STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 9, 2003
v	No. 242324 Wayne Circuit Court
ANTWAN BANKS, Defendant-Appellant.	LC No. 01-007106-01

Before: Saad, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of assault with intent to rob while armed, MCL 750.89. The jury rejected the higher charges of felony-murder and second-degree murder. The trial court sentenced defendant to fifteen to twenty-five years in prison. We affirm.

At trial, the parties agreed that a codefendant, Lamont Akins, who was tried in a separate proceeding, shot and killed the victim, Vito Davis, during a botched robbery. Akins and two other men, Osiris Guesta and Jamario Mitchell, walked up to Davis' Cadillac after Davis had dropped off his girlfriend in a residential neighborhood in Detroit during the early morning hours of February 19, 2001. Somehow a gun carried by Akins discharged[1] and a bullet hit Davis, who died as a result of the single gunshot wound.

The prosecutor's theory of the case against defendant was that defendant solicited Akins to rob Davis out of jealousy because Davis was dating defendant's former girlfriend. The testimony concerning the prosecutor's theory came from Guesta, from Sergeant Isaiah Smith, and from Kenyon Bailey.

Guesta testified as follows: He received a reduction in his sentence in exchange for testifying. He, Mitchell, and Akins were in a residential neighborhood in Detroit around 2:00 a.m. on the day in question. They decided to go to Akins' house to get some marijuana. As they walked down Glenwood Street, defendant, who lived on that street, came to his porch and called Akins over to him. Defendant and Akins held a conversation, after which Guesta, Mitchell, and

[1] Certain testimony suggested that the gun discharged by accident.

Akins did not continue to Akins' house to get some marijuana but instead decided to "do a robbery." They decided to perpetrate a robbery "[b]ased on the information [they] got from [defendant]." The three proceeded to Mitchell's house, and Mitchell obtained a gun. They waited for Davis to arrive in the neighborhood to drop off a woman. They received the information about Davis' arrival from defendant and, based on defendant's information, suspected that Davis would have jewelry.

Guesta testified that Davis eventually drove up in a Cadillac and a female exited the vehicle. Guesta and Akins approached the vehicle, Guesta tried to open the front passenger door, and Akins hit the front passenger window with the butt of the gun. A shot was fired, Davis drove off,[2] and Akins tried shooting after the vehicle, but the gun did not fire.[3]

Bailey testified that he lives in the neighborhood where the shooting occurred and that he saw Akins the day after the incident, at which time Akins appeared nervous. He testified that he asked Akins if he had heard about a man being shot four times the previous night on Glenwood Street, and Akins replied, "I only shot him once." Bailey stated that he saw Akins again later that day and Akins told him that "[defendant] told him to do [the robbery] because he [i.e., the victim] was dating his girlfriend or something." According to Bailey, Akins said that defendant told him Davis had money or jewelry.

Sergeant Smith of the Detroit Police Department testified that he arrested defendant as a result of his interview with Bailey. Because of defense counsel's hearsay objections, he did not specify exactly what Bailey told him.

On appeal, defendant first argues that the trial court erred in admitting Bailey's testimony about Akins' statements. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001).

The trial court admitted Bailey's testimony under the rationale of *People v Beasley*, 239 Mich App 548; 609 NW2d 581 (2000). In *Beasley*, *supra* at 550, the main evidence against the defendant consisted of an out-of-court statement by a codefendant that implicated both the defendant and the codefendant. The trial court ruled that the out-of-court statement was inadmissible as substantive evidence against the defendant, and this Court reversed, reasoning that the statement was admissible under MRE 804(b)(3) because the statement as a whole subjected the codefendant to criminal liability. *Beasley*, *supra* at 551, 555-556. The Court further found that admitting the statement did not violate the defendant's right to confront the witnesses against him because the codefendant's statement was voluntarily given to the witness, was clearly against the codefendant's penal interest, and did not shift the blame to the defendant but "ma[de] reference to defendant only in the context of [the] narration of the events of the incident." *Id.* at 557-558.

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[2] Although Davis drove the Cadillac for a short distance after the shooting, he soon died as a result of the shot that was fired.

[3] The evidence suggested that the remaining bullets had fallen out of the gun as a result of Akins using the gun to smash the window of the Cadillac.

We discern no abuse of discretion with regard to the trial court's decision to admit Bailey's statement under the reasoning of *Beasley*. Akins' statements were voluntarily given to Bailey, a non-police witness. While Bailey asked a general question about the shooting that occurred the previous night, there is no indication that Bailey asked about the perpetrator of the killing or in any way coerced or influenced Akins into making a confession or an accusation.[4] Moreover, Akins' statements were clearly against his penal interest in that they indicated his guilt of some type of homicide and of conspiracy to rob. The statements referred to defendant as part of the narrative of the events and in no way tried to shift the blame from Akins to defendant. Under these circumstances, the admission of the statements as substantive evidence was proper and did not violate defendant's right to confront the witnesses against him. *Id.* at 555, 557-558. See also *People v Poole,* 444 Mich 151, 161, 165; 506 NW2d 505 (1993). No error occurred.

Next, defendant argues that the trial court erred in refusing to give the "mere presence" jury instruction, CJI2d 8.5, or an alternative instruction to the jury. We review jury instructions as a whole, rather than piecemeal. *People v Dabish,* 181 Mich App 469, 478; 450 NW2d 44 (1989). Even if somewhat imperfect, instructions are not grounds for reversal if they fairly presented the issue to be tried and sufficiently protected the defendant's rights. *People v Gaydosh,* 203 Mich App 235, 237; 512 NW2d 65 (1994).

CJI2d 8.5 states, "Even if the defendant knew that the alleged crime was planned or was being committed, the mere fact that he was present when it was committed is not enough to prove that he assisted in committing it." The trial court declined to give this instruction, noting the absence of evidence that defendant was present during the shooting. Defense counsel then stated, "perhaps you could strike the part about presence and read the instruction [as] even if the defendant knew that the alleged crime was planned or was being committed, it is not enough to prove that he assisted in committing it." The trial court declined to give the modified instruction, stating that the other instructions in the case were sufficient to explain the necessary information and that the additional instruction would simply confuse the jury.

We find no basis for reversal. Indeed, the "mere presence" instruction was inapplicable, as no evidence indicated that defendant was present during the shooting. Moreover, the instructions as given sufficiently covered the information set forth in defense counsel's modified instruction. The court instructed the jurors that in order to find defendant guilty, they had to find that he "did something to assist the commission of the crime" and that "his help, advice or encouragement actually did help, advise or encourage the crime." Under these circumstances, the jury instructions as a whole fairly presented the issue to be tried and sufficiently protected defendant's rights. *Dabish, supra* at 478; *Gaydosh, supra* at 237.

Next, defendant argues that the prosecutor presented insufficient evidence to convict defendant of assault with intent to rob while armed because "no substantive evidence was presented to show that [defendant] had any involvement in Akins' decision to arm himself;

[4] We do not consider the general question asked by Bailey to be a "prompting or inquiry" weighing against admission of Akins' statements. See *Beasley, supra* at 553-554 (discussing the "prompting or inquiry" issue).

nothing proves or suggests[] that [defendant] aided, encouraged or otherwise assisted Akins in his decision to get a gun."

In reviewing the sufficiency of the evidence presented to support a conviction, this Court "must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); see also *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Further, this Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *Id.*; *Wolfe, supra* at 514-515.

MCL 750.89 states:

> Any person being armed with a dangerous weapon, or any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon, who shall assault another with intent to rob and steal, shall be guilty of a felony . . . .

MCL 767.39 states:

> 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.

In *People v Abernathy*, 39 Mich App 5, 7; 197 NW2d 106 (1972) (internal citation omitted), this Court stated, "Where more than one person is engaged in a robbery, and all are acting in concert, one of them being armed with a dangerous weapon, all are guilty of robbery armed whether any of the others were armed or not." The *Abernathy* Court extended this rule to a situation in which the defendant accomplice had no knowledge of the existence of a weapon during the robbery, reasoning that "the foreseeability of the use of weapons in robberies adequately supports the general rule." *Id.* Similarly, in *People v Young*, 114 Mich App 61, 65; 318 NW2d 606 (1982), this Court stated:

> Although there is no evidence that the defendant knew [his accomplice] was carrying a gun, this does not preclude the conviction of the defendant for armed robbery. It is not necessary that the trier of fact infer from the evidence that the defendant knew that [the accomplice] was armed. It is only necessary that the evidence be sufficient to sustain the conclusion by the trier of fact that the defendant knowingly aided and abetted in the commission of the robbery and that carrying or using a weapon to commit the robbery was fairly within the scope of the common unlawful enterprise, whether or not the defendant was actually aware that the principal was armed.

We reject defendant's insufficiency argument under the rationale of *Abernathy* and *Young*. Given the foreseeability of the use of weapons during robberies, the codefendant's use of a gun may be imputed to defendant.[5] No error occurred.

Finally, defendant argues that the trial court erred in failing to instruct the jury on the lesser-included offense of attempted armed robbery. However, defendant did not raise this issue below. Accordingly, we review this claim for plain error. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To obtain relief under the plain error doctrine, a defendant must demonstrate the existence of a clear or obvious error that likely affected the outcome of the case. *Id.* Even if a defendant satisfies this initial burden, reversal is appropriate only if the plain error resulted in the conviction of an actually innocent person or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763-764.

We find no basis for reversal. First, our Supreme Court has held that, with the exception of lesser charges related to first-degree murder, the failure of a trial court to sua sponte instruct a jury with regard to lesser-included offenses is not a basis for reversal. See *People v Johnson*, 409 Mich 552, 562; 297 NW2d 115 (1980). Second, the evidence in this case, involving the death of a man during a botched robbery that was solicited by defendant, clearly supported a conviction of the crime of assault with intent to rob while armed. Accordingly, we are not faced with a situation involving a clearly innocent defendant. Nor, given the circumstances of the case, do we believe that the failure to instruct the jury with regard to attempted armed robbery seriously affected the fairness, integrity, or public reputation of judicial proceedings.

Affirmed.

/s/ Henry William Saad
/s/ Jane E. Markey
/s/ Patrick M. Meter

[5] We acknowledge that *Abernathy* and *Young* were concerned with convictions for armed robbery, whereas the instant case concerns a conviction for assault with intent to rob while armed. Under the unique circumstances of the instant case, however, in which an armed robbery was intended but ultimately resulted in a fatal assault instead, we believe that the rule from *Abernathy* and *Young* applies with equal force. Essentially, defendant was convicted of the lesser offense of assault with intent to rob while armed because the robbery was never completed. See, e.g., *People v Antoine*, 194 Mich App 189, 190; 486 NW2d 92 (1992). (assault with intent to rob while armed is a lesser-included offense of armed robbery).