STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

G. H. MONTGOMERY,

Defendant-Appellant.

UNPUBLISHED
January 22, 2002

No. 225981
Wayne Circuit Court
Criminal Division
LC No. 99-005578

Before: Hood, P.J., and Murphy and Markey, JJ.

PER CURIAM.

Defendant was convicted of carjacking, MCL 750.529a, and armed robbery, MCL 750.529. He was sentenced to two concurrent terms of twelve to twenty years' imprisonment. He appeals by right. We affirm.

Defendant first argues that trial counsel was ineffective because he failed to move to suppress the victim's voice identification testimony. We disagree. In order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). "Defense counsel is not required to make frivolous or meritless motions." *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

In this case, a motion to suppress the voice identification would not have been successful. In *People v Hayes*, 126 Mich App 721, 725; 337 NW2d 905 (1983), this Court discussed the law of voice identification. Voice identification testimony is competent evidence if it is "reasonably positive and certain," and is based on a peculiarity in the voice or on sufficient knowledge by the witness about the voice. *Id.*, quoting *People v Bozzi*,36 Mich App 15, 19; 193 NW2d 373 (1971).

> [S]ome reason must appear to which the witness can attribute the ability to make the voice identification, of which familiarity and peculiarity are the most common, though not exclusive, examples. [*Hayes, supra* at 725.]

In this case, within five seconds of submitting to a codefendant's demands to hand over his car keys, the victim heard a voice say, "take him in the alley and run his pockets." The

victim testified that the statement made him run faster. Later, the victim received eight or nine telephone calls from a certain caller, who identified himself as "G. Money." The victim gained familiarity with the voice and testified that it was the same voice that said "take him in the alley and run his pockets." He was "absolutely positive" that defendant was the person who said "run his pockets" and the person who later made the numerous telephone calls. The victim testified that the voice haunted him and greatly affected his life. It also had an immature and silly sounding quality to it. Given that the victim was "absolutely" positive and certain about the voice, that the victim indicated there was a certain quality to the voice, and that the victim had ample opportunity to become familiar with the voice after hearing it numerous times, there was no reason to move to suppress the voice identification. Counsel was therefore not ineffective for failing to bring the meritless motion.

Defendant next argues that the evidence was insufficient to sustain his convictions. This argument also has no merit. When reviewing the sufficiency of the evidence in a criminal case, the reviewing court "must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997).

The elements necessary to obtain a conviction for carjacking are:

> (1) that the defendant took a motor vehicle from another person, (2) that the defendant did so in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle, and (3) that the defendant so either by force or violence, by threat of force or violence, or by putting the other person in fear. [*People v Davenport*, 230 Mich App 577, 579; 583 NW2d 919 (1998).]

The aiding and abetting statute, MCL 767.39, provides:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

In this case, defendant does not argue that a carjacking did not occur. Rather, he argues that the evidence was insufficient to support that he aided and abetted the carjacking. In making his argument, he views the evidence and inferences in a light favorable to himself. This is impermissible. Considered in a light most favorable to the prosecution, *Hoffman, supra* at 111, there was evidence that a codefendant took possession and control of the victim's vehicle at gunpoint. Within five seconds of handing the codefendant the keys to the vehicle, the victim heard defendant say, "take him in the alley and run his pockets." The victim ran away from the scene faster because of the statement. Later, defendant was in possession of an item that was in the vehicle when the victim turned over the car keys at gunpoint. Defendant later admitted to a friend that he was with the codefendant and another person and that he committed a carjacking. He claimed that he drove away from the scene in the stolen car. The evidence, viewed in a light most favorable to the prosecution, supports defendant's conviction for carjacking.

Defendant also argues that there was no evidence that he aided and abetted in the armed robbery. He argues that the crime was complete before he made the alleged statement, "take him in the alley and run his pockets." This argument, like the argument with regard to carjacking, has no merit. Within seconds after the victim gave up his car keys, defendant made a statement from which it can reasonably be inferred that he wanted to steal additional items. An inference can be made that defendant was assisting the codefendant, not only because of his proximity to the codefendant at the time of the crime and his contemporaneous statement about running the victim's pockets, but because defendant later had possession of an item, a pager, that was in the stolen car. More importantly, defendant bragged about being involved in the taking of the automobile and necessarily, the taking of the items inside. There was sufficient evidence to support that defendant aided and abetted the armed robbery.

Defendant next argues that the trial court committed error requiring reversal by improperly reading the aiding and abetting instructions. This argument is waived because, after the jury was instructed, defense counsel specifically expressed satisfaction with the jury instructions "as read." *People v Carter,* 462 Mich 206, 214-219; 612 NW2d 144 (2000). We note that even if the issue were not waived, reversal is not warranted. Unpreserved errors are reviewed under the plain error rule. *People v Carines,* 460 Mich 750, 774; 597 NW2d 130 (1999). Defendant cannot meet the requisite burden of proof to support plain error requiring reversal. He cannot demonstrate prejudice. When the aiding and abetting instructions are read as a whole, the misspoken word did not change the meaning or burden with regard to aiding and abetting. The instructions as a whole did not impart or imply that post-crime conduct is grounds to support a conviction on a theory of aiding and abetting. The instructions made clear that in order to be convicted as an aider and abettor, defendant had to encourage or participate in the crimes before or during their commission. Thus, defendant has failed to demonstrate that the misreading of the instruction affected the outcome of the trial.

Finally, defendant argues that the trial court erred when it failed to instruct the jury on the offense of receiving or concealing stolen property as a lesser offense of both carjacking and armed robbery. We disagree.

Criminal defendants and prosecutors are entitled to request lesser included offense instructions. *People v Torres (On Remand),* 222 Mich App 411, 416; 564 NW2d 149 (1997). There are two types of lesser included offenses: necessarily included lesser offenses and cognate lesser offenses. *People v Hendricks,* 446 Mich 435, 442-443; 521 NW2d 546 (1994); *People v Mosko,* 441 Mich 496, 499-500; 495 NW2d 534 (1992). If it is impossible to commit the greater offense without first committing the lesser offense, the lesser offense is necessarily included. *Hendricks, supra* at 443. A trial court must instruct on all necessarily included offenses. *Id.* at 442-443. Cognate offenses are offenses that are related to the charged offense, i.e., in the same class or category but contain some different elements than the higher offense. *Id.* at 443. With regard to cognate offenses, there needs to be a correlation between the charged offense and the requested lesser offense. *Id.* at 445. There must be an inherent relationship between the two offenses. *Id.* at 446.

Receiving or concealing stolen property is neither a necessarily included lesser offense nor a cognate lesser offense of armed robbery. *People v Jackson,* 158 Mich App 544, 558-559; 405 NW2d 192 (1987); *People v Harris,* 82 Mich App 135, 137-138; 266 NW2d 477 (1978), overruled in part on other grounds in *Hendricks, supra* at 450-451, n 20. Similarly, receiving or

concealing stolen property is neither a necessarily included offense nor a cognate lesser offense of carjacking. The greater crime of carjacking can be committed without the commission of receiving or concealing stolen property. Receiving or concealing stolen property does not have any elements in common with the crime of carjacking, and defendant has offered no authority or argument to support that the crimes are related or share an inherent relationship. Because the lesser offense is neither a necessarily included nor cognate lesser offense of the crimes charged, the trial court properly refused to instruct the jury on the lesser crime.

We note that defendant has offered no authority to support that a trial court may instruct the jury on a lesser crime that is wholly unrelated to the charged crimes. A defendant is not simply permitted to request instruction on any possible lesser crimes that might be supported by the evidence. There must be a correlation or relationship between the charged offenses and the crimes for which the defendant is requesting an instruction. Even where the requisite relationship is found, there are restraints, e.g., instruction is inappropriate unless evidence presented at trial would support conviction of the lesser offense. *Hendricks*, *supra* at 442.

> To preserve the jury's proper function, the bounds of possible offenses the jury may consider in a particular case must be described. In the case of cognate lesser offenses, the method of management adopted by this Court is to limit instruction to those offenses that bear a sufficient relationship to the principal charge in that they are in the same class or category, protect the same societal interests as that offense, and are supported by the evidence adduced at trial. . . . If the jury's mercy-dispensing power is unrestrained, attention to the factfinding duty may be diverted, and the jury may assume the punishment prerogative of the court. [*Id.* at 447.]

We affirm.

/s/ Harold Hood
/s/ William B. Murphy
/s/ Jane E. Markey