# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>July 20, 2004 |
| v | No. 247043<br>Wayne Circuit Court |
| ANDRE DWAYNE BUTLER,<br><br>Defendant-Appellant. | LC No. 01-013633-01 |

Before: Murphy, P.J., and Griffin and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, and felonious assault, MCL 750.82. Defendant was sentenced, as a third habitual offender, MCL 769.11, to fifteen to thirty years' imprisonment for the armed robbery conviction, and one to four years' imprisonment for the felonious assault conviction. We affirm.

Defendant first argues that there was insufficient evidence of armed robbery because the prosecution failed to prove beyond a reasonable doubt that property or money that could be the subject of a larceny was taken away from Gerald Lamar Parker, Jr., or Larissa Jones, the victims in this case. We disagree. Defendant's argument apparently has two prongs. First, he argues that the evidence only showed that a bag was stolen without any indication that the bag contained property that would be the subject of a larceny. Second, there was no showing that the bag had any value, nor that the bag itself could be the subject of a larceny.

When a defendant argues on appeal that there was insufficient evidence to support a conviction, we review the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). The requirement that there be sufficient evidence to support a verdict is a component of a criminal defendant's due process rights and attempts to protect those rights by preventing irrational jury verdicts. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). A reviewing court must consider not whether there was any evidence to support the conviction but whether there was sufficient evidence to justify a rational trier of fact in finding that the essential elements of the crime were proven beyond a reasonable doubt. *Id*.

We will 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, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Further, all conflicts in the evidence will be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Under an aiding and abetting theory, one who counsels, procures, aids, or abets in the commission of an offense may be convicted and punished as if he directly committed the offense. MCL 767.39; *People v Mass*, 464 Mich 615, 627-628; 628 NW2d 540 (2001). "Aiding and abetting" describes all forms of assistance given to the perpetrator of a crime and comprehends all words or deeds that might encourage, support, or incite the commission of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Defendant was convicted of armed robbery, MCL 750.529, which provides, in pertinent part:

> Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, *which may be the subject of larceny*, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony . . . . [Emphasis added.]

The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute. *People v Rodgers*, 248 Mich App 702, 707; 645 NW2d 294 (2001).

MCL 750.529 qualifies what property may be the subject of an armed robbery as anything "which may be the subject of larceny." MCL 750.356, which governs larceny, prohibits a person from stealing the property of another person, including, but not limited to, money, goods, or chattels. The elements of larceny are as follows:

> (1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the subject matter must be the goods or personal property of another, (5) the taking must be without the consent and against the will of the owner. [*People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999), quoting *People v Anderson*, 7 Mich App 513, 516; 152 NW2d 40 (1967).]

There is no specification in the statutes that the property taken must have a minimum value, or any value at all.[1] Therefore, it does not matter if the property taken had any value, but merely that there was property that was taken.

Defendant's statement indicated that defendant and Timothy Clifford, the codefendant, spotted a car standing on Robinwood with two occupants. Codefendant stated that he was going to get their money. Both men walked up to the car, with codefendant on the driver's side and defendant on the passenger's side. Codefendant had a gun and began shooting into the car.

[1] Of course, the larceny statute does contain value amounts for purposes of distinguishing between misdemeanor and felony larceny and the different levels of punishment. MCL 750.356. The least serious is the theft of property having a value less than $200. MCL 750.356(5). Zero value would be less than $200, yet still qualify as a larceny.

Codefendant then opened the driver's door and defendant opened the passenger's door, and both men searched the car. Codefendant grabbed a bag from the car,[2] but defendant did not take anything. The bag was described by defendant as a "personal belongings type pack."

If the jury believed defendant's own statement, this would be sufficient evidence to find beyond a reasonable doubt that property was taken. The personal-belongings bag itself would constitute a good or a chattel, regardless of its contents. Because there is no element requiring the property to be of value, it is enough that a bag was taken from the car. By assisting codefendant in the robbery, defendant was an aider and abettor in the armed robbery and can be convicted and sentenced as if he directly committed the offense. 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 conviction of armed robbery.

Defendant next argues that the trial court committed error requiring reversal by erroneously instructing the jury on the intent element of aiding and abetting. We disagree. To preserve an instructional issue for appeal, a party must object below to the instruction prior to jury deliberations. MCL 768.29; MCR 2.516(C); *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). An objection to a jury instruction must be specific. *People v Fletcher*, 260 Mich App 531, 558; 679 NW2d 127 (2004). Here, defendant failed to object to the pertinent instruction; therefore, the issue is unpreserved, and our review is limited to plain error that affected defendant's substantial rights. *Carines, supra* at 763-764, 767.

The jury instruction on aiding and abetting, as given by the court, was as follows:

> In this case the defendant is charged with committing these crimes or intentionally assisting someone else in committing them. Anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted as an aider and abettor. To prove this charge the prosecutor must prove the following elements beyond a reasonable doubt:
>
> First, that the alleged crime was actually committed either by the defendant or someone else.
>
> Second, that before or during the crime that the defendant did something to assist in the commission of the crime.
>
> And third, the defendant must have intended the commission of the crime alleged or must have known that the other person intended its commission at the time of giving assistance. It does not matter how much help, advice or encouragement he defendant gave. However, you must decide whether the defendant intended to help another commit the crime, and whether his help, advice or encouragement actually did help, advise or encourage the crime.

[2] There is nothing in the record that reveals the contents of the bag.

A trial judge must instruct the jury regarding the law applicable to the case, and completely and fairly present the case to the jury in an understandable manner. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). In reviewing jury instructions, the instructions must be viewed in their entirety to determine if error requiring reversal occurred. *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000), citing *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). Even if the instructions are somewhat imperfect, they do not create error requiring reversal if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Kris Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

Here, the given jury instruction on aiding and abetting properly reflected Michigan law. In *Carines, supra* at 757-758, our Supreme Court, quoting *People v Turner,* 213 Mich App 558, 568-569; 540 NW2d 728 (1995), overruled in part on other grounds *Mass, supra* at 627-628, stated:

> "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. . . . To support a finding that a defendant aided and abetted a crime, the prosecutor must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that 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 he gave aid and encouragement*. An aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. [Emphasis added; omission in original.]

Therefore, because the court properly instructed the jury consistent with applicable law, there was no plain error that affected defendant's substantial rights.

Defendant next argues that the trial court committed error requiring reversal by failing to give a requested jury instruction stating that it may be inferred that evidence the prosecution did not produce was unfavorable to the prosecution's case. We disagree. Instructional errors are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

A defendant is entitled to the production at trial of all evidence bearing on guilt or innocence that is within the prosecutor's control. *People v Wimberly*, 384 Mich 62, 66; 179 NW2d 623 (1970); *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993). In this case, the homicide file pertaining to defendant's case was lost. All of the contents of the file were reproduced, except for the homicide scene investigation report and the progress notes. As a result of comments in the prosecutor's closing argument about the missing documents, defense counsel requested M Civ JI 6.01(c), which provides:

> The [plaintiff / defendant] in this case has not offered [the testimony of _____ name / _____ Identify exhibit]. As this evidence was under the control of the [plaintiff / defendant] and could have been produced by [him / her], you may infer that the evidence would have been adverse to the [plaintiff / defendant], if you believe that no reasonable excuse for [plaintiff's / defendant's] failure to produce the evidence has been shown.

As discussed in the context of a civil suit, this instruction should be given in cases where a question of fact arises regarding whether a party has a reasonable excuse for its failure to produce the evidence, the court finds that the evidence was under the party's control and could have been produced by the party, and the evidence would have been material, not cumulative, and not equally available to the other party. *Clark v Kmart Corp*, 249 Mich App 141, 147; 640 NW2d 892 (2002). In *Davis, supra* at 514, a similar instruction in the context of a criminal prosecution was requested,[3] and this Court ruled that proper considerations, in determining to give such an instruction, are whether (1) suppression was deliberate, (2) the evidence was requested, and (3) in retrospect, the defense could have significantly used the evidence. *Davis* involved, in part, photographs of the crime scene and autopsy being misplaced, along with shoes and clothing being inadvertently lost. *Id.*

In this case, the prosecutor did not refuse to produce the evidence. Rather, the evidence that defendant asserts was not produced was merely not available because the homicide file was lost. The prosecutor asserts that the file was lost while the office was being moved to a different location. Defendant offers no evidence to contradict the prosecution's claim. Defendant has not demonstrated that the prosecutor acted in bad faith in failing to produce the homicide scene investigation report and the progress notes. *Davis, supra* at 514-515 (no instruction required where bad faith not shown). Further, defendant asserts that review of the investigation report may be helpful in clearing up inconsistencies, but fails to specifically state what these inconsistencies are, or why the report would be valuable in clearing them up. Accordingly, reversal is not warranted.

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Helene N. White

[3] The defendant in *Davis* contended that the trial court erred in failing to instruct the jury that, where the prosecution fails to make reasonable efforts to preserve material evidence, the jury may infer that the evidence would have been favorable to the defendant. *Davis, supra* at 514-515.