STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTHA CALBERT,

Defendant-Appellant.

UNPUBLISHED
April 8, 1997

No. 176224
Saginaw Circuit Court
LC No. 93-008388-FC

Before: Markman, P.J., and O'Connell and D. J. Kelly*, JJ.

PER CURIAM.

At a jury trial in connection with the 1990 murder of Marvelle Toney, defendant Calbert was convicted of second-degree murder, MCL 750.317; MSA 28.549. Calbert was tried together with codefendants Michael Earl Young (No. 176222) and Rosie Miller (No. 176226). Calbert was sentenced to twenty-two to fifty years' imprisonment for second-degree murder. We affirm.

The evidence at trial established that, in the late evening of May 26, 1990, Marvelle Toney and Miller were involved in a dispute outside a nightclub (Soul Survivors Club) during which Miller chased Toney with a crowbar that she removed from the trunk of her car. After the altercation, Miller went to Calbert's house and said that she was going to kill the person who had fought with her. Calbert is Miller's sister. Once at Calbert's house, Miller went into a room and was seen loading and cocking a gun. Young, a nephew of Miller and Calbert, said that Miller should let him (Young) kill the guy and he placed a long gun in the trunk of Miller's car. The three defendants, along with Jennifer Clemmons, Barbara Barns and one other person, then drove to the Soul Survivors Club. En route, they discussed who would lure Toney out of the club. When they arrived at the club, Calbert lured Toney into a position where Young could shoot him by telling Toney that she had car trouble. Young shot Toney twice and he died of a gunshot wound.

Defendants were not arrested for Toney's murder until 1993. On December 31, 1993, while awaiting trial in the instant case, Young was mistakenly released from prison. In a separate prosecution, it was charged that, after this release, he killed a clerk at a 7-Eleven store in Saginaw. Young was

* Circuit judge, sitting on the Court of Appeals by assignment.

undergoing the preliminary examination for the charges arising from the 7-Eleven killing when this trial was about to begin and, as a result, there was considerable television and newspaper coverage of Young. One newspaper article stated that Young was awaiting trial in a 1990 slaying and stated that eight of his relatives were "behind bars" including four who were facing charges of murder.[1]

Calbert first argues that the trial court abused its discretion in denying her motion for directed verdict as to all counts because there was insufficient evidence to support their submission to the jury. The trial court properly denied the motion. The charge of first-degree murder, as an aider and abettor, was properly submitted to the jury because Calbert took the specific action of luring the victim out of the Soul Survivor's Club to a place where she knew Young would attempt to shoot him. This effort on her part materially aided Young and was undertaken after Calbert had had a more than adequate opportunity during the ride over to the nightclub to premeditate and deliberate upon her conduct. See *People v Vail*, 393 Mich 460, 468-469; 227 NW2d 535 (1975); *People v Coddington*, 188 Mich App 584, 599-600; 470 NW2d 478 (1991). With regard to the charge of conspiracy to commit first-degree murder, there was also sufficient evidence. Evidence demonstrated that there was a combination of two or more persons convened for the purpose of killing Toney and that Calbert knowingly cooperated in furthering the object of the conspiracy. See *People v Blume*, 443 Mich 476, 481-485; 505 NW2d 843 (1993). In particular, the three defendants discussed who would lure Toney out of the nightclub to a location where Young could shoot him and Calbert agreed to serve this role.

Calbert argues that, because no one testified that she saw Young's gun, the charge of carrying a dangerous weapon with unlawful intent should have been dismissed. The testimony was that first Miller and then Young had a gun out at Calbert's house and that Young carried his long gun out of her house and placed it in the car. It is reasonable to infer from this testimony that Calbert was aware of the gun and knew of the use to which Young intended to put it. See *People v Harrington*, 194 Mich App 424, 428; 487 NW2d 479 (1992). Additionally, we do not believe that the trial court abused its discretion in denying Calbert's motion for a directed verdict as to the felony-firearm charge. There was sufficient evidence, in our judgment, from which to infer that Calbert provided encouragement to Young in his possession of the firearm. Even if Calbert is correct that this charge should not have been submitted to the jury, it resulted in no harm to her and does not require reversal because she was acquitted of the charge. Nor did the submission of the charge result in a compromise verdict because the felony-firearm charge was a separate and discrete count from the other charges. See *People v Swartz*, 171 Mich App 364, 379; 429 NW2d 905 (1988).

Calbert further argues that she was denied the effective assistance of appellate counsel when her original appellate counsel chose to challenge the sufficiency of the evidence rather than move for a new trial on the ground that her conviction was against the great weight of the evidence. Defendant fails to rebut the presumption that the decision by her original appellate counsel was reasonable appellate strategy. *People v Hurst*, 205 Mich App 634, 642; 517 NW2d 858 (1994). Although a trial court may grant a new trial because it finds that the prosecution witnesses lack credibility, it must exercise such power with great caution, keeping in mind the special role accorded the jury in our system of justice. *People v Herbert*, 444 Mich 466, 475-477; 511 NW2d 654 (1993). Calbert argues that the testimonies of witnesses Clemmons and Barns were incredible. However, their testimonies

corroborated each other and were corroborated by at least one other witness and were never directly contradicted. Looking at the entire body of proofs presented, a remand to allow Calbert an opportunity to file a motion for new trial is not required. *Id*. at 475.

Calbert next claims that the trial court abused its discretion in not changing the venue of the trial. However, Calbert did not raise this issue before the trial court. In fact, in seeking additional peremptory challenges, her attorney specifically stated that he had not asked for a change of venue. In the absence of manifest injustice, this Court generally will not review unpreserved errors. *People v Metzler*, 193 Mich App 541, 548; 484 NW2d 695 (1992). Here, a review of the voir dire convinces us that, despite pretrial publicity relating to the 7-Eleven killing, all three defendants were tried by a fair and impartial jury and that, accordingly, no change of venue was necessary.[2] Accordingly, no manifest injustice requires us to review this unpreserved error.

Calbert next argues that the trial court abused its discretion in denying her motion for additional peremptory challenges. MCR 6.412(E)(2) states in pertinent part, "On a showing of good cause, the court may grant one or more of the parties an increased number of peremptory challenges." At the end of the fifth day of voir dire, she requested additional peremptory challenges because of the pretrial publicity. Calbert argued that additional peremptory challenges were necessary because she had only one challenge left while the prosecutor had ten peremptories left. The trial court properly noted that it had carefully excused for cause those jurors who could not decide the case impartially; in the selection process, it struck more than twenty-five percent of the potential jurors for cause. Although Calbert knew of the pretrial publicity prior to the start of voir dire, she waited until five days had passed before asking for additional peremptories. While the prosecutor entered the final day of jury selection with more remaining peremptories, the fact that Calbert had none remaining was her own choice because she knew the number of peremptory challenges available at the beginning of voir dire. Accordingly, the trial court did not abuse its discretion in determining that the pretrial publicity did not constitute good cause for granting additional peremptory challenges here. See *People v King*, 215 Mich App 301, 304; 544 NW2d 765 (1996).

Calbert also argues that the trial court erred in the manner in which it conducted jury selection. Because Calbert did not object below to the procedure used by the trial court, a violation of this court rule would not require reversal. See *People v Lewis*, 160 Mich App 20, 32; 408 NW2d 94 (1987). We will nonetheless briefly address this issue. Calbert's specific complaint is that challenged jurors were replaced in a predetermined order rather than by blind draw.[3] MCR 2.511(F) states:

> After the jurors have been seated in the jurors' box and a challenge for cause is sustained or a peremptory challenge exercised, another juror must be selected and examined before further challenges are made. This juror is subject to challenge as are other jurors.

MCR 2.511(F) does not specifically direct the manner in which the trial court is to select a juror to replace the seat of a successfully-challenged juror; it states only that a replacement juror must be "selected and examined before further challenges are made." The procedure used here complied with this requirement. We find no manifest injustice occurred as a result of this jury selection process.

Calbert next contends that the trial court abused its discretion in failing to order separate trials. Specifically, Calbert argues that she was prejudiced and denied her right to confrontation when several of Young's statements were presented to the jury and Young did not testify. Calbert did not preserve this issue because she did not file a motion for separate trial below. However, this Court will "consider claims of constitutional error for the first time on appeal when the alleged error could have been decisive of the outcome." *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). Calbert also claims that the failure of her trial counsel to move for a separate trial constituted ineffective assistance of counsel. In order to justify reversal of an otherwise valid conviction on the basis of ineffective assistance of counsel, "a defendant must show that a counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

In *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), the United States Supreme Court held that "a defendant is deprived of his rights under the Confrontation Clause when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant." *Richardson v Marsh*, 481 US 200, 201-202; 107 S Ct 1702; 95 L Ed 2d 176 (1987). The general rule is that a witness whose testimony is introduced at a joint trial is not to be considered a witness against a defendant if the jury is instructed to consider that testimony only against a codefendant. *Richardson*, *supra* at 206. *Bruton* recognized a narrow exception to this general rule when a codefendant's confession "expressly implicated" the defendant as his accomplice, creating a great risk that the jury will not follow instructions to disregard the codefendant's statement when assessing the guilt of the defendant. *Id*. at 207-208. The *Richardson* Court found *Bruton* inapplicable to the case before it because the codefendant's admission did not directly implicate the defendant, but rather implicated him by inference in the context of other evidence introduced at trial. *Id*. at 208. The Court stated, at 208:

> Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that "the defendant helped me commit the crime" is more vivid than inferential information, and hence more difficult to thrust out of mind. Moreover, with regard to such an explicit statement the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt; whereas with regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget. In short, while it may not always be simple for the members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the overwhelming probability of their inability to do so that is the foundation of *Bruton*'s exception to the general rule.

Here, Calbert contends that three statements denied her the right of confrontation. The first was Young's statement to Lovie Barns that he shot someone near the "Hickory Rib" restaurant. There was no mention of Calbert in this confession and, therefore, it could not have implicated her. The second

was the testimony of Tara Clay that Miller had gone to Calbert's that evening and that later in the evening Young returned and stated that he shot someone "because he got into it with his aunt." Although this statement is a confession that Young shot the victim, it does not implicate Calbert. Specifically, the statement does not indicate that Calbert was with Young when he shot the victim, only that the victim at some point had been in a dispute with Young's aunt and that such dispute precipitated the shooting. Finally, Calbert argues that Barns' testimony that Young asked her to lie to protect his aunts was grounds for a separate trial. This statement more directly implicated Calbert than the other two challenged statements. While this statement suggests that Young's aunts had done something that would require Barns to lie to protect them, it does not directly state that Calbert was involved in the incident giving rise to the charges at issue. Thus, there does not exist the "overwhelming possibility" that the jury would be incapable of "obey[ing] the instruction that they disregard an incriminating inference" here. *Richardson*, at 208. Accordingly, it is not clear if this statement would fit within the *Bruton* rule for codefendant statements that expressly implicate a defendant as an accomplice. However, even if we assume that the court abused its discretion in allowing this statement into evidence, independent evidence justifying Calbert's conviction was overwhelming and the admission of this statement was harmless beyond a reasonable doubt. See *People v Harris*, 201 Mich App 147, 150; 505 NW2d 889 (1993) (a violation of *Bruton* is subject to "harmless error" analysis). Similarly, Calbert's trial counsel's failure to move for separate trials does not constitute ineffective assistance of counsel.

Calbert next argues that the trial court erred when it refused to allow witness Barns to testify regarding her state of mind during the car ride from Calbert's house to the Soul Survivors Club. Calbert argues that such testimony was admissible under MRE 803(3). However, she misapprehends this rule. MRE 803 lists exceptions to the hearsay rule, including an exception for "then existing state of mind." Under MRE 803(3), an extrajudicial statement may be admitted as a statement of state of mind if it refers to the state of mind of the *declarant*. *People v Brown*, 76 Mich App 733, 738; 257 NW2d 233 (1977). Here, there was no attempt to introduce an extrajudicial statement. Rather, there was an attempt to elicit testimony pertaining to the state of mind of the *witness* rather than some other declarant. Even if the trial court had been reviewing an out-of-court statement by witness Barns, such evidence would have been inadmissible because Barns' state of mind was not at issue here. See *People v DeWitt*, 173 Mich App 261, 268; 433 NW2d 325 (1988).

Calbert next contends that the trial court abused its discretion when it dismissed a witness, Kervin Owens, who could have presented exculpatory evidence. The trial court stated that it dismissed the witness under MRE 601 because he was incapable of testifying understandably but appears also to have dismissed the witness because it found him incredible.[4] Although the court may have a limited role to dismiss a juror who lacks a "sense of obligation to testify truthfully," MRE 601, generally the determination of the credibility of a witness is left for the trier of fact. *People v Harris*, 110 Mich App 636, 652; 313 NW2d 354 (1981). While we recognize that the witness was extremely combative and argumentative, upon review of the record, we believe that the court abused its discretion by striking his testimony. Owens testified that Toney had been involved in the initial fracas outside the club with Miller. This testimony was cumulative of other properly admitted evidence. However, Calbert claims that Owens' earlier statement to the police, in which he stated that Toney was not involved in this initial fracas, was exculpatory. The net effect of Owens' contradictory statements -- his in-court testimony

and statement to the police -- was confusing and ambiguous. Thus, it is unclear that Owens' testimony, including impeachment with his police statement, would have been exculpatory regarding Calbert, who was wholly uninvolved in this initial fracas. Moreover, Owens' testimony and police statement related to a peripheral issue -- the initial fracas that precipitated the homicide -- not the actual homicide at issue. Even if Toney had not been involved in the initial fracas with Miller, there was overwhelming evidence that Miller precipitated and Calbert participated in the subsequent murder of Toney. Accordingly, any error was harmless beyond a reasonable doubt and would not justify reversal of Calbert's conviction. See MCL 769.26; MSA 28.1096 and MCR 2.613(A).

Calbert next argues that she received ineffective assistance of counsel when her trial counsel gave a short and allegedly inadequate closing argument. In order to justify reversal of an otherwise valid conviction on the basis of ineffective assistance of counsel, "a defendant must show that a counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *Pickens*, *supra* at 302-303. To demonstrate ineffective assistance of counsel, a defendant must overcome the strong presumption that trial counsel's actions constituted reasonable trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Here, Calbert's closing argument followed the closing arguments for her codefendants. Those arguments went into great detail regarding the evidence presented and inconsistencies thereof. Calbert's counsel chose to emphasize her defenses rather than repeat all of the facts already given in great detail to the jury. The argument was not long but it was a reasonable closing. It did not constitute ineffective assistance of counsel.

Calbert argues that she was denied a fair trial by the cumulative effect of many errors. We disagree. As discussed above, the only claims raised by Calbert that possibly constitute errors were allowing into evidence Barns' testimony that Young asked her to lie to protect his aunts and dismissing Owens as a witness. Both of these were harmless errors, in our judgment, and their cumulative effect did not deny Calbert a fair trial. See *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987).

Finally, Calbert argues that her sentence is disproportionate. Calbert fails to rebut the presumption that her sentence which is within the guidelines' range is proportionate. See *People v Piotrowski*, 211 Mich App 527, 532; 536 NW2d 293 (1995). We reject her assertion that she was "only" an aider and abettor in this situation as a basis for finding her sentence to be disproportionately severe.

Affirmed.

/s/ Stephen J. Markman
/s/ Peter D. O'Connell
/s/ Daniel J. Kelly

[1] In addition to the three family members involved in the instant killing, a cousin of Young's was a codefendant in the 7-Eleven killing.

[2] See our opinion in *People v Young*, unpublished opinion per curiam of the Court of Appeals, (Docket No. 176222) for a more detailed discussion of this issue.

[3] Here, after the initial individual pretrial publicity voir dires, the procedure used was to initially seat twenty-eight potential jurors for general voir dire; to allow challenges to those seated in seats one through fourteen; and to replace struck jurors with potential jurors seated in seats fifteen through twenty-eight in order. Then lots were drawn to seat another fourteen potential jurors in seats fifteen through twenty-eight for general voir dire and the jury selection process was continued using the jurors in seats one through fourteen as the base jury. This procedure continued until a jury was selected.

[4] MRE 601 states that a court may exclude a witness who "does not have sufficient physical or mental capacity or sense of obligation to testify truthfully," but requires that such a witness must be "question[ed]" as a precondition to his exclusion.