STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 23, 2001
v	No. 215419 Oakland Circuit Court
TERENCE ANTHONY SLACK, Defendant-Appellant.	LC No. 98-159064-FC

Before: Neff, P.J., and Holbrook, Jr., and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from a jury trial conviction of assault with intent to rob while armed, MCL 750.89; MSA 28.284. Defendant was sentenced, as a third habitual offender, MCL 769.11; MSA 28.1083, to six to twenty years' imprisonment. We affirm.

I

Defendant first argues that the trial court abused its discretion by admitting the 911 audio tape because there was no corroboration as required for a statement to be admissible under the present sense impression exception to the hearsay rule. We disagree.

This Court reviews the trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). A present sense impression is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." MRE 803(1). Defendant does not argue that the audio tape of the 911 call is not a present sense impression, rather, he argues that the tape was inadmissible because it was not corroborated. Corroboration is required to admit present sense impressions. *People v Hendrickson*, 459 Mich 229, 237-238; 586 NW2d 906 (1998). Corroboration is sufficient where it assures the reliability of the statement. *Id*. In *Hendrickson*, the Michigan Supreme Court found that photographs depicting the victim's injuries were sufficient corroboration to establish the reliability of statements made by the victim during a 911 call reporting that the defendant had assaulted her, where the photographs were taken soon after the beating was alleged to have occurred, and the injuries were consistent with a beating. *Id.* at 233, 239.

The *Hendrickson* Court, in determining that corroboration was necessary for present sense impressions, explained the reason for the exception:

> Present sense impressions are presumed to be trustworthy because (1) the simultaneous event and description leave no time for reflection, (2) the likelihood for calculated misstatements is minimized, and (3) generally, the statement is made in the presence of another witness who has the opportunity to observe and verify its accuracy. [*Id.* at 235; footnote omitted.]

The *Hendrickson* Court noted that many 911 tapes lack the third component of trustworthiness because the speaker is alone and the dispatcher is unable to observe and verify the statement's accuracy. *Id.* at 235 n 2. In order to admit these present sense impressions, corroborating evidence is required to establish their reliability. *Id.* at 237-238.

In the present case, there is sufficient circumstantial evidence that establishes the reliability of the gas station attendant's statements to the 911 dispatcher. Officer Talrita[1] testified that she arrived at the scene, heard defendant say, "Give me the money," and later observed that the south door to the station was bent outward, glass was broken, and items in the store were in disarray on the floor. Talrita's testimony sufficiently corroborated the 911 report that the gas station was being robbed. Although there was no independent corroboration of the attendant's statements regarding the gunman who allegedly abetted defendant, *Hendrickson* does not require that every statement be independently corroborated. The trial court did not abuse its discretion by admitting the audio tape of the 911 call.

II

Defendant next argues that the evidence was insufficient to sustain his conviction because there was no evidence establishing that defendant was armed or that defendant could form the specific intent necessary to commit the crime while he was intoxicated. We disagree. In reviewing sufficiency of the evidence claims, this Court must determine if there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). In doing so, this Court must view the evidence in a light most favorable to the prosecution. *Id*. at 723.

The elements of assault with intent to commit armed robbery are: "(1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed." *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). This is a specific intent crime. *Id.* Here, the prosecutor relied, in part, on an aiding and abetting theory. The elements of aiding and abetting are: "(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." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

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[1] At the time of trial, Officer Talrita had married, and her name had changed to Marshall.

A

Defendant first argues that there was insufficient evidence to establish that defendant committed assault with intent to commit armed robbery, as he was unarmed. However, the attendant's testimony provided sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. The attendant testified that he saw defendant with a man, and the man was holding a gun. Defendant said, "[o]pen the door and give us the money." Defendant forced the locked door open and entered the station, while the gunman waited outside. The gunman remained outside, pointing the gun at the attendant through the window, while defendant tried to open the door to the cashier's office. The attendant testified that he thought he was going to lose his life that night. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could find, beyond a reasonable doubt, that defendant and the gunman aided and abetted each other in assaulting the attendant with force or violence, that defendant had the intent to rob, and that the man with defendant had a gun.

B

Defendant next argues that he was intoxicated, and therefore, could not form the requisite intent to rob or steal. The voluntary intoxication defense is applicable only to specific intent crimes. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). Specific intent is intent beyond the act done, whereas general intent is merely the intent to perform the physical act itself. *Id*. at 144. "A defense of intoxication is only proper if the facts of the case could allow the jury to conclude that the defendant's intoxication was so great that the defendant was unable to form the necessary intent." *People v Mills*, 450 Mich 61, 82; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995).

