

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEYONTA R. ROBINSON,

Defendant-Appellant.

UNPUBLISHED

January 22, 2004

No. 243335

Muskegon Circuit Court

LC No. 01-046785-FC

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

PER CURIAM.

Defendant Deyonta R. Robinson appeals by right his jury trial convictions for armed robbery, MCL 750.529, and three counts of unarmed robbery, MCL 750.530. Defendant was sentenced to 27 to 41 years' imprisonment for the armed robbery conviction and concurrent 20- to 30-year sentences for the three unarmed robbery convictions. We affirm.

Following the parties' closing arguments in this case, the trial court instructed the jury that defendant could be found guilty of armed robbery as a principal and as an aider and abettor to his brother, Karl McBride. Defendant argues that he was denied his constitutional right to a unanimous jury verdict because the trial court's jury instructions allowed the jury to consider two materially distinct acts to convict him of armed robbery: (1) that he used a gun to rob complainant James Hardy; or (2) that he had no gun, but aided and abetted McBride who used a beer bottle to rob Hardy. Defendant specifically objected to the aiding and abetting instruction at trial, and he contends again on appeal that the trial court's instructions denied him his constitutional right to a unanimous jury verdict. We disagree. This Court reviews de novo claims of instructional error. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Imperfect instructions will not require reversal if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *Id.* Defendant bears the burden of showing that as a result of the alleged error, when weighed against the facts and circumstances of the entire case, it affirmatively appears more probable than not that the error was outcome determinative. MCL 769.26; *People v Riddle*, 467 Mich 116, 124-125; 649 NW2d 30 (2002).

It is well established that to protect a defendant's constitutional right to a unanimous verdict, it is the duty of the trial court to properly instruct the jury regarding the unanimity requirement. *People v Smielewski*, 235 Mich App 196, 201; 596 NW2d 636 (1999), citing *People v Cooks*, 446 Mich 503, 511; 521 NW2d 275 (1994). In *Cooks*, the defendant was

charged with a single count of first-degree criminal sexual conduct, MCL 750.520b, but the victim testified to three separate instances of sexual penetration over a three-day period. *Cooks, supra* at 506-507. The trial court rejected the defendant's request that the jury be specifically instructed that it must unanimously agree on which, if any, of the alleged acts of penetration defendant committed before convicting him. *Id.* at 508. The jury convicted the defendant of second-degree criminal sexual conduct, MCL 750.520c. *Id.* at 509. Our Supreme Court held that the trial court did not err in refusing the defendant's requested instruction because the evidence offered to support each distinct incident was materially identical and nothing indicated the jury was confused or disagreed about the basis of the defendant's guilt. *Id.* at 506. The *Cooks* Court also noted that the defendant did not present a separate defense or offer materially distinct evidence to impeach any particular incident, and that the task of the jury "was to determine the credibility of the victim with respect to the pattern of alleged conduct." *Id.* at 528. But the Court cautioned that a specific unanimity instruction may often be required because "in most cases, the evidence will be materially distinct regarding one of the multiple acts allegedly committed by the defendant." *Id.* at 530 n 34.

The facts of the instant case are far different from those addressed in *Cooks*. Although defendant was charged with multiple counts of armed robbery involving multiple victims, each offense was alleged to have occurred at the same time and place. Indeed, the *Cooks* Court distinguished the fact situation it addressed from one where statutes provide alternative means of defining a single criminal offense. *Cooks, supra* at 514-515, citing *Schad v Arizona*, 501 US 624; 111 S Ct 2491; 115 L Ed 2d 555 (1991) (upholding first-degree murder conviction without requiring jury unanimity whether its verdict was based on the theory of premeditation and deliberation or based on felony-murder theory). The *Cooks* Court found multi-theory statutes analytically distinct, and noted when "a statute lists alternative means of committing an offense which in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theory." *Cooks, supra* at 515 n 16, quoting *People v Johnson*, 187 Mich App 621, 629-630; 468 NW2d 307 (1991). Thus, as distinguished from a case involving separate and distinct acts or offenses which require a unanimity instruction, a unanimity instruction is generally not required when a statute provides alternative means of committing an offense and the prosecutor advances alternative theories to prove guilt. *Smielewski, supra* at 209; *People v Gadomski*, 232 Mich App 24, 31; 592 NW2d 75 (1998).

In *Smielewski*, this Court addressed a claim similar to the present case in which the defendant appealed his conviction for armed robbery, claiming that the trial court erred by instructing the jury that it did not have to unanimously agree as to whether defendant actually committed the armed robbery himself or aided and abetted another. *Id.* at 200-201. This Court concluded that "merely because the jury could find from the evidence that defendant committed the charged offense of armed robbery as a principal or an aider and abettor, a unanimity instruction was not required." *Id.* at 209. The *Smielewski* Court explained:

If the opposite were true, a defendant could escape conviction even if he openly acknowledged that he participated in the crime—as either a principal or an aider and abettor—but the jury could not agree on which of the two roles the defendant played in the commission of the crime. Such a result defies common sense. In our opinion, if each juror found that defendant committed the crime by either of

such means, each juror found that the defendant committed the crime, MCL 767.39 [aiding and abetting statute], and the jury verdict is unanimous. [*Id.*]

Our holding in *Smielewski* was therefore based primarily on the aiding and abetting statute, MCL 767.39, which abolished the distinction between accessories and principals so that one who counsels, aids, or abets in the commission of an offense may be tried and convicted as if he had directly committed the offense. *Smielewski, supra* at 202-203, citing *People v Palmer*, 392 Mich 370, 378; 220 NW2d 393 (1974). Furthermore, the *Smielewski* Court cited *People v Burgess*, 67 Mich App 214; 240 NW2d 485 (1976), and *People v Ewing (On Remand)*, 102 Mich App 81; 300 NW2d 742 (1980), as similar cases applying MCL 769.39 in unanimous verdict appeals. For instance, the *Smielewski* Court cited *Burgess*, in which this Court stated:

[W]ith the abolition of the common law distinction between a principal and an aider and abettor, the defendant cannot complain if some members of the jury found his participation in the crime to be more substantial than did the remaining members of the jury. [*Smielewski, supra* at 203-204, quoting *Burgess, supra* at 222.]

And in *Ewing*, this Court also held that because the prosecutor presented substantial evidence of the defendant's guilt at trial both as a principal and as an aider and abettor, the jury's verdict should be preserved because:

Direct commission of a crime and aiding and abetting its commission are both punishable by the same penalty; the evidence required to prove either is not substantially different and both require proof of the principal's guilt; and they are not separate and distinct in character, particularly in light of the statute which abolishes the common-law distinctions between direct commission and aiding and abetting. [*Smielewski, supra* at 205, quoting *Ewing, supra* at 90.]

Here, as stated above, the record indicates that the trial court gave an instruction for armed robbery as well as an instruction that defendant could be convicted of aiding and abetting Karl McBride. Therefore, similar to *Smielewski*, the evidence at trial showed either that defendant committed an armed robbery with a gun as the principal, or that defendant committed the crime as an aider and abettor by helping McBride collect the money after McBride hit Hardy over the head with a bottle. Moreover, the victims of the robbery testified that after McBride hit Hardy, defendant pulled out a hand-gun and ordered everyone to give up their money. Additionally, as was revealed during defendant's proofs, there was also testimony that although defendant did not have a gun he helped McBride collect money after McBride had hit Hardy with the bottle.

Therefore, we find that because there was ample evidence to support both theories presented, the mere fact that the jury could have found that defendant either committed the charged offense of armed robbery as a principal or aided and abetted McBride, does not deny defendant his constitutional right to a unanimous verdict.

Next, defendant argues that it was impossible for the jury to unanimously agree on how defendant committed unarmed robbery because there was no evidence that McBride threatened

anyone other than Hardy with the bottle and because some jurors may have relied on defendant's use of a gun to find an assault while others relied on McBride's use of the bottle. But as we discussed above, the mere fact that some jurors may have concluded that defendant acted as a principal while others believed he aided and abetted McBride does not deny defendant his right to a unanimous verdict because under MCL 767.39, there is no distinction between these two theories of guilt. In other words, "if each juror found that defendant committed the crime by either of such means, each juror found that the defendant committed the crime, MCL 767.39, and the jury verdict is unanimous." *Smielewski, supra* at 209. This conclusion is consistent with *Smielewski, supra*, holding that defendant was not denied his right to a unanimous verdict because it is not necessary for the jury to unanimously agree on which theory of unarmed robbery was actually perpetrated when the alternative theory is aiding and abetting, and the evidence at trial supported the aiding and abetting theory. *Id.*

Next, defendant argues that to the extent this Court determines that defense counsel failed to properly preserve his unanimous verdict claim by failing to make the proper objections, he was denied effective assistance of counsel. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient, such that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney guaranteed by the Sixth Amendment. *LeBlanc, supra*. The record indicates defendant objected to the original aiding and abetting instruction and again objected to the trial court's instruction on aiding and abetting after the jury posed two questions during deliberations. Therefore, the unanimous verdict issue was preserved for this Court's review, and defendant has failed to overcome the presumption that he received effective assistance of counsel.

Defendant next argues that the trial court impermissibly broadened the scope of the original information by instructing the jury that defendant could be found guilty of armed robbery if he aided and abetted McBride. The trial court read the information for armed robbery as follows:

That on or about September 12th of the year 2000 in the city of Muskegon at 420 Allen Avenue, Deyonta Robinson assaulted [complainant] while being armed with a dangerous weapon or an article used or fashioned in a manner to lead [complainant] to reasonably believe it to be a dangerous weapon, specifically a gun, and did then and there feloniously rob, steal and take from the person

Defendant insists that he was convicted of a crime for which he was not charged because the trial court read the above information to potential jurors, but then improperly broadened the scope of that information by instructing the jury on the aiding and abetting theory. We disagree.

A defendant may not be convicted of a crime for which he has not been charged. *People v Kelley*, 78 Mich App 769, 776; 260 NW2d 923 (1977). But the distinction between committing a crime as the principal and as an aider and abettor has been abolished. "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.” MCL 767.39 (Emphasis added). Therefore, aiding and abetting the armed robbery or unarmed robbery is not a separate *charge*, but merely a different *theory* from which to find defendant’s guilt. Accordingly, the information provided adequate notice. *People v McKeighan*, 205 Mich 367, 370-371; 171 NW 500 (1919); *People v Palmer*, 42 Mich App 549, 553; 292 NW2d 536 (1972). There was no variance between the information charged and the jury instructions because aiding and abetting is not a separate *charge*; it is merely a separate *theory* for conviction under the same charge.

We affirm.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Michael J. Talbot