

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VICTORIA WARE,

Defendant-Appellant.

UNPUBLISHED

January 7, 2000

No. 210020

Recorder's Court

LC No. 97-003959

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KYLE GADSON,

Defendant-Appellant.

No. 210700

Recorder's Court

LC No. 97-003959

Before: Gribbs, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

In Docket No. 210700, defendant Kyle Gadson was initially charged with six counts of first-degree criminal sexual conduct (CSC I) (sexual penetration of a person under thirteen years of age), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), for allegedly forcing two of codefendant Victoria Ware's children to perform oral sex (three acts per child). Following a jury trial, Gadson was convicted of four counts of CSC I and sentenced to concurrent terms of twenty to thirty years' imprisonment for each count. In Docket No. 210020, Ware was convicted by a jury of one count of CSC I, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), on an aiding and abetting theory. Ware was sentenced to five to ten years' imprisonment. Both defendants appealed as of right, and this Court consolidated the appeals. We affirm.

In Docket No. 210020, defendant Ware argues that the evidence was insufficient to support her conviction of CSC I on a theory of aiding and abetting Gadson. There is no merit to this claim. When reviewing a challenge to the sufficiency of the evidence, this Court must examine the evidence in the light most favorable to the prosecution to determine whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Marsack*, 231 Mich App 364, 370; 586 NW2d 234 (1998).

One who procures, counsels, aids, or abets in the commission of an offense may be convicted and punished as if he directly committed the offense. MCL 767.39; MSA 28.979; *People v Motor City Hosp & Surgical Supply, Inc*, 227 Mich App 209, 214; 575 NW2d 95 (1997); *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).

‘Aiding and abetting’ describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. . . . To support a finding that a defendant aided and abetted a crime, the prosecutor 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. An aider and abettor’s state of mind may be inferred from all the facts and circumstances. 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. [*People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999), quoting *Turner, supra* at 568-569 (citations omitted).]

Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to allow a jury to reasonably find that defendant either intended the commission of the crime or had knowledge that Gadson intended its commission. *Carines, supra* at 758. Defendant Ware’s children, eight-year-old R.C. and seven-year-old B.C, both testified that they told defendant Ware many times that Gadson forced them to perform oral sex on him. R.C. testified that defendant Ware had actually seen Gadson in the middle of a sex act with R.C., and that defendant Ware simply turned and walked out of the room. Defendant Ware’s mother, Barbara, testified that both boys told her what Gadson had done, and that, when Barbara confronted her, defendant Ware simply indicated that she did not believe it. Defendant Ware did not call the police or Protective Services, and she did not remove Gadson or the children from the house. Further, R.C. testified that defendant Ware told him not to tell the Protective Services worker about the sexual abuse and that he lied to the worker to avoid a whipping. We agree with the prosecution that defendant Ware assisted Gadson in his crime by leaving the children in his care with knowledge that he was abusing them. There is ample evidence to support defendant Ware’s conviction.

Defendant Ware also argues that she was denied her right to a unanimous verdict because the trial court failed to properly instruct the jury. We disagree. Defendant Ware failed to object to the jury instructions or the verdict form, and this issue is not preserved for appellate review. MCR 2.516(C); *People v Paquette*, 214 Mich App 336, 339; 543 NW2d 342 (1995). In any case, defendant Ware has failed to demonstrate prejudice requiring reversal. *Carines*, *supra* at 763-764.

In Docket No. 210700, defendant Gadson contends that he was denied the effective assistance of counsel when his attorney failed to object to several instances in which the prosecutor elicited hearsay testimony. We disagree. To establish that his right to the effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced him as to deprive him of a fair trial. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To find prejudice, a court must conclude that there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. *Id.* at 312. Because defendant Gadson failed to move below for a *Ginther*¹ hearing or a new trial on the basis of ineffective assistance of counsel, our review is limited to mistakes apparent on the record. *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998); *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

While some of the prosecutor's questions did result in the admission of hearsay statements, we conclude that defendant has failed to overcome the strong presumption that counsel's failure to object to the questions might be considered sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998). Furthermore, defendant Gadson has not established that, absent counsel's errors, the outcome of the proceedings would have been different. *Pickens*, *supra* at 302-303; *Plummer*, *supra* at 307.

Defendant Gadson also alleges several instances of prosecutorial misconduct. Because none of these allegations were preserved by objection below, appellate relief is precluded unless any prejudicial effect could not be cured by a cautionary instruction or failure to consider the issue would result in a miscarriage of justice. *Stanaway*, *supra* at 687; *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999). Upon examining the pertinent portions of the record and evaluating the prosecutor's remarks in context, *Avant*, *supra* at 508, we conclude that the prosecutor's comments were supported by the evidence and were proper. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *Stanaway*, *supra* at 686. Moreover, a prompt admonishment to the jury regarding its role as factfinder would have cured any error resulting from the prosecutor's comments during closing argument. *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996). Accordingly, defendant Gadson was not deprived of his right to a fair trial, and our failure to review this issue will not result in manifest injustice.

Finally, defendant Gadson argues that he was denied the effective assistance of counsel when his attorney failed to object to the prosecutor's comments. Because the prosecutor's remarks were proper, however, defense counsel's failure to object did not fall below an objective

standard of reasonableness. *Smith, supra* at 556; *Pickens, supra* at 302-303. Defendant Gadson has failed to overcome the strong presumption that counsel's actions were sound trial strategy. *Stanaway, supra* at 687; *Ho, supra* at 191.

Affirmed.

/s/ Roman S. Gibbs

/s/ William B. Murphy

/s/ Richard Allen Griffin

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).