STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 30, 2009
v	No. 280316 Wayne Circuit Court
TOMMY EARL MOORE, Defendant-Appellant.	LC No. 06-009363-01

Before: Fort Hood, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to rob and steal while armed, MCL 750.89, under an aiding and abetting theory. He was sentenced to 3.5 to 10 years' imprisonment. He appeals as of right. We affirm.

The facts presented at trial established that defendant and the principal, nicknamed "C.J.," were standing on a corner three houses away from the victim's home. When C.J. spotted the victim pulling into her driveway with a Chevy Impala, he stated to defendant "There she go, she's old as hell, I'm tired of walking." Before C.J. left to walk towards the victim's driveway, he tossed defendant a pair of latex gloves. Defendant remained near the corner, but stood in the middle of the street facing the victim's driveway. Defendant was to drive the car to his house after C.J. took it. C.J. approached the victim alone, covered the lower part of his face, pulled a gun out from the center of his pants and demanded that the victim surrender her keys and her car. The victim resisted, stating "I don't think so," before she started to scream for help. Defendant and C.J. fled from the scene. The victim and a neighbor, Thomas Wright, got into their cars to search for the men. The victim and Wright tracked down defendant, but not C.J. The victim, Wright and Elvin Holmes, Wright's friend, detained defendant in the street until the police arrived, asking him questions about the attempt to take the victim's car. Defendant admitted that C.J. was a friend, that C.J. had a revolver in his possession when he assaulted the victim, and that C.J. threw defendant the latex gloves because C.J. was going to let defendant drive the car first to defendant's home, then to a chop shop.

Defendant first argues that the evidence produced at trial was insufficient to support the conviction because, at most, it suggests that defendant was "merely present" at the crime scene - he stood near the corner and then fled independently from the scene when the victim started screaming. Defendant alleges that his acceptance of the latex gloves from C.J. was not preoffense conduct that helped to "procure, counsel, aid or abet" the commission of the crime.

See MCL 767.39. The standard of review for a sufficiency of the evidence claim is de novo, and a court must review "the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

MCL 750.89 provides in relevant part:

> Assault with intent to rob and steal being armed – Any person, being armed with a dangerous weapon, or any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon, who shall assault another with intent to rob and steal shall be guilty of a felony, punishable by imprisonment in the state prison for life, or any term of years.

The elements of assault with intent to rob while armed are: 1) an assault with force; 2) an intent to rob and steal; and 3) the defendant being armed. See *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). Assault with intent to rob is a specific intent crime; "there must be evidence that the defendant intended to rob or steal." *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991).

Furthermore, MCL 767.39 provides in relevant part:

> 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 the offense.

Under MCL 767.39, aiding and abetting is not a distinct offense, but a prosecutorial theory that imposes vicarious liability on a defendant; an accessory to a crime may be convicted and punished as if he directly committed the offense. *People v Robinson*, 475 Mich 1, 5-6; 715 NW2d 44 (2006). To support a finding that a defendant aided and abetted a crime, the prosecution 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." *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004); *People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001). "An aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors which may be considered include a close association between defendant and principal, defendant's participation in the planning and execution of the crime, and evidence of flight after the crime." *People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999). However, "[m]ere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to establish" that a defendant aided and abetted a crime. *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999). If defendant's conduct had the effect of inducing the crime, the amount of assistance is immaterial. *Moore*, *supra* at 71. The "requisite intent for conviction of a crime as an aider and abettor" is that which is necessary "to be convicted of the crime as principal." *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001). An accessory's intent may be established by proving the defendant had knowledge of the principal's intent, that the

criminal act committed by the principal was a natural and probable consequence of the intended offense, or defendant had the specific intent to commit the crime. *Robinson, supra* at 9, 15.

