STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY L. KINARD,

Defendant-Appellant.

UNPUBLISHED
January 21, 1997

No. 171961
LC No. 93-066663-FC

Before: Sawyer, P.J., and Markman and H.A. Koselka,* JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797, conspiring to commit armed robbery, MCL 750.157(a); MSA 28.354(1), and habitual offender, fourth offense, MCL 769.12; MSA 28.1084. He was sentenced to twenty to forty years' imprisonment, and now appeals as of right. We reverse and remand for a new trial.

First, because defendant failed to object to the aiding and abetting instruction given, appellate review is limited to whether there was manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). However, even under that standard, we hold that the trial court erred in failing to instruct the jury with the standard criminal jury instruction for aiding and abetting. The armed robbery charge went to the jury on an aiding and abetting theory, yet the trial court did not give the standard instruction on aiding and abetting. Instead, the court modified the standard criminal jury instruction for armed robbery by adding the phrase "or the person he was aiding and abetting" immediately after each appearance of the word "defendant" in the standard instruction. This modified instruction failed to convey to the jury what the prosecution had to prove to support a conviction on an aiding and abetting theory. Accordingly, the court failed to instruct the jury on the essential elements of the case. *People v Liggett*, 378 Mich 706, 714; 148 NW2d 784 (1967); *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995); *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). This failure resulted in manifest injustice.

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant next argues that he was deprived of a fair and impartial trial by numerous instances of prosecutorial misconduct. Because defendant failed to timely and specifically object below to the alleged improper conduct of the prosecution, appellate review is limited to whether there was a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We find that defendant was deprived of a fair and impartial trial by prosecutorial misconduct. *People v Foster*, 175 Mich App 311, 317; 437 NW2d 395 (1989).

The prosecution repeatedly informed the jury that defendant had been seen leaving a bar in the company of a "black" woman shortly before the armed robbery and assault. The race of this woman was of no consequence to a determination of defendant's guilt or innocence. Given that defendant was black, while the victims, defendant's then-pregnant girl friend, and the jury were all white, the only reason to repeatedly refer to her race was to appeal to any latent racial bias held by members of the jury. This injection of race into the trial constituted error. *People v Bahoda*, 448 Mich 261, 271-273; 531 NW2d 659 (1995).

Defendant contends that the prosecution also engaged in misconduct by injecting into trial evidence that defendant had a history of intimidating his girl friend's family and then using these prior bad acts to support the argument that defendant's actions in this case were consistent with his general bad character. While defendant is correct that the prosecution would have erred to the extent that such a conclusion was urged upon the jury, viewing Michael's testimony in context, we believe that the prosecution acted properly because it sought to elicit relevant information. Incidents of intimidation toward a testifying family member—in this case Christina—were relevant to the extent that they provided evidence of a reason why Christina might fabricate exculpatory testimony with respect to defendant.

The prosecution engaged in further misconduct by calling defendant's girl friend as a prosecution witness ostensibly to place before the jury the witness' prior inconsistent statements to the police and then arguing those statements as substantive evidence of guilt. Prior inconsistent statements may be used under some circumstances to impeach credibility. MRE 613; *Stanaway, supra*, 692. They may not be used, however, as substantive evidence of guilt. *People v Dalessandro*, 165 Mich App 569, 582; 419 NW2d 609 (1988).

The prosecution exceeded the bounds of proper comment on the evidentiary weakness of defendant's alibi during closing argument. By employing such language as "[i]f the defendant had an air-tight alibi," and "if he had somebody that could absolutely tell you unassailable . . . and could absolutely account for his whereabouts at the time of the crime," the prosecution created the opportunity for the jury to reasonably conclude not only that defendant bore the burden of proving his defense, but also that the degree of certainty needed to establish a valid defense was something greater than beyond a reasonable doubt and more akin to beyond all doubt. Such argument was improper where defendant bore no burden of proving his defense and where the prosecution had the duty to show beyond a reasonable doubt that defendant did commit the crimes charged and that, therefore, defendant was present at the scene of the crime at the time it was committed. *People v Erb*, 48 Mich App 622, 629-630; 211 NW2d 51 (1973).

The prosecutor also exceeded the bounds of proper comment by vouching for the credibility of witness Michael Comperchio. The prosecutor argued to the jury that he and Comperchio had met in the prosecutor's office, that the prosecutor had explained perjury to Comperchio, that the prosecutor had informed Comperchio that he wanted Comperchio to testify truthfully, and that, in the prosecutor's estimation, Comperchio had testified truthfully. From this argument, the jury could infer that the prosecutor had some special knowledge concerning the truthfulness of Comperchio's testimony. Such an argument is improper. *Bahoda, supra*, 276; *Erb, supra*, 631.

The prosecution further exceeded the bounds of proper comment by asking the jury to reject defendant's alibi defense because defendant failed to present any alibi witnesses at his preliminary examination. Such comment was improper for two reasons. First, the argument contained a statement of fact not supported in the record. *Stanaway, supra*, 686. Second, the argument was legally inaccurate and misleading given the general rule that a preliminary examination is not a trial and defenses should be presented at trial. *People v Martin*, 59 Mich App 471, 490; 229 NW2d 809 (1975), rev'd in part on other grounds sub nom *Jackson Co Prosecutor v Court of Appeals*, 394 Mich 527 (1975).

Likewise, the prosecution exceeded the bounds of proper comment by arguing that the jury should reject defendant's alibi defense because no alibi witnesses went to the local newspaper in an attempt to clear defendant of the charges. *People v Martinez*, 190 Mich App 442, 446; 476 NW2d 641 (1991).

The cumulative effect of these unobjected-to instances of prosecutorial misconduct created sufficient prejudice to establish a miscarriage of justice.

Defendant also argues that trial counsel rendered ineffective assistance. We agree. During the cross-examination of Michael Comperchio, defense counsel elicited testimony that defendant possessed a "big bag" of marijuana on the night of the robbery and assault. Additionally, defense counsel intimated in his questioning of Comperchio and of defendant's girl friend that defendant might sell marijuana. Defense counsel explained at an evidentiary hearing that this questioning was part of defendant's trial strategy to hint to the jury that "there was something else going on here" between defendant and the victims, one of whom used to be defendant's housemate. The fact that this questioning was part of trial strategy does not defeat, in and of itself, defendant's ineffective assistance of counsel claim. For the claim to be defeated, the strategy employed must be sound. *Dalessandro, supra*, 578. Here, the strategy was unsound. Defense counsel did not mention the marijuana during opening statements or during closing argument. Absent any explanation to the jury of defendant's strategy, all the jury had before it was that defendant had a big bag of marijuana and might be a drug dealer. In other words, defense counsel placed damaging evidence before the jury without providing the jury with a context in which this damaging evidence could be used to defendant's benefit. On this record, defense counsel's performance fell below an objective standard of reasonableness. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Likewise, defense counsel's performance fell below an objective standard of reasonableness when counsel failed to insure that the jury was instructed with the essential elements of aiding and

abetting and when counsel failed to object to numerous instances of prosecutorial misconduct. *Pickens, supra*.

Finally, defense counsel's performance fell below an objective standard of reasonableness when counsel failed to independently investigate defendant's alibi defense. Defendant gave counsel the names of two witnesses who could place him at a location other than the scene of the robbery and assault at the time of the crimes' commission. Counsel conducted no independent investigation to determine whether these individuals could provide exculpatory evidence. Instead, counsel delegated the investigation of these witnesses to Michael Comperchio, who testified at trial as a prosecution witness and who also testified at trial that he hated defendant. Moreover, counsel's failure to produce either of these witnesses left a crucial question in this case unanswered, that being if defendant was not at the scene of the robbery then where was he? The prosecution exploited this weakness in defendant's alibi defense to its fullest extent.

The cumulative effect of defense counsel's deficient conduct was of sufficient magnitude to undermine the jury verdict and deprive defendant of a fair trial.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Stephen J. Markman
/s/ Harvey A. Koselka