STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 23, 2001
v	No. 219504 Ingham Circuit Court
JASON DEMYERS, Defendant-Appellant.	LC No. 98-073971-FH

Before: Wilder, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Defendant was convicted, after a jury trial, of delivering less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), as an aider and abettor, MCL 767.39; MSA 28.979. The trial court sentenced defendant to a term of 18 to 240 months' imprisonment, with credit for nine days served.[1] Defendant appeals as of right from his conviction. We affirm.

I. Factual and Procedural Background

This case arises from an undercover police officer's purchase of crack cocaine on a Lansing street corner. The police officer testified that defendant acted as a go-between, facilitating the sale of cocaine. Defendant, who testified on his own behalf, denied that he intended to assist or encourage the sale of drugs. Rather, defendant claimed that he warned the drug dealer not to complete the sale because he believed the buyer was an undercover police officer. Given the concerns raised in the dissenting opinion, we set forth the facts developed at trial in detail.

Officer Guy Pace, a City of Lansing police officer, testified that he was assigned to an undercover unit targeting street level narcotics. On July 1, 1998, Pace was attempting to purchase drugs from street dealers, with the intent to arrest the dealers immediately after the sale. At approximately 10:00 p.m. that night, Pace was working alone, in street clothes, in an unmarked car. Pace testified that Officer Noel Garcia, who was familiar with defendant, spotted

[1] According to its Offender Tracking Information System, the Michigan Department of Corrections paroled defendant on September 15, 2000, after he served his minimum sentence of eighteen months.

him at the corner of Grand River and Farrand, and directed Pace to that location. When Pace approached the intersection in his unmarked car, he noticed defendant sitting against a building on the southeast corner. Pace parked his car on that side of the street, facing south on Farrand. Pace admitted that he initiated contact with defendant, and that defendant neither flagged him down nor waved at him.

Pace testified that he asked defendant "if there was anything going on." Defendant then approached the vehicle and asked Pace either what he wanted or what he needed. Pace told defendant that he was "looking for a couple 20's." Pace explained that "a couple 20's" means, in street slang, two $20 rocks of crack cocaine. Pace also testified that he told defendant he was "trying to get on," meaning that he was trying to get high on drugs. According to Pace, defendant asked him whom he knew and whom he had been dealing with. Pace pointed toward the house at 1143 Farrand and stated that a friend had been buying drugs for him there.[2]

According to Pace, defendant told him to stay in the parked car. Defendant then walked down the street to 1143 Farrand, stopping to speak with a woman on the sidewalk. Police later identified that woman as Michelle Richardson, who lived at 1143 Farrand. Although Pace could not hear the conversation between defendant and Richardson, he testified that he could see the two conversing for one or two minutes. Richardson left defendant and walked directly to Pace's vehicle. According to Pace, her first words were, "[g]ive me the 40." When Pace asked Richardson, "[d]o you got the stuff," she said "yes." Pace handed Richardson $40 in pre-recorded currency and Richardson handed Pace two rocks of crack cocaine.[3]

After the prosecution rested its case, defendant testified on his own behalf. Although defendant admitted that some portions of Pace's testimony were accurate, he contested other portions of that testimony. Defendant admitted that he was present at the corner of Grand River and Farrand on the night in question, waiting outside a Mexican restaurant for carry-out food. He testified that Pace approached him in a vehicle and asked him "what was going on." Defendant testified that Pace also told him that he wanted "a couple of 20's," and defendant admitted knowing that Pace was referring to crack cocaine. Defendant testified that he responded, "I don't know. I don't—I don't do that." Defendant denied asking Pace whom he had been dealing with. Defendant also denied that Pace ever stated that he was obtaining drugs from 1143 Farrand. Finally, defendant denied telling Pace to wait in his car.

Defendant testified that he walked away from Pace's vehicle because he did not want to be involved in a drug transaction. Defendant indicated that he walked south on Farrand because his aunt lived about one block down in that direction. Defendant testified that he did not specifically approach Richardson, but happened to run into her on the sidewalk as he walked away from Pace. Defendant admitted knowing, at the time of the incident, that Richardson sold cocaine. He stated that Richardson asked him what Pace wanted, and he replied that Pace wanted "a couple of 20's." Defendant also testified that he warned Richardson that he thought

[2] Pace testified that police had previously raided the home at 1143 Farrand for drug activity and that police had received numerous complaints of drug trafficking in that area.

[3] There is no dispute that the substance Richardson sold to Pace was cocaine.

Pace was an undercover police officer. Defendant denied that he intended to assist Richardson in selling cocaine to Pace. Rather, defendant claimed that he intended to warn Richardson against doing so.

