

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALTER LUMPKIN,

Defendant-Appellant.

UNPUBLISHED

May 18, 2004

No. 245440

Wayne Circuit Court

LC No. 02-000774-01

Before: Cavanagh, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of armed robbery, MCL 750.529, and carjacking, MCL 750.529a(1), for which he was sentenced as a fourth habitual offender, MCL 769.12. We affirm.

Defendant first argues that the jury was improperly given a supplemental aiding and abetting instruction in response to a question posed by jurors during deliberations as to whether someone could commit armed robbery if only present when another person possessed the weapon. Defendant claims that the instruction was erroneous because that scenario was not consistent with the prosecutor's theory of the case. We disagree.

Claims of instructional error are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). In reviewing claims of error in jury instructions, we examine the instructions in their entirety. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). When a jury expresses confusion regarding the law, it is incumbent upon the trial court to give guidance by providing a "lucid statement of the relevant legal criteria." *People v Martin*, 392 Mich 553, 558; 221 NW2d 336 (1974), overruled in part on other grounds, *People v Woods*, 416 Mich 581, 621 n 12; 331 NW2d 707 (1982).

Here, the victim testified that he was sitting in the driver's side seat of a parked car between 4:00 a.m. and 5:00 a.m. when he was approached by two black men, one of them went to the passenger side of the car and the other to his side of the car, banged on the window with a gun, and then opened his car door. The victim was forcibly removed from the car by having his arm pulled, he was turned physically around so that his back was to the perpetrator, and a gun was placed to the back his head. The perpetrator kept asking the victim for his money. The

other perpetrator came around to the driver's side and was checking inside the car. The perpetrator who was holding the gun then went through the victim's front and back pockets, retrieved the victim's wallet, and turned him back around to face him. After asking, again, where the money was, the perpetrator pulled the victim to the side, got into the driver's seat, his accomplice got into the back seat of the vehicle, and they drove off with the wallet and the vehicle. The victim testified that defendant was the primary perpetrator of both the armed robbery and the carjacking. On cross examination, defense counsel elicited testimony from the victim that his statement to the police on the day of the incident was that the main perpetrator of the crimes was a dark-skinned black male and counsel indicated that defendant was a light-skinned black male. The victim also testified that it was dark outside when the events occurred.

The police officer who took the initial complaint in this matter testified that the victim described the perpetrators of the crime as one dark-skinned black male, who held the gun to his head, and one light-skinned black male, who patted him down, took his wallet, and kept asking him for his money. The arresting officer testified that when he stopped the victim's carjacked vehicle the next morning, defendant was driving the vehicle. The police investigator who conducted the photo lineup testified that the victim immediately picked defendant out from the lineup and identified him as the man who had the gun and pulled him out of the car.

An aiding and abetting instruction is appropriate when there is evidence that more than one person was involved in committing a crime and that the defendant's role in the crime may have been less than direct commission of the crime. *People v Bartlett*, 231 Mich App 139, 157; 585 NW2d 341 (1998). Here, there is evidentiary support for the aiding and abetting instruction. The police officer who took the initial complaint on this matter testified that the victim told him a dark-skinned male held a gun to his head while a light-skinned black male patted him down, took his wallet, and kept asking him for his money during the course of the armed robbery and carjacking. Defense counsel noted that defendant is a light-skinned black male and he was positively identified by the victim as one of the perpetrators of these crimes. Although the victim may have given conflicting identifying information with regard to which perpetrator held the gun to his head; obviously, the jury must have found more reliable the information that the victim gave to the police officer right after these highly emotional crimes were committed against him. The prosecutor's theory was that defendant was the perpetrator who held the gun to the victim's head but aiding and abetting is not a separate charge, it is merely a separate theory for conviction under the same charge. In this case, there was evidence to support the prosecutor's theory, as well as the aiding and abetting theory; accordingly, the trial court's instruction was proper. See *People v Triplett*, 68 Mich App 531, 542-543; 243 NW2d 665 (1976), rev'd on other grounds 407 Mich 510 (1980).

Next, defendant argues that his convictions for both carjacking and armed robbery violated the federal and state double jeopardy clauses because the victim's vehicle was taken during the commission of both crimes in a single criminal transaction. We disagree. This same argument, under apposite factual circumstances, has already been thoroughly considered and rejected by this Court. See *People v Parker*, 230 Mich App 337, 341-345; 584 NW2d 336 (1998); see, also, *People v Davis*, 468 Mich 77, 80-82; 658 NW2d 800 (2003). We need not revisit the issue again here.

Finally, defendant argues that he was denied a fair trial because, in her opening statement, the prosecutor indicated that defendant was guilty of the charged crimes. After review

for plain error affecting defendant's substantial rights, we disagree. See *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). The prosecutor merely indicated that the charged crimes were committed and that, based on the forthcoming evidence to be presented, she would prove that defendant committed them—a statement supported by the fact that defendant was being prosecuted for the crimes. The prosecutor did not ask the jury to convict defendant on the basis of her special or personal knowledge. See *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995).

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Michael R. Smolenski