STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 8, 2010
v	No. 290546 Wayne Circuit Court
ROBERT LEE TIMBS, Defendant-Appellant.	LC No. 08-010359

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of unarmed robbery, MCL 750.530, first-degree home invasion, MCL 750.110a(2), and unlawful imprisonment, MCL 750.349b. He was sentenced to concurrent prison terms of 7 to 20 years for the robbery conviction and 7 to 15 years each for the home invasion and unlawful imprisonment convictions. He appeals as of right. We affirm.

Defendant's convictions arise from an incident in which Scott Coiner and his son Daniel forcibly entered a home that Brenda Yi shared with Robert Ramey, after which they restrained Yi with duct tape and stole money, jewelry, and other items from the home. Testimony indicated that Ramey knew defendant, who had frequented Ramey's bar. In addition, Coiner testified that it was defendant who initiated and planned the offense. According to Coiner, defendant was familiar with Ramey's schedule, planned the offense at a time when Ramey would not be home, and agreed to watch Ramey while Coiner and his son broke into the house to make sure Ramey did not return during the offense. Defendant also told Coiner that Yi should not be home during the offense, but if she was, she was a "short lady" whom they "shouldn't have any problems with." After Coiner and his son committed the offense, they called defendant, who picked them up from the house. The defense theory at trial was that the defendants robbed Ramey's home to steal drugs, but that defendant did not know that Yi would be there or that a gun would be used.[1]

[1] The trial court acquitted defendant of an original charge of armed robbery and convicted him of the lesser offense of unarmed robbery because it found that there was no evidence that defendant knew about the use of a gun to commit the crime.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence to support his convictions. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find beyond a reasonable doubt that the essential elements of the crime were proven. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id*. at 514-515. Rather, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of first-degree home invasion are: (1) the defendant broke and entered a dwelling or entered the dwelling without permission; (2) when the defendant did so, he intended to commit a felony, larceny, or assault, or he actually committed a felony, larceny, or assault while entering, being present in, or exiting the dwelling; and (3) another person was lawfully present in the dwelling or the defendant was armed with a dangerous weapon. *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004); MCL 750.110a(2). A person commits the crime of unlawful imprisonment if he knowingly restrains another person to facilitate the commission of another felony or to facilitate flight after the commission of another felony. MCL 750.349b. The elements of unarmed robbery are: (1) a felonious taking from another, (2) by force, violence, assault, or putting in fear, and (3) being unarmed. *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994).

At trial, the prosecutor also advanced the theory that defendant was guilty as an aider or abettor. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39. "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 Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001) (internal quotations and citation omitted). "'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." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (citation omitted). An aider or abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, and the defendant's participation in the planning or execution of the crime. *Id.*

In this case, the evidence was sufficient to show, first, that Coiner and his son committed first-degree home invasion by forcibly entering the home shared by Ramey and Yi, intending to commit a larceny, while Yi was present inside the home. Further, the evidence showed that Yi was robbed and that the crime of unlawful imprisonment was committed when Yi was restrained with duct tape to facilitate the robbery and the home invasion. Second, there was sufficient evidence that defendant assisted the commission of the crimes by planning the break-in, advising Coiner of Ramey's schedule, identifying Ramey's home, agreeing to watch Ramey while Coiner and his son broke into his house, giving Coiner the go-ahead to proceed after defendant located Ramey, and by picking up Coiner and his son from the house after the offense. Third, the

evidence was sufficient to show that defendant intended for Coiner and his son to break into the home. Further, the testimony that defendant advised Coiner that Yi was a "short lady" whom they "shouldn't have any problems with" indicates that defendant was aware of the possibility that Yi would be home during the offense, and thus contemplated that it might be necessary to commit the crimes of first-degree home invasion, robbery, and unlawful imprisonment. Accordingly, the evidence was sufficient to support defendant's convictions under an aiding and abetting theory. Although defendant argues that Coiner's testimony was not credible, the trial court specifically found that Coiner was a "very credible witness, and this Court will not interfere with the trier of fact's role of determining the credibility of witnesses. *Wolfe*, 440 Mich at 515.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he was denied the effective assistance of counsel at trial. Because defendant did not raise this issue in the trial court and no evidentiary hearing was conducted, our review is limited to mistakes apparent on the record. *People v Sabin* (*On Second Remand*), 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

"Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness and that it is "reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant argues that defense counsel was ineffective for failing to call him as a witness in order to present a defense that he was merely an accessory after the fact. Decisions about what evidence to present and whether to call a witness are matters of trial strategy, which this Court will not assess with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "Ineffective assistance of counsel can take the form of failure to call witnesses only if the failure deprives the defendant of a substantial defense." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), mod 453 Mich 902 (1996). A defense is substantial if it might have made a difference in the outcome of the trial. *Id.*

In this case, the defense strategy at trial was to minimize defendant's culpability by arguing that, although defendant agreed to break into Ramey's house, he did not know that Yi would be present or that a gun would be used. This strategy was partially successful because the trial court acquitted defendant of an original charge of armed robbery. Although defendant argues that he should have been permitted to testify that his role was limited to that of an accessory after the fact, such testimony would have been inconsistent with the defense strategy that was pursued at trial, and defendant has not overcome the presumption that counsel's strategy, which was partially successful, was sound. Further, the record indicates that defendant was advised of his right to testify and that it was his decision not to testify. Thus, the record does not support defendant's claim that he was foreclosed from testifying at trial. Moreover, given Coiner's testimony establishing defendant's involvement in the charged offenses, and the trial court's finding that Coiner was a "very credible witness," there is no reasonable probability that

the outcome would have been different had defendant attempted to present a defense that he was only an accessory after the fact.

We also disagree with defendant's claim that defense counsel was ineffective for failing to seek a jury trial. The decision whether to waive a jury trial was a matter of trial strategy. Defendant has not presented any reason to believe that this decision was unsound. Further, the record indicates that defendant was in agreement with that decision because he was expressly advised of his right to a jury trial and agreed to waive that right. Defendant does not contend that his jury waiver was not voluntarily or understandingly made.

For these reasons, defendant has not established a cognizable claim of ineffective assistance of counsel.

III. SENTENCING

Defendant lastly argues that he is entitled to resentencing because the trial court erroneously scored offense variables (OV) 1, 8, and 16 of the sentencing guidelines. We disagree.

Although defendant preserved his challenge to the scoring of OV 1 by objecting to the scoring of that variable at sentencing, he did not object to the scoring of OV 8 or OV 16. Accordingly, those scoring challenges are not preserved. MCL 769.34(10). However, we may review unpreserved scoring challenges for plain error. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). Defendant's challenge to the scoring of OV 8 may also be reviewed in the context of his claim that defense counsel was ineffective for failing to object to the scoring of that variable at sentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id.*

A. OV 1

Defendant argues that the trial court should have scored zero points for OV 1 (aggravated use of a weapon), because there was no evidence that Yi actually saw a gun pointed at her. The trial court scored 15 points for this variable, which is proper where a "firearm was pointed at or towards a victim." MCL 777.31(1)(c). Yi testified that she saw a gun on the living room table before her eyes were covered with tape. She later felt an object that she believed was a gun pressed against her temple and her groin area. The trial court determined that Yi's observation of a gun nearby, coupled with her "vivid testimony" about her perception that the gun was the object that was pressed against her, was sufficient circumstantial evidence to support a 15-point score for OV 1. We agree with the trial court that the evidence was sufficient to support its scoring of this variable at 15 points.

B. OV 8

MCL 777.38(1)(a) (victim asportation or captivity) authorizes a score of 15 points for OV 8 if "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." The instructions provide that OV 8 should be scored at zero points "if the sentencing offense is kidnapping." MCL 777.38(2)(b). Defendant argues that his unlawful imprisonment conviction is a lesser form of kidnapping and, therefore, OV 8 should have been scored at zero points.

Here, however, the guidelines were not scored for kidnapping, or even for unlawful imprisonment. Rather, the guidelines were scored only for first-degree home invasion, the crime having the highest crime class. When a defendant is subject to concurrent sentences for multiple convictions, a sentencing information report is only required to be prepared for the highest class conviction. MCL 771.14(2)(e); *People v Mack*, 265 Mich App 122, 127-128; 695 NW2d 342 (2005). Because a lesser class conviction is not scored under the legislative guidelines, the guidelines are inapplicable to that conviction. *Id*. Defendant received concurrent sentences for his convictions. Because the guidelines do not prohibit a 15-point score for OV 8 when the sentencing offense is first-degree home invasion, and defendant does not otherwise challenge the factual basis for the 15-point score, we find no error. Therefore, defendant has also failed to establish that defense counsel was ineffective for failing to object to the scoring of OV 8. *Frazier*, 478 Mich at 243.

C. OV 16

MCL 777.46 pertains to property obtained, damaged, lost, or destroyed. MCL 777.46(1)(c) authorizes a score of five points for OV 16 if the property was valued between $1,000 and $20,000. Ten points are to be scored if "[t]he property had a value of more than $20,000.00 *or had significant historical, social, or sentimental value*." MCL 777.46(1)(b) (emphasis added). Although defendant argues that only five points should have been scored because the evidence of restitution showed a property value of less than $20,000, he ignores the second part of MCL 777.46(1)(b), which authorizes a ten-point score where the property had significant historical or sentimental value. Yi testified that the defendants stole jewelry that she had accumulated over 45 years, which had been given to her by her children, boyfriend, and husband. Ramey testified that the defendants stole several items, including an antique "unique Italian gold" ID bracelet made in 1904, antique watches, a cameo ring given to him by his aunt from World War II, and his military tags. This evidence was sufficient to support the trial court's ten-point score for OV 16.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Pat M. Donofrio