

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACK ROBERT NEGUS,

Defendant-Appellant.

UNPUBLISHED

February 7, 1997

No. 186981

Recorder's Court

LC No. 94-010687

Before: Corrigan, P.J., and J.B. Sullivan* and T.G. Hicks, ** J.J.

PER CURIAM.

Defendant appeals by right his jury trial conviction for assault with intent to rob while armed as an aider and abettor. MCL 750.89; MSA 28.284; MCL 767.39; MSA 28.979. Defendant was sentenced to eight to twenty-years in prison. We affirm.

Defendant's first argument on appeal is that this case must be remanded for resentencing because the trial court violated the indeterminate sentencing act, MCL 769.8; MSA 28.1080; MCL 769.9; MSA 28.1081, when it orally sentenced defendant to "a maximum of eight years, no more than ten years," at defendant's sentencing hearing. Defendant argues that even if the sentence is construed as being a sentence of a minimum of eight and a maximum of ten years, the sentence is still invalid as it violates the two-thirds rule as defined in *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972). We disagree.

Courts speak through their judgments and orders, not their oral statements or written opinions. *People v Stackpoole*, 144 Mich App 291, 298; 375 NW2d 419 (1985). The judgment of sentence in this case reflects that defendant was sentenced to a minimum term of eight years in prison and a maximum term of twenty years in prison. This sentence comports with both the requirements of the

* Former Court of Appeals Judge, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-3.

** Circuit judge, sitting on the Court of Appeals by assignment.

indeterminate sentencing act and the two-thirds rule of *People v Tanner*. Therefore, defendant's sentence is affirmed.

Defendant next argues that the evidence presented at trial was insufficient to convict him of assault with intent to rob while armed as an aider and abettor. We disagree. In assessing whether the evidence was sufficient to convict, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Herbert*, 444 Mich 466, 473; 511 NW2d 654 (1993). To convict a defendant as an aider and abettor, the prosecution must prove beyond a reasonable doubt that the crime charged was committed by the defendant or some other person, that the defendant performed acts or gave encouragement that assisted the commission of the crime, and that 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 Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995); MCL 767.39; MSA 28.979.

Defendant's only argument is that there was insufficient evidence to support the jury's conclusion that he possessed the requisite intent to be convicted as an aider and abettor. This argument lacks merit. An aider and abettor's state of mind may be inferred from all the facts and circumstances. *Turner, supra*, 213 Mich App 568. Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Id.*, 569.

The evidence in this case viewed in a light most favorable to the prosecution established that the principal, a long-time friend of defendant, held a large shotgun in the front seat of defendant's car as defendant drove the automobile. Defendant stopped the car at a corner near the victim's place of employment at approximately 2:00 a.m. As the victim left work and walked down the street toward her pick-up, defendant slowly followed in his automobile, picking up his pace in accordance with the victim's speed. When the victim got to her truck, defendant stopped the car and the principal got out, holding the shotgun. Defendant waited as the principal demanded the victim's money and fired two shots in her direction. When the principal got back in the car, defendant drove off at a high rate of speed.

At a minimum, a rational trier of fact could have concluded that defendant, aware the principal possessed a shotgun in the front seat of defendant's car, knew that the principal intended to commit a robbery. The remaining evidence could have led a rational trier of fact to conclude that defendant himself actually intended to commit a robbery. The evidence that defendant waited for the victim and then slowly followed her down the street suggests planning and participation in the execution of the crime. Therefore, the prosecution evidence was sufficient to convict defendant beyond a reasonable doubt.

Defendant's final argument is that he was denied his right against self-incrimination due to the prosecutor's statements in rebuttal that defendant had an absolute right not to testify and that his failure to testify could not be used against him. However, appellate review of a claim that the prosecutor made

improper comments during closing argument is precluded where there was no objection at trial unless failure to consider the matter would result in manifest injustice. *People v Duncan*, 402 Mich 1, 15-16; 260 NW2d 58 (1977) (Opinion by Ryan, J). Defendant did not object to the prosecutor's comments. Failure to consider defendant's claim will not result in manifest injustice for two reasons. First, the prosecutor's statements were in response to defense counsel's statement that a jury is not permitted to consider defendant's silence. Secondly, the prosecution never asked the jury to make a negative inference because of defendant's silence. The rule that a prosecutor may not comment on a defendant's failure to testify to safeguard a defendant's right against self-incrimination, *People v Davis*, 199 Mich App 502, 517; 503 NW2d 457 (1993); MCL 600.2159; MSA 27A.2159; has been narrowly interpreted to mean that a prosecutor may not ask the jury to make negative inferences because of a defendant's failure to testify. See *People v Balog*, 56 Mich App 624, 629; 224 NW2d 725 (1974); *People v Iaconelli*, 112 Mich App 725, 742; 317 NW2d 540, vacated in part on other grounds 116 Mich App 176; 321 NW2d 684 (1982); *People v Mancill*, 393 Mich 132; 223 NW2d 289 (1974). Since the prosecutor's comments were merely responsive to defense counsel's and because the prosecutor never asked the jury to make an adverse inference because of defendant's silence, defendant has presented no grounds for reversal of his conviction.

Affirmed.

/s/ Maura D. Corrigan

/s/ Joseph B. Sullivan

/s/ Timothy G. Hicks