Regarding his claim that he recognized Pace as a police officer, defendant testified that he had met Pace on two prior occasions. First, defendant met Pace in the street in front of defendant's mother's home. Apparently, Pace walked up to defendant, wearing street clothes, and told him to stop lighting fire crackers because defendant was disturbing a neighbor who had a new baby. Second, defendant testified that he saw Pace cutting the grass in front of his home on one occasion, without his shirt, and that he had seen the scar on Pace's stomach.[4] However, defendant did not explain how those two encounters with Pace, during which Pace was not in uniform, led him to believe that Pace was a police officer.[5]

The prosecutor charged defendant with delivering less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), as an aider and abettor, MCL 767.39; MSA 28.979. After a one-day trial, the jury found defendant guilty as charged. Defendant appeals as of right. We affirm.

II. Jury Instructions

Defendant's sole argument on appeal challenges the jury instructions read by the trial court regarding the intent required to convict defendant as an aider and abettor. The trial court read an aiding and abetting instruction closely modeled after CJI2d 8.1. Defense counsel approved the instructions before they were submitted to the jury and did not object to the instructions as given. Therefore, the issue is unpreserved for appellate review. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). In order to avoid forfeiture of this issue, defendant must demonstrate plain error. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).[6]

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have 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. . . . Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'seriously affect[ed] the fairness, integrity of public reputation of judicial proceedings'

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[4] Pace acknowledged that he has a scar on his stomach.

[5] In contrast, Pace testified that he did not know defendant before the incident in question and that he did not believe defendant knew him before that encounter.

[6] The issue-forfeiture rule applies even to claims of instructional error pertaining to essential elements of the charged offense. *People v Mass*, 238 Mich App 333, 340; 605 NW2d 322 (1999), lv gtd in part 462 Mich 877 (2000).

> independent of the defendant's innocence." [*People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999) (citations omitted).]

Defendant argues that the jury instructions read by the trial court failed to correctly express the intent required to convict defendant as an aider and abettor. The aiding and abetting statute, MCL 767.39; MSA 28.979, provides:

> 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 such offense.

This Court described the elements of an aiding and abetting offense in *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995):

> To support a finding that a defendant aided and abetted a crime, the prosecutor 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. An aider and abettor's state of mind may be inferred from all the facts and circumstances. [Citations omitted.]

The instruction read by the trial court in the present case complied with the elements set forth in *Turner*, and it was not erroneous.

III. Aiding and Abetting

Although defendant does not raise the issue, the dissenting opinion notes a concern that the prosecutor failed to prove an essential element of the offense.[7] The dissent argues that the prosecutor failed to present any evidence that defendant committed an act that assisted the principal commit the crime. The dissent stresses that Officer Pace did not hear defendant's conversation with Richardson. Therefore, the dissent argues that the only direct evidence of what defendant told Richardson was provided by defendant, who testified that he warned Richardson not to sell cocaine to Pace.

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[7] By order dated October 3, 2000, this Court, on its own motion, requested the parties to appear at oral argument to answer the following questions:

(1) What evidence was adduced at trial that proved that defendant assisted, encouraged, supported or otherwise committed an act that aided and abetted the principal in this case?

(2) Does the evidence that the defendant warned the principal that the person attempting to purchase narcotics was an undercover police officer negate any inference that he was aiding and abetting the principal?

There are three main elements to the crime of aiding and abetting: (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. *Turner*, *supra* at 568. Because Pace did not personally hear defendant encourage Richardson to sell cocaine, the dissent concludes that the proofs failed to establish the assistance, encouragement, or support for the principal's criminal conduct necessary to prove an aiding and abetting charge.

At trial, Officer Pace testified that he told defendant that he wanted a "couple of 20's," meaning two $20 rocks of crack cocaine. Defendant admitted that Pace told him this, and admitted knowing what defendant meant. Although Pace did not hear what defendant said to Richardson, defendant admitted telling her that Pace wanted a "couple of 20's." Furthermore, Pace testified that, immediately after Richardson spoke to defendant, she walked directly to Pace's vehicle and said, "[g]ive me the 40." We believe that the above evidence was sufficient to support a finding that defendant conveyed to Richardson the essential information she needed to complete the drug sale: (1) that she had a willing buyer, (2) the desired quantity of drugs, and (3) the proposed price. "'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." *Turner*, *supra* at 568. In our view, conveying the above information to a known cocaine dealer satisfies the actus reus required to sustain a conviction based on an aiding and abetting theory.

Defendant did not argue at trial that he did not perform the actus reus of the offense. Rather, he argued that he lacked the mens rea necessary to commit the crime. Defendant essentially testified that he intended to *prevent* Richardson from selling drugs to Pace. If that was actually defendant's intent, then he did not commit an aiding and abetting offense. However, the jury clearly rejected defendant's testimony in this regard. We note that a jury is free to believe or disbelieve, in whole or in part, any of the evidence presented. *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). Such a credibility determination is not within the province of this Court to disturb. *People v Lee*, 243 Mich App 163, 167; 622 NW2d 71 (2000). Further, we recognize that "[a]n aider and abettor's state of mind may be inferred from all the facts and circumstances." *Turner*, *supra* at 568. Given the testimony presented at trial, we believe the jury was presented with sufficient circumstantial evidence to infer that defendant intended to assist Richardson in selling cocaine to Pace.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael R. Smolenski