STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 18, 2010
v	No. 293385 Kent Circuit Court
CALVIN CHRISTOPHER MURPHY, Defendant-Appellant.	LC No. 08-010102-FC

Before: M. J. KELLY, P.J., and K. F. KELLY and BORRELLO, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of four counts of armed robbery, MCL 750.529; four counts of torture, MCL 750.85; first-degree home invasion, MCL 750.110a; four counts of unlawful imprisonment, MCL 750.349b; unlawful driving away of a motor vehicle, MCL 750.413; four counts of obtaining personal identification information with intent to commit identity theft, MCL 445.67(a); and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to 18 to 40 years' imprisonment for each conviction of armed robbery, 18 to 40 years' imprisonment for each conviction of torture, 10 to 20 years' imprisonment for the first-degree home invasion conviction, 8 to 15 years' imprisonment for each conviction of unlawful imprisonment, 3 to 5 years' imprisonment for the unlawful driving away of a motor vehicle conviction, 3 to 5 years' imprisonment for each conviction of obtaining personal information with intent to commit identity theft, and 2 years' imprisonment for the felony-firearm conviction. We affirm.

I. AMENDMENT OF INFORMATION

At the outset, we reject defendant's argument that the trial court improperly "amended the information" by "charging defendant on 19 counts of aiding and abetting." Specifically, defendant asserts that because the information charged him as a principal, he was prejudiced when the trial court instructed the jury on the elements of aiding and abetting. However, aiding and abetting is not a separate charge; it is an alternate theory of liability. See *People v Lamson*, 44 Mich App 447, 449-450; 205 NW2d 189 (1973) ("The distinction between accessories and principals has been abolished by statute [MCL 767.39]. The statute makes an aider and abettor into a principal and it is unnecessary to charge the defendant in any form other than as a principal."). Accordingly, the trial court did not amend the information to include a separate charge when it provided the jury with an aiding and abetting instruction and there was no error.

In any case, defendant has failed to explain how his defense was prejudiced as a result and, thus, his argument that the trial court's action deprived him of a fair trial lacks merit.

II. SUFFICIENCY OF THE EVIDENCE

Defendant next contends that there was insufficient evidence to support his convictions. We disagree. We review de novo a challenge to the sufficiency of the evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In conducting our review, we construe the evidence in a light most favorable to the prosecution and consider whether there was sufficient evidence to justify a rational trier of fact in finding all of the elements of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

As noted, although defendant was charged as a principal, his convictions were also pursued under an aiding and abetting theory of liability. In order to support a conviction under an aiding and abetting theory of liability, the prosecutor must prove the following elements beyond a reasonable doubt:

> (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 Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999).]

A. ARMED ROBBERY

Defendant was convicted of four counts of armed robbery committed against four different victims. "The elements of armed robbery are: (1) an assault; (2) a felonious taking of property from the victim's presence or person; and (3) while the defendant is armed with a weapon." *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007).

Here, Joshua Hall testified that three robbers charged into his apartment as he and three friends attempted to leave; one of the men hit Hall in the face with a gun, kicked him in the ribs, slammed his head into the floor, threatened him with a gun, bound him, burned him with a cigarette while he was bound, and made numerous oral threats over the course of six hours. Joshua Clincy testified that the robbers hit him with a shotgun in the face, stomped on him and kicked him, dragged him into the living room, immobilized him, burned him with a cigarette, and verbally threatened him. Paul Whitman testified that the men forced him to lie on the living room floor, bound him with wire, threatened him with golf clubs, burned him with a cigarette, and orally threatened him. Max Burger testified that the men bound him, kicked him in the head, threatened him with weapons and objects, and threatened to kill him. All of the victims testified that three men broke into the apartment, and were consistently present until they had all four victims subdued and had taken their ATM cards and PIN numbers. The robbers took items from the victims and the apartment and stole a Honda Accord that belonged to one of the victims. Defendant's fingerprints were on the Accord and police found one of his fingerprints on a beer bottle inside the apartment. Defendant admitted to Detective Stephanie Morningstar that he had knowledge of the planned robbery and that he agreed to assist the codefendants commit the robbery. Defendant wrote two letters while he was incarcerated in jail wherein he admitted that

he was present at the crime scene and had a role in the offenses. Morningstar testified that the man in photographs taken at a Chase ATM at the time the victims had cash removed from their accounts appeared to be defendant, rather than one of the other codefendants. Later, an empty holster was found in defendant's residence. Thus, based on this evidence, a reasonable juror could conclude beyond a reasonable doubt that defendant committed four counts of armed robbery, either as an aider and abettor, or as the principal.

Further, although defendant advanced an alternate version of events consistent with innocence, it is not this Court's role to weigh the evidence and make credibility determinations. See *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992). Rather, the jury is the sole judge of the facts. *Id*. Apparently, the jury did not believe defendant's testimony to be credible and we will not now displace this determination.

B. TORTURE

Next, we find there was sufficient evidence to allow a rational jury to convict defendant, as an aider and abettor or as a principal, of four counts of torture, MCL 750.85, beyond a reasonable doubt. A person commits torture if, "with the intent to cause cruel or extreme physical or mental pain and suffering, [he] inflicts great bodily injury or *severe mental pain or suffering* upon another person within his or her custody or physical control . . . ." MCL 750.85(1) (emphasis added). Further, MCL 750.85(2)(d) defines "severe mental pain or suffering" to mean

> a mental injury that results in a substantial alteration of mental functioning that is manifested in a visibly demonstrable manner caused by or resulting from any of the following:
>
> (*i*) The intentional infliction or threatened infliction of great bodily injury.
>
> (*ii*) The administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt the senses or the personality.
>
> (*iii*) The threat of imminent death.
>
> (*iv*) The threat that another person will imminently be subjected to death, great bodily injury, or the administration or application of mind-altering substances or other procedures calculated to disrupt the senses or personality.

Here, all four victims testified that the incident had negative long-term affects on their well-being. Each of the victims testified that their mental injuries resulted from the perpetuators' threats of death and threats to inflict great bodily injury that occurred continuously throughout the six hour altercation. Testimony at trial established that the perpetuators bound and injured each of the victims, threatened to cause great bodily injury with golf clubs and knives, and, at times, pointed guns at the victims. The perpetuators also informed the victims that one of the intruders had killed before and indicated he would kill again if the victims did not comply with their demands. The victims testified that they were terrified and unaware of what was going to

happen to them. Accordingly, the evidence was sufficient for the jury to find defendant guilty of four counts of torture beyond a reasonable doubt.

C. FIRST-DEGREE HOME INVASION

Sufficient evidence also supported defendant's conviction of first-degree home invasion either as a principal or as an aider and abettor. MCL 750.110a(2) sets forth the elements of the crime of first-degree home invasion and provides as follows:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling.

As discussed above, the victims' testimonies showed that three perpetrators forced their way into Hall's apartment and assaulted and robbed the victims with guns and other weapons. This evidence supports a determination that defendant was actively involved in the home invasion and robbery.

D. FALSE IMPRISONMENT

Next, we conclude that there was sufficient evidence for a rational jury to find defendant guilty of four counts of false imprisonment. Defendant was convicted of unlawful imprisonment under MCL 750.349b, which provides as follows:

> (1) A person commits the crime of unlawful imprisonment if he or she knowingly restrains another person under any of the following circumstances:
>
> (a) The person is restrained by means of a weapon or dangerous instrument.

As already noted, the evidence established that the three robbers forced all four victims to the floor of the apartment after threatening them with guns. For the next six hours, the perpetuators used guns and knives to keep all four of the victims restrained.

E. UNLAWFUL DRIVING AWAY OF MOTOR VEHICLE

Sufficient evidence also supported defendant's conviction of unlawful driving away of a motor vehicle beyond a reasonable doubt. MCL 750.413 provides in relevant part:

> Any person who shall, willfully and without authority, take possession of and drive or take away, and any person who shall assist in or be a party to such taking

> possession, driving or taking away of any motor vehicle, belonging to another, shall be guilty of a felony. . . .

Here, the perpetuators took one of the victim's vehicles on the night of the break-in and robbery. Subsequently, police found the vehicle and defendant's fingerprints were found on its exterior. Accordingly, a rational trier of fact could infer beyond a reasonable doubt that defendant took the vehicle without permission.

F. OBTAINING PERSONAL IDENTIFICATION INFORMATION

In addition, sufficient evidence supports defendant's convictions of four counts of obtaining personal identification information with intent to commit identity theft under a direct theory of liability or as an aider and abettor. MCL 445.67(a) provides in relevant part that a person shall not "[o]btain or possess, or attempt to obtain or possess, personal identifying information of another person with the intent to use that information to commit identity theft or another crime." For purposes of the statute, "personal identifying information" includes credit card numbers and "financial transaction device account number[s] or the person's account password." MCL 445.63(o). Three of the victims testified that the robbers took their ATM cards, forced them to reveal their PIN numbers, and withdrew currency from their bank accounts. The fourth victim testified that the robbers attempted to take an ATM card from him, but instead took his credit card. The victim's testimony was sufficient evidence to support defendant's convictions under MCL 445.67.

G. FELONY FIREARM

Finally, sufficient evidence supported the jury's verdict of felony-firearm, MCL 750.227b(1), where evidence showed that two of the robbers had guns, where defendant actively participated in the offenses, and where police found a handgun holster at defendant's residence. Defendant's argument that his convictions were unsupported by sufficient evidence lacks merit.

III. DOUBLE JEOPARDY

Next, defendant contends that his convictions of torture and false imprisonment violate the constitutional protection against double jeopardy. In his view, because those offenses arose from the same continuous transaction, he was twice punished for the same offense. We do not agree. A double jeopardy challenge presents a question of constitutional law that we review de novo. *People v Lett*, 466 Mich 206, 212; 644 NW2d 743 (2002). The "same elements" test set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), governs whether multiple punishments are barred on double jeopardy grounds. *Smith*, 478 Mich at 295-296. Under the *Blockburger* "same elements" test, "two offenses are not the 'same offense' if each requires proof of an element that the other does not." *People v Chambers*, 277 Mich App 1, 5; 742 NW2d 610 (2007). A comparison of the elements of torture, MCL 750.85, and false imprisonment, MCL 750.349b(1)(a), reveals that torture requires proof of an element not required to prove false imprisonment, i.e. severe mental pain and injury. Additionally, false imprisonment requires proof of an element not required to prove torture, i.e. use of a dangerous weapon. Therefore, because each offense requires proof of a distinct element, double jeopardy concerns are not implicated under the "same elements" test. *Chambers*, 277 Mich App at 5.

IV. JURY INSTRUCTIONS

Defendant also contends that the trial court erred by instructing the jury on the elements of aiding and abetting. In particular, defendant contends that the trial court over-emphasized the aiding and abetting elements and de-emphasized the rule on mere presence, see CJI2d 8.5, thereby failing to ensure that the jury's deliberations were fairly conducted. We disagree. At the outset, we note that defendant has waived any claim that the trial court erred by providing the instructions because defense counsel affirmatively approved of them. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Nonetheless, we conclude that the instructions were proper. "We review jury instructions in their entirety to determine if error requiring reversal occurred." *People v Chapo*, 283 Mich App 360, 373; 770 NW2d 68 (2009) (citation and quotation marks omitted). "Even if the instructions are somewhat imperfect, there is no error if they fairly present to the jury the issues to be tried and sufficiently protect the rights of the defendant." *People v Head*, 211 Mich App 205, 210-211; 535 NW2d 563 (1995).

The instructions in the instant matter fairly presented the issues to be tried. After the trial court had instructed the jury on the elements of aiding and abetting and all the elements of the crimes at issue, further discussion ensued outside the jury's presence with regard to an additional instruction. Apparently, defense counsel requested an instruction on mere presence, CJI2d 8.5, which was consistent with defendant's theory of the case that he was merely at the scene and which had not been provided in the original instruction. The trial court then instructed the jury on the elements of aiding and abetting, this time including CJI2d 8.5. We fail to see how this instruction unfairly presented the issues or otherwise prejudiced defendant. Apparently, defendant would have preferred that CJI2d 8.5, standing alone, be read to the jury. But reading it in conjunction with the elements of aiding and abetting provided the jury with the necessary context to better understand the rule. This was not unfair. Accordingly, the trial court did not err by instructing the jury on mere presence.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant further posits that defense counsel rendered ineffective assistance of counsel when he failed to ensure that the trial court properly instructed the jury on aiding and abetting, specific intent, and mere presence. However, we have already concluded that the instructions were proper. Counsel's performance cannot be ineffective for failing to raise a futile objection. *People v Jordan*, 275 Mich. App. 659, 668; 739 N.W.2d 706 (2007). Thus, counsel's performance was not deficient and this claim also fails.

VI. PROSECUTORIAL MISCONDUCT

Next, defendant contends that the prosecutor committed misconduct when he introduced "falsified evidence" at trial. Although defendant provides a list of allegedly improperly admitted evidence, some of it allegedly entered for purposes of inflaming the jury's passions, defendant fails to specify which evidence was falsified and which evidence was improperly admitted under the Michigan Rules of Evidence. Because defendant has failed to provide any detailed discussion tying the facts to the law, we consider this issue to be abandoned. *People v Anderson*, 209 Mich App 527, 538; 531 NW2d 780 (1995).

VII. CUMULATIVE ERROR

Defendant also argues that the cumulative effect of the above discussed alleged errors denied him a fair trial. However, we have concluded that there were no errors in defendant's trial. Thus, this argument does not warrant relief. See *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995) ("[O]nly actual errors are aggregated to determine their cumulative effect.").

VIII. MOTION FOR A NEW TRIAL

Next, defendant contends that the trial court erred when it denied his motion for a new trial and a *Ginther*[1] hearing. We review a trial court's decision whether to grant a new trial, and whether to hold an evidentiary hearing, for an abuse of discretion. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998); see *People v Mischley*, 164 Mich App 478, 481-482; 417 NW2d 537 (1987). "A trial court may grant a new trial … on the basis of any ground that would support reversal on appeal, or because it believes that the verdict has resulted in a miscarriage of justice." *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). Defendant's motion for a new trial was based on the same grounds he now raises on appeal, discussed above. However, as we have already concluded, none of these grounds standing alone, or cumulatively, support reversal of defendant's convictions; and, further, the jury's verdict did not result in a miscarriage of justice where there was significant evidence of defendant's guilt introduced at trial. See *id*. Thus, the trial court did not abuse its discretion by denying defendant's motion for a new trial.

Further, the trial court did not abuse its discretion when it denied defendant's motion for a *Ginther* hearing. Defendant's request for a *Ginther* hearing was based on counsel's failure to object to the jury instructions and his alleged failure to request a "mere presence" instruction. However, defendant has failed to explain what additional facts were necessary in relation to this argument that would warrant a *Ginther* hearing. The record plainly shows that counsel requested the mere presence instruction, it was provided to the jury, and the instructions, as we have already concluded, were otherwise proper. Accordingly, an expansion of the record was not necessary to review his ineffective assistance of counsel claim, and the trial court did not err by denying the request.

IX. SENTENCING

Defendant asserts that the trial court erred by scoring Prior Record Variable (PRV) 7, subsequent or concurrent convictions, at 20 points. We disagree. We review a sentencing court's scoring decision "to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). MCL 777.57(a) governs the scoring of PRV 7 and provides that the trial court assess 20 points where "[t]he offender has 2 or more subsequent or concurrent convictions." The statute directs a sentencing court to "[s]core the appropriate point value if the offender was convicted of multiple felony counts . . . ." MCL 777.57(2)(a).

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Here, defendant did not have any prior felony record. However, he was concurrently convicted of more than two felonies in the present case. Thus, the trial court did not err by scoring PRV 7 at 20 points. Defendant's argument that his multiple felony convictions in this case could not be considered for purposes of scoring PRV 7 because he was convicted as an aider and abettor is without authority. As noted, there is no distinction between a principal and an accessory under Michigan law. See MCL 767.39; *Lamson*, 44 Mich App at 449-450.

X. STANDARD 4 BRIEF

In addition, defendant, in pro per, contends that the prosecutor engaged in several instances of misconduct. Specifically, defendant alleges that the prosecutor improperly sought to admit irrelevant evidence, including the ATM photographs, a handgun holster, and bullets from a rifle. Because no contemporaneous objections were made a trial, this issue is not preserved. We review unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. See *Carines*, 460 Mich at 764-765. "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 502 (2003).

Defendant has failed to establish any error with regard to the ATM photographs. The photographs were probative of defendant's involvement in the crime. MRE 401. Morningstar testified that the man in photographs taken at a Chase ATM at the time the victims had cash removed from their accounts appeared to be defendant. Thus, it cannot be said the prosecutor purposely sought the introduction of irrelevant evidence. Nor was it misconduct for the prosecutor to allegedly request that the ATM photographs be provided to the jury during deliberations. Juries are permitted to review exhibits during deliberations, MCR 6.414(I), and defendant has not established why providing the photographs to the jurors would have unfairly prejudiced him.

Further, the handgun holster found in defendant's apartment was also probative of his involvement in the crimes. MRE 401. Although the holster is not incriminating in itself, the question of how much weight it is to be afforded is a question reserved for the jury. See *Wolfe*, 440 Mich at 514. Moreover, while the bullets for a rifle, also found in defendant's apartment, were likely irrelevant and improperly admitted—none of the victims testified that the perpetuators used a rifle—it cannot be said that the admission of this evidence denied defendant a fair trial in light of defendant's own admissions of involvement and the other substantial evidence of defendant's guilt. Accordingly, we conclude that the prosecutor's conduct did not deny defendant a fair and impartial trial.

Affirmed.

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello