STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 21, 2013
v	No. 311264 Macomb Circuit Court
BARRON DUKES, Defendant-Appellant.	LC No. 2011-003654-FC

Before: M. J. KELLY, P.J., and CAVANAGH and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions for armed robbery, MCL 750.529, conspiracy to commit armed robbery (conspiracy), MCL 750.157a, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 81 to 240 months in prison for armed robbery and conspiracy, and two years in prison for felony-firearm, with 283 days' credit. We affirm.

I. FACTS

Defendant's convictions arise from an armed robbery that occurred on the evening of September 5, 2011. After getting off the bus at approximately 10:00 p.m., the victim was approached by three male individuals. When she turned around, the first individual held a handgun to her face, the second took her purse and searched for her wallet, and the third took her cell phone. After finding the victim's wallet, the perpetrators ran away. The victim ran to a coworker's home and dialed 911.

The victim testified that the second individual wore a red bandana over his face during the robbery. When police located three suspects later that night, defendant was found with a red bandana on his person. The first individual, identified as having brandished the gun, was later identified as Jalen Felix. According to the prosecutor in defendant's case, Felix pleaded guilty to the same charges of which defendant was convicted. The third individual, identified as the perpetrator who took the victim's cell phone, was later identified as Anthony Anderson. Anderson was convicted by a jury of armed robbery and conspiracy to commit armed robbery. Defendant was identified as the second individual, the perpetrator who took the victim's wallet.

II. AIDING AND ABETTING FELONY-FIREARM

Defendant first argues that there was insufficient evidence[1] to support his conviction for felony-firearm as an aider and abettor and that the trial court failed to properly instruct the jury[2] on the elements of aiding and abetting the commission of felony-firearm. We disagree.

A. SUFFICIENCY OF THE EVIDENCE

Defendant challenges the sufficiency of the evidence presented to support his conviction of felony-firearm as an aider and abettor.

> When reviewing a defendant's 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. A prosecutor need not present direct evidence of a defendant's guilt. Rather, circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. [*People v Williams*, 294 Mich App 461, 471; 811 NW2d 88 (2011) (quotation marks, brackets, and citations omitted).]
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> The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. One must carry or possess the firearm when committing or attempting to commit a felony. Possession of a firearm can be actual or constructive, joint or exclusive. A person has constructive possession if there is proximity to the article together with indicia of control. Put another way, a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant. Possession can be proved by circumstantial or direct evidence and is a factual question for the trier of fact. [*People v Johnson*, 293 Mich App 79, 82-83; 808 NW2d 815 (2011) (quotation marks, brackets, and citations omitted).]

The elements of aiding and abetting are:

> (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 that [the defendant] gave aid and encouragement. [*People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004) (quotation marks and citation omitted).]

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[1] Whether a defendant's conviction was supported by sufficient evidence is reviewed de novo. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010).

[2] We review questions of law arising from the provision of jury instructions de novo. However, we review a trial court's determination whether a jury instruction is applicable to the facts of a case for an abuse of discretion. *People v Guajardo*, 300 Mich App 26, 34; 832 NW2d 409 (2013) (citations omitted).

Our Supreme Court has held that "the proper standard for establishing felony-firearm under an aiding and abetting theory is whether the defendant's words or deeds procure[d], counsel[ed], aid[ed], or abet[ted]' another to carry or have in his possession a firearm during the commission or attempted commission of a felony-firearm offense." *Id*. at 58-59 (quotation marks and citation omitted). The *Moore* Court stated:

> The prosecutors must do more than demonstrate that defendants aided the commission or attempted commission of the underlying crimes (here murder and robbery). Rather, the prosecutors must demonstrate that defendants specifically aided the commission of felony-firearm. Establishing that a defendant has aided and abetted a felony-firearm offense requires proof that a violation of the felony-firearm statute was committed by the defendant or some other person, that the defendant performed acts or gave encouragement that assisted in the commission of the felony-firearm violation, and that the defendant intended the commission of the felony-firearm violation or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement. In determining whether a defendant assisted in the commission of the crime, the amount of advice, aid, or encouragement is not material if it had the effect of inducing the commission of the crime. It must be determined on a case-by-case basis whether the defendant "performed acts or gave encouragement that assisted," in the carrying or possession of a firearm during the commission of a felony. [*Id.* at 70-71 (citations omitted).]

