

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID DENNARD MCKINNEY,

Defendant-Appellant.

UNPUBLISHED

September 27, 2007

No. 269823

Wayne Circuit Court

LC No. 05-000357-01

Before: Whitbeck, C.J., and Wilder and Borrello, JJ.

PER CURIAM.

Defendant was convicted of felony murder, MCL 750.316, and accessory after the fact to arson, MCL 750.505. He was sentenced to life without parole for the felony murder conviction and to two to five years' imprisonment for the accessory after the fact conviction. Defendant appeals as of right. We affirm.

Defendant first argues on appeal that his incriminating statements of November 21, 2004, should have been suppressed because his Fifth Amendment rights were violated. We disagree. This Court reviews a trial court's ruling on a motion to suppress de novo. *People v Van Tubbergen*, 249 Mich App 354, 359-360; 642 NW2d 368 (2002). However, the trial court's factual findings are reviewed for clear error, "giving deference to the trial court's resolution of factual issues." *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004), quoting *People v Frohriep*, 247 Mich App 692, 637 NW2d 562 (2001). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *Bolduc, supra* (citations omitted).

The Fifth Amendment of the United States Constitution and Article 1 of the Michigan Constitution protect criminal suspects against self-incrimination. US Const, Am V; Const 1963, art 1, § 17. Once a suspect invokes his or her right against self-incrimination through an unequivocal request for counsel, police must cease interrogation and may not resume interrogation without counsel present, unless the accused initiates further discussion. *Minnick v Mississippi*, 498 US 146, 151-152; 111 S Ct 486; 112 L Ed 2d 489 (1990); *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981); *People v McBride*, 273 Mich App 238, 258-259; 729 NW2d 551 (2006). If the accused initiates further discussion, he may validly waive his previously invoked right to counsel. See *People v Kowalski*, 230 Mich App 464, 478-482; 584 NW2d 613 (1998). On the other hand, if police continue interrogating the suspect after he has requested the presence of an attorney, any resultant incriminating statements by the

suspect are generally inadmissible at trial. *Smith v Illinois*, 469 US 91, 95; 105 S Ct 490; 83 L Ed 2d 488 (1984). A rereading of *Miranda* rights is insufficient to render such incriminating statements voluntary and admissible. *Edwards, supra* at 484-485.

Here, the first issue is whether Inkster Detective Anthony Delgreco's statement to defendant that Delgreco "did not know if we were going to take this case state or federally and at the federal level that there was the death penalty involved in this case possibly," made shortly after defendant unequivocally invoked his right to counsel, qualifies as interrogation. Interrogation "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v Innis*, 446 US 291, 301; 100 S Ct 1682; 64 L Ed 2d 297 (1980); *People v Anderson*, 209 Mich App 527; 531 NW2d 780 (1995). The test is objective, viewed from a defendant's perspective, but the intent of police may still be relevant because "where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect." *Innis, supra* at 302 n 7. If this Court determines that Delgreco's comment qualifies as interrogation, a second issue then arises whether defendant's incriminating statements, made the following morning, qualify as a response to Delgreco's impermissible interrogation.

Merely informing a defendant of the charges against him does not qualify as interrogation. *Kowalski, supra* at 483, citing *People v McCuaig*, 126 Mich App 754, 759-760; 338 NW2d 4 (1983). Asking a defendant, subsequent to his invoking his Fifth Amendment right, whether he has changed his mind about having an attorney present is not interrogation. *Edwards, supra* at 490 (Powell, J., concurring); *Kowalski, supra* at 474. Informing a defendant that a codefendant has given a statement, ninety minutes after the defendant has invoked his right to silence, is not the functional equivalent of interrogation. *Kowalski, supra* at 482.

Taken in context, we find that there would be no other purpose to Delgreco's statement but to elicit a response from defendant, and if police intend to elicit a response, their statements constitute impermissible interrogation. See *Innis, supra* at 302 n 7. Delgreco's statement that defendant might be subject to the death penalty if charged under federal law was made immediately after defendant stated that he wanted his attorney. Delgreco did not merely provide defendant with a charging statement, which is permissible, but rather, told defendant that he may be facing the death penalty as he walked defendant back to his cell for the night. That night, Delgreco invited federal ATF Agent Ray Tomaszewski to come to the station the following day. Delgreco stopped at defendant's cell the following morning even though defendant did not ask Delgreco to come to his cell.

Viewed from defendant's perspective, when he started the discussion with Delgreco the following morning, it was presumably defendant's first opportunity to respond to Delgreco's statement from the night before. In addition, the last comment between defendant and Delgreco until defendant gave his statements was Delgreco's imparting to defendant that defendant might be subject to the death penalty, and it was the first time defendant became aware that he might be subject to the death penalty.

Given our conclusion that Delgreco intended to elicit an incriminating response, we next need to determine whether defendant's statements the following morning qualify as a response to

Delgreco's comment from the night before. If an accused starts a substantive discussion with police after invoking his Fifth Amendment right, the discussion is "initiated" by the defendant only if a "substantial amount of time has elapsed such that 'the coercive effect of the interrogation will have subsided.'" *United States v Gomez*, 927 F2d 1530, 1539 n 8 (CA 11, 1991). If the coercive effect of impermissible interrogation has subsided and the defendant starts the discussion, an "initiation exception" to *Edwards* occurs. See *Hill v Brigano*, 199 F3d 833, 842 (CA 6, 1999). In *Hill*, the Sixth Circuit held that enough time elapsed between when the police impermissibly interrogated the suspect at night and when the suspect began a conversation with them the following morning, that the coercive effect of the improper interrogation conducted the night before had subsided. *Id.* at 842-843. Similarly, here the impermissible interrogation took place the night before defendant started discussions with Delgreco. Defendant was subsequently re-Mirandized and stated that he understood his rights, yet he chose to make incriminating statements. We hold that the trial court did not err by admitting defendant's statements under the initiation exception to *Edwards*.

This reasoning is not vitiated by the recent federal decision cited by defendant, *Van Hook v Anderson*, 488 F3d 411 (CA 6, 2007). In *Van Hook*, the court held that the defendant did not succumb to the authority of the police in making his confession, but to his own mother. *Id.* at 428. Defendant himself admits that *Van Hook* is distinguishable on that basis. Therefore, *Van Hook* does not alter our conclusion that defendant's incriminating statements made the next morning after Delgreco's death penalty threat were admissible because they were sufficiently later than the interrogation to render them not a coerced response to the improper interrogation.

The fact that defendant was re-Mirandized does not compel the conclusion that his statements were coerced. Rather, being re-Mirandized lends more to the conclusion that his statements that morning were voluntary. Mirandizing is not an interrogation. Rather, Mirandizing is a reminder to the suspect that he need *not* make any statements, that he *may* remain silent, and that he *may* request an attorney before making any statements. Therefore, the fact that defendant was re-Mirandized the next morning, before he made incriminating statements, does not in any way lend toward the conclusion that the coercive effect of the prior night's interrogation had not subsided. In conclusion, defendant's incriminating statements were not coerced but were voluntary, and properly admitted under the initiation exception to *Edwards*.

Defendant next argues on appeal that there was insufficient evidence to convict him of felony murder and accessory after the fact to arson. We disagree. This Court reviews claims of insufficient evidence de novo, viewing the evidence in the light most favorable to the prosecutor, to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

The required elements to convict of first-degree felony murder are (1) the killing of a human being, (2) with malice, (3) while committing, attempting to commit, or assisting in the commission of specified felonies. *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999). Malice is 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. *Id.* at 758.

The prosecution must prove the elements of the underlying felony in order to prove the corresponding felony murder. In this case, the underlying felony is larceny. The elements of larceny in a building are (1) the actual or constructive taking of goods or property of another, (2) without the consent and against the will of the owner, (3) a carrying away or asportation of the goods, (4) with felonious intent, and (5) the taking occurred within the confines of the building. MCL 750.360; *People v Sykes*, 229 Mich App 254, 278; 582 NW2d 197 (1998). The parties do not contest whether defendant committed larceny.

The elements necessary to convict defendant as an aider and abettor 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 the aid and encouragement. [*People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (citations omitted).]

Thus, to convict defendant of felony murder on an aiding and abetting theory, the prosecution had to show that defendant (1) performed acts or gave encouragement that assisted the commission of a felony, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of a felony. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003).

Defendant argues that there was no evidence to suggest that the larceny would be violent, Clyde Alexander was not killed because of the robbery but was killed by the fire, and defendant did not contemplate or cause the fire. Defendant states that there was no evidence he went into the gun shop, and he only saw smoke coming from the building afterwards. Defendant asserts that his statements read at trial indicate only that he planned the larceny, there was no evidence regarding his specific plans, and his statements indicated that he did not plan the killing of Alexander or the arson. Defendant also argues that it is not known whether Alexander died because of the larceny or an accident. On the contrary, the parties stipulated to the medical examiner's report, which determined that the manner of death was homicide.

Specifically, defendant claims that the prosecutor did not establish malice. However, "a defendant is liable for the crime the defendant intends to aid or abet as well as the natural and probable consequences of that crime." *Robinson, supra* at 14-15. Having knowledge that the principle actor committing a felony is armed is sufficient for a finding of malice in an aiding and abetting felony murder conviction. *People v Bulls*, 262 Mich App 618, 625-626; 687 NW2d 159 (2004); *People v Turner*, 213 Mich App 558, 572; 540 NW2d 728 (1996), overruled on other grounds *People v Mass*, 464 Mich 615 (2001).

We find that Alexander's death was a foreseeable consequence of the larceny, and therefore, the prosecution established defendant's individual liability. Defendant planned the larceny of the gun shop containing firearms and ammunition. They stopped to "gas up" on their way to the gun shop. The perpetrators committed the crime in the middle of the day, while the shop was open for business. While no evidence was presented that any of the perpetrators were armed, they were committing a larceny of a gun shop filled with firearms, and it would be likely

that an employee of the gun shop would have a concealed firearm. Furthermore, it is likely that defendant knew that force or a threat of force would be necessary to accomplish the larceny, and that defendant therefore knew that violence could result. Thus, we hold that there was sufficient evidence to infer malice based on defendant's participation in a larceny of a gun shop.

Defendant also argues that the fire was unforeseeable, and therefore, he is not personally liable for Alexander's death. However, the manner of Alexander's death is not dispositive. Defendant further argues that since he did not go into the shop he cannot be responsible for Alexander's death. On the contrary, a defendant does not need to be present at the murder scene to be responsible for the murder. See *People v Flowers*, 191 Mich App 169, 170-171, 177; 477 NW2d 473 (1991). Rather, by planning the larceny of a gun shop, even though defendant did not plan the death of Alexander and he did not go into the shop during the larceny, defendant set in motion a series of events that was likely to cause death or great bodily harm. See *Bulls, supra* at 627. Therefore, viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence for a rational trier of fact to find defendant guilty beyond a reasonable doubt of aiding and abetting felony murder.

Next, defendant claims there was insufficient evidence to convict him of accessory after the fact to arson. To establish arson of a building, the prosecution must show that the defendant willfully or maliciously burned a building or other real property or the contents of it. MCL 750.73; *People v Barber*, 255 Mich App 288, 294; 659 NW2d 674 (2003). To establish accessory after the fact liability, the prosecution must show that the defendant, with knowledge of another's guilt, renders aid or assistance to that other person in the effort to hinder that person's detection, arrest, trial, or punishment. *People v Perry*, 460 Mich 55, 62; 594 NW2d 477 (1999).

Defendant claims that the only evidence of his involvement as an accessory to the arson was that he saw smoke coming from the building. He states that there was no evidence that an arson was planned, that the fire was deliberately set, that he knew the source of the fire, or that he assisted any principals that may have set the fire.

Contrary to defendant's claims, the evidence showed that defendant was with his associates when they stopped to "gas up" before proceeding to the gun shop, and accelerants were found at the fire site, allowing an inference that gas was purchased to burn the gun shop. After the guns were taken from the shop, defendant saw smoke. He asked one of the others involved what happened and was told, "[i]t got wild." Defendant, the self-proclaimed lookout, then drove away with the other perpetrators. Thus, we find that in viewing the evidence in a light favorable to the prosecution, there was sufficient evidence for a rational trier of fact to find defendant guilty beyond a reasonable doubt of accessory after the fact to arson.

Next, defendant argues on appeal that prosecutorial misconduct denied him a fair trial. We disagree. This Court reviews preserved constitutional issues involving prosecutorial misconduct de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). This Court reviews unpreserved issues for plain error that affected the defendant's substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002).

The test of prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct

claims are decided case by case, and the prosecutor's remarks are evaluated in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Reversal is not required when a prosecutor makes improper comments if the prejudicial effects of the comments could have been cured by a timely instruction. *Watson, supra* at 586. Reversal is inappropriate for unpreserved claims unless a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763.

First, defendant claims that during opening statement the prosecutor stated which witnesses he would call but then failed to call all of the witnesses named. During voir dire of the jurors, the court asked the prosecutor to read the names of witnesses he might call at trial to see if any of the jurors recognized any of the witnesses' names. Before reading the names, the prosecutor stated, "We will probably call most of these witnesses, some of them may not be called but I want to read the names to see if anyone knows who they are." Then the prosecutor read the names of possible witnesses. Read in context, the prosecutor's comments were proper.

Defendant next claims that the prosecutor failed to present all of the evidence he claimed he would. A prosecutor may not make statements of fact that are not supported by the evidence. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). However, a prosecutor's "good faith effort to admit evidence does not constitute misconduct." *Id.* at 448.

Specifically, defendant complains about the prosecutor's statement that the facts of the case would show that "[defendant] noticed the smoke, the fire," but the evidence did not show that defendant saw fire. While defendant never stated that he saw fire, he stated that he saw smoke coming from the gun shop, and his accomplice stated that "[it got wild]" inside the shop. In addition, the perpetrators stopped to purchase gas before proceeding to the gun shop and the fire was started intentionally. Consequently, the prosecutor's comment was not made in bad faith. Furthermore, in his closing argument defendant used to his own advantage the prosecutor's failure to present evidence. Last, the court instructed the jury that the attorney's statements are not evidence, thereby curing any prejudice.

Defendant also claims that the prosecutor stated that he would introduce evidence showing that defendant's accomplices tied up, beat, and then burned Alexander to death, but then failed to present the evidence. We find that the prosecutor made his comments in good faith, given the direct evidence from the medical examiner that Alexander was found with plastic ties on his wrist, he was beaten around his head, he was burned to death, and the fire was intentionally set. The prosecutor's comments were proper and did not prejudice defendant. In addition, the court instructed the jury that the attorney's statements are not evidence, thereby curing any prejudice.

Defendant next argues that the prosecutor incorrectly stated that evidence would show defendant drove away from the scene. The prosecutor's statement was, "And if one of your compadres lights the building on fire and you drive away without helping put out the fire or notifying anyone, you're guilty of accessory after the fact." The prosecution did not state that defendant was the driver of a vehicle. Thus, the prosecutor's comment was made in good faith.

Defendant next claims that the prosecutor misstated the law during his opening statement and closing argument by stating that when a person commits a felony and someone dies, the felon is responsible for that death. Defendant made an untimely objection to the opening statement comment but did not object to the closing argument comment. A defendant can be denied a fair trial if a prosecutor's clear misstatement of law is not corrected by the trial court. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). Here, the trial court found defendant's single objection to be untimely, and stated that any prejudice could have been cured with an instruction, and defendant agreed. Furthermore, the trial court instructed the jury to follow the court's instructions on the law and not the attorney's statements of the law. In addition, the trial court properly instructed the jury on felony murder, which cured any prejudice from the prosecutor's alleged misstatement of the law.

Defendant next claims that during the prosecutor's opening statement he instructed the jury to use their own personal knowledge when he stated that "some of you know [the gun shop] was right on Michigan Avenue" Defendant did not object and on appeal does not provide governing law or analysis, and therefore, abandons the issue on appeal. See *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001). Moreover, stating that some of the jurors know the location of the crime scene is not the same as asking them to use their personal knowledge to decide a case. Thus, the prosecutor's comment was proper. In addition, the court instructed the jury that they should not use any personal knowledge about a person or place to decide the case.

Next, defendant claims that it was improper for the prosecutor in closing argument to tell the jury that it was the conscience of the community. A prosecutor is prohibited from urging the jury to find the defendant guilty as part of their civic duty. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). Civic duty arguments may improperly cause a jury to debate issues that are broader than the guilt or innocence of the accused. *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005). On the other hand, otherwise improper comments of the prosecutor may not require reversal if they address issues raised by the defendant. *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003).

We find that the prosecutor's statement was not an improper appeal to the jury's civic duty, but rather, was a proper response to a defense argument. Defense counsel, in closing argument, stated:

But in a criminal case because you're talking about liberties and freedoms we want to make absolutely sure as possible that the system can – that can give you that a person who was accused has these rights. This is the system. We're defending the system and this is why you're here. Juries are buffers. If not for juries we'll have the police arresting people and throwing them in jail. We have a criminal justice system and the jury serves as the buffers between the prosecution and the accused.

In response, the prosecutor stated, "You are a buffer, that's true, but you're also the conscience of the community." Read in context, the prosecutor's comment was proper.

Defendant next claims that during the prosecutor's closing argument he improperly stated his own personal belief when he said that defendant knew what was happening inside the gun

shop during the larceny but did nothing to help Alexander. Evidence was presented that defendant saw his associates go into the shop, and then when they were carrying guns out, defendant saw smoke coming from the shop. One of defendant's accomplices said that "[i]t got wild" inside the shop. The prosecutor's comment was proper because it was a reasonable inference based on the evidence.

Defendant next claims that the prosecutor misstated the facts in his closing argument when he said, "We don't know which one of those guys actually lit the match, which one burned [Alexander] up," because there was no evidence presented regarding how the fire was started or by whom. Parties are permitted to make reasonable inferences from the evidence. *Bahoda, supra* at 282. Here, the evidence established that the fire was intentionally set. It would be reasonable to infer that someone used a match or lighter to start the fire. In any event, defendant has failed to show how the prosecutor's comment prejudiced him.

Next, defendant argues that the prosecutor stated an illogical conclusion to the jury that, but for defendant's actions, Alexander would be alive. Defendant claims there was no evidence that defendant's plan included killing Alexander or setting the building on fire. However, to be guilty of aiding and abetting felony murder, one only has to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result during the commission of a felony. *Carines, supra* at 755. Here, defendant planned the larceny of a gun shop containing firearms and ammunition. The perpetrators stopped to "gas up" on their way to the gun shop. The perpetrators committed the crime in the middle of the day while the shop was open for business, and therefore, someone would presumably be present inside the gun shop. Thus, the prosecutor could reasonably infer that, by planning the larceny, defendant set in motion a series of events that resulted in Alexander's death. See *Bulls, supra* at 627. The prosecutor's comment was proper.

Defendant next claims that the prosecutor misstated the facts in his closing argument when he stated that defendant gave his confession voluntarily, and "[defendant] had been in jail for a couple of days so there's no way possible for him to have any alcohol or drugs." Defendant contends there is no evidence to support this statement because defendant was taken into custody on November 20, 2004, and gave his confession to police on November 21, 2004. Defendant did not object at trial and does not explain on appeal how this statement prejudiced him.

Finally, defendant argues that the prosecutor improperly injected his personal opinion of defendant's guilt into the trial when he indicated in closing argument that defendant's exculpatory statements were not truthful. In a closing argument, a prosecutor may state an opinion regarding whether a defendant is guilty or a witness worthy of belief, as long as the prosecutor relates that opinion to the evidence of the case and does not invoke the authority of executive offices. *Bahoda, supra* at 286-287. We find that the prosecutor could reasonably infer that, since defendant spent a week planning the larceny, defendant knew more about the plan than he told police. Thus, the prosecutor was properly relating his opinion to the evidence. Furthermore, the prosecutor did not invoke the authority of his office. Thus, the prosecutor's comment was proper. Furthermore, the trial court properly instructed the jury that, "[I]t's your job to decide what the facts of this case are. You must decide which witnesses you believe and how important you think their testimony is." Hence, even if the prosecutor's statements were prejudicial, any error was cured by the trial court's instruction.

Defendant next argues on appeal that the trial court gave erroneous felony murder instructions to the jury, and consequently, defendant's conviction should be reversed. The failure to make a timely assertion of a right constitutes a forfeiture of the issue, but an "intentional relinquishment or abandonment of a known right" waives the issue and extinguishes the error, *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), quoting *Carines, supra* at 762-763 n 7, thereby foreclosing appellate review. *Id.* at 214-215; *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003). Here, when the trial court finished instructing the jury, it asked both parties if there were any objections to the instructions. Defense counsel responded, "No, your Honor." Thus, defendant intentionally waived the issue and any alleged error is extinguished.

Last, defendant argues on appeal that the trial court committed error requiring reversal by denying his motion for a new trial. We disagree. "This Court reviews a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion." *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). An abuse of discretion occurs when the result is outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

A trial court may grant a new trial if a verdict is contrary to the great weight of the evidence. MCR 2.611(A)(1)(e). The test is "whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003).

A verdict is contrary to the great weight of the evidence only under exceptional circumstances, for example, where "'testimony contradicts indisputable facts or laws,'" where "'a witness's testimony is so patently implausible it could not be believed by a reasonable juror,'" or "where the witnesses [sic] testimony has been seriously 'impeached' and the case marked by 'uncertainties and discrepancies.'" *People v Lemmon*, 456 Mich 625, 643-644, 647; 576 NW2d 129 (1998) (citations omitted).

Defendant argues that his incriminating statements of November 21, 2004, should have been suppressed and there was insufficient evidence to convict him of the charged crimes, and therefore, the verdict was against the great weight of the evidence. However, defendant's statements were admissible and there was sufficient evidence to convict him of felony murder and accessory after the fact to arson. There was no testimony that defied physical reality or was patently implausible. There were no inconsistencies in the testimony. In sum, there were no "exceptional circumstances" in this case such as those described in the *Lemmon* examples. We hold that the evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to let the verdict stand. Thus, the trial court did not abuse its discretion by denying defendant's motion for a new trial.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Stephen L. Borrello