

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAN STOWERS,

Defendant-Appellant.

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UNPUBLISHED

December 26, 2000

No. 217596

Wayne Circuit Court

LC No. 98-000669

Before: Bandstra, C.J., and Wilder and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of less than fifty grams of cocaine and of possession of less than fifty grams of cocaine with intent to deliver, MCL 333.7401(1) and (2)(a)(iv); MSA 14.15(7401)(1) and (2)(a)(iv). Defendant was sentenced to 1½ to 20 years' imprisonment for the delivery conviction, and 2 to 20 years' imprisonment for the possession with intent to deliver conviction, the sentences to run consecutively. Defendant appeals as of right. We affirm.

Defendant claims that his constitutional right to a properly instructed jury was denied because the trial court refused to give a "mere presence" instruction. We disagree. Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). Instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996). The instructions must include all elements of the crime charged and must not exclude material issues, defenses, and theories for which there is evidence in support. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

The mere presence instruction requested by defendant, CJI2d 8.5<sup>1</sup>, provides as follows:

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<sup>1</sup> CJI2d 8.5 is included in the cluster of Michigan Criminal Jury Instructions that includes the instruction on aiding and abetting, CJI2d 8.1. See also CJI2d 8.4.

Even if the defendant knew that the alleged crime was planned or was being committed, the mere fact that [he/she] was present when it was committed is not enough to prove that [he/she] *assisted* in committing it. [Emphasis added.]

The clear and unambiguous language of CJI2d 8.5 indicates that the instruction applies when the prosecutor's theory is aiding and abetting, i.e., that the defendant intentionally assisted someone else in committing a crime. See CJI2d 8.1. See also *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995). It is well settled that mere presence, even with the knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider and abettor. *People v Turner*, 125 Mich App 8, 11; 336 NW2d 217 (1983).

Here, the prosecution did not argue under an aiding and abetting theory that defendant *assisted* in committing the crimes charged; the prosecution argued only that he committed them. Thus, defendant's reliance on *People v Head*, 211 Mich App 205; 535 NW2d 563 (1995) is misplaced. In *Head*, the prosecution requested an aiding and abetting instruction as consistent with its theory that even if the defendant did not possess the illegal drugs he was charged with possessing, he assisted another person by providing a storage place for them. *Id.* at 211. This Court found that the trial court properly gave the aiding and abetting instruction, as well as the instruction on mere presence, which was requested by the defendant. *Id.* at 211-212. Here, the prosecution did not argue that defendant assisted in committing the crimes charged or request an aiding and abetting instruction. To read the standard mere presence instruction in the absence of the instruction on aiding and abetting, as defendant urges, would be confusing and potentially misleading to jurors.

The instructions given in this case fairly presented the issues to be tried and sufficiently protected the defendant's rights. The court's instructions included all elements of the crimes charged, see CJI2d 12.2 and 12.3, and did not exclude consideration of defendant's defense or theory. Defendant argued that he did not sell any cocaine to anyone, that he did not know cocaine was hidden in the house, that the cocaine was sold to the undercover officer by the other individuals in the home, and that he was merely in the home when the police raided it. *Daniel, supra*. Accordingly, the court instructed the jury that defendant's theory was that he "was merely present at the time of the sale." Had the jury accepted defendant's claim of non-involvement, it would not have convicted defendant under the instructions given. See *People v Moldenhauer*, 210 Mich App 158, 161; 533 NW2d 9 (1995). Defendant was not denied his right to a properly instructed jury.

Affirmed.

/s/ Richard A. Bandstra  
/s/ Kurtis T. Wilder  
/s/ Jeffrey G. Collins