In a footnote, the Court further explained:

> Despite the concern expressed in Justice Taylor's dissent, our opinion does not make "an aider and abettor in virtually any gun-related crime guilty of felony-firearm." As explained above, we specifically require the prosecutor to do more than demonstrate that the defendants aided the commission or attempted commission of the underlying crimes. Nor are we suggesting that the fact that the defendant incidentally benefited from the principal's possession of the firearm is sufficient to convict the defendant of aiding and abetting felony-firearm possession. Rather, to convict a defendant of felony-firearm under an aiding and abetting theory, the prosecutor must present evidence proving that the defendant intentionally aided or abetted felony-firearm possession by specific words or deeds. [*Id.* at 70 n 18 (citation omitted).]

There was sufficient evidence presented at trial to allow the jury to conclude beyond a reasonable doubt that defendant aided or abetted a violation of the felony-firearm statute. First, there was evidence that codefendant Felix violated the felony-firearm statute by possessing a firearm during the commission of a robbery. See *id*. at 70; *Johnson*, 293 Mich App at 82. Second, there was evidence that defendant performed acts or gave encouragement that assisted in the commission of the felony-firearm violation. See *Moore*, 470 Mich at 70. Defendant knew that Felix possessed a gun and agreed to rob the victim. During the robbery, defendant took the victim's purse and obtained her wallet after Felix pointed a gun at her head. The evidence established that defendant not only aided in the commission of the robbery, but similar to defendant Harris in *Moore*, he "encouraged and assisted the principal's possession of the firearm

by specifically relying on that possession to intimidate his own robbery victim." *Id.* at 71. Thus, defendant did not merely incidentally benefit from Felix's possession of the firearm. *Id.* at 70 n 18. Finally, there was evidence that defendant intended that a firearm be used or possessed during the robbery or knew that Felix intended to possess or use a firearm during the robbery. See *id.* at 70-71. Defendant stated that he knew Felix had a gun and that they agreed to rob someone. Accordingly, there was sufficient evidence to support defendant's conviction for felony-firearm as an aider and abettor.

B. JURY INSTRUCTIONS

Defendant also argues that neither the standard jury instructions, nor the trial court's special instruction to the jury, adequately addressed his theory that he did not encourage Felix to possess or use a gun to commit the crime.

"We review jury instructions in their entirety to determine if error requiring reversal occurred. Even if instructions are imperfect, reversal is not required if they fairly present the issues to be tried and sufficiently protect the defendant's rights." *People v Chapo*, 283 Mich App 360, 373; 770 NW2d 68 (2009) (quotation marks and citations omitted). "Jury instructions must clearly present the case and the applicable law to the jury. The instructions must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005) (citations omitted).

Before trial, defendant filed a motion requesting three additional instructions relating to aiding and abetting felony-firearm and four additional instructions relating to aiding and abetting in general. The trial court ruled that it would give a special jury instruction regarding aiding and abetting felony-firearm. Consistent with its order, the trial court instructed the jury as follows:

> In this case the defendant is also charged with the separate crime of possessing a firearm or intentionally assisting someone else in possessing a firearm at the time the defendant committed the crime of armed robbery. Anyone who intentionally assist [sic] someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of that crime as an aider and abettor. To prove this charge the prosecutor must [sic] each of the following elements beyond a reasonable doubt:
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> First, that the felony[-]firearm crime was actually committed either by the defendant or someone else. Does not matter whether anyone else has been convicted of the crime [sic]. Second, that before or during the crime the defendant did something to assist in the commission of the crime. To assist in the commission of felony[-]firearm the defendant must have performed acts or gave encouragement that assisted in the commission of the felony[-]firearm. The amount of advice, aid, or encouragement is not material but had the affects [sic] of inducing the commission of the crime. Third, the defendant must have intended the commission of the felony[-]firearm crime or had knowledge that the principal intended its commission at the time the defendant gave the aid and encouragement. If the defendant incidentally benefitted from the principal's

possession of the firearm, it is insufficient to find defendant Dukes guilty of felony[-]firearm.

The trial court's instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. See *Chapo*, 283 Mich App at 373. Defendant contends that his theory was that "he did not use words or do acts to encourage Felix to possess and/or use a gun to commit the crime." The trial court's instructions specifically provided that "[t]o assist in the commission of felony firearm the defendant must have performed acts or gave encouragement that assisted in the commission of the felony[-]firearm." Therefore, the instructions addressed defendant's theory of the case.

Defendant also suggests that the trial court should have instructed the jury that "mere presence even with knowledge that an act is about to be committed, is insufficient to aid and abet," citing *People v Burrel*, 253 Mich 321, 323; 235 NW 170 (1931). The trial court's instructions did not include this specific language. However, the trial court's instructions fairly presented the issues to be tried and sufficiently protected defendant's rights by providing that "the defendant must have performed acts or gave encouragement that assisted in the commission of the felony[-]firearm" and that it is insufficient "[i]f the defendant incidentally benefitted from the principal's possession of the firearm." See *Chapo*, 283 Mich App at 373. Accordingly, there was no instructional error.

III. *BATSON* CHALLENGE

Defendant contends that was deprived of his constitutional right to trial by an impartial jury. He argues that the trial court erred by allowing the prosecution to excuse an African-American juror on the basis of race in violation of *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). "[A] party may not exercise a peremptory challenge to remove a prospective juror solely on the basis of the person's race." *People v Knight*, 473 Mich 324, 335; 701 NW2d 715 (2005).

Batson entails a three stage analysis. *Knight*, 473 Mich at 335-338. First, defendant must make a prima facie showing of discrimination. *Id*. at 336. This requires three showings: (a) that defendant is a member of a cognizable racial group; (b) that the prosecution exercised a peremptory challenge to exclude a member of certain racial group from the jury; and (c) all the relevant circumstances raise an inference that the juror was excluded due to race. *Id*. If a prima facie case is shown, the burden shifts to the prosecution to articulate a race-neutral explanation for the juror's exclusion. *Id*. at 337. This step does not require that the explanation be persuasive, only that some explanation other than race be offered. *Id*. If the prosecution meets this burden, the trial court must determine if the race-neutral explanation is a pretext. *Id.* at 337-338.

The trial court concluded that defendant did not establish a prima facie case of discrimination. The court recognized that defendant established that he is an African-American and that the prosecution exercised a peremptory challenge to exclude an African-American juror, but ruled that the relevant circumstances did not entitle defendant to the inference that the juror was excluded on the basis of race. We disagree with this last conclusion. The juror was the sole African-American in the jury array. Moreover, during voir dire, he stated that on several

occasions he had been accused of crimes he had not committed; he attributed those false accusations to the fact that he was an African-American. Accordingly, we conclude that defendant established a prima facie case under *Batson*.

Although the trial court found that defendant had not established a prima facie case, it went on to address the other two factors. We agree with the court's conclusion that the prosecution articulated a sufficient race-neutral explanation for the juror's dismissal. Specifically, the prosecution indicated that it excused the juror because he stated that he had been tried and acquitted of felonious assault and because he expressed some concern about his ability to be fair to the prosecution. These are valid race-neutral explanations.

This brings us to the final factor. We conclude that the trial court did not clearly err by finding that the prosecution's race-neutral explanations were not pretext. *Id*. at 344-345. As noted, the juror had previously been tried and acquitted of felonious assault. Moreover, he stated that, "I think that [] for the prosecutor I may not be the best type of juror" and he expressed the view that, "as human beings we make mistakes." Although he went on to affirm his willingness to be impartial and apply the law as instructed, we conclude that the trial court did not clearly err by finding that having been subjected to false accusations and expressing hesitation about the ability to be fair to the prosecution constituted a nonpretextual, race-neutral basis for excluding the juror.

Accordingly, although we view the matter somewhat differently than the trial court, we conclude that defendant's *Batson* challenge was properly denied.

IV. SENTENCING

Finally, defendant contends that his minimum sentence guidelines range was erroneous because the trial court erred in scoring offense variable (OV) 1, OV 2, and OV 4 and that he is entitled to resentencing because his sentence was increased based on facts that were not proven beyond a reasonable doubt. We disagree.

> Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo. [*People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013) (footnotes with citations omitted).]

A. OFFENSE VARIABLES

The trial court properly scored OV 1, OV 2, and OV 4.

"Offense variable 1 is aggravated use of a weapon." MCL 777.31(1). Under OV 1, 15 points are scored if "[a] firearm was pointed at or toward a victim." MCL 777.31(1)(c). "In multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points." MCL 777.31(2)(b). "When the sentencing court assesses points for the first offender, it must assess the 'highest number of

points' that can be assessed under the statute." *People v Morson*, 471 Mich 248, 260; 685 NW2d 203 (2004).

The trial court found that OV 1 was appropriately scored 15 points because there was evidence that a gun was pointed at the victim's head, defendant was convicted as an aider and abettor, the statute requires multiple offenders to all be scored, and there was no requirement that all three offenders be before the court. The trial court's factual findings were not clearly erroneous. There was evidence that Felix pointed a revolver, a firearm, at the victim's head during the robbery and that defendant aided and abetted in the crime. MCL 767.39 provides that an aider and abettor "on conviction shall be punished as if he had directly committed such offense." Accordingly, the trial court properly scored OV 1 at 15 points.

"Offense variable 2 is lethal potential of the weapon possessed or used." MCL 777.32(1). Under OV 2, five points are assessed if "[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." MCL 777.32(1)(d). "In multiple offender cases, if 1 offender is assessed points for possessing a weapon, all offenders shall be assessed the same number of points." MCL 777.32(2). "'Pistol', 'rifle', or 'shotgun' includes a revolver, semi-automatic pistol, rifle, shotgun, combination rifle and shotgun, or other firearm manufactured in or after 1898 that fires fixed ammunition, but does not include a fully automatic weapon or short-barreled shotgun or short-barreled rifle." MCL 777.32(3)(c).

The trial court found that OV 2 was appropriately scored five points because it was a multiple offender situation and defendant was found guilty as an aider and abettor. The trial court's factual findings were not clearly erroneous. There was evidence that Felix possessed and used a revolver during the robbery. Moreover, there was sufficient evidence to establish that defendant committed felony-firearm as an aider and abettor. Accordingly, the trial court properly scored OV 2 at five points.

"Offense variable 4 is psychological injury to a victim." MCL 777.34(1). Ten points are scored if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). The statute directs 10 points to be scored "if the serious psychological injury may require professional treatment," and provides that "the fact that treatment has not been sought is not conclusive." MCL 777.34(2).

The trial court did not discuss OV 4, but scored OV 4 at 10 points. According to the presentence investigation report (PSIR), the victim completed a Victim's Impact Statement, in which she reported that she lost her job because she was afraid to take the bus, she is afraid to leave her home, she cannot sleep at night, and she is seeing a counselor because she cannot deal with what happened to her. "A court may rely on the contents of a PSIR in calculating the guidelines." *People v Nix*, 301 Mich App 195, 205 n 3; 836 NW2d 224 (2013). Therefore, the trial court properly scored OV 4 at 10 points.

B. CONSTITUTIONAL VIOLATION

Defendant claims that he is entitled to resentencing because his sentence was increased based on facts that were not proven beyond a reasonable doubt in violation of *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), *Blakely v Washington*, 542 US 296;

124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). We disagree. This Court has stated that "our Supreme Court has clearly and consistently held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme[.]" *People v Ericksen*, 288 Mich App 192, 202; 793 NW2d 120 (2010). Moreover, there is sufficient factual support in the record for the trial court's scoring of OV 1, OV 2, and OV 4. Accordingly, there was no error.

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro