

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
January 30, 2014

v

DARRYL ANTHONY CLARK,  
Defendant-Appellant.

No. 305552  
Wayne Circuit Court  
LC No. 10-009869-FC

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

v

KRYSTAL DENISE CLARK,  
Defendant-Appellant.

No. 305601  
Wayne Circuit Court  
LC No. 10-011040-FC

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

v

DEMETRIUS DARELL CLARK,  
Defendant-Appellant.

No. 305681  
Wayne Circuit Court  
LC No. 11-002069-FC

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Before: OWENS, P.J., and JANSEN and HOEKSTRA, JJ.

PER CURIAM.

Defendants Darryl Anthony Clark, Krystal Denise Clark, and Demetrius Darell Clark were tried jointly, before a single jury, for charges arising from a robbery at 15174 Grayfield Street in Detroit, and the subsequent assault of a state trooper. The jury convicted Darryl Clark

of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84(1), armed robbery, MCL 750.529, carrying a concealed weapon (CCW), MCL 750.227(2), possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b(1).<sup>1</sup> The jury convicted Krystal Clark of AWIGBH, MCL 750.84(1), and armed robbery, MCL 750.529.<sup>2</sup> The jury convicted Demetrius Clark of AWIGBH, MCL 750.84(1), armed robbery, MCL 750.529, CCW, MCL 750.227(2), felon-in-possession, MCL 750.224f, and felony-firearm, MCL 750.227b.<sup>3</sup> All three defendants appeal as of right. We affirm in each appeal.

## I. JAIL CLOTHING

Defendants Darryl and Demetrius Clark both argue that the trial court deprived them of a fair trial when it denied their requests immediately before jury selection to change out of their jail clothing. We review for an abuse of discretion a trial court's decision concerning "a defendant's physical appearance during trial." *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009); *People v Harris*, 201 Mich App 147, 151; 505 NW2d 889 (1993).

A criminal defendant has a fundamental right to a fair trial, which includes appearing in court while wearing "civilian clothes rather than prison clothing." *People v Turner*, 144 Mich App 107, 109; 373 NW2d 255 (1985) (internal quotations and citations omitted); see also *People v Lewis*, 160 Mich App 20, 31; 408 NW2d 94 (1987). A court generally must grant a "defendant's timely request to wear civilian clothing." *Harris*, 201 Mich App at 151. But because "orderly court process often unavoidably requires a defendant to appear in court in handcuffs or prison uniform," "absent a showing that such necessity was lacking or that prejudice has resulted, this Court will not reverse a defendant's criminal conviction merely because the jury may have seen the defendant in" jail clothing. *People v Meyers (On Remand)*, 124 Mich App 148, 164; 335 NW2d 189 (1983) (internal quotations and citation omitted).

Shortly before jury selection commenced, counsel informed the court that Darryl Clark was not aware that he was coming over for a jury trial and wanted to change his clothing before

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<sup>1</sup> The trial court sentenced Darryl Clark as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 18 to 30 years for the armed robbery conviction, 10 to 15 years for the AWIGBH conviction, and 2 to 5 years for the CCW and felon-in-possession convictions. He was sentenced to a consecutive prison term of five years for the felony-firearm (second-offense) conviction.

<sup>2</sup> The trial court sentenced Krystal Clark as a second habitual offender, MCL 769.10, to concurrent prison terms of 10 to 15 years for the AWIGBH conviction and 17 to 30 years for the armed robbery conviction.

<sup>3</sup> The trial court sentenced Demetrius Clark as a second habitual offender, MCL 769.10, to concurrent prison terms of 5 to 15 years for the AWIGBH conviction, 17 to 30 years for the armed robbery conviction, 2 to 5 years for the CCW conviction, and 2 to 7 years for the felon-in-possession conviction. He was sentenced to a consecutive prison term of two years for the felony-firearm conviction.

trial. Counsel advised the court that Darryl's sister was coming with new clothing. Trial counsel for Demetrius Clark joined Darryl Clark's request. The trial court responded as follows:

Well, you'll have ample opportunity to have the[m] change clothing tomorrow. But it's my understand[ing] that the defendants, all three, had refused to chang[e] into civilian clothes before they came over to the courthouse this afternoon. That is not my doing. That's their own choosing.

And so tomorrow, so long as their clothing's brought over to the Wayne County Jail, they'll be allowed to change into civilian clothing over there.

In response, Darryl Clark asserted that "[h]e did not state that he did not want to change," but "they were told they could not change." Demetrius Clark joined this assertion.

Because the existing record reflects the trial court's belief that defendants had opted against changing out of prison clothing, the court had a legitimate basis for its ruling. *People v Harris*, 80 Mich App 228, 231; 263 NW2d 40 (1977) (observing that "[a] prisoner who voluntarily chooses to stand trial in jail clothing cannot be heard to complain on appeal"). Therefore, the trial court did not abuse its discretion by denying the requests of Darryl and Demetrius Clark to change into civilian clothing, notwithstanding their assertions that they had no opportunity to change before coming to court. *Payne*, 285 Mich App at 186.

We further conclude, however, that neither Darryl nor Demetrius Clark has substantiated that the trial court's ruling prejudiced their constitutional rights. An appellate court may deem a preserved, nonstructural constitutional error harmless if it appears "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005) (internal quotations and citations omitted). "[T]o safeguard the jury trial guarantee, a reviewing court must conduct a thorough examination of the record in order to evaluate whether it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error." *Id.* at 348 (internal quotations and citation omitted).

The parties agree that defendants remained in jail clothing only during the first day of jury voir dire, and arrived in civilian clothing for the second and third days of voir dire and the remainder of the lengthy trial. Moreover, the properly admitted evidence of Darryl's and Demetrius's guilt included the following evidence: (1) Edward Taschereau, who lived at 15174 Grayfield, recounted at trial the details of the forced entry into his residence on May 8, 2010, and identified Darryl Clark as one of the men who had come inside, held a gun to his head, and with someone resembling Demetrius Clark ransacked the house, stole property, and ran to a black car; (2) Michigan State Trooper Jonathan Henry testified regarding (a) his observations of several men running across Fenkell Street from Grayfield, Kevin Woods (another armed robbery participant) getting inside a silver van, Darryl Clark firing two gunshots while standing next to the passenger door of a black Monte Carlo, and Darryl and Demetrius Clark getting inside the Monte Carlo, and (b) his 14 or 15-minute pursuit of the black Monte Carlo, during which he observed Demetrius Clark lean out the driver's side window and twice fire multiple shots at Henry's vehicle and a rifle barrel appear from the passenger's side window where Darryl Clark got into the car; (3) Michigan State Police laboratory technicians testified that they identified

Darryl Clark's fingerprint on a bottle on the floor of the black Monte Carlo's front passenger seat, and blood with a DNA profile matching Demetrius Clark's in the Monte Carlo's back seat; (4) accomplice witness Virginia Gonzales testified that (a) when she saw Darryl Clark leave his mother's house on May 8, 2010, he had a silver 0.22-caliber revolver in his waistband that he covered with his shirt and carried into the Monte Carlo, (b) she drove Darryl and Demetrius Clark to a parking lot near the robbery scene, where Krystal and Darryl Clark discussed the robbery target, (c) at Darryl Clark's direction, she dropped Woods off in an alley near the house and drove down Grayfield in the opposite direction of the house, a vantage point from which she observed Darryl Clark leave the car holding his gun, run across Fenkell with Demetrius Clark, approach the house and go inside, (d) she saw Darryl and Demetrius Clark leave the house and run toward the Monte Carlo, Demetrius Clark get into her rear driver's side seat while carrying a hand safe and a long gun, and heard two or three gunshots on the front passenger's side, where Darryl Clark then got into the car, (e) Darryl Clark told Gonzales to drive, which she did at approximately 70 miles per hour through mostly residential neighborhoods, (f) while driving she observed Darryl Clark shoot at the black Suburban (Henry's vehicle) that was following the Monte Carlo, heard gunshots from directly behind her seat immediately after seeing Demetrius Clark lean out the driver's side window, and heard Demetrius Clark calling Woods to advise that he and Darryl Clark had used their ammunition and Woods had to do something; (g) after the Monte Carlo got away from the black Suburban, she watched Darryl Clark reload his gun at his mother's house, saw Demetrius Clark retrieve a Play Station from Krystal Clark's van and a hand safe being opened at another sister's house, and heard Darryl and Demetrius Clark complain to Krystal Clark that the robbery had been a set up, and (h) Darryl and Krystal Clark advised Gonzales the next day to turn herself in to the police and say she had not seen Darryl or Demetrius Clark; and (5) Darryl and Demetrius Clark stipulated that on May 8, 2010, they had prior felony convictions that precluded their right to possess firearms.

We conclude that, even assuming *arguendo* that the trial court infringed on Darryl's and Demetrius's constitutional rights, the other evidence of record proved their guilt beyond a reasonable doubt. *Shepherd*, 472 Mich at 347-348.

## II. INEFFECTIVE ASSISTANCE OF COUNSEL

In Docket No. 305552, Darryl Clark raises several claims of ineffective assistance of counsel. "Because a *Ginther*<sup>4</sup> hearing was not conducted, [this Court's] review of the relevant facts is limited to mistakes apparent on the existing record." *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant's claim of ineffective assistance of counsel includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." To establish the first component, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional

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<sup>4</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at 663-664. The defendant must overcome the strong presumptions that his "counsel's conduct falls within the wide range of professional assistance," and that his counsel's actions represented sound trial strategy. *Strickland*, 466 US at 689. Defense counsel possesses "wide discretion in matters of trial strategy." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). This Court may not "substitute [its] judgment for that of counsel on matters of trial strategy, nor will [it] use the benefit of hindsight when assessing counsel's competence." *Payne*, 285 Mich App at 190.

#### A. FAILURE TO PRESENT ALIBI AND MISIDENTIFICATION DEFENSES

Darryl Clark first argues that trial counsel was ineffective for failing to present an alibi or misidentification defense through the testimony of Darryl, his mother Izora Clark, his grandmother Gracie Newbold, and a sister Iesha Woods. On appeal, Darryl Clark has submitted four affidavits to the effect that all four had spent the afternoon of May 8, 2010, on Grand Boulevard in Detroit. The affidavits further aver that Darryl Clark informed trial counsel that he had been at home with his grandmother, mother, and sister on May 8, 2010, and that trial counsel told Darryl's mother and sister that the jury would not find their alibi testimony credible because they were family members. The record reflects that trial counsel knew about the proposed alibi defense and opted against raising it at trial on the ground that only Darryl Clark's immediate family members could support it. Darryl Clark has not overcome the strong presumption that counsel's decision not to pursue this alibi defense constituted sound trial strategy. See *Payne*, 285 Mich App at 190.

We further conclude that trial counsel's decision against pursuing an alibi or misidentification theory did not deprive Darryl Clark of a substantial defense "that might have made a difference in the outcome of the trial." *People v Marshall*, 298 Mich App 607, 612; 830 NW2d 414 (2012), vacated in part on other grounds 493 Mich 1020 (2013). Although the evidence at trial established that Taschereau could not identify Darryl Clark in a photographic lineup and investigating officers never showed Henry a lineup after he inadvertently saw individual photographs of the defendants and Gonzales, Darryl Clark's counsel did not vigorously pursue a misidentification theory at trial. He instead (1) suggested that Taschereau had lied about the home invasion because he wanted to conceal that on May 8, 2010, he owed Woods money for a drug transaction that Woods had come to collect, a theory founded in Taschereau's account that he had not called the police after the robbery, Taschereau's acknowledgment that he had at some point used Vicodin, and evidence of the Vicodin bottle stolen from the Grayfield house; (2) questioned the veracity of Henry's account that Darryl or Demetrius Clark could have fired gunshots while leaning out the Monte Carlo's front window, which no allegedly uninterested eyewitnesses to the pursuit had reported; (3) insisted Henry had fired all the gunshots while chasing the Monte Carlo, pointing to the numerous bullet holes in the Monte Carlo and the absence of any in Henry's Suburban; (4) attacked Gonzales's credibility on the basis of her varying statements to the police, her plea agreement, and other details revealed during her extensive cross-examination at trial; and (5) twice mentioned that the Michigan State Police "may be [sic] manipulate witnesses or may be [sic] . . . don't provide a photo [lineup] cause it's tainted."

Three witnesses identified Darryl Clark at trial: Taschereau, who testified that Darryl Clark pointed a gun at his head and helped ransack the house on Grayfield; Henry, who testified that while stopped in traffic he saw Darryl Clark as Darryl ran across Fenkell, and watched Darryl fire a handgun while standing near the Monte Carlo; and Gonzales, who described her three-year acquaintance with Darryl Clark, the sexual nature of the relationship when she first met him in person, and her allegedly unwitting participation in the robbery with defendants. We reject that the jury might reasonably have found persuasive a misidentification defense, especially given Gonzales's close relationship with Darryl Clark. In light of the evidence against Darryl Clark, we defer to trial counsel's decision to pursue other defenses that attempted to undermine and discredit the most incriminating evidence against Darryl Clark. See *Payne*, 285 Mich App at 190.

And in light of the properly admitted evidence of Darryl Clark's guilt and the several reasonable trial strategies pursued by counsel, we detect no reasonable likelihood that counsel's decision to forego an alibi or misidentification defense affected the outcome of Darryl Clark's trial. *Solmonson*, 261 Mich App at 663-664. With respect to Darryl Clark's related condemnation of his trial counsel for not challenging Taschereau's or Henry's in-court identifications, counsel exercised sound trial strategy by choosing to pursue several defense theories other than a misidentification defense, and Darryl Clark cannot establish a reasonable likelihood that objections to the in-court identifications would have affected the outcome of his trial. *Id.*

#### B. PRIOR FELONY-FIREARM CONVICTION

Darryl Clark also maintains that trial counsel was ineffective for not objecting to the prosecutor's employment of a prior felony-firearm conviction to enhance his present felony-firearm sentence and the sentences for his other crimes. A felony information filed on August 25, 2010, identified Darryl Clark as a fourth habitual offender on the basis of three prior convictions dated May 2, 2001, one each for armed robbery, assault with intent to commit murder, and felony-firearm. The trial court thus correctly sentenced Darryl Clark to a five-year term of imprisonment for his second felony-firearm conviction. MCL 750.227b(1). The existence of Darryl Clark's three prior felony convictions likewise justified potential enhanced sentences for his present felonies in conformity with the plain language of MCL 769.12(1).

The only authority Darryl Clark offers is *People v Honeycutt*, 163 Mich App 757, 758; 415 NW2d 12 (1987), in which the defendant pleaded guilty of felonious assault, MCL 750.83, felony-firearm, and being a fourth habitual offender. The trial court enhanced the defendant's sentences for both felonious assault and felony-firearm because of his status as a fourth habitual offender. *Id.* In a case of first impression, this Court rejected that a "sentence for the felony-firearm conviction could be enhanced by the habitual offender statute based upon [the] defendant's prior convictions for felonies other than felony-firearm." *Id.* at 760. This Court examined the legislative purposes that prompted the enactments of "the felony-firearm statute and the . . . habitual offender statute[s]," during which it made the observation that "the Legislature was addressing separate and distinct problems and did not intend for the two statutes to cross paths." *Id.* at 761. However, the Court did not hold that a prior felony-firearm conviction could not be used to enhance a defendant's sentence pursuant to MCL 769.10, MCL 769.11, or MCL 769.12.

We conclude that Darryl Clark has not demonstrated any legal grounds to support an objection to either his felony-firearm (second offense) conviction, or to his fourth habitual offender status. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (noting that counsel need not advocate a meritless position).

### III. ACCOMPLICE TESTIMONY INSTRUCTIONS

In Docket Nos. 305552 and 305681, Darryl and Demetrius Clark both argue that the trial court erred by neglecting to give CJI2d 5.4 (the undisputed accomplice witness instruction), CJI2d 5.5 (the instruction applicable to a disputed accomplice witness), or CJI2d 5.6 (the cautionary instruction on accomplice testimony). After completing the final jury instructions, the trial court asked whether the parties wished to note “any objections or corrections to the jury instructions as read to the jury,” and counsel for both Darryl and Demetrius Clark declined. Darryl and Demetrius Clark thus waived any appellate claims concerning the propriety of the trial court’s instructions. *People v Carter*, 462 Mich 206, 208-209, 215; 612 NW2d 144 (2000).

Even if Darryl’s and Demetrius’s claims of instructional error were not waived, it has not been shown that any plain instructional error concerning accomplice Gonzales affected their substantial rights. *People v Young*, 472 Mich 130, 135, 143-144; 693 NW2d 801 (2005) (declining to find prejudice to the defendant’s substantial rights because the “prosecution presented evidence of guilt beyond the testimony of the alleged accomplices, . . . defense counsel thoroughly cross-examined [the alleged accomplices] and challenged their testimony during closing argument, thereby exposing their potential credibility problems to the jury,” and the trial “court also instructed the jury to consider any bias, prejudice, or personal interest that a witness might have”). The trial court properly instructed the jury in relevant part to consider whether the witnesses had “any bias, prejudice or personal interest in how this case is decided,” whether “any promises, threats, suggestions or other influences” affected the witnesses’ testimony, and whether the witnesses had “any special reason to tell the truth or any special reason to lie.” See *Young*, 472 Mich at 138. With respect to Gonzales, the court instructed the jury as follows after the prosecutor’s direct examination and during the final instructions:

You have heard testimony that a witness, Virginia Maria Gonzales, made an agreement with the prosecutor about charges against her in exchange for her testimony in this trial.

You have also heard evidence that Miss Gonzales faced the possibility of life in prison or any number of years up to life, but with the possibility of parole with guidelines of one hundred and eight months to one hundred and eighty months before the agreement.

Miss Gonzales was allowed to plead guilty to a five year felony with guidelines of zero to seventeen months or probation with one year in the Wayne County Jail after the agreement as a result of those charges. You are here to consider this evidence only as it relates to Miss Gonzales’ credibility and as it may tend to show Miss Gonzales’ bias or self interest.

Like CJI2d 5.6, the cautionary instruction twice given by the trial court brought home to the jury the potential credibility concerns regarding Gonzales's testimony on the basis of her plea agreement.<sup>5</sup>

Additionally, the prosecutor presented substantial evidence in addition to Gonzales's testimony to prove the guilt of Darryl and Demetrius Clark, including the testimony of Taschereau, Henry, and eyewitnesses to portions of the pursuit on May 8, 2010; several police officers who arrested Woods, discovered a handgun and Taschereau's wallet and cell phone in Woods's possession, and located Gonzales's Monte Carlo behind the Clarks' mother's residence; and physical evidence including Darryl Clark's fingerprint on a bottle located on the front passenger side of the Monte Carlo and Demetrius Clark's blood in the Monte Carlo's back seat. Over the course of three days at trial, the prosecutor questioned Gonzales at length and counsel for all three defendants cross-examined and recross-examined Gonzales, during which they touched on relevant topics including the following: Gonzales had a three-year friendship and ultimately romantic relationship with Darryl Clark; she picked up Darryl Clark from prison eight days before the Grayfield robbery took place; on May 8, 2010, even after learning of the plan to rob the house on Grayfield, she continued following Darryl Clark's directions about where to drop off Woods, repositioning the Monte Carlo, and speeding through mostly residential areas at approximately 70 miles per hour; her decision to turn herself in to the police and the less-than-candid statement she gave on May 9, 2010; her receipt of bail money from the Clarks, after which she spent weeks living with the Clark family and Darryl Clark impregnated her; her alleged motivation to implicate defendants when her personal relationship with Darryl Clark seemed unlikely to continue; and her acceptance of the prosecutor's offer that in exchange for her truthful testimony against defendants, she could plead guilty to being an accessory after the fact, and the prosecutor would dismiss charges of armed robbery, several assault counts, and first-degree home invasion. During closing arguments, all three defense attorneys further described Gonzales as a liar and otherwise attacked Gonzales's credibility, including on the basis of her plea agreement.<sup>6</sup>

#### IV. SCORING OF OFFENSE VARIABLE 9

Darryl Clark next argues that the trial court improperly assessed 10 points for offense variable 9 (OV 9) with respect to the armed robbery conviction because his crimes impacted two victims, Taschereau and Henry. We review for clear error a trial court's factual determinations with respect to the scoring of offense variables in the sentencing guidelines, and the factual

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<sup>5</sup> CJI2d 5.4 simply identifies the nature of an accomplice, and that the accomplice witness "has already been convicted of charges arising out of the commission of that crime." CJI2d 5.4(1)(a). CJI2d 5.5, describing a disputed accomplice, does not apply to this case. Here, the parties did not dispute that Gonzales had acted as an accomplice.

<sup>6</sup> With respect to Demetrius Clark's alternative argument that trial counsel was ineffective for failing to request accomplice witness instructions, we detect no reasonable likelihood that the outcome of the trial would have differed had counsel requested that the court read CJI2d 5.6. *Solmonson*, 261 Mich App at 663-664.

determinations “must be supported by a preponderance of the evidence.” *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

In MCL 777.39(1)(c), the Legislature authorized the assessment of 10 points if the sentencing offense involved “2 to 9 victims who were placed in danger of physical injury or death,” and zero points if “fewer than 2 victims . . . were placed in danger of physical injury or death,” MCL 777.39(1)(d). “Offense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise,” and “[t]he language of [MCL 777.39] . . . does not so provide.” *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009).

Darryl Clark invokes our Supreme Court’s decision in *McGraw* as the basis for his claim that the armed robbery only involved one victim. The Supreme Court in *McGraw*, 484 Mich at 135, made the following relevant observations:

In this case, the sentencing court scored OV 9 by including defendant’s conduct in fleeing from the police after his offense of breaking and entering an unoccupied building[, MCL 750.110], was completed. His flight from the police should not have been used in scoring OV 9. The sentencing court should have assessed zero points for OV 9 because no one was placed in danger during the breaking and entering.

Unlike the defendant in *McGraw*, Darryl Clark was convicted of armed robbery. MCL 750.529. The armed robbery statute, MCL 750.529, provides for a conviction when “[a] person . . . engages in conduct prescribed under section 530 and . . . in the course of engaging in that conduct, possesses a dangerous weapon.” The robbery statute, MCL 750.530, provides:

(1) A person who, in the course of committing a larceny of any money or other property that may be the subject of a larceny, uses force or violence against any person who is present, or who assaults or puts that person in fear, is guilty of a felony . . . .

(2) As used in this section, “*in the course of committing a larceny*” includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or *in flight or attempted flight after the commission of the larceny*, or in an attempt to retain possession of the property. [Emphasis added.]

The trial record reflects that the armed robbery occurred first and endangered one victim, Taschereau, and the assault of Henry took place during defendants’ flight from the robbery scene. Because more than a preponderance of the evidence established that defendants placed two people “in danger of physical injury or death” while the armed robbery remained ongoing, the trial court did not clearly err by assessing 10 points for OV 9. See also *People v Mann*, 287 Mich App 283, 286-287; 786 NW2d 876 (2010) (finding proper a scoring of OV 9 that took into account a victim the defendant placed in danger while fleeing from an armed robbery).

## V. SUFFICIENCY OF THE EVIDENCE

In Docket No. 305601, Krystal Clark challenges the sufficiency of the evidence supporting her convictions of aiding and abetting the armed robbery and assault on Henry.

### A. STANDARD OF REVIEW

We review the evidence in a light most favorable to the prosecution to determine whether any rational trier of fact could have found 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). “It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

“[W]hether alleged conduct falls within the scope of criminal law is a question of law subject to review de novo.” *People v Cassadime*, 258 Mich App 395, 398; 671 NW2d 559 (2003).

### B. AIDING OR ABETTING

MCL 767.39 authorizes a defendant’s conviction if she aided or abetted the commission of a charged crime. The statute provides:

Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

To support Krystal Clark’s convictions pursuant to an aiding and abetting theory of guilt, the prosecutor was required to show that (1) she or some other person committed the crime charged; (2) she performed acts or offered encouragement that assisted the crime’s commission; and (3) either (a) at the time that she gave aid and encouragement, she possessed the requisite intent necessary to support her conviction of the charged crime as a principal or knowledge that the principal intended the commission of the charged crime, or (b) “the criminal act committed by the principal is an incidental consequence which might reasonably be expected to result from the intended wrong.” *People v Robinson*, 475 Mich 1, 6, 9; 715 NW2d 44 (2006) (internal quotations and citation omitted); see also *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001). “An aider and abettor’s state of mind may be inferred from all the facts and circumstances.” *People v Carines*, 460 Mich 750, 758; 597 NW2d 130 (1999) (citation omitted).

“To place the issue of aiding and abetting before a trier of fact, the evidence need only tend to establish that more than one person committed the crime, and that the role of a defendant charged as an aider and abettor amounts to something less than the direct commission of the offense.” *People v Vaughn*, 186 Mich App 376, 382; 465 NW2d 365 (1990). “The phrase ‘aids or abets’” encompasses “any type of assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite the commission of that crime.” *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004). “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.” *Id.* at 71. “[W]hether the defendant performed acts or gave encouragement that assisted” “must be determined on a case-by-case basis.” *Id.* (internal quotation and citations omitted).

### C. ARMED ROBBERY

This Court in *People v Gibbs*, 299 Mich App 473, 490-491; 830 NW2d 821 (2013), summarized the elements necessary to sustain a conviction of armed robbery, MCL 750.529:

“(1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, . . . possessed a dangerous weapon . . . .” [Citation omitted.]

“[I]n the course of committing a larceny” “includes acts that occur in an attempt to commit the larceny, or during the commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.” MCL 750.530(2). With respect to the larceny component of the statute defining both armed robbery and unarmed robbery in MCL 750.530, the elements of larceny consist of (1) “an actual or constructive taking of goods or [personal] property,” (2) “a carrying away or asportation” of the property, (3) “with a felonious intent,” and (4) “without the owner’s consent.” *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999). Felonious intent means a “specific intent to steal another person’s property.” *Id.*; see also *Harverson*, 291 Mich App at 177.

Gonzales testified that on May 8, 2010, she drove Darryl and Demetrius Clark and Woods to Krystal Clark’s house, that Krystal Clark started driving her silver van, and that Gonzales followed the van at Darryl Clark’s direction to a bar parking lot on Grayfield. In Gonzales’s presence, Darryl Clark conversed with Krystal Clark, and Gonzales heard Krystal Clark say, “[T]he house was across the street on the corner; that there was a lot of money in this house and suppose [sic] to be drugs in this house,” something Krystal Clark reportedly had heard from her children’s father. Krystal Clark pointed toward the house. Gonzales then heard Darryl Clark question whether Krystal Clark “knew what actually was in the house,” to which Krystal Clark responded “that there was enough money for them to get out of Detroit if they got in there.” According to Gonzales, Krystal Clark and the silver van stayed in the parking lot, while Gonzales dropped off Woods in an alley and navigated the Monte Carlo to Grayfield near its intersection with Fenkell. From the Fenkell-Grayfield intersection, Gonzales watched Darryl and Demetrius Clark go inside the house down the block on Grayfield, then noticed that Krystal Clark had moved her silver van to the same intersection. Taschereau testified about the three men who broke into the house on Grayfield, Darryl Clark and Woods pointing handguns at his head, and eventually leaving with personal property.

Gonzales recounted that she saw all three men leave the house, run toward the Monte Carlo and the silver van, Woods get into the silver van, and Darryl and Demetrius Clark get inside the Monte Carlo. Gonzales then drove her Monte Carlo in pursuit of Krystal Clark, who was driving the silver van. Henry testified that while stopped in traffic at the intersection of

Fenkell and Grayfield, he saw four or five African-American men run across Fenkell, one or two of the men get inside a silver Chevrolet Venture stopped in traffic in front of his Suburban, and the other two or three get inside a black Monte Carlo parked on Grayfield. Henry observed the silver van speed away north on Grayfield and the Monte Carlo follow the silver van, so Henry began following the van and the Monte Carlo. Henry testified that he lost sight of the silver van, but remained behind the Monte Carlo for approximately 15 minutes as it sped through residential neighborhoods. Henry remembered seeing the silver van later during his pursuit of the Monte Carlo “parked at the corner of Schoolcraft and Rosemont.”

Police officers recovered Taschereau’s cell phone from Woods. Taschereau testified that after the theft of his cell phone, someone had accidentally called his daughter and left her a voicemail, which police officers played for Taschereau and the prosecutor played for the jury. Taschereau described that he heard the sounds of “scuffling in the background,” but could understand the declaration, “[W]e got the safe, we got the safe.” Gonzales identified the female voice on the recording as Krystal Clark’s voice.

A rational jury could have found beyond a reasonable doubt that Krystal Clark aided and abetted Darryl and Demetrius Clark and Woods in committing an armed robbery. Before the crime, Krystal Clark encouraged the Clarks and Woods to commit the armed robbery. She pointed out the house on Grayfield and her belief regarding what valuables the house contained. The jury could reasonably infer Krystal Clark’s larcenous intent while pointing out the Grayfield house on the basis of her comment about potentially finding “enough money for them to get out of Detroit if they got in there.” Abundant other evidence established that Darryl and Demetrius Clark and Woods went inside the house on Grayfield, assaulted Taschereau with handguns, and took personal property. Furthermore, Krystal Clark parked the silver van near Gonzales’s Monte Carlo within eyesight of the robbery target, awaited Woods’s entry into the van, and sped away from the robbery scene. *People v Norris*, 236 Mich App 411, 419-422; 600 NW2d 658 (1999) (finding the evidence sufficient to support an armed robbery conviction under an aiding and abetting theory where a store worker saw the defendant enter the store with several other men and leave, and other witnesses testified to their observations of a getaway car driven by the defendant). Viewed in a light most favorable to the prosecution, the evidence was sufficient to sustain Krystal Clark’s conviction of aiding and abetting the armed robbery on Grayfield.

#### D. ASSAULT OF HENRY

The evidence was also sufficient to prove beyond a reasonable doubt that Krystal Clark aided and abetted the assault on Henry. A conviction of assault with intent to do great bodily harm less than murder, MCL 750.84(1)(a), requires the prosecutor to prove that the defendant committed “an assault, i.e., an attempt or offer with force and violence to do corporal hurt to another coupled with (2) a specific intent to do great bodily harm less than murder.” *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325, amended 453 Mich 1204 (1996).

The testimony of Gonzales and Taschereau established that Woods had a handgun when he pushed his way inside the house on Grayfield. The testimony of Gonzales and Henry established that Krystal Clark drove Woods away from the robbery scene; Gonzales drove Darryl and Demetrius Clark away from the robbery scene; Darryl and Demetrius Clark fired guns at Henry from the Monte Carlo; Darryl and Demetrius Clark called Woods from the Monte Carlo to

ask for assistance because they had spent their ammunition; and Woods appeared twice in the area of Rosemont and Schoolcraft to fire at Henry's Suburban, the same area in which Henry had spotted the silver van later in his pursuit of the Monte Carlo. A police officer resident of Rosemont testified that he heard something that sounded like rocks striking his house, looked outside and saw a black Suburban and a car driving down the street; he also observed a man directly across the street "trying to unjam" a gun, the same man make a phone call, and walk toward a white or grey Chevrolet Venture van, which the man with the gun eventually waved away after the sound of police sirens became audible. The reasonable inferences arising from this evidence are that Krystal Clark assisted in Woods's shooting at Henry by spiriting him away from the armed robbery scene and dropping off Woods near Rosemont and Schoolcraft. In light of the evidence that Woods possessed a handgun during the armed robbery and after his arrest, and that Darryl and Demetrius Clark contacted Woods to request assistance after running out of ammunition, reasonable inferences also establish that at the time Krystal Clark dropped off Woods, she knew that Woods intended to assault Henry and inflict great bodily harm.

The jury also could have found Krystal Clark guilty of aiding and abetting Woods's assault on Henry as "a natural and probable consequence" of her participation in the armed robbery. *Robinson*, 475 Mich at 15. The evidence was sufficient to prove beyond a reasonable doubt that Krystal Clark helped plan the armed robbery in which Darryl Clark and Woods used guns, awaited Woods's return to her silver van and Darryl and Demetrius Clark's return to Gonzales's Monte Carlo, was present when Darryl Clark fired gunshots just before getting into the Monte Carlo, led Gonzales in the high-speed attempt to escape through residential areas, and eventually dropped off Woods on Rosemont where he twice shot at Henry. The principals' use of multiple firearms and Krystal Clark's initiation of the high-speed chase through residential neighborhoods allowed the jury to find beyond a reasonable doubt that the assault on Henry "came within the common enterprise [Krystal Clark] aided" because the shooting at Henry "might be expected to happen if the occasion should arise within the common enterprise of" the armed robbery. *Id.* at 11 (internal quotation and citation omitted).<sup>7</sup>

## VI. CJI2d 8.3

In Docket No. 305601, Krystal Clark argues that the trial court should have instructed the jury, in conformity with CJI2d 8.3, that it could not convict her of the assault on Henry because the record did not prove that she intended to assist anyone in committing that separate crime. As discussed in Issue V, *supra*, the evidence was sufficient to prove beyond a reasonable doubt that Krystal Clark aided and abetted Woods's assault of Henry as "a natural and probable consequence of" her participation in the armed robbery. *Robinson*, 475 Mich at 15. The principals' use of multiple firearms and Krystal Clark's initiation of the high-speed chase through residential neighborhoods also allowed the jury to find beyond a reasonable doubt that the assault on Henry "came within the common enterprise [Krystal Clark] aided." *Id.* Because the evidence established that the shooting at Henry while in flight constituted a natural and

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<sup>7</sup> Because the record supports both of Krystal Clark's convictions, we need not consider her suggestion to remand for resentencing in the event this Court vacates one conviction.

probable consequence of the armed robbery, the trial court acted within its discretion by determining that CJI2d 8.3 “does not apply to the facts of record.” See *People v Hartuniewicz*, 294 Mich App 237, 242; 816 NW2d 442 (2011).

## VII. NEWLY DISCOVERED EVIDENCE

In Docket No. 305601, Krystal Clark argues that the trial court erred by denying her motion for a new trial on the basis of newly discovered evidence regarding falsehoods by Gonzales. We review for an abuse of discretion a trial court’s ruling on a motion for a new trial. *People v Terrell*, 289 Mich App 553, 558; 797 NW2d 684 (2010). “An abuse of discretion occurs when the trial court’s decision” falls “outside the range of principled outcomes.” *Id.* at 559. We review for clear error the trial court’s factual findings. *Id.*

“On the defendant’s motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes the verdict has resulted in a miscarriage of justice.” MCR 6.431(B). A trial court may grant a new trial

on the basis of newly discovered evidence when the defendant satisfies a four-part test: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. [*Terrell*, 289 Mich App at 559 (internal quotations and citations omitted).]

The trial court conducted an evidentiary hearing to address Krystal Clark’s contentions that Gonzales had disclosed to two jail inmates, Lakeisha Lawson and Michelle Renaud, that she fabricated her trial testimony. The court heard testimony from Gonzales, Lawson, Renaud, and Krystal Clark’s mother. The court found that neither Lawson nor Renaud could offer “any specificity as to what supposedly [Gonzales] had lied concerning,” while Gonzales “maintained the testimony that she gave at the time of the trial” was “factually accurate, truthful,” and unmotivated by prosecutorial coercion. With respect to Gonzales’s credibility, the court found that “the credibility of Ms. Gonzales by far and away outweighs the testimony of Ms. Lawson and Ms. Renaud,” in part because Krystal Clark, Lawson, and Renaud “were jointly housed in . . . the Huron Valley Women’s Correctional Facility,” which “provided ample time for all three people to ostensibly conspire with each other and exchange information with each other in an effort to negate the adverse jury verdict that had been found against . . . Krystal Clark.” The court opined “that Ms. Lawson’s testimony and Ms. Renaud’s testimony were trumped up” or “suggested at the very minimum by . . . Krystal Clark.” The court denied the motion because the testimony of Lawson and Renaud “would provide nothing to . . . support[] the defense of [Krystal Clark] in regard to this case, and . . . the outcome of this trial would . . . not have been any different than what was ultimately arrived at by the jury.”

The court did not clearly err in its findings of fact, all of which had ample support in the evidentiary hearing testimony. We conclude that the trial court did not abuse its discretion by denying Krystal Clark’s motion for a new trial because Krystal Clark could not substantiate her claim that the allegedly new evidence would have made “a different result probable on retrial.” *Id.*

## VIII. SUBSTITUTION OF COUNSEL

In Docket No. 305681, Demetrius Clark argues that the trial court erred by denying his pretrial motion for substitute counsel, and inexcusably did not investigate the reasons underlying his dissatisfactions with appointed counsel. We review for an abuse of discretion the “trial court’s decision regarding substitution of counsel.” *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

“An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic.” [*Id.* (internal quotation and citation omitted).]

“A mere allegation that a defendant lacks confidence in his or her attorney, unsupported by a substantial reason, does not amount to adequate cause. Likewise, a defendant’s general unhappiness with counsel’s representation is insufficient.” *People v Strickland*, 293 Mich App 393, 398; 810 NW2d 660 (2011).

Because the record reveals that the trial court invited Demetrius Clark to elaborate on his complaints concerning his appointed counsel, we reject his “claim that the trial court failed to adequately inquire into the nature of the breakdown of the attorney-client relationship.” *Strickland*, 297 Mich App at 397. Some of Demetrius Clark’s complaints about trial counsel embodied general expressions that he lacked confidence in, or felt unhappy with, his appointed attorney, which do not give rise to adequate cause for substitution. *Id.* at 398. With respect to Demetrius Clark’s protestations that trial counsel “ain’t [sic] doing right for my case,” “ain’t [sic] doing nothing [sic] for me,” “ain’t [sic] helping me on nothing [sic],” and “ain’t [sic] came to see me or none of that [sic],” these nonspecific assertions also do not substantiate any “legitimate difference of opinion” with regard to a fundamental trial tactic. *Id.* at 397. Furthermore, the record fails to disclose any inadequacy of representation, absence of diligence, or disinterest on the part of Demetrius Clark’s appointed counsel. *People v Ginther*, 390 Mich 436, 441-442; 212 NW2d 922 (1973). On the contrary, the record establishes that Demetrius Clark’s trial counsel vigorously cross-examined the prosecutor’s witnesses and pursued several reasonable defense strategies. We therefore reject this claim of error.

Affirmed.

/s/ Donald S. Owens

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra