

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DESHAWN E. BROWN,

Defendant-Appellant.

UNPUBLISHED
October 26, 1999

No. 209516
Recorder's Court
LC No. 96009032

Before: O'Connell, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, assault with intent to rob being armed, MCL 750.89; MSA 28.284, and possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b; MSA28.424(2). He was sentenced to five to ten years' imprisonment for the assault with intent to do great bodily harm conviction, to run concurrently with a term of ten to twenty years' imprisonment for the assault with intent to rob being armed conviction, both of which are consecutive to the statutory two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the evidence was insufficient to support a conviction of assault with intent to commit robbery while armed. Specifically, defendant contends that the custodial statements made by defendant reflect mere presence rather than aiding and abetting other individuals in the commission of the offense. This Court reviews attacks on the sufficiency of the evidence in a light most favorable to the prosecution. An attack on the sufficiency of evidence must fail if a rational trier of fact could have found evidence sufficient to prove the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, modified on other grounds 441 Mich 1201 (1992).

The elements of assault with intent to rob being armed are: (1) assault with force and violence; (2) intent to rob or steal; and (3) defendant being armed. *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). Here, the prosecution relied in part on the aiding and abetting theory, which we have previously summarized:

One who procures, counsels, aids, or abets in the commission of an offense may be convicted and punished as if he committed the offense directly. MCL 767.39; MSA 28.979; *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). To establish that a defendant aided and abetted a crime, the prosecutor must prove 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 principal in committing the crime, and (3) the defendant intended the commission of the crime or knew the principal intended its commission at the time he gave aid or encouragement. *Turner, supra*. Mere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to establish that a defendant aided or assisted in the commission of the crime. *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992). [*People v Norris*, ___ Mich App __; ___ NW2d ___ (#204051, dec'd 06/25/99).]

See also *People v Carines*, 460 Mich 750; 757-758; ___NW2d ___ (1999).

The state of mind of an aider and abettor may be inferred from all facts and circumstances, including, for example, close association between the defendant and principal, the defendant's participation in planning or executing the crime, and evidence of flight after the crime. *Id.*; *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995).

Here, the evidence revealed that defendant knew of the principals' intent to rob and participated in the crime by firing two shots during the attempted robbery and wounding the victim. Defendant also assisted one of the principals, who was defendant's brother, by shooting at the victim and helping his brother from the scene. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could determine that defendant aided and abetted in the commission of an assault with the intent to rob while being armed.

Defendant next argues that the trial court erred by unfairly limiting and impeding defense counsel's cross-examination of the police officers who took custodial statements from defendant. "The extent of and control over cross-examination lie within the sound discretion of the trial court, and its decision in that regard will not constitute reversible error absent a clear abuse of discretion." *People v Paintman*, 139 Mich App 161, 172; 361 NW2d 755 (1984); see also *People v Lucas*, 188 Mich App 554, 572; 470 NW2d 460 (1991). In criminal cases, an abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

On appeal, defendant cites many portions of the transcript where the trial court often sustained the prosecutor's objections to defense counsel's questioning. Defendant maintains that defense counsel should have been allowed to vigorously cross-examine the interrogating officers concerning the manner in which the statements were obtained and their content. Upon review of the alleged errors, we conclude that the trial court did not abuse its discretion. An unprejudiced person would not conclude that there was no justification or excuse for the rulings made. In fact, in some instances, the trial court

merely required defense counsel to rephrase the question. In other instances, the trial court's rulings sustaining objections to questions eliciting legal conclusions were proper where the officers were not testifying as experts, and even experts are precluded from providing legal conclusions. *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 122; 559 NW2d 54 (1996). The trial court made other rulings based on relevance, MRE 401-403, none of which leads us to conclude that the trial court abused its discretion. Although the trial court prohibited defense counsel from utilizing certain tactics during cross-examination, defense counsel was not unduly impeded from cross-examining the officers regarding the manner in which the statements were obtained and their content.

Finally, defendant argues that the trial court erred by failing to sua sponte instruct the jury on identification and on accessory after the fact as a cognate included offense. Because defendant did not object to the omission of such instructions below, he has failed to preserve this issue for appeal. Unpreserved claims of error are forfeited on appeal absent a showing that the trial court committed plain error which affected the outcome at trial. *People v Carines*, 460 Mich 750, 772; ___NW2d ___ (1999). In light of defendant's admission that he was at the scene and shot at complainant, defendant has failed to show that the trial court's failure to instruct the jury regarding identification affected the outcome of the trial. Accordingly, we find that defendant forfeited this issue on appeal.

Further, we find no error with regard to the trial court's failure to sua sponte instruct on accessory after the fact where such an instruction was not requested and where it has not been established that accessory after the fact is a cognate lesser included offense. See *People v Perry*, 460 Mich 55, 56-64; ___ NW2d ___ (1999); *People v Hendricks*, 446 Mich 435, 443; 521 NW2d 546 (1994). Defendant argues that such instruction is necessary to correct the prosecutor's misapplication of the aiding and abetting theory. We disagree. The trial court properly instructed the jury on the theory of aiding and abetting. The trial court instructed the jury that statements and arguments by counsel are not evidence. Further, the trial judge instructed the jurors that "if a lawyer said something different about the law, follow what I say."

Defendant argues alternatively that defense counsel's failure to request such instructions denied defendant effective assistance of counsel. The standards for review for ineffective assistance of counsel and for unpreserved instructional error are substantially similar with no substantive distinction. Assuming error on the part of counsel, a defendant cannot prevail on a claim of ineffective assistance of counsel unless defendant establishes by a "reasonable probability" that counsel's error was outcome determinative. *People v Pickens*, 446 Mich 298, 313; 521 NW2d 797 (1994). Because we previously found that defendant's claims of instructional error did not affect the outcome of the trial, defendant's claim that counsel was ineffective in failing to request those instructions must also fail.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Brian K. Zahra