

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

IRA L. RILEY,

Defendant-Appellant.

UNPUBLISHED

June 25, 2002

No. 232896

Wayne Circuit Court

LC No. 00-002774

Before: Neff, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of armed robbery, MCL 750.529, and was sentenced to ten to twenty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the evidence was insufficient to support his conviction. We disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). This standard applies to bench trials. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001).

Defendant was convicted of armed robbery on an aiding and abetting theory. To establish criminal liability as an aider and abettor it must be shown that (1) the crime was committed by someone, (2) the accused performed acts or gave encouragement that assisted the commission of the crime, and (3) the accused 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, 757-758; 597 NW2d 130 (1999).

Defendant does not dispute that a robbery occurred, but he argues that he was not involved. When viewed in the light most favorable to the prosecution, the evidence established that defendant was involved in the planning, organizing and commission of the robbery of his place of work. The trial court found that defendant told a co-worker that a robbery was being planned at the work site and he offered the co-worker \$1,000 to open the door for him. Apparently, entry to the building could only be gained by a person opening the door from the inside. The co-worker testified that on the day of the robbery he did open the door for defendant and another individual, who put on a mask after entering the building and appeared to reach in his pants for a gun. The trial court resolved credibility issues in favor of the prosecution, as it

was entitled to do. This Court will defer to the trial court's resolution of factual issues, especially when credibility of witnesses is involved. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997). While much of the evidence against defendant was circumstantial, such evidence and the reasonable inferences arising from it can constitute satisfactory proof of the elements of a crime. *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993). Based on the trial court's findings and the record before us, we hold that there was sufficient evidence to support defendant's conviction on an aiding and abetting theory.

Defendant next argues that the verdict was against the great weight of the evidence because a certain witness had no credibility and other witnesses' testimony was conflicting. Again, we disagree. Absent exceptional circumstances, conflicting testimony or a question as to the credibility of a witness is an insufficient basis for granting a new trial. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). No such circumstance existed here. We conclude that the discrepancies in testimony do not preponderate so heavily against the verdict that it would be a miscarriage of justice to let the verdict stand. *Id.* at 627. Moreover, as noted, we defer to the credibility determinations of the trial court in a bench trial. *Cartwright, supra*.

Defendant next argues that he was denied effective assistance of counsel. We disagree. Because there was no evidentiary hearing, our review is limited to the existing record. *People v Portillo*, 241 Mich App 540, 543; 616 NW2d 707 (2000). The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, sec 20, is the right to effective assistance of counsel. *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996).

To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Cronin, supra* at 657; *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id.* at 302. A defendant can overcome the presumption by showing that counsel failed to perform an essential duty and that the failure was prejudicial to the defendant, *People v Reinhardt*, 167 Mich App 584, 591; 423 NW2d 275 (1988).

First, defendant argues that his trial counsel should have objected when the prosecution constructively amended the information at the beginning of the trial. Defendant was charged with armed robbery and the prosecution argued the case on an aiding and abetting theory, which it announced during its opening statement.

An information may be amended at any time before, during or after trial to cure any defect, imperfection or omission in form or substance, including a variance between the information and the proofs, if the accused is not prejudiced by the amendment and the amendment does not charge a new crime. MCL 767.76. Because Michigan has abolished by statute the distinction between being a principal of a crime and an aider and abettor to a crime, it is not necessary for a prosecutor to charge a defendant in any form other than as a principal, MCL 767.39, and a defendant may be charged as a principal and convicted as an aider and abettor, *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). Therefore, we hold there was no error. Because there was no error, defendant's trial counsel was not ineffective for

failing to object. Trial counsel need not make a futile objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Second, defendant argues that his trial counsel's lack of pretrial communication with him resulted in defendant being denied a substantial defense. Defendant contends that his trial counsel should have obtained his timecard, which would have proven conclusively that he did not arrive at the building until after the robbery had occurred. However, the evidence established that there were no set procedures for punching in, other than the worker's daily routine. There was nothing to prevent defendant from punching in at any time after his arrival. Additionally, three witnesses testified to seeing defendant in the building before the robbery occurred. Therefore, we conclude that defendant was not prejudiced by his trial counsel's failure to obtain his timecard.

Affirmed.

/s/ Janet T. Neff
/s/ Richard Allen Griffin
/s/ Michael J. Talbot