When viewed in a light most favorable to the prosecution, there was sufficient evidence to establish defendant's guilt beyond a reasonable doubt. The testimony of the victim established that the principal, C.J., approached her with a gun, covered the lower part of his face, and demanded that she give up her keys and her car. This evidence established the elements of the crime, including the specific intent of the principal to "rob and steal" the car. In addition, defendant's statements and admissions to police presented at trial established that defendant was aware of the intent of the principal to steal the victim's vehicle. C.J. told defendant that he was "tired of walking" and the victim was "old as hell." C.J. indicated he was going to get the victim's Impala. Defendant's admissions also established that he was aware that C.J. was armed. Defendant voluntarily waited on the corner for C.J., knew his role was to drive the car once C.J. had stolen it, and accepted a pair of latex gloves from C.J. A reasonable jury could conclude that the gloves would enable defendant to drive the car from the crime scene without leaving fingerprint evidence. The evidence and reasonable inferences support that defendant encouraged the principal by assuring that defendant would drive the car away if C.J. stole it. According to the standard in *Carines, supra* at 757-758, we may infer defendant's state of mind from all of the circumstances, including his friendship with C.J. and evidence of defendant's flight with C.J. after the crime. This evidence clearly established that defendant was not "merely present" at the crime scene. The evidence was, therefore, sufficient to establish defendant's guilt beyond a reasonable doubt of assault with intent to rob and steal while armed.

Defendant also challenges on appeal the scoring of two offense variables (OVs) by the trial court. Because defendant failed to raise any argument that OV 4, MCL 777.34, was improperly scored until his appeal with this Court, review is for plain error. *Carines, supra* at 763. Defendant must show that "1) error . . . occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* Defendant raised his objection to the scoring of OV 10, MCL 777.40, during sentencing, and therefore, it is reviewed as preserved error, and under the abuse of discretion standard, to determine whether the trial court properly exercised its discretion, and whether the score is supported by the evidence in the record. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). In reviewing the issue, defendant's arguments regarding what is encompassed by the statute's term "predatory conduct" is a question of statutory interpretation that is reviewed de novo. *Id.* The trial court's findings of fact with respect to scoring are, however, reviewed for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). "Scoring decisions for which there is any evidence in support will be upheld." *People v Wilkens*, 267 Mich App 728, 740; 705 NW2d 728 (2005).

Under MCL 777.40(1)(a), "Exploitation of Vulnerable Victim," 15 points may be scored where predatory conduct was involved. "Predatory conduct" is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). The trial court found, based on the record, that before the assault, the principal stated that the victim was as "old as hell" and that he was going to get her Impala. In addition, there was evidence that he planned the attack, and defendant knew of the plan and his role, and accepted a pair of gloves from the principal for the purpose of driving the car away from the scene. The principal walked

up to the victim's driveway and intentionally aimed a gun at the victim, demanding her keys and her car. This evidence is sufficient to support a finding that the principal engaged in predatory conduct that targeted the victim because of her age. Our Court's precedents indicate that a score of 15 is proper for OV 10 "when a defendant takes measures to determine the suitability and vulnerability of a particular victim before executing the crime." *People v Davis*, 277 Mich App 676, 680; 747 NW2d 555 (2008). The trial court's decision was supported by the record, and its factual findings were not clearly erroneous regarding the score of 15 for OV 10.

Under MCL 777.34(1)(a), psychological injury to victim, ten points may be scored where a victim suffers serious psychological injury requiring professional treatment. Based on our review of the record, we conclude that there was no plain error in the scoring of OV 4 at ten points. Under MCL 777.34 (2), the victim was not required to seek treatment for psychological injury. The victim testified at sentencing that she was afraid during the attack; that she has continuing anxiety post-attack while performing the routine, weekly task of taking her garbage cans to the curb; and that she felt counseling might help her cope with these anxieties. This testimony satisfies the requirements of MCL 777.34(1)(a) that there be evidence that the victim suffered serious psychological injury that may require professional treatment. See *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004), where the victim testified about being "fearful" during the commission of the crime, and *Wilkens, supra* at 741, where acts during the commission of a crime caused the victim "anxiety" or "alter[s] her demeanor."

The trial court's findings that defendant warranted a score of 15 points for OV 10 and a score of ten points for OV 4 were not clearly erroneous, and did not constitute an abuse of discretion or plain error. Resentencing is not required.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello