S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR LEE CAL III,

Defendant-Appellant.

UNPUBLISHED
April 27, 2004

No. 245500
Wayne Circuit Court
LC No. 02-000754

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Following a jury trial defendant was convicted of two counts of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to thirteen to twenty-five years' imprisonment for each armed robbery conviction, and two years' imprisonment for the felony-firearm conviction. Defendant now appeals as of right. We affirm.

Defendant's convictions stem from the robbery of two victims, Marlen Nixon and Torrey Virgis. According to the victims, they were outside of a bar when they were approached and robbed by four men with guns. The men took money and jewelry from the victims, beat the victims, and then drove off in Nixon's vehicle. Defendant was tried both as a principal in the robberies and under the theory of aiding and abetting.

Defendant first argues that there was insufficient evidence to support his convictions. When a defendant argues on appeal that there was insufficient evidence to support a conviction, this Court reviews the evidence de novo. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). "Factual conflicts are to be viewed in a light most favorable to the prosecution." *Id*. at 723.

Defendant was convicted of two counts of armed robbery, MCL 750.529. The elements of armed robbery include: (1) an assault, (2) a felonious taking of property from the victim's presence or person, and (3) that the taking occurred while the defendant was armed with a dangerous weapon. *People v Lee*, 243 Mich App 163, 168; 622 NW2d 71 (2000). A conviction of aiding and abetting requires proof that (1) the underlying crime was committed by either defendant or some other person, (2) the defendant performed acts or gave encouragement that aided and 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 of giving aid or encouragement. *People v Smielewski*, 235 Mich App 196, 207; 596 NW2d 636 (1999).

Defendant was also convicted of felony-firearm, MCL 750.227b. A conviction under the felony-firearm statute requires proof that the defendant carried or possessed a firearm during the commission or attempted commission of a felony. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). Possession may be actual or constructive and may be proven by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-471; 446 NW2d 140 (1989).

Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). This Court should not interfere with the jury's role in determining the weight of evidence or the credibility of a witness, *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), as questions of intent and credibility should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999); *People v Queenan*, 158 Mich App 38, 55; 404 NW2d 693 (1987). Intent may be inferred from all the facts and circumstances. *People v Hawkins*, 245 Mich App 439, 458 n 42; 628 NW2d 105 (2001); *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987).

At trial, a statement made by defendant established that defendant drove Darrell Johnson, Michael Bell (Bell), and Myra Bell to the scene of the armed robbery. Defendant's statement revealed that defendant knew that Johnson and Bell were going to commit a robbery. Defendant admitted to having a gun during the robbery and was aware that Johnson was also armed with a handgun as he and Bell robbed Virgis and Nixon.

Bell testified that he was with defendant, Myra Bell, Johnson, and Charles Jones in defendant's van when defendant stated that he needed to get some money. According to Bell, defendant drove to the scene of the robbery and let Jones out of the van, telling Jones to act as a lookout. Bell stated that defendant got out of the van with a gun, and, along with Johnson and Jones, began robbing Virgis and Nixon. Bell stated that defendant had his gun pointed at one of the men being robbed.

If the jury found the statements by defendant and Bell credible, this would be sufficient evidence to find beyond a reasonable doubt that defendant participated in the armed robberies, or at a minimum, aided and abetted the armed robberies. Testimony clearly indicates that an assault occurred when either defendant, Bell, Johnson, or Jones pointed a gun at Virgis and Nixon. Testimony also establishes a felonious taking of property from the victims' presence or person. Further, testimony establishes that the taking occurred while either defendant, Bell, Johnson, or Jones was armed with a dangerous weapon, namely a gun.

Even if defendant did not himself complete the armed robbery, there is enough evidence that a rational trier of fact could establish that defendant aided and abetted in the armed robbery by driving Bell, Johnson, and Jones to the scene, knowing their intention to rob Nixon and Virgis. Defendant's driving of Bell, Johnson, or Jones to the scene gave encouragement that aided and assisted the commission of the crime. Bell testified that defendant dropped off Jones to act as a lookout and also pointed his gun at one of the victims and took the victim's possessions. Defendant also stated that his part in the robbery consisted of driving to the scene. Both of these statements indicate that defendant intended the commission of the crime or had

knowledge that the principal intended its commission at the time defendant gave aid or encouragement. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could conclude that sufficient evidence existed to support defendant's armed robbery and felony-firearm convictions.

