eventually learned was a staple gun at him, he fired a shotgun at Cantu twice. According to Hodges, defendant then racked a .45-caliber handgun, Ruiz took the handgun, and Ruiz fired "[a]bout six" shots at Cantu before returning the handgun to defendant. Hodges testified that defendant then withdrew a second firearm and fired two more shots at Cantu. Cantu eventually died from multiple gunshot wounds. After the shooting, the five men drove to a bar and, according to Hodges, defendant and Lemley hid two of the firearms inside. Defendant was convicted and sentenced as described above, and this appeal followed.

On appeal, defendant first challenges the sufficiency of the evidence to support his convictions. Specifically, he claims that the jury's verdict was either premised on insufficient evidence or against the great weight of the evidence. We disagree.

When considering a challenge to the sufficiency of the evidence, we review "the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). "The standard of review is deferential: a reviewing court

is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Any conflicting evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). "Circumstantial evidence and reasonable inferences therefrom may be sufficient to prove all the elements of an offense beyond a reasonable doubt." *People v Schumacher*, 276 Mich App 165, 167; 740 NW2d 534 (2007). The elements of second-degree murder are "(1) death, (2) caused by defendant's act, (3) with malice, and (4) without justification." *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (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).

Defendant's position on appeal is clear—he argues that there was insufficient evidence to convict him under an aiding-and-abetting theory. This argument is meritless. As indicated by the trial court's jury instructions, the information, and the complaint, defendant was charged with murder *or* aiding and abetting murder. Hodges testified that, after Ruiz fired the handgun that defendant racked, defendant withdrew a second firearm and fired two additional shots at Cantu. This testimony, if believed by the jury, was sufficient to support the jury's verdict without resorting to an aiding and abetting theory. *Avant*, 235 Mich App at 506. For the sake of thoroughness, however, we will address defendant's arguments on appeal despite the fact that they rely on the assumption that the jury convicted under an aiding-and-abetting theory only.

Aiding and abetting is not a separate substantive offense; it is a theory of prosecution that permits imposition of vicarious liability on an accomplice. *Robinson*, 475 Mich at 6. Conviction under a theory of aiding requires proving beyond a reasonable doubt (1) that the crime charged was committed by the defendant or some other person, (2) that the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense. *Id*. Here, the second and third requirements are at issue. Specifically, defendant claims that the evidence presented by the prosecution proved that he was merely present with his gun when Cantu was killed, not that he performed acts or gave encouragement that assisted Ruiz, nor that he intended to kill or knew Ruiz intended to kill Cantu.

We agree with the prosecution's position that, by racking the firearm before Ruiz took it, defendant performed acts or gave encouragement that assisted Ruiz as well as intended to kill or knew that Ruiz intended to kill Cantu. The jury was free to believe or disbelieve Hodges' testimony in this regard, and we defer to the jury's superior ability to assess witness credibility. *Avant*, 235 Mich App at 506. Had defendant merely been present as he contends, our conclusion may well have been different, but those are not the facts presented here. Rather, the testimony indicated defendant racked the handgun, thus preparing it to be used in shooting Cantu. Accordingly, the prosecution presented sufficient evidence to support the jury's verdicts.

For similar reasons, we also conclude that the jury's verdicts were not against the great weight of the evidence. A verdict is said to be against the great weight of the evidence where "the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129

(1998). As with a sufficiency challenge, we are mindful that "[i]t is the province of the jury to determine questions of fact and assess the credibility of witnesses." *Id.* at 637. Consistent with this principle of appellate review, "[c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Id*. at 647. Here, at best, defendant's argument is premised on conflicting testimony, and we defer to the jury's credibility determinations. *Id*.; see also *Avant*, 235 Mich App at 506. Accordingly, the jury's verdicts were not against the great weight of the evidence.

On appeal, defendant also argues that the prosecutor used preemptory challenges to dismiss four jurors solely because they were African-American in violation of *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 69 (1986). We disagree.

"[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson*, 476 US at 80; see also *People v Armstrong*, 305 Mich App 230, 237; 851 NW2d 856 (2014). To determine if a violation of the Equal Protection Clause has occurred, a trial court uses a three-step analysis. *Batson*, 476 US at 96-98; *Armstrong*, 305 Mich App at 237-238. First, the defendant must establish a prima facie case of discrimination against potential jurors based on race. *Armstrong*, 305 Mich App at 238.

> To establish a prima facie case of discrimination based on race, the opponent must show that: (1) he is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool; and (3) all the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race. [*People v Knight*, 473 Mich 324, 336; 701 NW2d 715 (2005).]

Second, the prosecutor must rebut the prima facie case by articulating a racially neutral reason for dismissing the jurors in question. *Armstrong*, 305 Mich App at 238. Third, the trial court must determine whether the reasons proffered by the prosecutor are merely a pretext for discrimination. *Id*.

The first and second requirements are not at issue in this case. With respect to the first requirement, it is moot. See *Knight*, 473 Mich at 338. With respect to the second requirement, it is undisputed that the prosecutor articulated racially neutral reasons to support her peremptory challenges of the four jurors at issue. Specifically, the prosecutor dismissed the first juror because she admitted that she has had multiple negative experiences with police, including situations where she believed that she or others were racially profiled; the prosecutor dismissed the second juror because she admitted that she has had negative experiences with police, including a situation where her son was unfairly charged with and convicted of armed robbery; the prosecutor dismissed the third juror because she admitted that she would be uncomfortable in rendering a guilty verdict; and the prosecutor dismissed the fourth juror because she admitted that her father was convicted of first-degree murder. For the sake of thoroughness, it should be noted that the prosecutor also exercised peremptory challenges with respect to jurors who were not African American. With respect to the third requirement, defendant argues that the racially neutral reasons articulated by the prosecutor were merely a pretext, pointing to the fact that the

jurors indicated that their negative experiences with the criminal justice system would not impact their ability to be fair. The fact that the jurors indicated that they could be fair, or, with respect to one of the jurors, that they were at least willing to "hear the testimony," is not dispositive of defendant's arguments. It was reasonable for the prosecutor to strike jurors who believed law enforcement racially profiled, who had negative experiences with police, who would not be comfortable rendering a guilty verdict, and who had a father who was convicted of first-degree murder. The prosecutor could very well have believed that these negative experiences trumped the jurors' agreements to be fair, and the trial court was in a much better position to determine the prosecutor's credibility in that regard. Accordingly, we conclude that the trial court properly denied defendant's *Batson* challenge.

Lastly, defendant argues that resentencing is required because the trial court used judicially found facts to score offense variable (OV) 1 and OV 6 in violation of the Sixth Amendment. We disagree.

In *People v Lockridge*, 498 Mich 359, 364; 870 NW2d 502 (2015), our Supreme Court held that a defendant's Sixth Amendment rights are violated when judicially found facts are used to increase his or her minimum sentence. Thus, "[t]o remedy the constitutional violation," the Supreme Court "sever[ed] MCL769.34(2) to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory." *Id*. If, however, the facts admitted by the defendant or found by the jury are sufficient to score the offense variables, relief is not required. *Id*. at 395.

Here, the trial court's 25-point score for OV 1, which is appropriate where "[a] firearm was discharged at or toward a human being[,]" MCL 777.31(1)(a), was supported by facts found by the jury. Specifically, in order to find defendant guilty of second-degree murder, the jury was required to find that a firearm was discharged at the victim, which is all that is required to support a 25-point OV 1 score. Similarly, the trial court's 25-point score for OV 6, which is appropriate where "[t]he offender had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result[,]" MCL 777.36(1)(b), was also supported by facts found by the jury. Specifically, in order to find defendant guilty of second-degree murder, the jury was required to find that defendant acted with malice, which "is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm."

People v Goecke, 457 Mich 442, 464; 579 NW2d 868 (1998). Accordingly, we conclude that resentencing is not required based on the trial court's scoring of OVs 1 and 6.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Elizabeth L. Gleicher
/s/ Colleen A. O'Brien