Order

Michigan Supreme Court
Lansing, Michigan

June 27, 2023

163837

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 163837
COA: 350281
Oakland CC: 2018-267165-FC

DEMARCUS ALLEN-TROY MILES,
Defendant-Appellant.

_____/

By order of May 31, 2022, the application for leave to appeal the October 21, 2021 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Dupree* (Docket No. 161589). On order of the Court, the case having been decided on March 21, 2023, ___ Mich ___ (2023), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE Part V.A. of the Court of Appeals judgment and REMAND this case to the Court of Appeals for reconsideration of the scoring of Offense Variable 1 in light of *Dupree*. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

We do not retain jurisdiction.

b0620

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 27, 2023

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMARCUS ALLEN-TROY MILES,

Defendant-Appellant.

UNPUBLISHED
October 21, 2021

No. 350281
Oakland Circuit Court
LC No. 2018-267165-FC

Before: MURRAY, C.J., and JANSEN and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317, and his sentence of 30 to 60 years' imprisonment. We affirm in all aspects.

I. FACTUAL BACKGROUND

This case arises out of the shooting and killing of Austin Reinhardt in the afternoon of May 3, 2018, at 249 High Street in Pontiac. The victim's girlfriend, Kae-Milee Serna, testified that "there was some type of issue" between the victim and defendant. On the day of the shooting, Serna and the victim were visiting a friend at 249 High Street when Serna spotted defendant approaching the home in his car. Fearing that an altercation was going to ensue, Serna fled inside the home. She testified that, as she was doing so, the victim exited the home and the victim and defendant began to approach one another. Serna overheard the victim ask defendant "what's up," but at that point she was far enough into the home that she could hear but not see either defendant or the victim. Serna then heard "two or three" gunshots. When she exited the home, she observed the victim laying on the ground and called 911. When an officer arrived, Serna exclaimed to him that "it was Demarcus, and she didn't care if she was snitching."

Shortly thereafter, the victim was pronounced dead, with the cause of death being two gunshot wounds. One bullet was retrieved from the victim's body, and another was found near him on the ground. Additionally, two shell casings were found in the street in front of 249 High Street, and another shell casing was found in the windshield-wiper bed of defendant's vehicle. A brick was also recovered from the front pocket of a hooded sweatshirt that the victim was wearing.

Defendant admitted at trial that he was present at 249 High Street when the shooting occurred. He indicated that he had stopped at the house to speak with a friend, and that he had driven another friend, Justin Sumner, with him. Defendant noted that, when he arrived at 249 High Street and began to exit his vehicle, the victim approached defendant with his hand in his hoodie pocket. Although defendant indicated that he had no prior issues with the victim, the manner in which the victim was approaching him concerned him. According to defendant, before the victim reached him, Sumner fired off approximately 7 bullets. After a brief period of shock, defendant and Sumner got back into defendant's vehicle and fled the scene.

Defendant was charged with first-degree premediated murder and carrying a firearm during the commission of a felony (felony-firearm). A jury convicted defendant of aiding and abetting second-degree murder, and acquitted him of felony-firearm.

I. IMPROPER HEARSAY

Defendant first contends that he is entitled to a new trial on the basis of two out-of-court statements made by the victim that were admitted through the testimony of Serna. Defendant contends that the statements were inadmissible under MRE 803(3) because the state of mind of the victim was not at issue, and thus the statements were highly prejudicial against defendant. At trial, Serna testified that approximately 1 ½ months before the shooting the victim told her that the victim and defendant did not like each other, and that the victim told her the same thing when they encountered defendant at a Marathon gas station early in the morning on the day of the shooting. We conclude these statements were not properly admissible under MRE 803(3), but admission of the statements was not outcome-determinative and defendant is therefore not entitled to a new trial.

"The decision to admit evidence is within a trial court's discretion, which is reviewed for an abuse of that discretion." *People v Bynum*, 496 Mich 610, 623; 852 NW2d 570 (2014). Whether a rule of evidence should have precluded admissibility is a preliminary question of law that we review de novo. *People v Chelmicki*, 305 Mich App 58, 62; 850 NW2d 612 (2014). Reversal is not warranted unless defendant can establish that it is more probable than not that the improper admission of evidence affected the outcome of the trial. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001).

"Hearsay is 'a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.' " *Chelmicki*, 305 Mich App at 62, quoting MRE 801(c). Hearsay is generally inadmissible unless otherwise provided by the rules of evidence. *Id*. at 63. Neither party disputes that the out-of-court statements of the victim admitted through the testimony of Serna constituted hearsay; the issue is whether they were properly admitted under MRE 803(3). That rule provides certain statements involving a declarant's present sense impression are not barred by the general prohibition against hearsay:

> **(3) Then Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will. [MRE 803(3).]

Evidence otherwise admissible under MRE 803(3) may nonetheless be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403.

We have noted before that a victim's state of mind "is usually only an issue in a homicide case when self-defense, suicide, or accidental death are raised as defenses to the crime." *People v Smelley*, 285 Mich App 314, 316; 775 NW2d 350 (2009), vacated in part on other grounds 485 Mich 1023 (2010), citing *People v White*, 401 Mich 482, 504; 257 NW2d 912 (1977), superseded by statute on other grounds as stated in *People v Koonce*, 466 Mich 515, 520 (2002). "The general rule in Michigan is that statements indicative of the declarant's state of mind are admissible when that state is in issue in the case." *White*, 401 Mich at 502-503. Otherwise, the victim's state of mind may be " 'only remotely and collaterally related to the real issues in the case.' " *Smelley*, 285 Mich App at 321, quoting *White*, 401 Mich at 505. In those cases, there is an inherent danger "that the jury would accept [the victim's] statement as somehow reflecting on defendant's state of mind rather than the victim's . . . ." *White*, 401 Mich at 505 (quotation marks and citation omitted). That is, the jury may inadvertently take the statements "as a true indication of the defendant's intentions, actions or culpability." *Id*. (quotation marks and citation omitted).

Defendant relies upon *Smelley* and *People v Moorer*, 262 Mich App 64, 65; 683 NW2d 736 (2004), the prosecution refers us to *People v King*, 215 Mich App 301, 309; 544 NW2d 765 (1996), in support of their respective arguments on the applicability of MRE 803(3). *Smelley*, *Moorer*, and *King* all involve analysis of *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995) (*Fisher II*). In that case, the defendant was convicted of the first-degree murder of his wife, and on an initial appeal, our Supreme Court determined that the defendant "had been denied a fair trial because of the admission of hearsay evidence regarding the victim-wife's state of mind," and, in lieu of granting leave to appeal, issued an order granting the defendant a new trial. *People v Fisher*, 439 Mich 884, 889 (1991) (*Fisher I*). The Court noted that, although limiting instructions had been given, "there was such a great likelihood of prejudice that the evidence should have been excluded because the relevance of the evidence was substantially outweighed by the prejudice." *Id*., citing MRE 403. The issue then came before the Supreme Court a second time prior to the defendant's next trial on the prosecution's motion to permit the introduction of "certain oral and written statements of the victim-wife that were relevant to the issue of motive and premeditation." *Fisher II*, 449 Mich at 443.

The *Fisher II* Court's subsequent analysis of MRE 803(3) was short, as only a small number of the statements the prosecution sought to admit fell under the exception. *Id*. at 450-451. These included statements that the victim planned "to visit Germany to be with her love," and that she planned "to divorce the defendant upon her return." *Id*. at 450. The Court noted that these statements plainly fell under the exception prescribed by MRE 803(3) because they were statements of the declarant's then existing intent and plans. *Id*. at 450-451, citing MRE 803(3). However, the Court also noted in reference to its previous peremptory reversal that it had excluded in that order " 'hearsay evidence regarding the victim's state of mind' where its 'relevance . . . was substantially outweighed by the prejudice.' " *Id*. at 453-454, quoting *Fisher I*, 439 Mich at 885. The Court noted that evidence that was admissible in *Fisher II* was not the same as the evidence held to be inadmissible in *Fisher I* because, in between the two appeals, the prosecution had "properly interpreted [the] order to mean that any of [the] decedent wife's statements that expressed fear of the defendant, or that depicted significant misconduct of the defendant tending to show him to be a 'bad person,' were inadmissible."

We first conclude that the suggestion from *King* that *Fisher II* somehow overruled *White* is inapt. Nothing about *Fisher II* purports to say that statements concerning a victim's fear of a defendant or statements that suggest future action by the defendant should be carefully weighed against whether the declarant's state of mind is at issue in the case. See *Fisher II*, 449 Mich at 450-451, 453-454. In fact, the holding of *Fisher II*, that a victim's statements expressing fear of a defendant or misconduct on a defendant's part tend to be inadmissible, supports the reasoning of *White*. That is, where the victim's state of mind is not at issue, those statements tend to reflect more on the state of mind and perceived future actions of the defendant than the actual declarant, and thus carry with them a substantial danger of unfair prejudice if admitted. See *White*, 401 Mich at 505-507 (speaking to the danger of unfair prejudice where a victim testifies to their fear of a defendant when the same is not specifically at issue in the case). See also MRE 403.

Turning to the statements at issue, they are unlike the statements admitted in *Fisher II*,[1] but they are also unlike the statements that were inadmissible in *Moorer and Smelley*. These were not statements suggesting that the victim feared the defendant, nor were they statements of memory offered to prove the facts remembered. See *Moorer*, 262 Mich App at 66, 73; *Smelley*, 285 Mich App at 325. Here, the statements were primarily used to show only that defendant and the victim did not like one another. And, to the extent that this was their purpose, the subject statements were far more prejudicial toward defendant than probative of any relevant issue related to the victim's state of mind.

That the victim did not like defendant was not probative as to any issue that was raised at trial, but that defendant did not like the victim carried with it strong implications about defendant's motives and future actions. See *White*, 401 Mich at 505; *Smelley*, 285 Mich App at 325. And, to the extent the statements purported to show any specific plan or motive on the victim's part—in that the victim purportedly indicated he was willing to fight defendant—that plan or motive was premised on the idea that the victim would fight the defendant only "if [defendant] wanted a fight."[2] To the extent that the statements evidence the victim's state of mind, they "bore only a remote and tenuous connection to the real claims and defenses in the case." *White*, 401 Mich at 507. Contrarily, for defendant's part, "[t]he likelihood of prejudice was substantial because the statement[s] contained matters which coincided with the issues in the case and [were] highly and unfairly damaging to the defendant's case." *Id*. at 507. That is, to the extent the statements of the victim were admitted to show the victim's state of mind under MRE 803(3), the statements bore only a tenuous connection to the real issues, but carried with them a substantial danger of unfair

[1] Because *King* was not specific about the statements that were admitted in that case, it is difficult to say how similar they might have been to the statements in this case. The statements in *King* were admitted because the Court determined they were similar to the statements from *Fisher II* in that they explained certain actions and precautions the victim took leading up to her death. *King*, 215 Mich App at 309. As discussed below, the statements at issue here do not cleanly fit that bill.

[2] Self-defense was not raised as a defense, and thus the idea that the victim might have elected to "fight" defendant had no real relevance.

prejudice for what they implied about defendant's state of mind. For that reason, the statements should not have been admitted under MRE 803(3).[3]

In any event, reversal is not warranted because the evidence was not outcome-determinative. See *Whittaker*, 465 Mich a 427. Defendant was convicted of aiding and abetting second-degree murder.

> 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) (quotation marks and citation omitted).]

With respect to intent, "a defendant is liable for the crime the defendant intends to aid or abet as well as the natural and probable consequences of that crime." *People v Robinson*, 475 Mich 1, 14-15; 715 NW2d 44 (2006). "The intent necessary for second-degree murder is the intent to kill, the intent to inflict great bodily harm, or the willful and wanton disregard for whether death will result." *Id*. at 14. Defendant's primary argument with respect to the prejudicial effect of the subject-hearsay statements is that there was no other evidence that he had any knowledge of Sumner's intent to shoot the victim, nor any evidence that defendant intended to assault the victim or otherwise commit a crime against the victim of which the natural and probable consequence could be death.

However, the thrust of Serna's testimony was never that the victim was fearful of defendant, but that Serna herself was fearful.[4] Serna was fearful of defendant when she ran into him at a Marathon gas station early in the morning on the day of the shooting, not only because of the victim's statements to her, but because she felt that defendant had been staring at her. She was fearful enough that she argued with the victim because she felt that he "wasn't driving away fast enough." Similarly, Serna was fearful later that night when she saw defendant driving near her

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[3] The statements may have been admissible for another purpose, as the subject-hearsay statements may have been admissible, not as evidence of the victim's state of mind, but for the effect that they had on Serna. It is well-established that "[a]n out-of-court statement introduced to show its effect on a listener, as opposed to proving the truth of the matter asserted, does not constitute hearsay under MRE 801(c)." *People v Gaines*, 306 Mich App 289, 306-307; 856 NW2d 222 (2014). See also *Fisher II*, 449 Mich at 448-450. Here, the statements of the victim were helpful to contextualize the feelings and actions of Serna throughout the morning and into the afternoon of May 3, 2018, and to the extent that they were proffered for that purpose, they were arguably admissible irrespective of MRE 803(3).

[4] Defendant does not address statements Serna made at trial referencing her personal belief that "there was some type of issue between" the victim and defendant that were made largely without reference to the victim's prior out-of-court statements.

apartment complex, so much so that she instructed the person driving her vehicle to take an alternate route to avoid defendant, and when she noticed a vehicle that she believed to be defendant's drive past 249 High Street multiple times. On the day of the shooting, Serna was fearful when she again saw defendant drive by 249 High Street before turning around and approaching the house. On the basis of that fear, Serna fled inside 249 High Street when she realized that defendant was approaching. Corroborating Serna's testimony was the fact that the victim apparently elected to approach defendant with a brick immediately before he was shot. All of the above was evidence of defendant's motive and intent, and defendant does not purport to argue that Serna should have been barred from testifying about her own, personal experiences with defendant on May 3, 2018.[5]

Moreover, "[t]he element of intent may be inferred from circumstantial evidence." *People v Kenny*, 332 Mich App 394, 403; 956 NW2d 562 (2020).

> Indeed, "because it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind . . . ." [*People v*] *Kanaan*, 278 Mich App [594,] 622[; 715 NW2d 57 (2008)]. Intent to kill may be inferred from all the facts in evidence, including the use of a deadly weapon. See [*People v*] *Carines*, 460 Mich [750,] 759[; 597 NW2d 130 (1999)]. Minimal circumstantial evidence is sufficient to show an intent to kill, and that evidence can include a motive to kill, along with flight and lying, which may reflect a consciousness of guilt. *People v Unger*, 278 Mich App 210, 223, 225-227; 749 NW2d 272 (2008). [*People v Henderson*, 306 Mich App 1, 11; 854 NW2d 234 (2014), overruled in part on other grounds by *People v Reichard*, 505 Mich 81, 89 n 18, 96 (2020).]

Here, defendant himself testified that he drove Sumner to the scene of the crime, that he fled the scene of the crime, and that he drove Sumner to safety afterwards. Despite being aware that police would undoubtedly desire to question him, rather than go to the police, defendant made plans for the vehicle he drove to and from the scene to be delivered to his girlfriend, and waited for the police to find him. Defendant then repeatedly lied about whether he drove the vehicle and whether he was present at the scene of the crime. It was not until eight months after the shooting that defendant finally admitted to police that he was present when the shooting occurred, but that the shooting was perpetrated by someone else. Defendant would not say who. At that time, defendant told police that he was with a friend on his way to drop them off so that they could get to work when he stopped at 249 High Street because he was flagged down by the victim. At trial, defendant admitted that this was a lie, that he was not with that friend, and that he stopped because he saw another friend that he wanted to speak with. Defendant testified that the victim began flagging him down as he was exiting his vehicle. It was then that defendant first indicated he was with a different friend, Sumner, and that Sumner was, in fact, the shooter.

Defendant gave explanations for his actions and dishonesty at trial, but his credibility was an issue for the jury. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). There was

[5] And, all of this ignores that, when police arrived at the scene of the crime, Serna excitedly and repeatedly exclaimed: "it was Demarcus that had done it, and she didn't care if she was snitching."

enough evidence through the testimony of Serna and inferable from defendant's actions prior to and after the shooting for the jury to make a determination as to defendant's intent, and we conclude that it was not more probable than not that the exclusion of the victim's two out-of-court statements to Serna would have altered the outcome of the proceedings.

II. AIDING-AND-ABETTING INSTRUCTION

Defendant next contends that the trial court erred when it gave the jury an aiding-and-abetting instruction because there was insufficient evidence to warrant the instruction since no evidence was admitted that defendant had the requisite intent to aid the alleged shooter in killing or otherwise harming the victim.

We review arguments of instructional error de novo. *People v Fennell*, 260 Mich App 261, 264; 677 NW2d 66 (2004). We review a trial court's determination as to whether a jury instruction is applicable to the facts of the case for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). "In reviewing a claim of instructional error, this Court examines the instructions as a whole, and, even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried." *People v Martin*, 271 Mich App 280, 337; 721 NW2d 815 (2006) (quotation marks and citation omitted).

There must be evidence on the record to support a charge in order to instruct the jury on that offense. *People v Mann*, 395 Mich 472, 478; 236 NW2d 509 (1975). As noted, the elements of aiding and abetting a crime are:

> (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. [*Izarraras-Placante*, 246 Mich App at 495-496 (quotation marks and citation omitted).]

"The jury may be instructed about aiding and abetting where there is evidence that (1) more than one person was involved in committing a crime, and (2) the defendant's role in the crime may have been less than direct participation in the wrongdoing." *People v Bartlett*, 231 Mich App 139, 157; 585 NW2d 341 (1998).

For the reasons more fully articulated in Section I of this opinion, there was sufficient admissible evidence of defendant's intent. Moreover, it was defendant's own statements at trial that necessitated the instruction. The prosecution sought a charge of premeditated murder under the theory that defendant shot the victim, but it was defendant who testified that someone else shot the victim, and that defendant drove that person to and from the scene of the crime. See *id*. Given defendant's own testimony, as well as the evidence of his guilt presented prior to that testimony,

we discern no abuse of discretion on the trial court's part for concluding that an aiding-and-abetting instruction was appropriate. See *Gillis*, 474 Mich at 113.[6]

III. SUFFICIENCY OF THE EVIDENCE

Related to his previous two arguments, defendant again contends that there was insufficient evidence that he had the requisite intent to support a conviction of aiding and abetting second-degree murder.

We review challenges to the sufficiency of the evidence de novo. *People v Savage*, 327 Mich App 604, 613; 935 NW2d 69 (2019). We review "the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proved beyond a reasonable doubt." *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). As indicated above, "[c]ircumstantial evidence and reasonable inferences arising therefrom may constitute proof of the elements of the crime." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). We "defer to the fact-finder's role in determining the weight of the evidence and the credibility of the witnesses," *id*., and we resolve conflicts in the evidence in favor of the prosecution, *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004).

As noted above, "a defendant is liable for the crime the defendant intends to aid or abet as well as the natural and probable consequences of that crime." *Robinson*, 475 Mich at 14-15. "The intent necessary for second-degree murder is the intent to kill, the intent to inflict great bodily harm, or the willful and wanton disregard for whether death will result." *Id*. at 14.

Again, there was substantial evidence from Serna that it was her belief that defendant had some sort of intent to assault the victim on the day of the shooting. Although defendant contended in his testimony that his multiple run-ins with the victim leading up to the shooting were purely coincidental, it was within the province of the jury to determine which witness was more credible. *Bennett*, 290 Mich App at 472. Moreover, that the victim approached defendant with a brick on the day of the shooting supported Serna's testimony that bad blood existed between the two, and that there was a general understanding that an altercation was going to occur. Defendant himself testified that he drove Sumner to the scene, and that he drove the shooter to safety afterwards. And, although defendant testified that he only drove to the scene in order to talk to someone he saw outside the home, Serna gave conflicting testimony about her understanding of his intent, and the jury clearly believed her. See *Bennett*, 290 Mich App at 472.

Finally, defendant's actions in the aftermath of the shooting reflected his consciousness of guilt. Defendant fled the scene of the crime with Sumner, drove Sumner to safety, disposed of his vehicle, did not seek out the police, and thereafter lied on multiple occasions to the police and to

[6] Defendant relies upon *People v Battle*, 71 Mich App 136, 142-143; 246 NW2d 389 (1976), wherein this Court affirmed a trial court's decision to give an aiding-and-abetting instruction on the basis of substantial direct evidence pointing to a "concert of action" between the defendant and the principal. But defendant fails to analyze how *Battle* requires a different result under these facts.

others about his involvement. See *Unger*, 278 Mich App at 225-227 (noting that minimal circumstantial evidence is sufficient to demonstrate an intent to kill, and that flight and lying can reflect a consciousness of guilt). It was not until eight months after the shooting that defendant finally admitted to police that he was present when the shooting occurred, but that the shooting was perpetrated by someone else. Even then, defendant refused to disclose the identity of the alleged shooter to police.

We conclude that, taking the evidence in a light most favorable to the prosecution, there was sufficient evidence presented at trial for the jury to conclude that defendant, at the very least, intended to assault the victim, and that the death of the victim was a natural and probable consequence of that crime. See *Robinson*, 475 Mich at 14-15 ("[A] defendant is liable for the crime the defendant intends to aid or abet as well as the natural and probable consequences of that crime."). See also *Reese*, 491 Mich at 139; *Bennett*, 290 Mich App at 472.[7]

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next contends that his counsel was ineffective for failing to object to improper vouching testimony and for failing to consult an expert in order to challenge rebuttal testimony.[8] Relatedly, defendant contends that the trial court abused its discretion when it denied his request for a *Ginther* hearing and when it denied his request to appoint an expert at public expense to testify at that hearing.

"The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). The trial court's constitutional determinations are reviewed de novo while factual determinations are reviewed for clear error. *Lockett*, 295 Mich App at 186. "Clear error exists where the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Callon*, 256 Mich App 312, 321; 662 NW2d 501 (2003).

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[7] In arguing to the contrary, defendant cites *People v Burrell*, 253 Mich 321, 323; 235 NW 170 (1931), *People v Gordon*, 60 Mich App 412, 414, 417; 231 NW2d 409 (1975), *Brown v Palmer*, 441 F3d 347, 349 (CA 6, 2006), and *Fuller v Anderson*, 662 F2d 420, 421 (CA 6, 1981). Each of these cases are easily distinguishable based on the different sets of facts. With respect to *Palmer* and *Fuller*, there was little evidence showing that the defendants were anything but present when crimes were committed, and their requisite intent could only be inferred from that presence. *Palmer*, 441 F3d at 352; *Fuller*, 662 F2d at 424. Here, defendant refers to his testimony that he was unaware of the alleged shooter's intentions, but largely ignores that he specifically drove the person he alleges to have shot the victim to and from the crime, and that there was other evidence that defendant intended, when he drove to the scene, to harm the victim. Serna testified to this repeatedly, and again, that the victim felt it necessary to carry a brick while he and defendant approached one another supports that idea. Moreover, repeated lies about involvement in the crime not present in either *Palmer* or *Fuller*.

[8] Defendant also argues that his counsel was ineffective for failing to object to the improper assessment of his minimum sentencing guidelines range. We address that argument in Section V of this opinion.

"Because no *Ginther* hearing was held . . . review is limited to errors apparent on the record." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007) (citations omitted).

"Criminal defendants have a right to the effective assistance of counsel under the United States and Michigan Constitutions." *People v Schrauben*, 314 Mich App 181, 189-190; 886 NW2d 173 (2016). " 'Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.' " *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009), quoting *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Petri*, 279 Mich App 407, 411; 760 NW2d 882 (2008) (quotations omitted).

> To establish an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008). A defendant must also show that the result that did occur was fundamentally unfair or unreliable. *Id.* [*Lockett*, 295 Mich App at 187.]

A. IMPROPER VOUCHING TESTIMONY

Defendant first contends that his trial counsel was ineffective for failing to object to improper vouching testimony by Detective Eric Hix. We agree that defendant's counsel should have objected to Detective Hix's testimony, but conclude that reversal is not warranted because counsel's error did not prejudice the outcome of defendant's trial.

"It is generally improper for a witness to comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). To that end, police witnesses may not improperly vouch for a complainant's credibility or improperly comment on a defendant's guilt. *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987).

Detective Hix explained in his testimony how officers eventually came to possess defendant's vehicle. Detective Hix was asked by the prosecutor about how officers began searching for defendant's vehicle after Detective Hix discovered defendant's license plate number through video surveillance. The following colloquy occurred:

> *Q.* All right. All right. Now, you had indicated that you got the license plate of this vehicle, and you disseminated that out to other detectives; is that correct?
>
> *A.* That's correct.
>
> *Q.* All right. And detectives are going—or deputies are going in various locations; is that correct?
>
> *A.* Yes.

Q. You mentioned hotels.

A. Okay.

Q. Why hotels?

A. In our experience, people trying to hide or get away, flee to those specific locations sometimes.

Q. All right. Anything about—specific about the Roadway[9] Inn in your—your experience?

A. That's just like, in my experience, the one that everybody that tries to like get away goes to. It's just outside of Pontiac. [Footnote added.]

Defendant contends that this constituted improper vouching for defendant's guilt. That is, by indicating to the jury that the Rodeway Inn is a place that perpetrators flee to, Detective Hix suggested that defendant was a guilty perpetrator.[10] Defendant notes that this evidence was irrelevant and prejudicial. We tend to agree, as defense counsel should have objected to Detective Hix's statements about the Rodeway Inn on the basis of their irrelevance, MRE 401; MRE 402, and potential for prejudice, MRE 403.[11]

We note that defendant's counsel—with dubious success—attempted to address the statement during Detective Hix's cross-examination in order to establish that Detective Hix had no actual reason to believe that defendant was attempting to flee the police. One might argue that counsel's decision to cross-examine Detective Hix about the statement rather than object to its admission was a matter of trial strategy. See *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (indicating that decisions with respect to what evidence to present and how to question witnesses are presumed to be matters of trial strategy that "we will not second-guess with the benefit of hindsight"). The distinction is one without a difference, because either way, defendant cannot show that, but for the admission of Detective Hix's statement, there was a reasonable probability that the result of his trial would have been different. See *Lockett*, 295 Mich App at 187.

Detective Hix was one of a multitude of witnesses to testify, and this statement, while inappropriate, was only tangentially related to his actual purpose for testifying, which was to explain that he uncovered defendant's license plate through surveillance at the Marathon gas

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[9] The correct spelling is Rodeway Inn.

[10] Defendant erroneously suggests that Detective Hix *also* testified that defendant's vehicle was found at the Rodeway Inn. This is not true, and that fact would not be admitted into evidence until the following day through the testimony of Sergeant Maurice Martin.

[11] The prosecution argues that Detective Hix's statement was not improper because he was merely explaining how the police conducted their search and eventually found their way to the Roadway Inn. However, Detective Hix could have explained law enforcement's process without specifically inferring that the presence of defendant's vehicle at the Rodeway Inn was indicative of guilt.

station, and to corroborate some of Serna's statements about the gas station event. Although the statement inappropriately suggested that guilty parties might flee to the Rodeway Inn, other evidence indicated that defendant was not present at the Rodeway Inn, that defendant, his girlfriend, and her mother had been staying at the Rodeway Inn *before* the shooting, and that defendant had organized for the vehicle to be delivered to his girlfriend after the shooting so that she could use it to attend the viewing of her deceased father. All that is to say, the majority of the facts in evidence did not support a conclusion on the basis of Detective Hix's testimony that either defendant or his vehicle were present at the Rodeway Inn *because* defendant was fleeing a crime. More importantly, and as indicated multiple times above, the evidence that defendant was present at the scene of the crime with motive and intent to harm the victim was not insubstantial, and there is no reason to believe that Detective Hix's singular statement was unduly prejudicial, let alone outcome-determinative, on the jury's ultimate verdict.

B. REBUTTAL TESTIMONY

Defendant next argues that his counsel was ineffective for failing to properly challenge the rebuttal testimony of Detective Adam Miller. At trial, Detective Miller testified in rebuttal to defendant's testimony that, in his experience, 9mm semiautomatic handguns tend to eject shell casings to the right, and not to the left.[12] Defendant had testified that he was on the driver's side of the car and that Sumner was to defendant's right—presumably on the passenger side of the car—when the victim was shot. Thus, Detective Miller's testimony purported to show that defendant was the likely shooter because the 9mm semiautomatic weapon used to shoot the victim ejects bullets to the right, defendant was standing to the left of the vehicle, and a bullet casing was found in defendant's windshield-wiper well. Detective Miller testified that, if Sumner had actually been the shooter as defendant suggested, bullet casings should have been found "on the grass or the sidewalk" near where the car was parked. Defendant argues that his counsel was ineffective for failing to employ an expert to challenge Detective Miller's testimony.

"[A] defense attorney may be deemed ineffective, in part, for failing to consult an expert when counsel had neither the education nor the experience necessary to evaluate the evidence and make for himself a *reasonable*, *informed determination* as to whether an expert should be consulted or called to the stand." *People v Trakhtenberg*, 493 Mich 38, 54 n 9; 826 NW2d 136 (2012) (quotation marks and citation omitted). Consultation with potential experts, in some cases, is part of counsel's "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *People v Ackley*, 497 Mich 381, 390; 870 NW2d 858 (2015) (quotation marks and citation omitted).

Defendant relies primarily on *Ackley*, where the defendant was convicted of first-degree felony murder and first-degree child abuse after his girlfriend's three-year-old daughter died while in his care. *Id*. at 384. The prosecution "alleged that the defendant killed the child, either by blunt force trauma or shaking," and because of the lack of eyewitnesses, called five medical experts to testify in support of their case. *Id.* "Each testified that the child died as a result of abusive head

[12] A handgun was never uncovered, but two bullets and three shell casings were. A deputy who was qualified as an expert in firearm and toolmark examination testified that the bullets were 9mm caliber, and were consistent with "a Glock type of firearm."

injury caused either by nonaccidental shaking, blunt force trauma, or a combination of both." *Id*. Although the court provided funding for expert assistance, "the defense . . . called no expert in support of its theory that the child's injuries resulted from an accidental fall." *Id*. The defendant's counsel had initially consulted with an expert who did not believe he could aid the defense because he agreed with the prosecution's witnesses, but gave the defendant's counsel the name of another expert that he believed would be more likely to agree with defendant's theory of the case and had more expertise in the area. *Id*. at 389-390. Defendant's counsel failed to consult with that expert, and in light of the fact that "expert testimony was the cornerstone of the prosecution's case," our Supreme Court held that the defense's decision was objectively unreasonable. The Court further noted that the defense "admittedly failed to consult any of the readily available journal articles" related to the prosecution's theory of the case and "short-fall deaths, and did not otherwise educate himself or conduct any independent investigation of the medical issues at the center of the case." *Id*. at 391.

The case at hand is nothing like *Ackley*. Expert testimony was not the cornerstone of the prosecution's case, and in fact, Detective Miller was not qualified as an expert at trial. Moreover, we tend to agree with the prosecution that there is no evidence defendant's counsel had any reason to know prior to trial that an expert's opinion regarding how certain weapons eject bullet casings would be necessary. The first time defendant testified to the identity of Sumner, and to Sumner's location during the shooting, was at trial. Detective Miller's testimony was offered to rebut defendant's surprise assertion that Sumner was the shooter. Defendant has provided no evidence or reason for this Court to conclude that his counsel could have foreseen Detective Miller's rebuttal testimony.

The expert testimony defendant now proffers on appeal does little in the way of contradicting Detective Miller's testimony. According to defendant's appellate counsel, defendant consulted with a firearm expert who could have testified at trial that "while a 9mm firearm is designed to eject to the right, the assertion that the shell from a 9mm will always eject to the right is incorrect." But, the crux of Detective Miller's testimony was that, given defendant's testimony about the location of Sumner during the shooting and the manner in which 9mm firearms are designed to eject bullet casings, he would expect that, if Sumner was the shooter, bullet casings would have been found in the grass or sidewalk next to the vehicle. Instead, a bullet casing was found in defendant's windshield-wiper well, and two bullet casings were found in the street. Although, as the prosecution concedes, Detective Miller's testimony could have been clearer, it was not necessarily Detective Miller's testimony that 9mm firearms in *all* circumstances *will* eject bullet casings to the right.

With all of the above in mind, defendant has failed to establish that his counsel's performance was objectively unreasonable. Defendant points to no strategic choices that were made "after less than complete investigation," or even that any additional investigation would have been reasonably foreseeable, let alone necessary, in the first instance. See *Ackley*, 497 Mich at 389 (quotation marks and citation omitted). And, even assuming arguendo that his counsel's performance was somehow deficient, defendant has no basis to argue that, but for his counsel's performance, there is a reasonable probability that the outcome of defendant's trial would have been different. The jury was unanimous that defendant was, at the very least, guilty of aiding and

abetting second-degree murder.[13] To that end, detective Miller's testimony could not have prejudiced the jury's guilty verdict.

C. *GINTHER*[14] HEARING AND APPOINTMENT OF AN EXPERT

Related to defendant's argument that he was denied the effective assistance of counsel, and particularly related to his argument concerning Detective Miller's rebuttal testimony, are defendant's arguments that the trial court (1) abused its discretion by denying him a *Ginther* hearing, and (2) abused its discretion by denying his request for the appointment of an expert to testify at that hearing.

A trial court's decision whether to grant an evidentiary hearing is reviewed for an abuse of discretion. *Unger*, 278 Mich App at 216-217. This Court also reviews for an abuse of discretion "a trial court's decision whether to grant an indigent defendant's motion for the appointment of an expert witness." *People v Carnicom*, 272 Mich App 614, 616; 727 NW2d 399 (2006). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Unger*, 278 Mich App at 217. A decision to deny a *Ginther* hearing does not constitute an abuse of discretion where a "defendant has not set forth any additional facts that would require development of a record to determine if defense counsel was ineffective." *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007).

"To obtain appointment of an expert, an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert. It is not enough for the defendant to show a mere possibility of assistance from the requested expert. Without an indication that expert testimony would likely benefit the defense, a trial court does not abuse its discretion in denying a defendant's motion for appointment of an expert witness." *Carnicom*, 272 Mich App at 617 (citations omitted).

Turning first to defendant's request for the appointment of an expert, an expert was unnecessary because defendant's proffered expert would have presented evidence that was largely corroborative, rather than contradictory to, Detective Miller's testimony. The expert would have testified that 9mm firearms are generally designed to eject shell casings to the right, although that will not happen in every circumstance. Detective Miller's testimony was also that 9mm firearms are designed to eject shell casings to the right, and the prosecution inserted the idea that this will not happen in every circumstance in its questioning of Detective Miller.

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[13] The fact that defendant was acquitted of felony-firearm and convicted of second-degree murder does not necessarily mean that the jury unanimously believed that defendant was not the shooter. See *People v Smielewski*, 235 Mich App 196, 202; 596 NW2d 636 (1999) ("[I]f the jury was unable to unanimously agree whether defendant acted as a principal or an aider and abettor in the offense, but did unanimously agree that he participated in the crime as one or the other, the jury's verdict of guilty . . . would be the result of permissible jury deliberation because all members of the jury would have found defendant guilty beyond a reasonable doubt . . . .").

[14] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

In any event, such testimony would have been of little value to defendant because, again, the jury convicted defendant as though he was not the shooter. See *People v Smielewski*, 235 Mich App 196, 202; 596 NW2d 636 (1999). Thus, for the purposes of ineffective assistance of counsel, his expert's testimony would not have established that Detective Miller's testimony prejudiced the outcome of the case. To that end, the trial court did not err in denying defendant's request for a *Ginther* hearing because defendant failed to set forth any additional facts the development of which could have aided him on his ineffective assistance claim. *Williams*, 275 Mich App at 200.

V. SENTENCING

Defendant contends in the alternative that he is entitled to resentencing because the trial court improperly assessed OV 1 at 25 points, and improperly assessed OV 9 at 10 points.

"Issues involving the proper interpretation and application of the legislative sentencing guidelines, MCL 777.11 *et seq*., are legal questions that this Court reviews de novo." *People v Sours*, 315 Mich App 346, 348; 890 NW2d 401 (2016) (quotation marks and citation omitted). The trial court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*.

A. OFFENSE VARIABLE 1

The trial court assessed OV 1 at 25 points. The variable is prescribed by MCL 777.31, which provides, in pertinent part:

> (1) Offense variable 1 is aggravated use of a weapon. Score offense variable 1 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> > (a) A firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon……25 points
>
> * * *
>
> (2) All of the following apply to scoring offense variable 1:
>
> > (a) Count each person who was placed in danger or injury of loss of life as a victim.
> >
> > (b) In multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points. [MCL 777.31(1)(a) and (2)(a)-(b).]

Importantly for defendant's purposes, "due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted."

People v Beck, 504 Mich 605, 629; 939 NW2d 213 (2019). Defendant contended below and repeats on appeal that he could not have been assessed 25 points for the discharge of a firearm because defendant was specifically acquitted of felony-firearm, and to that end, of discharging the firearm involved in this case.

The trial court concluded that, by its plain terms, MCL 777.31 is not concerned with *who* discharges the firearm, and that 25 points is properly assessed when a firearm is discharged at a victim in furtherance of the sentencing crime irrespective of whether the defendant himself discharged the weapon. In reaching this conclusion, the trial court referred to OV 2, for which defendant was initially assessed five points before that variable was later corrected and assessed at zero points. MCL 777.32 prescribes that variable, and provides:

> (1) Offense variable 2 is lethal potential of the weapon possessed or used. Score offense variable 2 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (d) The offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon……5 points
>
> * * *
>
> (f) The offender possessed or used no weapon……..0 points
>
> (2) In multiple offender cases, if 1 offender is assessed points for possessing a weapon, all offenders shall be assessed the same number of points. [MCL 777.32(1)(d), (1)(f), and (2).]

The court reasoned that, where OV 2 specifically referenced "the offender" possessing a weapon, and where OV 1 only referred to the general "use" of a weapon, assessment of the latter variable was not limited by whether the defendant himself used the weapon.

The trial court's reasoning ignored subsection (2) of the relevant statutes. The statutes pertaining to OV 1 and OV 2 both provide that, in multiple-offender cases, where one offender is assessed points under the statutes, all other offenders are to be assessed the same amount of points. MCL 777.31(2)(b); MCL 777.32(2). That is, although these subsections do not specifically apply because defendant was the only defendant and thus no other offender was assessed points, it is clear that the legislature intended for both OV 1 and OV 2 to apply equally to all offenders involved in a specific crime. See *Jesperson v Auto Club Ins Ass'n*, 499 Mich 29, 34; 878 NW2d 799 (2016).

Moreover, applying these variables to defendant is in keeping with the aiding-and-abetting theory under which he was convicted. "To aid and abet the commission of a crime, the crime itself must be proved, and the defendant must have rendered some kind of assistance or encouragement to the commission of that crime with the intent that the crime occur or the knowledge that the principal intended for the crime to occur." *People v Blevins*, 314 Mich App 339, 358; 886 NW2d 456 (2016). For the purpose of convicting and punishing under an aiding-and-abetting theory, we do not distinguish between principals and those that aid and abet. See

People v Moore, 470 Mich 56, 62-63; 679 NW2d 41 (2004); MCL 767.39. "The purpose of the aiding and abetting statute is to abolish the common law distinction between accessories before the fact and principals so that one who counsels, aids or abets in the commission of an offense may be tried and convicted as if he had directly committed the offense." *Moore*, 470 Mich at 63 (quotation marks and citation omitted).

In *People v Greaux*, 461 Mich 339, 344; 604 NW2d 327 (2000), the defendant was convicted, among other things, of aiding and abetting armed robbery. The trial court concluded that the sentencing guidelines were not applicable because there were no guidelines associated directly with "aiding and abetting," only armed robbery. *Id*. Our Supreme Court held:

> The aiding and abetting statute does not create a distinct crime; rather, it allows an aider and abetter [sic] to be convicted of, for example, armed robbery, even though that person did not hold the gun or take the money. When the time for sentencing arrives, the guidelines for armed robbery are to be used. [*Id*. at 344-345.]

That is, for sentencing purposes, unless the guidelines state otherwise, whether an individual is convicted as a principal or for aiding and abetting, the distinction is one without a difference. See *id*. at 344-345.

Here, irrespective of the fact that defendant was acquitted of felony-firearm, he was convicted of aiding and abetting a second-degree murder. Without question, the principal possessed a gun and discharged the gun in the victim's direction, killing the victim. Under those circumstances, we discern no error in the trial court assessing OV 1 at 25 points.[15] Moreover, we note that the initial assessment of OV 2 at five points was correct. Thus, the only error here was that the trial court—to defendant's benefit—later reassessed OV 2 at zero points.

B. OFFENSE VARIABLE 9

Defendant next contends that the trial court erred in assessing 10 points for OV 9. That variable is prescribed by MCL 777.39, which provides:

> (1) Offense variable 9 is number of victims. Score offense variable 9 by determining which of the following apply and assigning the number of points attributable to the one that had the highest number of points:
>
> * * *

[15] Because of this conclusion, we need not address defendant's argument that his counsel was ineffective for failing to object to the assessment of OV 1. *People v Ericksen*, 288 Mich App 201; 793 NW2d 120 (2010) ("Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.").

> (c) There were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss……..……10 points
>
> * * *

(2) All of the following apply to scoring offense variable 9:

> (a) Count each person who was placed in danger of physical injury or loss of life or property as a victim. [MCL 777.39(1)(c) and (2)(a).]

"A person may be a victim under OV 9 even if he or she did not suffer actual harm; a close proximity to a physically threatening situation may suffice to count the person as a victim." *People v Baskerville*, 333 Mich App 276, 294; ___ NW2d ___ (2020) (quotation marks and citation omitted). "Because bullets can travel a very long distance, 'close proximity' to a physically threatening situation with a gun may be much more extensive than 'close proximity' to, say, a physically threatening situation with a knife." *Id*. at 295-295. For example, in *Baskerville*, we noted that firing a gun in a house may endanger the lives of people even far away in separate rooms so long as the gun is fired in their general direction *Id*.

Here, multiple people, including defendant, testified to a large number of people (up to 15) outside and in the vicinity of 249 High Street when the shooting occurred. According to defendant's own testimony, the principal to his crime fired off approximately seven gunshots from the street in the direction of the victim, who was coming from 249 High Street. As a result, we discern no error, let alone clear error, from the trial court's conclusion that a preponderance of the evidence supported the assessment of 10 points for OV 9. See *Hardy*, 494 Mich at 438.[16]

Affirmed.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Michael J. Riordan

[16] Defendant refers us to *People v Phelps*, 288 Mich App 123, 138; 791 NW2d 732 (2010), for the contention that OV 9 should not have been assessed in this case. In *Phelps*, we reversed the trial court's assessment of points for OV 9 where the defendant had sexually assaulted a teenager while her friends were sleeping in the same room. *Phelps*, 288 Mich App at 129, 138-139. Where the defendant had targeted his actions at only one individual, we noted that there was no evidence that the other people in the room were ever actually in danger of physical injury. *Id*. at 138-139. Defendant provides no analyses as to how *Phelps* should apply to the facts at hand. That case did not involve discharging a firearm—an inherently dangerous weapon—in the vicinity and general direction of innocent bystanders. Accordingly, *Phelps* does not support defendant's argument.