STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY PATTERSON,

Defendant-Appellant.

UNPUBLISHED
September 18, 1998

No. 199246
St. Clair Circuit Court
LC No. 96-001371 FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUSTIN ROSE,

Defendant-Appellant.

No. 199250
St. Clair Circuit Court
LC No. 96-001372 FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELISSA F. GREAUX,

Defendant-Appellant.

No. 199314
St. Clair Circuit Court
LC No. 96-001370 FC

Before: Corrigan, C.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

In these consolidated appeals, defendants Patterson and Rose, in docket nos. 199246 and 199250, respectively, were both convicted of six counts: assault with intent to commit murder, MCL 750.83; MSA 28.278, armed robbery, MCL 750.529; MSA 28.797, conspiracy to commit first-degree premeditated murder, MCL 750.157a; MSA 28.354(1), MCL 750.316; MSA 28.548, conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1), MCL 750.529; MSA 28.797, receiving and concealing stolen firearms, MCL 750.535; MSA 28.803, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). In docket no. 199314, defendant Greaux was convicted of three counts: conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1), MCL 750.529; MSA 28.797, aiding and abetting armed robbery, MCL 767.39; MSA 28.979, MCL 750.529; MSA 28.797, and aiding and abetting an assault with intent to commit murder, MCL 767.39; MSA 28.979, MCL 750.83; MSA 28.278.

For his convictions, defendant Patterson received the following concurrent sentences: parolable life for the assault conviction, forty to sixty years' imprisonment for armed robbery, parolable life for the conspiracy to commit murder conviction, twenty to sixty years for conspiracy to commit armed robbery, and six to ten years in prison for the receiving and concealing conviction. Defendant Patterson also received a two-year consecutive sentence for the felony-firearm conviction. For his convictions, defendant Rose was sentenced to forty to sixty-five years in prison for the assault conviction, thirty to sixty years for the armed robbery conviction, parolable life for conspiracy to commit murder, twenty to sixty years for the conspiracy to commit armed robbery conviction, and six to ten years for the receiving and concealing conviction. Defendant Rose also received a two-year consecutive sentence for felony-firearm. Defendant Greaux received fifteen to twenty-five years in prison for conspiracy to commit armed robbery, fifteen to twenty-five years for the aiding and abetting armed robbery conviction, and parolable life for aiding and abetting an assault with intent to commit murder. On defendants' appeals by right, we affirm all defendants' convictions, but remand for resentencing of defendants Patterson and Rose.

Docket No. 199246

I

Defendant Patterson first argues that the trial court abused its discretion in denying his motion for severance because his defense theory was hostile to that of his co-defendants. We disagree. To the extent that defendant Patterson is asserting the severance argument with regard to defendant Rose, the issue is not preserved for our review because defendant Patterson requested severance from defendant Greaux at the motion hearing. He specifically stated that severance from defendant Rose was not being requested. *McCready v Hoffius*, 222 Mich App 210, 218; 564 NW2d 493 (1997), lv gtd 457 Mich 851; 577 NW2d 692 (1998). With regard to defendant Patterson's motion for severance from defendant Greaux based on antagonistic defenses, the trial court did not abuse its discretion in denying the motion.

Pursuant to MCL 768.5; MSA 28.1028 and MCR 6.121(D), the decision to sever or join defendants lies within the discretion of the trial court. *People v Hana*, 447 Mich 325, 331; 524 NW2d

682 (1994), amended in part sub nom *People v Rode; People v Gallina*, 447 Mich 1203 (1994). Inconsistency of defenses is not enough to mandate severance, but, rather, the defenses must be "mutually exclusive" or "irreconcilable" to the extent that "a jury would have to believe one defendant at the expense of the other." *Hana, supra* at 349.

As presented in an affidavit, the core of defendant Greaux's defense was that she did not have the intent to commit any crimes nor the knowledge that any crimes were going to occur. This defense is not mutually exclusive of or irreconcilable with defendant Patterson's proffered defense that he either was not there, or even if he was, he did not commit the crimes. Greaux's claim that she drove co-defendants Patterson and Rose to the store on the night in question concerns a collateral matter that is not part of her basic defense.

Although defendant Patterson repeatedly refers to various testimony and incidents that occurred during the trial to support his argument that his motion for severance should have been granted, the decision regarding joinder or severance is exercised before trial; thus, appellate review must focus on "what the trial court was made aware of by defense counsel before the trial began, rather than on what actually happened during trial." *People v Gibbs*, 120 Mich App 485, 489; 328 NW2d 65 (1982). Moreover, the trial court instructed the jury concerning reasonable doubt and the determination of guilt or innocence on an individual basis. These same cautionary instructions given in *Hana, supra* at 356, were a factor that aided our Supreme Court in concluding that the trial court properly denied the defendant's motion for severance.

II

Defendant Patterson next argues that the evidence was insufficient to sustain his convictions. We disagree. Defendant makes a blanket assertion of insufficient evidence to support his six convictions, but fails to set out the elements of the offenses and state how the evidence failed to support the elements. A party may not merely announce his position and leave it to this Court to discover and rationalize the basis for the claim. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997).

In any event, viewing the evidence in the light most favorable to the prosecutor, a rational trier of fact could have found that the essential elements of the crimes were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Although defendant argues that there was a lack of physical evidence (e.g., fingerprints) linking him to the crime scene, a vast amount of circumstantial evidence was presented in this case to link defendant to the crimes. Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). Numerous witnesses testified regarding defendant's planning of the robbery about a week before the robbery occurred, defendant's statement that guns were needed for the robbery so that no witnesses would be left behind, defendant's participation in stealing the guns prior to the robbery and hiding the guns thereafter, and defendant's admission after the crimes that he had robbed the store and had shot the store employee. Moreover, another witness identified

defendant Patterson as one of the two people she saw behind the counter in the store on the night of the robbery and shooting.

In addition, defendant complains that the testimony of many witnesses was "replete with lies" and "highly unreliable" because these witnesses were either not charged, or were convicted of lesser charges and sentenced as juveniles in exchange for their testimony. Although some of the witnesses did receive either lesser convictions, no convictions, or were sentenced as juveniles rather than adults, other witnesses not so treated also gave testimony linking defendant to the crimes. Moreover, the jury heard testimony regarding what witnesses received in exchange for their testimony and the credibility of such witnesses' testimony was properly left to the jury. *Wolfe, supra* at 514-515.

III

Defendant Patterson also argues that the trial court erred in denying his request for a jury instruction of the lesser included offense of theft of a firearm. Because defendant fails to analyze whether the offense of theft of a firearm is a lesser offense of receiving and concealing a stolen firearm, we need not consider this argument. *Meagher v Wayne State Univ*, 222 Mich App 700, 716, 718, 719; 565 NW2d 401 (1997) (a party cannot merely announce a position and present only cursory treatment of an issue in the appellate brief). The trial court properly denied defendant's request for a jury instruction on theft of a firearm because this offense is neither a necessarily included lesser offense nor a cognate lesser included offense of receiving and concealing a stolen firearm. *People v Hendricks*, 446 Mich 435, 442-444; 521 NW2d 546 (1994); *People v Ora Jones*, 395 Mich 379, 386-390; 236 NW2d 461 (1975).

IV

Defendant Patterson argues that the trial court abused its discretion in sentencing him as an adult rather than a juvenile. Because the trial court failed to hold a hearing to determine whether defendant should be sentenced as an adult or a juvenile pursuant to MCL 769.1(3); MSA 28.1072(3) and MCR 6.931, we vacate defendant's sentences and remand.

The circuit court had jurisdiction over defendant, who was sixteen years old at the time of the offenses, because two of the offenses of which he was charged, assault with intent to murder and armed robbery, fell within the enumerated offenses listed in the automatic waiver statute. MCL 600.606; MSA 27A.606. Because the circuit court obtained jurisdiction over defendant under the automatic waiver statute, the circuit court was required to hold a dispositional hearing pursuant to MCL 769.1(3); MSA 28.1072(3). *People v Cosby*, 189 Mich App 461, 465; 473 NW2d 746 (1991). However, the court sentenced defendant as an adult rather than a juvenile without holding a hearing and examining the criteria listed in MCL 769.1(3); MSA 28.1072(3) and MCR 6.931(E)(3).[1] Thus, we vacate defendant's sentences and remand for a hearing to examine the criteria listed in MCL 769.1(3); MSA 28.1072(3) and MCR 6.931(E)(3), to determine whether defendant should be sentenced as an adult or a juvenile, and for resentencing. *People v Hazzard*, 206 Mich App 658; 522 NW2d 910 (1994).

V

Defendant argues that his sentences violate the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Because we are vacating defendant's sentences as stated in Issue IV above, we need not consider this issue.

Docket No. 199250

Defendant Rose argues that the trial court was precluded from sentencing him as an adult pursuant to MCL 769.1(4); MSA 28.1072(4) because the trial court waived the hearing required under MCL 769.1(3); MSA 28.1072(3) after the parties consented to a waiver. After reviewing the parties' arguments and the lower court record, including the waiver stipulation and the sentencing transcript, we conclude that the trial court sentenced defendant Rose under a misconception of the law and the sentences are invalid. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997).

In the present case, the circuit court had jurisdiction over defendant, who was sixteen years old at the time of the offenses, because two of the offenses of which defendant was charged, assault with intent to murder and armed robbery, fell within the enumerated offenses listed in the automatic waiver statute. MCL 600.606; MSA 27A.606. Because the circuit court obtained jurisdiction over defendant under the automatic waiver statute, the circuit court was required to hold a dispositional hearing pursuant to MCL 769.1(3); MSA 28.1072(3) to determine whether defendant should be sentenced as an adult or a juvenile. *People v Cosby*, 189 Mich App 461, 465; 473 NW2d 746 (1991). However, pursuant to MCL 769.1(4); MSA 28.1072(4), if the prosecutor and the defendant consent, the trial court may, in its discretion, waive the dispositional hearing. If such a waiver does occur under subsection (4), the court may place the juvenile defendant on probation and commit the juvenile to a state institution, but the court is not allowed to impose any other sentence provided by law for an adult offender. In the present case, the court sentenced defendant as an adult (regardless of the waiver) rather than a juvenile without holding a hearing and examining the criteria listed in MCL 769.1(3); MSA 28.1072(3) and MCR 6.931(E)(3).

Upon review of the sentencing hearing transcript, we conclude that the trial court was unaware of MCL 769.1(4); MSA 28.1072(4) and its ramifications. Although the trial court was aware of the waiver signed by the prosecutor and defense counsel, the court construed the waiver as meaning that defendant had waived any consideration of being sentenced under the Juvenile Code. This is a misconception of the law as explained above. When told by defense counsel that the court's interpretation of the waiver was incorrect and that defendant was only waiving his right to a hearing, the court nonetheless sentenced defendant as an adult and not a juvenile. At no time was the trial court made aware of subsection (4) by defense counsel, nor does it appear, based on the sentencing hearing transcript, that defense counsel knew about subsection (4). Thus, because of the trial court's confusion regarding the law, we vacate defendant's sentences and remand for a hearing to examine the criteria listed in MCL 769.1(3); MSA 28.1072(3) and MCR 6.931(E)(3), to determine whether defendant should be sentenced as an adult or a juvenile, and for resentencing. *People v Hazzard*, 206 Mich App 658; 522 NW2d 910 (1994).

Docket No. 199314

I

Defendant Greaux asserts that the trial court abused its discretion in denying her motion for severance. We disagree for the reasons stated with respect to the identical issue raised by defendant Patterson regarding defendant Greaux (see Issue I above in docket no. 199246).

II

Defendant Greaux also argues that the trial court improperly allowed a witness to testify regarding defendant Patterson's statements that defendant Greaux had "chickened out" and that she was supposed to drive Patterson somewhere. We disagree. Because the statements were made by a coconspirator during the course and in furtherance of the conspiracy, contrary to defendant Greaux's assertion, the statement was not hearsay, MRE 801(d)(2)(E); *People v Bushard*, 444 Mich 384, 393-395; 508 NW2d 745 (1993) (Boyle, J.), and the trial court did not abuse its discretion in admitting the evidence, *People v Lugo*, 214 Mich App 699, 709; 524 NW2d 921 (1995). Defendant Patterson was clearly concerned about obtaining transportation to the store for the robbery, and his statement to Nicholas Dubay is reasonably interpreted as indicating that Patterson would need a ride if Greaux did not show up. The statement could reasonably be interpreted as prompting Dubay to give a ride to Patterson, thereby promoting or facilitating the robbery of the store. In addition, although defendant Greaux asserts that the trial court should have given a limiting instruction to the jury, defendant never requested a limiting instruction, see *People v Harris*, 158 Mich App 463, 466; 404 NW2d 779 (1987), nor has defendant specified what limiting instruction should have been given, *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997) (a party may not merely announce a position and leave it to this Court to rationalize the basis for the claim).

III

Defendant Greaux argues that the trial court improperly allowed Chad Wink to testify that Greaux was close enough to hear a conversation about a plan to commit the robbery. We disagree. Wink was qualified to testify regarding his physical observations and opinions formed as a result of those observations. MRE 701; *People v Hanna*, 223 Mich App 466, 475; 567 NW2d 12 (1997); *Lamson v Martin (After Remand)*, 216 Mich App 452, 459; 549 NW2d 878 (1996). Wink's testimony was rationally based on his perception of the incident and was relevant to the disputed fact of whether Greaux knew about the planned robbery. *Co-Jo, Inc v Strand*, 226 Mich App 108, 116; 572 NW2d 251 (1997). Moreover, because defendant Greaux failed to object to another witness' testimony that she was close enough to hear the conversation about the robbery, Wink's testimony was merely cumulative.

IV

Defendant Greaux argues that the evidence was insufficient to sustain her convictions of conspiracy to commit armed robbery, aiding and abetting armed robbery, and aiding and abetting

assault with intent to murder. We disagree. Viewing the evidence in the light most favorable to the prosecutor, a rational trier of fact could have found that the essential elements of all three of the above offenses were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

With regard to the conspiracy to commit armed robbery offense, sufficient evidence existed in the form of the circumstances, acts, and conduct of the parties to prove that defendant Greaux had the requisite intent and knowledge of the crime, contrary to defendant's assertion. *People v Justice (After Remand)*, 454 Mich 334, 345-347; 562 NW2d 652 (1997). Evidence was presented that defendant Greaux was present during a conversation in which the robbery was being planned and was close enough to have heard the conversation, that defendant was in the store the week before the robbery with two males who had their faces covered, that co-defendant Patterson was concerned that Greaux had "chickened out," that Greaux drove the co-defendants to the store on the night the crimes were committed, and that Greaux wrote in a school assignment several days before the crimes occurred that she would like to rob a store.

Sufficient evidence also existed to convict defendant of aiding and abetting armed robbery and aiding and abetting assault with intent to murder. Based on all the facts and circumstances, *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995), the same evidence used to support the intent and knowledge elements with regard to the conspiracy conviction above is sufficient to prove the intent and knowledge elements of the aiding and abetting convictions, *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993).

V

Defendant Greaux argues that the trial court abused its discretion in refusing to instruct the jury on CJI2d 3.16 and refusing to provide written instructions. We disagree. We reject defendant's assertion that the jury was clearly confused. The jury asked for only one instruction to be repeated. Further, the trial court did not foreclose the possibility that the written instructions could be given to the jury, but rather stated that he would wait and see. Defense counsel never repeated the request that the written instructions be given to the jury. The trial court did not abuse its discretion. MCR 6.414(G).

VI

Defendant Greaux argues that the trial court should have instructed the jury on the lesser included offense of accessory after the fact. We disagree. An accessory after the fact is a person who, with knowledge of the other's guilt, gives assistance to that felon in an effort to hinder the felon's detection, arrest, trial, or punishment. *People v Lucas*, 402 Mich 302, 304; 262 NW2d 662 (1978); *People v Perry*, 218 Mich App 520, 534; 554 NW2d 362 (1996). To support a conviction of aiding and abetting in the present case, the prosecution had to prove that defendant procured, counseled, aided, or abetted in the commission of the offenses. MCL 767.39; MSA 28.979; *People v Spicer*, 216 Mich App 270, 274; 548 NW2d 245 (1996). Because aiding and abetting does not include assisting another person to avoid discovery, arrest, trial, or punishment, the evidence to support the offense of aiding and abetting will not always support a conviction for accessory after the fact, and, thus,

accessory after the fact is not a necessarily included lesser offense of aiding and abetting. *People v Ora Jones*, 395 Mich 379, 387, 390; 236 NW2d 461 (1975).

Further, because the evidence presented at trial in this case would not support a conviction of the lesser offense of accessory after the fact, accessory after the fact is not a cognate lesser included offense of aiding and abetting. *People v Hendricks*, 446 Mich 435, 444; 521 NW2d 546 (1994). Although defendant Greaux argues that there is evidence to support the offense, she cites to nothing in the record to support this argument. *Meagher v Wayne State Univ*, 222 Mich App 700, 719; 565 NW2d 401 (1997). The only evidence that defendant refers to is her testimony that she did not know about the robbery. While, if believed, this testimony would prevent conviction of aiding and abetting, it does nothing to establish the offense of accessory after the fact. There is no hint in any of Greaux's testimony that she, with knowledge of the perpetrator's guilt, gave assistance in an effort to hinder that perpetrator's detection, arrest, trial, or punishment. *Lucas*, *supra*. In fact, defendant testified that she knew nothing about the robbery until she was arrested three days after the robbery occurred.

Defendant relies on *People v Rohn*, 98 Mich App 593; 296 NW2d 315 (1980), in stating that accessory after the fact is a lesser offense of aiding and abetting. Defendant's reliance is misplaced. In *Rohn*, but not here, the accessory after the fact instruction was appropriate because the evidence adduced at trial supported the offense of accessory after the fact.

VII

Defendant Greaux argues that the trial court erred in determining that the sentencing guidelines do not apply to aiding and abetting convictions. We disagree because, after reviewing the lower court record, we find no indication that the trial court thought that the sentencing guidelines did not apply to defendant's convictions of aiding and abetting.

VIII

Defendant Greaux argues that her sentences violate the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). We reject defendant's claim. First, the trial court did not depart from the guidelines when it sentenced her. The sentencing information report (SIR) completed on defendant's aiding and abetting armed robbery conviction states that the guidelines' range is 96 to 180 months (or 8 to 15 years).[2] This range should have also included parolable life as being in the guidelines' range because the statute authorizing punishment for armed robbery, MCL 750.529; MSA 28.797, states that punishment can be for any number of years or life. See *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993) (the guidelines' range for CSC I was 180 to 360 months or life); *People v Gonzalez*, 197 Mich App 385, 401; 496 NW2d 312 (1992). Thus, all of defendant's minimum sentences for her convictions, life and fifteen years, fall within the guidelines' range and are presumptively proportionate. *Johnson*, *supra*. Defendant has failed to present any unusual circumstances to overcome this presumption. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997). Thus, defendant's sentences do not violate the principle of proportionality, and the trial court did not abuse its discretion in imposing sentence. *Milbourn*, *supra* at 636, 661.

IX

Finally, in a supplemental brief, defendant Greaux argues that the trial court abused its discretion in admitting her journal entry stating that she wanted to rob a store. We disagree. The journal entry was relevant to determining whether defendant had any knowledge or intent regarding the robbery and the shooting. The journal entry was written between the time that the robbery was planned and its commission. Thus, the journal entry would have a tendency to prove defendant's prior knowledge of her co-defendants' plans to rob the store and to prove that defendant was not merely present during the crimes. MRE 401, 402; *People v VanderVliet*, 444 Mich 52, 60-61; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994).

Further, the probative value of the journal entry was not substantially outweighed by the danger of unfair prejudice. Although the journal entry damaged defendant's case, unfair prejudice does not mean "damaging." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), modified and remanded 450 Mich 1212 (1995); see, also, *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Unfair prejudice means "an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one." *Vasher*, *supra*. The probative value of the journal entry was great because it shed light on whether defendant had knowledge and intent regarding the crimes; the entry was written shortly before the crimes occurred and only two days after the initial planning of the robbery. Defendant's own reflections regarding her knowledge or intent are not "an improper basis" for her conviction. Defendant has certainly not established that the probative value of the evidence is *substantially* outweighed by the danger of unfair prejudice. *Mills, supra*.

Summary

In docket no. 199246, we affirm defendant Patterson's convictions, but vacate his sentences and remand for a hearing where the trial court shall (1) examine the criteria listed in MCL 769.1(3); MSA 28.1072(3) and MCR 6.931(E)(3), (2) determine whether defendant should be sentenced as an adult or a juvenile, and (3) resentence defendant. We retain jurisdiction.

In docket no. 199250, we affirm defendant Rose's convictions, but vacate his sentences and remand for a hearing where the trial court shall (1) examine the criteria listed in MCL 769.1(3); MSA 28.1072(3) and MCR 6.931(E)(3), (2) determine whether defendant should be sentenced as an adult or a juvenile, and (3) resentence defendant. We retain jurisdiction.

In docket no. 199314, we affirm defendant Greaux's convictions and sentences.

/s/ Maura D. Corrigan
/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra

[1] Although the prosecutor argues that defendant waived his right to a hearing, we conclude otherwise. Further, although not asserted by defendant Patterson on appeal, we conclude that his sentences are

invalid because the trial court sentenced defendant Patterson under a misconception of the law (see defendant Rose's issue on appeal, docket no. 199250).

[2] We note that the SIR completed on the armed robbery conviction, which was one of the convictions having the highest statutory maximum penalty, was sufficient to support sentencing on all defendant's convictions. *People v Gonzalez*, 197 Mich App 385, 401; 496 NW2d 312 (1992).