STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD R. HUNTLEY, JR.,

Defendant-Appellant.

UNPUBLISHED
May 30, 1997

No. 193817
Genesee Circuit Court
LC No. 95-052382

Before: Cavanagh, P.J., and Reilly and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of receiving and concealing stolen property over $100, MCL 750.535; MSA 28.803. After his conviction, defendant acknowledged three prior felony convictions. The trial court then found defendant guilty as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. Defendant was sentenced to five to ten years' imprisonment on the habitual offender conviction. Defendant now appeals as of right. We affirm.

I

Defendant first argues that the trial court abused its discretion by admitting evidence regarding the burglary of the victim's house and his absence from work at the time of the burglary. The decision whether to admit or exclude evidence is within the trial court's discretion. This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

Evidence of a defendant's other acts is inadmissible where it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith. *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993). However, evidence of other acts is admissible where (1) the evidence is relevant to an issue other than a defendant's propensity to commit crime, (2) the evidence is relevant to an issue or fact of consequence at trial under MRE 402, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice under MRE 403. *Id*. at 74-75.

To establish that defendant was guilty of receiving and concealing stolen property, the prosecutor was required to show both that the necklace was stolen and that defendant knew that it had been stolen. See *People v Ainsworth*, 197 Mich App 321, 324; 495 NW2d 177 (1992). Thus, evidence that the necklace had been stolen during the burglary and that defendant had possession of the necklace a very short time after was relevant. The probative value of the evidence was not substantially outweighed by any prejudice to defendant. Accordingly, we find that the trial court did not abuse its discretion in admitting the evidence.

Regarding the testimony of Lindsey Sprague that defendant had once given her a ride home, we find no error requiring reversal. Both the trial court and the prosecutor told the jury that defendant was not on trial for the burglary.

Defendant also argues that the prosecutor improperly introduced evidence of previous burglaries at the victim's home. However, because defendant failed to object to this testimony, this claim of error is not preserved for appellate review in the absence of manifest injustice. See *People v Asevedo*, 217 Mich App 393, 398-399; 551 NW2d 478 (1996). We find no evidence of manifest injustice.

II

Defendant next asserts that he was denied the effective assistance of counsel at trial. A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121 (1995).

Defendant essentially argues that his attorney should have objected to the evidence which linked him with the burglaries. However, as noted above, this testimony was admissible. Defense counsel was not required to raise a meritless objection. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

III

Defendant also argues that his statement should have been suppressed because he had not been given a *Miranda*[1] warning. The trial court held a *Walker*[2] hearing and concluded that the statement was admissible. A trial court's decision following a suppression hearing will not be reversed unless it is clearly erroneous. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996).

In the present case, a police officer testified that while they were en route to the jail, defendant spontaneously volunteered that he had bought the necklace from someone named Chuck. Where there is no interrogation, the *Miranda* rule does not apply. See *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). Based upon the above, we cannot find that the trial court's decision was clearly erroneous.

IV

Defendant argues that the trial court erred by giving, over his objection, a jury instruction on aiding and abetting. To give a particular instruction to a jury, there must be evidence to support giving the instruction. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988). An aiding and abetting instruction is proper where there is evidence that (1) more than one person was involved in the commission of a crime, and (2) the defendant's role in the crime may have been less than direct participation in the wrongdoing. *People v Head*, 211 Mich App 205, 211; 535 NW2d 563 (1995).

We find no error requiring reversal. The trial court admitted defendant's prior statement to a police officer that defendant had bought a gold necklace from an individual named "Chuck." On the basis of that statement, the trial court could properly instruct the jury on aiding and abetting because a reasonable juror could conclude that Chuck and defendant acted in concert. Cf. *People v Mann*, 395 Mich 472, 476-478; 236 NW2d 509 (1975). Moreover, the jury could have accepted defendant's argument that "a guy named Chuck" was involved, but still concluded that defendant knew the necklace was stolen and took possession of it, thereby aiding in the receiving and concealing of the item. The only possible basis for arguing that the aiding and abetting instruction was inappropriate is not that there was insufficient evidence of a principle's involvement, but rather that any construction of the facts that would permit an inference that defendant aided and abetted Chuck with guilty knowledge would also support his guilt of the principle offense because he admitted possessing the necklace. Under the circumstances, any error in the giving of the instruction was harmless.

V

Defendant next argues that the trial court committed reversible error in giving its own extended instruction on a defendant's right not to testify. Defendant has failed to cite any authority for his position and thus has effectively abandoned this issue. See *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). Further, because the trial court's instructions fairly presented to the jury the issues to be tried and sufficiently protected defendant's rights, there was no error requiring reversal. See *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992).

VI

Defendant next argues that the trial court erred in allowing the prosecutor to amend the witness list during trial. A prosecutor may endorse a witness at any time by leave of the court and for good cause shown. MCL 767.40a(4); MSA 28.980(1)(4); *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992). Here, the prosecutor explained his late endorsement of both witnesses. One unendorsed witness was called as a substitute for a witness who was out of the country. The other

unendorsed witness was called when the prosecutor discovered that she was the only person with personal knowledge that the defendant was familiar with the victim's house. These explanations constituted good cause for the prosecutor's late endorsements. In addition, the trial court gave defense counsel the chance to interview and cross-examine the witnesses outside the presence of the jury. Because defendant has not shown that he was prejudiced by the late endorsements, we find that the trial court did not abuse its discretion in allowing the witnesses to testify. See *People v Williams*, 188 Mich App 54, 59; 469 NW2d 4 (1991).

VII

Next, defendant argues that the cumulative effect of multiple errors denied him a fair trial. However, because we have not found any cognizable errors that deprived defendant of a fair trial, reversal under this theory is unwarranted. See *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

VIII

Finally, defendant argues that his sentence was disproportionate. We disagree. Defendant's sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Defendant also argues that he was improperly sentenced as an habitual offender, fourth offense, because two of his prior convictions stemmed from the same criminal transaction. However, this issue is not preserved for appellate review because it was not set forth in defendant's statement of the issues presented. See *People v Yarbrough*, 183 Mich App 163, 165; 454_ NW2d 419 (1990).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Helene N. White

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).