Defendant also argues that the verdict is against the great weight of the evidence. A claim that a verdict is against the great weight of the evidence is preserved by a motion for a new trial. *People v Harding*, 443 Mich 693, 736; 506 NW2d 482 (1993). Defendant did move for a new trial in this case, but it was on different grounds; therefore, the issue that the verdict is against the great weight of the evidence is unpreserved. This unpreserved issue will be reviewed for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

A verdict may only be vacated when it "does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence." *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993) (citation omitted). Questions regarding the credibility of witnesses and conflicting testimony do not constitute sufficient grounds for granting a new trial. *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998).

At trial, the prosecutor advanced alternative theories that defendant was guilty either as a principal or as an aider and abettor. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39. "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. *Carines*, *supra* at 757; *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991). The amount of aid or advice is irrelevant as long as it had the effect of inducing the crime. *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). Further, an aider and abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principals, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Carines*, *supra* at 758.

Again, defendant's statement established that defendant drove Johnson, Bell, and Myra Bell to the scene of the armed robbery. The statement also revealed that defendant knew that Johnson and Bell were going to rob the men. Defendant admitted to having a gun during the robbery, and Johnson was also armed with a handgun as he and Bell robbed Virgis and Nixon.

Bell's testimony established that defendant stated that he needed to get some money, so he drove to the scene of the incident where he let Jones out of the van, and told him to act as a lookout. Defendant then got out of the van with a gun, and, along with Johnson and Jones, began robbing Virgis and Nixon. Bell stated that defendant had his gun pointed at one of the men being robbed. Based on this evidence presented at trial, defendant's convictions are not against the great weight of the evidence.

Defendant next argues that the trial court abused its discretion by granting the prosecutor's motion to endorse two witnesses during trial. To preserve most issues, a party must object below. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Defendant objected to the late admission of Officer Julius Moses, but failed to object to the late endorsement of

Michael Bell; therefore, the issue regarding the addition of Moses to the witness list is preserved, while the issue regarding the late addition of Bell to the witness list is unpreserved. Accordingly, the late endorsement of Moses is reviewed for an abuse of discretion, *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992), citing *People v Heard*, 178 Mich App 692, 696; 444 NW2d 542 (1989); see also MCL 767.40a(4), while the late endorsement of Bell is reviewed for plain error. *Carines*, *supra* at 774.

MCL 767.40a(3) requires the prosecutor to provide a witness list to defense counsel not less than thirty days before the trial. MCL 767.40a(4) permits a prosecutor to add or delete from the list of trial witnesses at any time, "upon leave of the court and for good cause shown or by stipulation of the parties." *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003). If this statute is violated, the defendant must show prejudice from the violation before he is entitled to relief. *People v Hana*, 447 Mich 325, 385 n 10; 524 NW2d 682 (1994).

With regard to Officer Moses, the trial court credited the prosecutor's explanation that the witness was endorsed late in the proceeding because the prosecutor had discovered this witness only days earlier. During an interview, Officer Moses took a statement from defendant in which defendant implicated himself in the instant crimes. Defense counsel does not argue the fact that the defense knew of the statement that defendant had given to Moses, and had a copy of it in its possession. The court stated that since the defense was aware of the statement, it was not a surprise. The court further stated that the endorsement of Moses did not prejudice defendant because defense counsel was well informed about the statement. In his brief, defendant fails to set forth any facts or argument that the prosecution's explanation was untrue and also fails to show any unfair prejudice by the late endorsement of this witness. The court did not abuse its discretion in allowing the late addition of Moses to the witness list.

With regard to Bell, we find no plain error affecting defendant's substantial rights by the late endorsement. Bell was a former codefendant, who decided to enter a guilty plea on the first day of trial and agreed to testify against defendant. The details of Bell's plea agreement were presented to the jury, and he was cross-examined concerning his involvement in the commission of the offense and his decision to plead guilty. There is no indication that defendant's presentation of his case was prejudiced by the introduction of Bell as a witness. Defendant indicates only that there was not time to prepare a defense to Bell's statements, which placed defendant at the scene of the incident. However, defendant admitted in another statement to Officer Dion Peoples that he drove to the scene of the incident.

