

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ORLANDO RASHOUD GLOVER,

Defendant-Appellant.

UNPUBLISHED

April 12, 2005

No. 251874

Wayne Circuit Court

LC No. 03-007903-01

Before: Donofrio, P.J., and Murphy, and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for armed robbery, MCL 750.529. Defendant was sentenced to thirty months' to ten years' imprisonment for his conviction. On appeal, defendant challenges the sufficiency of the evidence presented at trial and argues that he was denied a fair trial due to prosecutor misconduct and ineffective assistance of counsel. Also, arguing in *propria persona*, defendant claims the verdict was against the great weight of the evidence and that inconsistent testimony denied him a fair trial. Because the record does not support any of defendant's arguments, we affirm.

This case stems out of an altercation that occurred on June 21, 2003. Deron Dunson testified that on that evening he was playing dice in an alley with approximately eleven other men when defendant and two other men interrupted the game. Dunson stated that defendant and another unidentified man pointed pistols at him while a third man known as "Black Bill" walked directly up to him, punched him in the face a few times causing him to bleed, and then took about \$200 out of his pocket. Dunson was able to escape by spinning away from Black Bill and fast-walking away down the alley where he ran into police.

The police asked Dunson what was wrong with him because he was bleeding from a cut over his eye. Dunson relayed to the police what happened and pointed out a van that was driving down the street as belonging to one of the men that had just robbed him. The police directed Dunson to go home and then seek medical attention for his injuries. The police searched for the identified van and located it shortly after parked near a field. Defendant was walking through the field near the van when the police apprehended him. Defendant did not have a gun on him and the police never found a gun. The police escorted defendant to the police station where Dunson picked him out of a line-up the following day.

Defendant was thereafter charged with both armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The jury found defendant guilty of armed robbery but acquitted him of the felony-firearm charge. As of the time of trial, the other two suspects in the crime had not been apprehended.

Defendant argues that prosecutorial misconduct denied him a fair trial. This Court reviews claims of prosecutorial misconduct by examining the remarks in context to determine whether the remarks denied defendant a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Because defendant failed to object to the prosecutor's conduct below, we review his unpreserved claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

Defendant argues that the prosecutor engaged in misconduct when he distorted the burden of proof in his closing argument. Specifically, defendant alleges that a lengthy statement by the prosecutor including the phrase, "somebody lied to you up there," improperly implied that the jurors had to decide whether to believe either defendant or the prosecution and invited the jury to disbelieve defendant's theory of the case and prove himself innocent. However, our Supreme Court has stated that "[a]lthough a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof." *People v Fields*, 450 Mich 94, 115 ; 538 NW2d 356 (1995). "When a defense makes an issue legally relevant, the prosecutor is not prohibited from commenting on the improbability of the defendant's theory or evidence." *Id.*, at 116. In light of the fact that defendant's version of the incident was wholly different from the prosecution's version, the prosecutor's comments regarding the fact that some of the witnesses had to be lying did not improperly shift the burden of proof to defendant.

Defendant also argues that large portions of the prosecutor's closing statement amounted to improper vouching. A prosecutor may not ask the jury to convict a defendant on the basis of the prosecutor's personal knowledge or the prestige of his office, *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995), nor may a prosecutor vouch for the credibility of witnesses to the effect that he has some special knowledge concerning a witness' truthfulness. *Bahoda, supra*, 448 Mich 276. A prosecutor may, however, argue from the facts that the defendant or another witness is not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

We have reviewed the challenged remarks, and when we consider them in context and evaluate them in light of defense arguments and their relationship to the evidence presented at trial, we conclude that no error occurred. It was defense counsel's theory of the case that Dunson lied about the circumstances of the altercation and he should not be believed. The prosecution was rebutting the defense theory of the case that Dunson lied, and argued that based on the facts, Dunson should be believed and that in fact it was defendant who lied. The prosecutor's remarks were not inappropriate because the comments were no more than a response to defense counsel's theory of the case and related argument. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). Further, a review of the challenged comments reveals that the prosecution was arguing that the facts and evidence taken as a whole demonstrated that either

Dunson or defendant was lying and that it was the prosecutor's theory that based on the evidence, Dunson was credible. Accordingly, the prosecution did not improperly vouch for the credibility of the victims. *Launsburry, supra*, 217 Mich App 361.

Additionally, we note that the trial court instructed the jury that the arguments and comments of the lawyers were not evidence, thereby dispelling any prejudice. *Bahoda, supra*, 448 Mich 281. Consequently, we find no error requiring reversal with respect to the prosecutor's comments at closing argument. Further, counsel was not ineffective for failing to challenge the prosecutor's comments during closing argument because counsel is not required to raise meritless or futile objections. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

Defendant also argues that there was insufficient evidence to convict him of armed robbery because the prosecutor failed to establish that he aided in the crime. A challenge to the sufficiency of the evidence is reviewed de novo and in a light most favorable to the prosecution to determine whether any rational factfinder could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002); *People v Knowles*, 256 Mich App 53, 57-58; 662 NW2d 824 (2003).

Defendant was prosecuted in this case under a theory of aiding and abetting the as yet unidentified perpetrators. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. *People v Mass*, 464 Mich 615, 627-628; 628 NW2d 540 (2001). This Court set forth the following requirements necessary to prove a crime under an aiding and abetting theory:

To support a finding that a defendant aided and abetted a crime, the prosecution must show that (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 he gave aid and encouragement. [*People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001).]

The elements of armed robbery are: (1) an assault, and (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute, MCL 750.529. *People v Rodgers*, 248 Mich App 702, 707; 645 NW2d 294 (2001).

Defendant argues that the evidence, even while viewed in the light most favorable to the prosecution establishes that defendant was merely present at the altercation and does not support a conviction for armed robbery. In this case where there are two separate versions of the facts, viewing the evidence in the light most favorable to the prosecution requires us to accord Dunson's testimony with credibility rather than defendant's testimony. Dunson testified that while Black Bill punched him repeatedly in the face and removed \$200 from his pocket, defendant stood close by with a pistol pointed at Dunson's hip. A further review of the record reveals that both defendant and defense witness Steven King testified that they went to find and confront Dunson in the alley during the craps game because King stated that Dunson had stolen \$35 from him earlier in the day. Contrary to defendant's assertions, when reviewing the evidence in the light most favorable to the prosecution, we conclude the prosecutor presented

sufficient evidence for a rational factfinder to conclude that defendant aided and abetted in the armed robbery.

Defendant also points out that he was also charged with felony-firearm, MCL 750.227b in this case, but the jury did not find him guilty of felony-firearm while at the same time convicting him of armed robbery. Defendant argues that the evidence adduced at trial, that defendant held a gun on Dunson while Black Bill punched him and took his money from his pocket, does not allow for a conviction for armed robbery as an aider and abettor, as well as a finding of not guilty for felony-firearm. As a result, on appeal, defendant asserts that the jury reached an inconsistent verdict when it ultimately convicted defendant of armed robbery and acquitted him of felony-firearm.

A jury is not held to any rules of logic and may render inconsistent verdicts. *People v Goss (After Remand)*, 446 Mich 587, 597; 521 NW2d 312 (1994). We find no error.

Finally, defendant has filed a supplemental brief pursuant to Administrative Order No. 2004-6 (Standard 4) replacing Administrative Order No. 1981-7 (Standard 11). Defendant first argues that his armed robbery conviction was against the great weight of the evidence. Because defendant did not move for a new trial based on the great weight of the evidence below, review of this question is only for plain error affecting defendant's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

The test for whether a verdict is against the great weight of the evidence is if "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Musser, supra*, 259 Mich App 218-219. In *Musser*, this Court held that defendant failed to show plain error affecting his substantial rights with regard to whether his convictions were against the great weight of the evidence because it could not state "that the complainant's testimony was deprived of all probative value or that the jury could not have believed it, or that the testimony contradicted indisputable physical facts or defied physical realities." *Id.*, at 219.

At trial, Dunson clearly testified that defendant and another man pointed pistols at him while Black Bill assaulted him and robbed him of \$200. In fact, defendant himself testified that he and others went looking for Dunson in order to confront him to retrieve King's \$35. Defendant eventually found Dunson in the alley playing craps and clearly an altercation ensued. Although defendant's testimony is at odds with Dunson's testimony, this case does not involve circumstances in which Dunson's testimony was blatantly incredible so as to be deprived of all probative value, unreasonable for the jury to believe, or contrary to indisputable physical facts or realities. Therefore, we cannot conclude that defendant's conviction was against the great weight of the evidence.

Defendant also argues that a portion of Officer David Kline's testimony given at trial was inconsistent and denied him a fair trial. Defendant specifically points to Kline's testimony that he did not arrest defendant immediately upon seeing him in the field near the van, and that neither Kline, nor his partner, Officer Alfred Thomas read him his rights after he was arrested and placed in the police car. Defendant claims that these were inconsistent statements but does not state what statement or prior testimony they were inconsistent with, or how they were inconsistent. Defendant also makes the bald assertion that the testimony at issue was false but

does not support that assertion with any citation to the record or any other evidence. Because a defendant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, we find no error. *People v Hermiz*, 235 Mich App 248, 258; 597 NW2d 218 (1999).

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Stephen L. Borrello