STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT RICHARD HEMP,

Defendant-Appellant.

UNPUBLISHED
September 23, 2004

No. 247716
Wayne Circuit Court
LC No. 02-008007

Before: Murphy, P.J., and O'Connell and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions on two counts of criminal sexual conduct in the first degree (CSC 1), MCL 750.520b(1)(d)(ii)(force or coercion used with accomplice), and assault with intent to cause great bodily harm less than murder, MCL 750.84. Defendant was sentenced to sixteen to thirty years' imprisonment for the CSC 1 convictions, and six years and eight months to ten years' imprisonment for the assault conviction. We affirm.

Defendant first argues on appeal that the trial court improperly instructed the jury on the issue of aiding and abetting regarding the crimes of CSC 1 and criminal sexual conduct in the third degree (CSC 3), MCL 750.520d. At trial, the court instructed the jury on two counts of CSC 1 and the lesser offense of CSC 3. During deliberations, the jury asked for clarification on the difference between CSC 1 and CSC 3, and the trial court provided it. Thereafter, the jurors asked the trial court for a second clarification, in the form of a written note: "Did you say that a person is guilty of criminal sexual conduct irrespective of whether or not they actually committed the act or assisted in? Is assisting in the act the same as doing the act for the first element of either degree?" Outside the presence of the jury, the trial court read to counsel the written inquiry received from the jury. The court asked counsel for their positions on the question. The prosecutor stated, "The People's position is you answer the long question having to do with aiding and abetting in the affirmative and we would respectfully ask the Court to do so." Defendant's counsel replied, "I'm going to leave it to the Court's discretion. I think that's correct." The trial court's verbal response to the jury was as follows:

> *The Court:* To answer your question, the answer is yes, in Michigan a person, if you believe they are guilty of a crime, and you also believe that someone is guilty of assisting in that crime, they are as guilty as each other. In other words, you are just as guilty in Michigan law

if you actually committed the crime if you assist, encourage, aid, abet the crime. Does this answer your question?

Jury: (In unison) Yes.

The Court: Okay. And with all the other guidelines and instructions I gave you together.

Jury: (In unison) Yes.

The Court: Together. All right.

Although defendant's counsel did not acquiesce to the trial court's instruction in its precise form, he arguably appeared to convey his approval to the trial court answering the jury's inquiry in the affirmative. Defendant now claims on appeal that this affirmative response to the jury's question misstated the law and urges this Court to find the issue forfeited and review it for plain error. Issues that are waived preclude appellate review for the waiver has extinguished any error, *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000), while forfeited issues do not extinguish error and are reviewed for plain error affecting substantial rights, *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). We find it unnecessary to determine whether the issue was waived or forfeited, because even if merely forfeited, there was no plain error affecting defendant's substantial rights. This issue will be discussed below in the context of defendant's accompanying ineffective assistance of counsel claim.

Defendant contends that defense counsel's failure to object to the trial court's response to the jury question regarding aiding and abetting constituted ineffective assistance of counsel. We disagree. The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law that are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because defendant has not established a testimonial record at a *Ginther*[1] hearing in support of his claim, review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

> presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Based on the record, defendant is unable to demonstrate ineffective assistance of counsel. A person is guilty of the crime of CSC 1 when he "engages in sexual penetration with another person," he "is aided or abetted by 1 or more other persons," and he "uses force or coercion to accomplish the sexual penetration." MCL 750.520b(1)(d)(ii). A person is guilty of the crime of CSC 3 when he "engages in sexual penetration with another person" and he uses force or coercion to accomplish the sexual penetration. MCL 750.520d(1)(b). "Sexual penetration" includes vaginal penetration and fellatio. MCL 750.520a(o). In Michigan, a person who aids or abets in a crime is as guilty as if he directly committed the offense. MCL 767.39. A person may be found guilty of either CSC 1 or CSC 3 under an aiding and abetting theory if the prosecution presents sufficient evidence 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 or encouragement. *People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001). The intent necessary to be convicted as an aider and abettor is the same that is necessary to be convicted as the principal. *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001). When reviewing a trial court's jury instructions, this Court must look at the instructions as a whole, rather than the potentially misleading effect of a single isolated sentence. *People v Kris Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.*

Defendant argues on appeal that the trial court's affirmative answer to the jury's question misstated the law: that by beginning its answer to the jury's question with the word "Yes," the trial court instructed the jury that defendant could be found guilty of the crime by virtue of an aiding and abetting theory "irrespective of whether or not [he] actually committed the act or assisted in" the act. Defendant also maintains that the instruction permitted the jury to convict him on an aiding and abetting theory without the need to find the requisite intent. Because the trial court's answer contained a correct statement of the law ("[Y]ou are just as guilty in Michigan law if you actually committed the crime if you assist, encourage, aid, abet the crime"), stating that it is necessary that defendant either committed the act or assisted in the act, the instruction fairly presented the issue and was not erroneous. MCL 767.39. Further, when viewing the trial court's entire answer to the jury in conjunction with its other verbal and written instructions, which included an instruction addressing the requisite intent, the court properly instructed the jury on the theory of aiding and abetting. Accordingly, there was no plain error affecting defendant's substantial rights. Moreover, counsel's acquiescence or failure to object to these instructions did not constitute ineffective assistance of counsel because they were reasonable and not fundamentally unfair to defendant. See *People v Thomas*, 260 Mich App

450, 457; 678 NW2d 631 (2004) (holding that defense counsel's failure to object to prosecutorial comments that properly stated the law was not ineffective assistance of counsel because any objection would have been futile).

Lastly, defendant argues that the trial court improperly instructed the jury on the crime of assault with intent to commit great bodily harm. Again, defendant waived his right to appeal this issue by his counsel's affirmative agreement to the assault with intent to commit great bodily harm instruction. At trial, the prosecution requested that the court give an instruction for assault with intent to commit great bodily harm, as one count under the charged offense of assault with intent to murder. The trial court asked defendant's counsel specifically if he had any objections to instructing the jury on the lesser included offense of assault with intent to commit great bodily harm, and he replied, "I have no objections." We, therefore, consider the issue waived and any error extinguished. *Carter, supra* at 215-216.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Hilda R. Gage