

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARNELL ANTHONY GETER,

Defendant-Appellant.

UNPUBLISHED

January 20, 2009

No. 280425

Wayne Circuit Court

LC No. 07-004470-01

Before: Murphy, P.J., and K. F. Kelly and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of aggravated assault, MCL 750.81a. Defendant was sentenced to eight months in jail. We affirm, but remand for correction of the presentence investigation report (PSIR).

Defendant argues on appeal that there was insufficient evidence to support his conviction. We disagree. In *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005), this Court stated:

“Generally, we review a challenge to the sufficiency of the evidence in a bench trial de novo and in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt.” All conflicts with regard to the evidence must be resolved in favor of the prosecution. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime. [Citations omitted.]

MCL 750.81a(1) provides:

Except as otherwise provided in this section, a person who assaults an individual without a weapon and inflicts serious or aggravated injury upon that individual without intending to commit murder or to inflict great bodily harm less than murder is guilty of a misdemeanor

Defendant argues that his claim of insufficient evidence is substantiated by the fact that dislocating the victim’s shoulder was not a serious or aggravated injury because it was restored to its socket at the scene. Defendant asserts that, at most, the crime committed was simple

assault and battery. Secondly, defendant argues that his codefendant, Dominique Williams, is responsible for the victim's broken nose. Defendant contends that there was no evidence to indicate that he acted in concert with Williams. Instead, he argues that their actions were separate and distinct. We disagree.

CJI2d 17.6, the pertinent instruction on aggravated assault, provides:

(1) [Y]ou may also consider the lesser charge of assault and infliction of serious injury. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant tried to physically injure another person.

(3) Second, that the defendant intended to injure [the victim] or intended to make [the victim] reasonably fear an immediate battery.

(4) Third, that the assault caused a serious or aggravated injury. A serious or aggravated injury is a physical injury that requires immediate medical treatment or that causes disfigurement, impairment of health, or impairment of a part of the body. [Footnotes omitted; see also *People v Brown*, 97 Mich App 606, 610-611; 296 NW2d 121 (1980).]

Viewing the evidence in the light most favorable to the prosecution, it established that defendant verbally threatened the victim and then attacked her, causing her to fall over the railing of the staircase in the restaurant. Defendant's assault of the victim caused her to sustain a shoulder injury that EMS personnel had to treat at the scene. As the victim crawled to the restroom, she could not remove her backpack without assistance because she could not move her arm as a result of defendant's assault and the shoulder injury. Officer Raymond Whitehill noticed in the ambulance that the victim's shoulder bone was pressing out against the skin, and he observed the bone go back into place after treatment by EMS personnel. Additionally, the victim testified that x-rays of her shoulder were taken at the hospital in order to see if the shoulder had been properly set. This evidence was sufficient to establish that the victim's shoulder injury was a serious or aggravated injury as it required medical treatment and impaired the use of the victim's shoulder and arm.

Moreover, while the victim's shoulder injury was serious enough to satisfy the elements of aggravated assault, there was also sufficient evidence to support defendant's conviction on the theory that he aided and abetted Williams's assault of the victim. The common law distinction between a principal and an aider and abettor was abolished by statute. *People v Smielewski*, 235 Mich App 196, 202-203; 596 NW2d 636 (1999). MCL 767.39 provides:

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.

To establish aiding and abetting, a prosecutor must show that: (1) the charged crime was committed by the defendant or some other person, (2) the defendant performed acts or gave

encouragement which 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 that the defendant gave the aid and encouragement. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006). The state of mind of an aider and abettor may be inferred from all the facts and circumstances. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Factors to consider 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. *Id.* at 757-758.

Viewing the evidence in the light most favorable to the prosecution, it showed that defendant and Williams entered the restaurant together and began ridiculing the victim. When the encounter escalated, the victim sustained a broken nose because Williams punched her in the face. Officer Whitehill testified that her nose appeared crooked and that she was having trouble breathing. The victim testified that EMS personnel gave her a small ice pack and gauze to stop her nose from bleeding and that the doctor treated her for a broken nose at the hospital. While defendant did not actually punch the victim in the face, he is still responsible under a theory of aiding and abetting.

First, Williams clearly committed an aggravated assault by breaking the victim's nose. Secondly, the evidence shows that defendant encouraged his companion, Williams, by engaging in verbal assaults, taunting, and threatening physical harm to the victim. According to the victim, defendant told her that "your . . . friend ain't going to be able to help you now," and the victim, as well as other witnesses, all testified that defendant invited the victim outside so he could harm her physically. Defendant also blocked the victim from exiting the restaurant while Williams yelled at her. Lastly, the requisite state of mind can be inferred from defendant's companionship with Williams, his participation in the assault by joining Williams in physically threatening the victim, blocking the victim from exiting, his own personal assault on the victim, and his fleeing with Williams after the assault. Therefore, sufficient evidence existed to also support defendant's conviction of aggravated assault under an aiding and abetting theory.

Finally, defendant argues that his (PSIR) should be corrected to show that his attorney was retained and not appointed, the provision recommending attorney fees should be stricken, and a corrected report should be forwarded to the Department of Corrections. We agree with defendant.

"This Court reviews a trial court's response to a defendant's challenge to the accuracy of a PSIR for an abuse of discretion." *People v Uphaus*, 278 Mich App 174, 181; 748 NW2d 899 (2008). Whenever a sentencing court either disregards the allegations of inaccurate information or determines that the information was in fact inaccurate, it must strike the disputed or incorrect information before sending the PSIR to the Department of Corrections. MCL 771.14(6); *People v Spanke*, 254 Mich App 642, 649; 658 NW2d 504 (2003).

During the sentencing hearing, counsel for defendant pointed out to the court that one of the sentencing recommendations asking for attorney fees was incorrect because he was retained. The judge responded, "I knew that." The prosecution also agrees with defendant that the PSIR should be corrected. Because the information recommending attorney fees was in fact inaccurate, the case is remanded for the ministerial task of striking the incorrect information and forwarding a corrected PSIR to the Department of Corrections.

Defendant's conviction and sentence are affirmed, but we remand to the trial court for correction of the PSIR. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Kirsten Frank Kelly

/s/ Pat M. Donofrio