

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BARRY ARNESS JACKSON,

Defendant-Appellant.

UNPUBLISHED

March 3, 1998

No. 199558

Kalamazoo Circuit Court

LC No. 96-000892-FH

Before: McDonald, P.J., and Sawyer and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of accessory after the fact to a felony, MCL 750.505; MSA 28.773, and operating a vehicle while under the influence of a controlled substance, MCL 257.625(1); MSA 9.2325. Defendant was sentenced as an habitual offender, fourth offense, to ninety days in jail for the OUIL conviction, and six to twenty years' imprisonment for the accessory after the fact conviction. We affirm.

Defendant was charged in the present case with intentionally aiding a codefendant to escape arrest following a robbery committed at a gas station in Kalamazoo, and for driving under the influence of cocaine. Defendant's theory at trial was that he was so high on cocaine and heroin on the day in question, that he never knew codefendant even committed the robbery, and that he fled from the police only because he did not want them to discover that he was driving while intoxicated, or that there was already a warrant out for his arrest.

I

Defendant first argues that the lower court erred in instructing the jurors that they could only consider his prior robbery conviction for impeachment purposes, claiming that such an instruction precluded the jury from using the conviction as substantive evidence supporting his defense theory at trial. Defendant also faults his trial attorney for failing to object to the court's instruction. We find no error.

Before trial, the prosecution was given permission by the court to introduce evidence of defendant's prior convictions for impeachment purposes should defendant decide to testify. When defendant took the stand, he first alluded to his prior robbery conviction by indicating that he was on parole for stealing a gold chain, and had violated the terms of his parole by traveling to Michigan without securing a permit from Illinois authorities. Defense counsel then argued in closing arguments that defendant fled from the police because he was in violation of his parole. The prosecution never mentioned the conviction, and during final instructions the court instructed the jury in pertinent part as follows:

Evidence has been received in this trial that the Defendant has been previously convicted of a crime. You may consider this evidence only in deciding whether you believe the Defendant is a truthful witness. You may not use it for any other purpose. A past conviction is not evidence that the Defendant committed the alleged crime in this case.

Despite the fact that defendant did not object to this instruction at trial, or in the alternative, propose a different one, he now claims that the words "You may not use it for any other purpose," precluded the jury from using the existence of the conviction to confirm his parole status, and in turn, his violation of that parole. Defendant's argument is without merit.

First, although defense counsel argued that defendant fled from police because he was in violation of his parole, defendant's own testimony did not reflect that same reasoning. Instead, defendant mentioned only the outstanding warrant, and his intoxication. Second, even if defendant had stressed the parole violation, we conclude that the court's instruction concerning the conviction did not preclude the jury from believing defendant with respect to his parole status.

Evidence of defendant's conviction alone does not provide substantive evidence to support the theory that defendant was indeed in violation of parole and that he fled from police for that reason. Hence, not only is there a question of whether the evidence presented by defendant even raised such a defense, the instruction given by the court had no effect on the jurors' decision to consider the defense or its veracity. Thus, no manifest injustice is found. *People v McVay*, 135 Mich App 617, 618; 354 NW2d 281 (1984).

Finally, having determined that the alleged error was not outcome determinative, defendant has failed to establish that his trial counsel was ineffective in neglecting to object to the instruction. *People v Sharbnaw*, 174 Mich App 94, 106; 435 NW2d 772 (1989).

II

Defendant next argues that the trial court erred in denying his request for an instruction defining the distinction between an aider and abettor and an accessory after the fact. Defendant claims that because the prosecution suggested that defendant knew of the robbery, purposely parked his vehicle for an easy getaway, and then intentionally aided Smith in attempted escape, it raised issues and elements of both the crime of aiding and abetting and accessory after the fact. Therefore, the jurors should have

been given the instruction in order to resolve any confusion they may have had in discerning the difference between the two crimes. We disagree.

A defendant cannot be convicted as both a principal under the theory of aiding and abetting, and as an accessory after the fact, with respect to the same crime. *People v Hartford*, 159 Mich App 295, 299; 406 NW2d 276 (1987). For this reason, the criminal jury instructions provide an explanation for the difference between an aider and abettor and an accessory after the fact, and instruct the jury to choose one or the other when convicting the defendant. *Id.*, 300. The jury in the present case did not have both options before them.

Defendant was not charged as an aider and abettor, nor was that term ever used throughout the duration of the trial. Therefore, we conclude that rather than clearing up any confusion, the reading of CJI2d 8.7 would have actually caused more. Accordingly, the instruction was simply inappropriate, and no error is found in the trial court's refusal to read it to the jury.

III

Last, defendant argues that his six- to twenty-year sentence for his accessory after the fact conviction is excessive and violates the rule of proportionality. We again disagree.

The sentencing of habitual offenders, like all other sentences, is reviewed for an abuse of discretion. *People v Cervantes*, 448 Mich 620, 627; 532 NW2d 831 (1995). An abuse of discretion will be found where the sentencing court violates the principle of proportionality, which requires sentences imposed by the sentencing court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.*; *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

As the sentencing court noted, defendant had an extensive criminal record, involving robbery, burglary, theft, and drug convictions, and was in fact on parole when he committed the instant offense. The court also opined, with reason, that the record contained sufficient evidence to suggest that defendant participated in the robbery to a greater extent than he was charged and convicted, and added that it was evident that any previous attempts made to rehabilitate defendant had not been successful, considering his history as a repeat offender. Accordingly, we conclude that the record raises no question concerning the propriety of the court's decision, and provides nothing to indicate that the court abused its discretion in sentencing defendant.

Affirmed.

/s/ Gary R. McDonald

/s/ David H. Sawyer

/s/ Joel P. Hoekstra