

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN TED GARDNER,

Defendant-Appellant.

UNPUBLISHED

January 4, 2007

No. 264610

Oakland Circuit Court

LC No. 05-201619-FH

Before: Borrello, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for unarmed robbery, MCL 750.350. Defendant was sentenced, as a third habitual offender, MCL 769.11, to 19 months to 30 years in prison. For the reasons set forth in this opinion, we affirm defendant's conviction and sentence.

Defendant argues that the jury's guilty verdict on the unarmed robbery charge is against the great weight of the evidence and that the trial court erred in denying defendant's motion for a new trial on this basis. A new trial based on the weight of the evidence should be granted "only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). A trial court's denial of a motion for a new trial on the ground that the verdict was against great weight of the evidence is reviewed for an abuse of discretion. An abuse of discretion occurs only when the trial court's denial of the motion was manifestly against the clear weight of the evidence. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003); *People v Stiller*, 242 Mich App 38, 49; 617 NW2d 697 (2000). The abuse of discretion standard acknowledges that there are circumstances in which there is no one correct outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). An appellate court should defer to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

In determining whether the verdict was against the great weight of the evidence, an appellate court examines the evidence to determine whether it preponderated heavily against the verdict to the extent that it would be a miscarriage of justice to allow the verdict to stand. *Lemmon, supra* at 641-642. A court should consider whether to overrule the jury with great reserve and with all presumptions running against the grant of a new trial, and the court may not

substitute its view of witness credibility for the jury's determination of credibility. *Id.* at 638-639. Generally, conflicting testimony and questions of witness credibility are insufficient grounds for granting a new trial. *Id.* at 643. However, when directly contradictory testimony was so far impeached that it was deprived of all probative value or the jury could not believe it, or contradicted indisputable physical facts or physical realities, the court may grant a new trial if there is a real concern that an innocent person might have been convicted. If the evidence is nearly balanced or is such that different minds would naturally and fairly arrive at different conclusions, the court must defer to the jury's determination. *Id.* at 643-645.

Defendant was convicted of unarmed robbery, MCL 750.350. The elements of unarmed robbery are: (1) a felonious taking of property from another, (2) by force or violence or assault or putting in fear, and (3) being unarmed. *People v Johnson*, 206 Mich App 122, 123; 520 NW2d 672 (1994); MCL 750.530. Every person concerned in the commission of an offense, whether he directly committed the act constituting the offense or procured, counseled, aided or abetted in its commission, may be prosecuted, indicted, and tried and on conviction must be punished as if he had directly committed the offense. To establish aiding and abetting, a prosecutor must show that: (1) the charged crime was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement which 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 the aid and encouragement. *People v Robinson*, 475 Mich 1, 5-6; 715 NW2d 44 (2006); MCL 767.39. "An aider and abettor's state of mind may be inferred from all the facts and circumstances." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Defendant claims that the evidence presented at trial is "seriously conflicting" and that the verdict was against the great weight of the evidence. Micah Israel, who was the victim, and three Burger King employees testified that Israel, defendant, and Bryant Griffin, a friend of defendant, went to Burger King, and a fight between defendant and Israel ensued. Defendant was the first to hit Israel. Israel tried to resist, but once he fell to the ground, defendant started punching Israel with his fist close to Israel's face. Griffin started kicking and hitting Israel close to his face as well. Israel "balled up," put his hands over his face, and did not fight back. Israel and Demitro Wells, a 17-year-old boy working at Burger King in the kitchen, testified that the beating lasted about five or eight minutes.

Israel testified that when defendant and Griffin stopped, Israel got up, took his coat off, and told them to calm down. Israel claimed that he intended to go in the bathroom to "check himself," and told the "people behind the counter . . . [that he] hate[ed] drunk people when they drunk [sic] and stuff." After that, defendant and Griffin started to hit Israel again, and Griffin said, "let's take the money out [of Israel's] pocket." Israel testified that defendant stopped and "was just talkin' smack" to Griffin. Israel was "balled up," and Griffin tried to take Israel's money. Israel testified that he felt "somebody go[ing] into his right pocket." Griffin tried to take Israel's wallet, but was unsuccessful because Israel was resisting. Israel testified that \$90 out of \$100 "somethin" was taken from his pants pocket. Israel stated that he did not remember whether defendant tried to take his wallet, but that defendant did not take any money from his pocket. Israel testified that defendant did not try to stop Griffin. Israel acknowledged that he and defendant used to be friends, and defendant is the father of his sister's child. Israel also stated that he met Griffin through defendant and did not know Griffin very well.

On the other hand, Wells testified that neither defendant nor Griffin stopped hitting Israel. Wells testified that Griffin and defendant removed Israel's coat and "went through his pockets." Bianca Williams, who was a cashier at Burger King, and Wells testified that defendant and Griffin searched Israel's pockets, and Griffin took the money out of Israel's pocket. Lashondria Calloway, a manager at Burger King, testified that Israel, defendant, and Griffin took their coats off before the fight started, and although both defendant and Griffin searched Israel's pockets, only defendant found and took Israel's money. Williams testified that defendant and Griffin "both did it together."

Thus, Israel and the three Burger King employees who witnessed the incident agreed that Israel was assaulted by defendant and Griffin, and money was taken from Israel during the assault. Israel, who had a reason to minimize defendant's participation in the robbery because of defendant's relation to his sister's child, testified that defendant stopped hitting Israel when Griffin expressed his intention to take Israel's money, and although Israel did not remember whether defendant tried to take his wallet, defendant did not take any money from him. Defendant argues that two offenses occurred: an assault that lasted until defendant and Griffin stopped hitting Israel the first time, and a robbery that commenced when Griffin started hitting Israel again and announced his intention to take Israel's money. Defendant claims that he participated in the assault, but not in the robbery. However, Israel testified that defendant hit him again after the alleged first assault ended and before Griffin expressed his intention to take Israel's money. Also, Williams, Wells, and Calloway, who had no relation to Israel, Griffin or defendant, testified that both defendant and Griffin continued to hit Israel after Griffin announced his intention to steal Israel's money, and both searched Israel's pockets.

The testimony of Williams, Wells, and Calloway was sufficient to establish the elements of unarmed robbery under a principal or aidor or abettor theory. Although there were some discrepancies between the testimony of Williams, Wells, and Calloway regarding who found and took the money—defendant or Griffin—and whether defendant and Griffin took Israel's jacket or Israel removed it himself, the jury chose to believe the Burger King employees and convicted defendant of unarmed robbery. These discrepancies did not deprive the Burger King employees' testimony of all probative value, and did not contradict indisputable physical facts or physical realities. Moreover, the jury could have believed their testimony. Different minds could naturally and fairly arrive at different conclusions. This Court will not interfere with the role of the jury in determining the weight of the evidence or the credibility of witnesses, and will not substitute its view of witness credibility for the jury's determination of credibility. *Lemmon, supra* at 638-639, 643-645; *People v Hill*, 257 Mich App 126, 141; 667 NW2d 78 (2003). Given the legal threshold that defendant must meet to establish that the verdict was against the great weight of the evidence, we cannot make such a finding based solely on discrepancies between the statements of witnesses. All of the witnesses testified that defendant and Griffin were assaulting the victim, and most testified that defendant and Griffin played a role in removing money from the victim. Therefore, the evidence did not preponderate heavily against the verdict to the extent that it would be a miscarriage of justice to allow the verdict to stand. *Lemmon, supra* at 641-642. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial. *Abraham, supra* at 269.

Defendant next argues that "there was insufficient evidence as a matter of law" to sustain his conviction of unarmed robbery. He claims that although there was sufficient evidence to

permit a rational jury to find the essential elements of assault, a rational jury could not have found him guilty of unarmed robbery. In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Tombs*, 260 Mich App 201, 206-207; 679 NW2d 77 (2003). In reviewing the sufficiency of the evidence in criminal trials, this Court must view the evidence de novo in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

The evidence presented, when viewed in a light most favorable to the prosecution, was sufficient to permit a rational jury to find defendant guilty beyond a reasonable doubt of unarmed robbery either as a principal, or under an aiding and abetting theory. All witnesses testified that there was a felonious taking of property from Israel, by force or violence or assault, and defendant and Griffin were unarmed. See *Johnson, supra* at 123; MCL 750.530. As noted above, Israel testified that although defendant and Griffin assaulted him, defendant stopped when Griffin expressed his intention to take Israel's money and did not take Israel's money from his pocket. However, Israel testified that he did not remember whether defendant tried to take his wallet. Williams, Wells, and Calloway, who had no relation to Israel, Griffin or defendant, testified that both defendant and Griffin continued to hit Israel after Griffin announced his intention to take Israel's money, both searched Israel's pockets, and either defendant or Griffin took the money. Thus, a rational jury could find that defendant either committed the unarmed robbery as a principal or performed acts, such as hitting Israel and searching Israel's pockets for money, which assisted Griffin in the commission of the crime, and defendant intended the commission of the crime or had knowledge that Griffin intended its commission at the time that defendant gave the aid. See *Robinson, supra* at 5-6; MCL 767.39. Although, as shown above, there were some testimonial discrepancies, these differences do not negate the credibility of Williams, Wells, and Calloway. Absent exceptional circumstances, issues of witness credibility are for the trier of fact. *Lemmon, supra* at 642. This Court will not interfere with the role of the jury in determining the weight of the evidence or the credibility of witnesses. *Hill, supra* at 141. Accordingly, we conclude that the prosecution presented sufficient evidence to establish the elements of unarmed robbery.

Defendant's final issue on appeal is that he was denied a fair and impartial trial when the prosecutor pointed out defendant and Griffin to Williams before the trial as the alleged perpetrators. Moreover, defendant argues that the cumulative effect of the above-mentioned errors denied him due process and warrants reversal of his conviction. "This Court review[s] a cumulative-error argument to determine if the combination of alleged errors denied the defendant a fair trial." *Hill, supra* at 152. An unpreserved claim of prosecutorial misconduct is reviewed for plain error. *People v Jones*, 468 Mich 345, 3550356; 662 NW2d 376 (2003); *Carines, supra* at 763.

Appellate review of allegedly improper prosecutorial conduct is precluded if the defendant fails to timely object unless the prejudicial effect of the remark was so great that it could not have been cured by an appropriate instruction. *People v Williams*, 265 Mich App 68, 70-71; 692 NW2d 722 (2005). A criminal defendant may obtain relief based upon an

unpreserved error if the error is plain and affected substantial rights in that it affected the outcome of the proceedings. *Jones, supra* at 355-356; *Carines, supra* at 763. Thus, the test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial, i.e., whether prejudice resulted. *Abraham, supra* at 272. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's conduct in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

At trial, the following exchange occurred between defense counsel and Williams:

Q. Did you see your report this morning?

A. (inaudible)

Q. Yes?

A. Yes.

Q. Did the prosecutor show it to you?

A. Yes.

Q. And did he show you who the people were on trial?

A. Yes.

Q. And did he point them out to you here in the Courtroom?

A. Yes.

Q. He did? Did he point them out to you?

A. (inaudible)

MR. BUNTING: May I approach with the statement?

THE COURT: Yes.

Defense counsel continued to ask Williams other questions unrelated to whether the prosecutor pointed out defendant to her. This dialogue does not automatically establish that the prosecutor pointed out defendant and Griffin to Williams prior to her trial testimony. When asked a second time whether the prosecutor pointed out defendant and Griffin to her, Williams's response was inaudible. After that, defense counsel moved on to another line of questioning, and no one raised this issue for the remainder of the trial. This can indicate that Williams answered, "no." If Williams answered, "no," the prosecutor did not commit misconduct. Moreover, even assuming that Williams answered affirmatively, the prosecutor's conduct did not amount to plain error that affected defendant's substantial rights because there were three other witnesses who identified defendant.

Defendant claims that the cumulative effect of the above mentioned alleged errors denied him due process and warrants reversal of his conviction. The cumulative effect of several minor errors can warrant reversal when individual errors would not. *Hill, supra* at 152. However, the effect of the errors must have been seriously prejudicial in order to warrant a finding that a defendant was denied a fair trial. *People v Knapp*, 244 Mich App 351, 388; 624 NW2d 227 (2001). “[C]umulative error,’ properly understood, actually refers to cumulative unfair *prejudice*, and is properly considered in connection with issues of harmless error. Only the unfair prejudice of several actual errors can be aggregated to satisfy the standard set forth in *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).” *People v LeBlanc*, 465 Mich 575, 591-592 n 12; 640 NW2d 246 (2002) (emphasis in original). A series of non-errors cannot aggregate to deny a defendant a fair trial. *Ackerman, supra* at 454. Here, defendant failed to show that the verdict was against the great weight of the evidence, that the trial court erred in denying his motion for a new trial, that the evidence presented at trial was insufficient to support his conviction, and that the prosecutor committed misconduct that affected defendant’s substantial rights. There was no cumulative effect so seriously prejudicial to warrant a finding that defendant was denied a fair trial.

Affirmed.

/s/ Stephen L. Borrello

/s/ Janet T. Neff

/s/ Jessica R. Cooper