Further, defendant states that the court should have fashioned a remedy for the late addition of witnesses. Under MCR 6.201, "[i]f a party fails to comply with [discovery], the court, in its discretion, may order that the testimony or evidence be excluded, or may fashion another remedy." However, we find the trial court did not abuse its discretion by not fashioning a remedy for the late endorsement of the witnesses because defense counsel already knew the nature and content of the witnesses' testimony; therefore, there was no need for remedial measures.

Defendant finally argues that he received ineffective assistance of counsel because defense counsel failed to move to quash the information, failed to file a motion to suppress defendant's prior conviction for receiving stolen property, and failed to move to suppress defendant's statements to the police.

A trial court's findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Effective assistance of counsel is presumed, and the defendant assumes a heavy burden of proving otherwise. *LeBlanc*, *supra* at 578. To establish a claim of ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant first claims that counsel was ineffective by failing to move to quash the information based on a lack of probable cause. In addressing defendant's motion for a new trial based on ineffective assistance of counsel, the trial court stated:

> It seems to the Court that there certainly was ample evidence for a question-of fact certainty at the time of the motion for directed verdict and apparently, you know, I can't deal with that at this time, but I don't see that there is necessarily any way that this Court could conclude that, had he filed such a motion, it would have been granted. I don't see anything there.

The court concluded that there was ample evidence to establish probable cause and that, had the defense filed a motion to quash the information, it would not have been granted. We find no error with the trial court's conclusion. Counsel is not required to advocate a meritless position, and therefore was not ineffective by not filing a motion to quash the information. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant next claims that counsel was ineffective by failing to file a motion to suppress defendant's prior conviction for receiving stolen property. In the motion for a new trial, the trial court correctly stated, regarding the prior conviction for receiving stolen property, ". . . that's a conviction involving theft or dishonesty and that's perfectly admissible under the rules. . . ." Under MRE 609(a)(1) and (2), the prior conviction for receiving stolen property would have been admissible because it is a conviction involving theft or dishonesty, making an objection to its admission meritless. *People v Coward*, 111 Mich App 55, 66; 315 NW2d 144 (1981). Again, counsel is not required to advocate a meritless position, and therefore was not ineffective by not filing a motion to suppress defendant's prior conviction for receiving stolen property. *Snider*, *supra* at 425. Further, defendant's decision not to testify was inquired into by the trial court at trial, and noted on the record.

Defendant also claims that defense counsel was ineffective for failing to move to suppress defendant's statements to the police. Defendant claims that there is evidence that his teeth had become chipped following his arrest, suggesting that he was physically abused by police following his arrest. The only evidence that came out during trial was that during an interview of defendant, Officer Julius Moses had written on the Interrogation Record Form dated December 19, 2001, that defendant's teeth were "good." On December 20, 2001, Moses completed another Interrogation Record Form for defendant that stated that defendant's teeth were chipped. Moses stated that he had not told defendant to smile for him, but rather, the

description of defendant's teeth came from casual observation. Defense counsel, during closing argument, implied that defendant may have been abused by the police to make him change his statement, but counsel did not move for his statement to be suppressed.

There is no indication that defendant was coerced into changing his statement to the police. Officer Moses and Officer Dion Peoples, who also interviewed defendant, both testified that defendant was read his constitutional rights, and knowingly and voluntarily waived his rights. Moses also stated that the comments about defendant's teeth were only made after casual observation. Therefore, the comments did not definitively note a change in the condition of defendant's teeth between his two interviews. Beyond defendant's mere assertion, there is no record evidence to show the police abused defendant.

The trial court, ruling on the motion for a new trial, stated, ". . . frankly, I think that [defendant] is just simply Monday morning quarterbacking. So I see absolutely no basis whatsoever for any kind of a new trial much less a motion notwithstanding the verdict and I'm going to deny it." We agree with the trial court that there is no basis to suppress defendant's statements. Therefore, counsel was not ineffective by not filing a motion to suppress defendant's statements to police. *Snider*, *supra* at 425.

Further, the Court will not second-guess matters of trial strategy. *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003)*; People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). It is probable that counsel determined, as a matter of trial strategy, that he should not make meritless motions. Failure of trial strategy does not necessitate a conclusion that the strategy constituted ineffective assistance of counsel. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Thus, in sum, defendant has failed to overcome the presumption that counsel rendered effective assistance. *LeBlanc*, *supra* at 578.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood