STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 27, 2013
v	No. 301000 Genesee Circuit Court
CEDRICK MONTAY BECK, Defendant-Appellant.	LC No. 10-026261-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v	No. 301054 Genesee Circuit Court
ERIC RAYSHON HOPSON, Defendant-Appellant.	LC No. 10-026263-FC

Before: JANSEN, P.J., and CAVANAGH and MARKEY, JJ.

PER CURIAM.

Defendants Cedrick Beck and Eric Hopson were tried jointly before separate juries. Defendant Beck was convicted of first-degree felony murder, MCL 750.316(1)(b), two counts of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant Beck to concurrent terms of life imprisonment for the first-degree murder conviction and 23-3/4 to 50 years for each robbery conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant Hopson was convicted of second-degree murder, MCL 750.317, two counts of armed robbery, felon in possession of a firearm, MCL 750.224f, and felony-firearm. The trial court sentenced defendant Hopson as a third-habitual offender, MCL 769.11, to concurrent prison terms of 56-1/4 to 93-3/4 years for the second-degree murder conviction, 427 to 900 months for each robbery conviction, and 4-3/4 to 10 years for the felon-in-possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant Beck appeals by right in Docket No. 301000, and defendant Hopson appeals by right in Docket No. 301054. We affirm in both appeals.

Defendants' convictions arise from their involvement in the robbery of two store employees, Peter Farah and Gregory Peterson, at a market in the city of Flint on April 9, 2009. Farah was shot during the offense and later died from his injuries. The store contained a Plexiglas partition that separated the cashier area from the main shopping area. While Farah and Peterson were both inside the enclosed cashier area, defendant Beck kicked open the door to the enclosed area, shot Farah, and ordered Peterson to lie down on the floor. Defendant Hopson also entered the cashier area and forced Peterson to remove his clothing. Both defendants took money before leaving the store.

I. DOCKET NO. 301000

Defendant Beck argues that he is entitled to a new trial because the jurors observed him in the courtroom while he was handcuffed. We disagree. Defendant Beck concedes that this issue is unpreserved because there was no objection at trial, and that this Court's review is therefore limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To be entitled to relief, it is necessary to show that a plain error affected the outcome of the lower court proceedings. *Id.*

Although a defendant's right to a fair trial generally includes the right to be free of shackles or handcuffs in the courtroom, *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009), "the prohibition against shackling does not extend to safety precautions taken by officers while transporting a defendant to and from the courtroom." *People v Horn*, 279 Mich App 31, 37; 755 NW2d 212 (2008). The record indicates that four or five members of defendant Beck's jury began to enter the courtroom before defendant Beck's handcuffs had been removed, at which point the jurors were led back outside the courtroom. According to the record made by the prosecutor regarding this matter at trial, defendant Beck was standing with his arms behind his back when the jurors began to enter the courtroom, and the prosecutor did not believe that the handcuffs were visible to the jurors. Defense counsel, who was present during the incident, did not disagree with the prosecutor's characterization of the events. But it is apparent that counsel understood the potential for prejudice had the jury viewed the defendant in handcuffs because counsel requested that procedures be implemented to avoid any inadvertent viewing of defendant Beck in handcuffs.

Because there is no record evidence that any juror actually saw defendant Beck in handcuffs, and defendant Beck's counsel, who was present, did not request an evidentiary hearing regarding the matter and instead agreed that it was "[n]o big deal," defendant Beck has not established a plain error affecting his substantial rights. A defendant is not prejudiced when the jury is unable to see he is shackled. *Horn*, 279 Mich App at 36.

Defendant Beck next argues that the prosecutor engaged in misconduct by remarking during closing argument that defendant Beck "came in armed with a weapon that could only be used against a person, and he committed the most serious crime there is, murder. *An abomination against the laws of man and God for which he is responsible*." (Emphasis added).

Defendant Beck argues that he was prejudiced by the emphasized inflammatory religious language, which he contends had no relationship to the evidence at trial and which he likens to an improper argument that the jury should convict on the basis of an implied civic-like duty.

Because defendant Beck did not object to the prosecutor's remark at trial, he bears the burden of establishing a plain error affecting his substantial rights. *People v Fyda*, 288 Mich App 446, 460-461; 793 NW2d 712 (2010). A prosecutor is generally afforded great latitude during closing argument. *Id.* at 461. But while the prosecutor's use of emotional language during closing argument is an "important weapon in counsel's forensic arsenal," it is limited by the principles that the prosecutor cannot comment on evidence that has not been introduced at trial and may not appeal to a jury's religious duties in calling for a conviction. *People v Mischley*, 164 Mich App 478, 483; 417 NW2d 537 (1987). In addition, "prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jury members." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor's remarks are examined in context to determine if there is error requiring reversal. *Id.* at 283.

Examined in context, the prosecutor's remarks do not indicate that the isolated "abomination" language was injected to suggest that the jury find defendant guilty of first-degree felony murder or any other charge for reasons other than the evidence. The remark was made in the context of describing the crime of murder. Any perceived prejudice could have been alleviated by a timely objection and request for a curative instruction. Even without an objection, the trial court instructed the jury that "it is your job to decide what the facts of the case are, to apply the law as I give it to you, and in that way to decide the case." The court also instructed that "[t]he lawyers' statements and arguments are not evidence." Because the jury is presumed to have followed the instructions it was given and a timely objection and request for a curative instruction could have alleviated any perceived error, we find no grounds for reversal. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

Lastly, defendant Beck argues that trial counsel was ineffective for failing to object both when the jury began to enter the courtroom while he was still handcuffed and to the prosecutor's closing remark referring to murder as an "abomination against the laws of man and God." Because defendant Beck failed to raise this claim in a motion for a new trial or a request for a *Ginther*[1] hearing in the trial court, our review is limited to errors apparent from the record. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). To establish ineffective assistance of counsel, defendant Beck must establish both deficient performance and resulting prejudice. *Unger*, 278 Mich App at 242. A counsel's performance is deficient if it falls below an objective standard of professional reasonableness, and it is prejudicial to the defense if there is a reasonably probability that, but for counsel's error, the result of the proceeding would have been different. *Fyda*, 288 Mich App at 450.

As discussed previously, there is no record support for defendant Beck's claim that a juror actually observed him in handcuffs. Moreover, defense counsel acted to protect defendant Beck's rights by requesting that procedures be undertaken to avoid any inadvertent viewing of defendant Beck in handcuffs. Therefore, the record does not support defendant Beck's claim that counsel's handling of this matter was objectively unreasonable or that defendant Beck suffered any prejudice.

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

As also previously discussed, defendant Beck was not prejudiced by the prosecutor's isolated remark referring to murder as an "abomination against the laws of man and God." Moreover, there is a strong presumption that counsel's performance constituted sound trial strategy. *Unger*, 278 Mich App at 242. "[D]eclining to raise objections, especially during closing arguments, can often be consistent with sound trial strategy." *Id*. In examining counsel's performance, a reviewing court must affirmatively entertain the range of possible reasons for counsel's performance. *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012). It is certainly possible in this case that defense counsel recognized that the isolated remark, to the extent it could be considered improper, was not prejudicial when considered in the context of the prosecutor's surrounding remarks and that counsel did not want to highlight that murder is "an abomination against the laws of man and God" by objecting. Because defendant Beck has not provided any reason for overcoming the presumption of sound strategy, his ineffective assistance of counsel claim fails.

II. DOCKET NO. 301054

Defendant Hopson argues that the prosecution failed to present sufficient evidence to support his convictions of second-degree murder, felon in possession of a firearm, and felony-firearm. With a challenge to the sufficiency of evidence, we review the evidence "in a light most favorable to the prosecution to determine whether a rational trier of fact could have concluded that the elements of the offense were proven beyond a reasonable doubt." *Unger*, 278 Mich App at 222. Circumstantial evidence and reasonable inferences arising therefrom may constitute satisfactory proof of the elements of a crime. *Id*. at 223.

We disagree with defendant Hopson's argument that the evidence was insufficient to find him guilty of second-degree murder under an aiding or abetting theory. Aiding and abetting is not a substantive offense; it is a prosecution theory that allows vicarious liability to be imposed on accomplices to crime. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006); MCL 767.39. The elements of aiding and abetting are:

> (1) that 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. [*Carines*, 460 Mich at 468 (citation omitted).]

Although defendant Hopson was actually convicted of the lesser offense of second-degree murder, he was charged in this case was first-degree felony murder. The elements of second-degree murder are a death, caused by an act of a person, with malice, and without justification or excuse. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id.* at 464.

A second-degree murder can be elevated to first-degree felony murder where the murder is committed in the perpetration of, or attempt to perpetrate, a felony offense enumerated in MCL 750.316(1)(b). *People v Gillis*, 474 Mich 105, 115; 712 NW2d 419 (2006). "[A] murder

committed during the unbroken chain of events surrounding the predicate felony is committed 'in the perpetration of' that felony." *Id.* at 125. "It is not necessary that the murder be contemporaneous with the enumerated felony." *People v Brannon*, 194 Mich App 121, 125; 486 NW2d 83; 486 NW2d 83 (1992). Rather, the defendant need only have intended to commit the underlying felony at the time the homicide occurred. *Id.* Robbery is an enumerated felony. MCL 750.316(1)(b). Armed robbery requires that the perpetrator possess or appear to be in possession of a dangerous weapon. *People v Williams*, 491 Mich 164, 183; 814 NW2d 270 (2012); MCL 750.529. A prosecutor must also prove that the person, in the course of committing a larceny, used force or violence against any person who was present, or assaulted or put the person in fear. MCL 750.530(1); see also *People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).

The evidence at trial showed that defendant Beck shot Farah with a shotgun during the commission of a robbery committed by both Beck and defendant Hopson. Further, viewed in a light most favorable to the prosecution, the evidence permitted the jury to find that the killing was elevated from second-degree murder to felony-murder because it was committed during an unbroken chain of events surrounding a robbery. Although the jury acquitted defendant Hopson of felony murder and instead found him guilty of the lesser offense of second-degree murder, that verdict does not implicate the sufficiency of the evidence in support of the jury's determination that defendant Hopson was criminally liable for murder. The concerted action depicted in the surveillance video was sufficient to enable the jury to find beyond a reasonable doubt that defendant Hopson performed acts or provided encouragement that assisted defendant Beck in committing the crime. The video depicts defendant Hopson acting in concert with defendant Beck and positioning himself in a manner that allowed him to act as defendant Beck's backup as he entered the store.

The evidence was also sufficient to establish that defendant Hopson acted with the requisite intent. The facts and circumstances of a killing may give rise to an inference of malice. *Carines*, 460 Mich at 759. The evidence permitted the jury to reasonably infer that defendant Hopson knowingly chose to participate in a robbery involving a shotgun. Although defendant Hopson did not himself use the shotgun, he is liable for crimes that are the natural and probable consequence of the offense he intends to aid and abet. *Robinson*, 475 Mich at 15. By acting in concert with defendant Beck to commit an armed robbery involving a shotgun, it could reasonably be inferred that defendant Hopson set in motion a force likely to cause death or great bodily harm. *Goecke*, 457 Mich at 464. Therefore, the evidence was sufficient to establish malice. Cf. *Carines*, 460 Mich at 760 (the defendant's participation in armed robbery involving the use of knife established malice, even though the defendant did not personally use the knife). Accordingly, the evidence was sufficient to support defendant Hopson's conviction of second-degree murder.

With respect to the felony-firearm conviction, we reject defendant Hopson's argument that there was no evidence to support a conviction for aiding and abetting. The evidence showed more than defendant Hopson's participation in stealing items from the store. Viewed in a light most favorable to the prosecution, the evidence that defendant Hopson was watching defendant Beck's back and taking control of Peterson was sufficient to establish that defendant Hopson performed acts that assisted defendant Beck in possessing the shotgun during the commission of the felonies. *People v Moore*, 470 Mich 56, 70-71; 679 NW2d 41 (2004).

Lastly, we find merit to defendant Hopson's argument that the evidence was insufficient to establish that he aided and abetted defendant Beck in committing the felon-in-possession offense. Criminal liability under an aiding and abetting theory requires that the charged crime be committed by the defendant or another person. *Carines*, 460 Mich at 468. MCL 750.224f prohibits a convicted felon from directly or constructively possessing firearms until the statutorily enumerated conditions are met. *People v Minch*, 493 Mich 87, 91-92; 825 NW2d 560 (2012). Because there was no evidence that defendant Beck was a convicted felon, the jury could not find that defendant Beck committed the felon-in-possession crime.

Nonetheless, aiding and abetting was not the sole theory of liability presented to the jury. The jury was instructed that the parties had stipulated to all elements of the felon-in-possession charge other than whether "defendant possessed a firearm in the State of Michigan." Possession of a firearm may be actual or constructive. *Minch*, 493 Mich at 91-92. Possession of a firearm may also be joint. *People v Strickland*, 293 Mich App 393, 400; 810 NW2d 660 (2011). The essential question in analyzing joint or constructive possession is the felon's control or authority over the firearm. *Id*.; *Minch*, 493 Mich at 92. A person has constructive possession where the person knowingly has the power and intent at a given time to exercise control over a thing directly or through another person or persons. *Minch*, 493 Mich at 92. Joint possession of a firearm is recognized in Michigan where the evidence suggests that two or more defendants acted in concert. *People v Hill*, 433 Mich 464, 471; 446 NW2d 140 (1989).

Although there was no evidence that defendant Hopson physically possessed the shotgun, the jury could have reasonably inferred from the evidence, particularly the surveillance video of the offense, that defendants Beck and Hopson were acting in accordance with a planned robbery. Viewed in a light most favorable to the prosecution, the evidence permitted the jury to find that defendants Beck and Hopson jointly possessed the shotgun, with defendant Beck having actual possession of the firearm and defendant Hopson having constructive possession of the weapon. The jury could reasonably infer from the defendants' concerted actions that the shotgun defendant Beck carried was reasonably accessible to defendant Hopson in the event it was needed to keep Peterson under control. Under these facts, the evidence was sufficient to support defendant Hopson's conviction of felon in possession of a firearm.

Defendant Hopson next argues that trial counsel was ineffective for not moving to quash the felon-in-possession charge to prevent the jury from hearing that he was a convicted felon. We disagree.

As indicated previously, the evidence at trial was sufficient to sustain defendant Hopson's conviction for felon in possession of a firearm. As the trial court observed when denying defendant Hopson's motion for a new trial on this issue, a lower standard of proof is applicable to support a bindover on a charge following a preliminary examination. See *People v Yost*, 468 Mich 122, 125-126; 659 NW2d 604 (2003). Examined in this context, we are not persuaded that trial counsel was ineffective for failing to move to quash the felon-in-possession charge. Counsel is not required to pursue a futile motion. *Horn*, 279 Mich App at 39-40.

Moreover, even if we were to conclude that trial counsel should have moved to quash the felon-in-possession charge, it is apparent from the trial court's decision denying defendant Hopson's motion for a new trial that it would have denied that motion. In addition, although

defendant Hopson complains that the charge permitted the jury to learn that he was a convicted felon, he has not established that a successful motion to quash would have precluded the jury from hearing information regarding his prior criminal record. Although the jury would not have heard the parties' stipulation regarding defendant Hopson's status as a convicted felon, references to defendant Hopson's criminal history were also included in his police interview. It does not follow that the trial court would have precluded the jury from hearing defendant Hopson's statements regarding his probation and the charge of attempted home invasion, yet allowed defendant Hopson to use the police interview to support his duress defense to the armed robbery charges. Under the rule of completeness, an entire statement may have probative value because "a thought or act cannot be accurately understood without considering the entire context and content in which the thought was expressed." *People v McReavy*, 436 Mich 197, 214-215; 462 NW2d 1 (1990). Because defendant Hopson has failed to establish that his statements concerning his criminal record to the police were not relevant to provide a proper context for evaluating the credibility of his statements regarding the charged offense, his allegations of ineffective assistance of counsel claim for his attorney's failing to keep this information from the jury cannot succeed.

Defendant Hopson seeks resentencing on the ground that the trial court erred in scoring offense variables (OVs) 6, 7, and 10 of the sentencing guidelines. We review a trial court's scoring decision to determine whether the court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). Issues of law involving the interpretation of the sentencing guidelines are reviewed de novo. *Id.*

In this case, the trial court scored the sentencing guidelines for defendant Hopson's convictions of second-degree murder, armed robbery, and felon in possession of a firearm. For each offense, defendant Hopson received a total offense variable score well in excess of the number of points necessary for placement in the highest level of offense severity. Defendant Hopson concedes that none of his scoring challenges, whether considered singularly or cumulatively, will affect his placement in these levels of offense severity; consequently, they do not affect the appropriate guidelines range. If a scoring error does not affect the appropriate guidelines range, resentencing is not required. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). Because the alleged scoring errors do not affect the guidelines ranges the trial court used, we need not to consider these scoring issues.

We affirm.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Jane E. Markey