

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DESVON MITCHELL,

Defendant-Appellant.

UNPUBLISHED
October 13, 1998

No. 200621
Detroit Recorder's Court
LC No. 96-003688

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERVARUS GILES,

Defendant-Appellant.

No. 200622
Detroit Recorder's Court
LC No. 96-003688

Before: Gage, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Defendants appeal as of right their jury trial convictions for carjacking, MCL 750.529a; MSA 28.797(a), and assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. Defendant Giles also appeals as of right his additional conviction for possession of a firearm during the commission of a felony. MCL 750.227b; MSA 28.424(2). Defendant Mitchell was sentenced to concurrent terms of four to fifteen years' imprisonment for the carjacking conviction, and three to ten years' imprisonment for the assault conviction. Defendant Giles was sentenced to concurrent terms of five to fifteen years' imprisonment for the carjacking conviction and three to ten years' imprisonment for the assault conviction, and a consecutive two-year term for the felony-firearm conviction. We affirm.

First, defendant Mitchell argues that the evidence was insufficient to convict him of carjacking because it merely established that he was present at the scene of the carjacking. We disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). An aider and abettor's state of mind may be inferred from all the facts and circumstances. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). Moreover, factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Id.* at 569. When viewed in a light most favorable to the prosecution, the evidence presented by the prosecution in this regard was sufficient to enable the jury to conclude beyond a reasonable doubt that defendant Mitchell knowingly aided and abetted in the carjacking.

Defendant Mitchell next argues that his attorney was ineffective for failing to present an alibi defense and for giving misleading advice regarding his right to testify. He also argues that the trial court erred in failing to ascertain whether he validly waived his right to testify. We disagree on both counts. The trial court had no obligation to ascertain on the record whether defendant was waiving his Fifth Amendment right to testify or determine whether any waiver was knowing and intelligent. *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991). Regarding the claim of ineffective assistance of counsel, the record discloses that defendant Mitchell announced on the record that he was waiving his right to testify and that he would not be presenting an alibi defense. He cannot be allowed "to harbor error as an appellate parachute." *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991). On this record, the presumption of effective assistance has not been overcome. See *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant Giles argues that the trial court should have suppressed the complainant's lineup identification because the lineup was impermissibly suggestive. He further complains that he was not allowed to call the complainant to testify at the suppression hearing. We disagree on both counts. A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995). The disparity in height and weight between defendant and the other lineup participants in this case was not grounds to exclude the identification. Physical differences between a defendant and other lineup participants goes to the weight the trier of fact should give to the identification and not its admissibility. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). Similarly, defendant sought to call the complainant for the sole purpose of attacking his credibility, which is a line of questioning relevant only to the weight of the identification and which defendant was permitted to pursue at trial. Because defendant has not proffered a basis for excluding the identification evidence, we find that the trial court did not commit clear error in deciding to admit the identification.

Defendant Giles next argues that the trial court abused its discretion in allowing a police officer to vouch for the complainant's credibility. We disagree. The decision whether to admit or exclude evidence is within the trial court's discretion. *People v Underwood*, 184 Mich App 784, 786; 459 NW2d 106 (1990). After reviewing the instances of alleged vouching identified in defendant's brief, we

conclude that the officer did not in fact give an opinion as to the complainant's credibility. Compare *People v Smith*, 158 Mich App 220, 230; 405 NW2d 156 (1987). Therefore, there was no abuse of discretion.

Defendant Giles also argues that the trial court abused its discretion in allowing the prosecutor to introduce into evidence a stocking mask recovered from a codefendant.¹ We disagree. The mask was relevant in connecting defendant with the carjacking and was part of the *res gestae* of Giles' and the codefendant's arrest. MRE 401. Moreover, its probative value was not substantially outweighed by the danger of unfair prejudice. MRE 403. Further, given the strength of the evidence presented against defendant Giles, any error in the admission of the evidence was harmless because it is highly probable that, in light of the strength and weight of untainted evidence against defendant Giles, the admission of the mask did not contribute to the verdict. See *People v Harris*, 458 Mich 310, 320; ___ NW2d ____.

Last, defendant Giles argues that the sentencing court abused its discretion in failing to resolve his challenge to the scoring of OV 9, and in imposing a disproportionate sentence. We again disagree. The proportionality argument is without merit because defendant's sentences are within the sentencing guidelines' recommended minimum sentence range and defendant failed to present any unusual circumstances to overcome the presumption of proportionality. See *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Further, appellate relief is not available for the alleged misscoring of the guidelines, *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997), nor would it be warranted in this case because defendant concedes that the alleged scoring error would not affect his offense variable level placement. See *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

Affirmed.

/s/ Hilda R. Gage
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra

¹ The mask was found on codefendant DuJuan Starkey, who pleaded *nolo contendere* to the original charge of assault with intent to murder.