Here, Talrita testified that defendant was on some type of alcohol or drugs, that defendant was "zoned out." Defendant did not appear confused, but did look like someone who was drunk. Defendant looked at Talrita as though he did not know what to do. Officer Wood testified that defendant did not respond to anything he said, even when Wood had his weapon drawn. Defendant testified that he had been smoking marijuana, had drunk five forty-ounce beers, and was intoxicated. However, defendant admitted that he yanked and bent the door to enter the building and that he told the attendant to give him the money. Defendant's own testimony established that defendant had more than the general intent to perform the physical act of entering the building.

Defendant's testimony of intoxication is also contradicted by Marshall's testimony that defendant was able to run and hop fences and defendant's own testimony that he ran and eluded Marshall. While there is evidence that defendant was intoxicated, viewing this evidence in a light most favorable to the prosecution, the evidence does not establish beyond a reasonable doubt that defendant's intoxication was so great that defendant was unable to form the necessary intent. *Id*.

Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find that defendant committed assault with intent to commit armed robbery by aiding and abetting a gunman in the attempted commission of the robbery, and that defendant's intoxication

was not so great that it rendered him unable to form the specific intent required for assault with intent to rob while armed.

III

Defendant next argues that the trial court erred by failing to sua sponte give the standard jury instruction regarding intoxication where the facts of the case supported such an instruction. Defendant did not request the intoxication instruction and expressed his satisfaction with the jury instructions. "The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused." MCL 768.29; MSA 28.1052; see *People v Gomez*, 229 Mich App 329, 332; 581 NW2d 289 (1998).

An appellate court is obligated to review only issues which are properly raised and preserved. *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994). This issue is not preserved. Because defendant did not request the intoxication instruction, the trial court could not have plainly erred in not, sua sponte, giving the instruction. *Carines, supra* at 763; *Gomez, supra* at 332. Further, as discussed above, while there was some evidence of intoxication, the evidence was not so conclusive that a rational trier of fact could not have found that defendant had the specific intent to assault and rob. See *id*. at 332-334.

IV

Defendant also argues that he was denied his fundamental right to a fair trial by the prosecution's misconduct in arguing facts not in evidence and asking defendant to comment on the credibility of his booking report. We disagree. Again, this issue is unpreserved because defendant did not object to the prosecutor's argument or questioning during trial. Review of improper prosecutorial remarks is generally precluded where the defendant did not object. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). This Court will only review defendant's claim for plain error. *Id*. No error requiring reversal will be found where the prosecutor's comments could have been cured by timely instruction. *Id* at 720-721.

This Court examines prosecutorial remarks in context to determine whether they denied a defendant a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995); *People v Rice*, 235 Mich App 429, 435; 597 NW2d 843 (1999). A prosecutor may not argue facts or evidence not admitted at trial. *Stanaway, supra* at 686. However, prosecutors may argue the evidence and reasonable inferences from that evidence. *Bahoda, supra* at 282.

A

Defendant contends that the prosecutor argued facts not in evidence when he stated that defendant had two packs of cigarettes on him and that the Rite Aid store was closer to defendant and open. Defendant is correct. There was no evidence that defendant had two packs of cigarettes. Defendant specifically denied having any cigarettes and the booking report was not introduced into evidence. There was also no evidence that defendant was closer to the Rite Aid store or that the Rite Aid store was open. Defendant testified that he was at a park and not at home, and there was no evidence of the Rite Aid store's hours. Further, these statements were not reasonable inferences from the evidence presented at trial. However, had defendant objected

to the prosecutor's statements, the trial court could have instructed the jury to disregard them and thereby avoided any prejudicial effect. Because the prejudicial effect of the misconduct could have been cured had defendant objected, this Court will not reverse. *Schutte, supra* at 721.

B

Defendant also argues that the prosecutor committed misconduct in asking defendant to comment on the credibility of the booking report. While it is improper for the prosecutor to ask a defendant to comment on the credibility of prosecution witnesses, there was no witness who testified to the information contained in the booking report. *People v Buckey,* 424 Mich 1, 17; 378 NW2d 432 (1985); *People v Messenger,* 221 Mich App 171, 180; 561 NW2d 463 (1997). Nevertheless, the prosecutor is precluded from asking a defendant to comment on credibility of prosecution witnesses because matters of credibility are to be determined by the trier of fact. *Buckey, supra*. That same reasoning would extend to a booking report, because it is the role of the jury to determine the accuracy of and weight given to the booking report. However, defendant would have suffered no prejudice had he properly and timely objected to the questioning regarding the booking report. Because any prejudicial effect of the misconduct could have been cured had defendant objected, this Court will not reverse. *Schutte, supra* at 720-721.

V

Finally, defendant argues that the cumulative effect of the above errors denied defendant his fundamental due process right to a fair trial. We disagree. This Court evaluates the cumulative effect of errors in determining whether the defendant received a fair trial. *Bahoda, supra* at 292 n 64. Only actual errors are aggregated to determine their cumulative effect. *Id*. Because this Court found no error as alleged by defendant, or any error was of minor consequence, defendant was not denied a fair trial.

Affirmed.

/s/ Janet T. Neff
/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen