STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 30, 2010
v	No. 293551 Kent Circuit Court
CHRISTOPHER LEE LAFOND, Defendant-Appellant.	LC No. 09-002696-FH

Before: STEPHENS, P.J., and MARKEY and WILDER, JJ.

PER CURIAM.

Defendant was found guilty by a jury of furnishing alcohol to a minor resulting in death, MCL 436.1701(2), and was sentenced as a second habitual offender, MCL 769.11, to two to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

Defendant's conviction arises from the death of 19-year-old Ryan Stevens (the victim) on August 2, 2008, from acute ethanol intoxication. Defendant and the victim's half-sister (whom defendant was dating at the time) supplied alcohol to the victim and an under-age friend of the victim at the hotel room where they were staying. Defendant had just been released from prison on a prior, unrelated conviction and was on parole at the time. Although the victim's sister allegedly paid for the alcohol, defendant selected a bottle of vodka for himself, offered some to the victim, and had engaged in a chugging contest with the victim. Sometime after the chugging contest, the victim looked ill so the others made a bed for him on the floor of the hotel room. After lying down, the victim began throwing up on himself. They turned the victim on his side, cleaned him up a bit, and then went to sleep. When they awoke the next morning, the victim was dead. Defendant and the victim's sister directed the friend to dispose of the alcohol containers in the room. Thereafter, they phoned 911. Initially, they told the police the victim was intoxicated before coming to the hotel room, but later admitted they had supplied the alcohol to him. Defendant claimed he was not aware that the victim was underage, but admitted he had not tried to ascertain the victim's age before allowing him to drink the alcohol.

On appeal, defendant first argues there is insufficient evidence to support his conviction of furnishing alcohol to a minor resulting in death, MCL 436.1701(2). We disagree.

Sufficiency of the evidence claims are reviewed de novo on appeal. *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992); *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). When reviewing a sufficiency of the

evidence challenge, this Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the elements of the charged offense were proven beyond a reasonable doubt. *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002); *Wolfe*, 440 Mich at 515.

To be guilty of furnishing alcohol to a minor resulting in death, it must be proven that a person: (1) knowingly sold or furnished liquor to a minor, or (2) failed to make diligent inquiry as to whether the person is a minor, and (3) the minor's subsequent consumption of liquor was a direct and substantial cause of the minor's death. MCL 436.1701(2).

There is sufficient evidence to support defendant's conviction of furnishing liquor to a minor resulting in death. *Lundy*, 467 Mich at 257. It is undisputed that defendant and the victim's sister went into a party store on the night in question and purchased gin, vodka, and a six-pack of Bud Ice. While defendant did not pay for the vodka, it was chosen for him and he showed his prison ID card at the time of purchase. When the victim and his friend arrived at the hotel, defendant never questioned the victim about his age even though he knew the victim's sister was just 21 years old. While the victim was a larger person, and he and the victim's sister shared the same father, defendant never questioned his age. This is sufficient to demonstrate that defendant never made a diligent inquiry into the victim's age. See *Lamson v Martin (After Remand)*, 216 Mich App 452, 456; 549 NW2d 878 (1996) ("diligence" means devoted and painstaking application to accomplish an undertaking [quote marks and citations omitted]).

Defendant also clearly "furnished" alcohol to the victim. While he did not physically pay for the vodka, it was purchased for him. After the victim's sister told the victim and his friend that they could have a beer, defendant entered into a vodka "chugging" contest with the victim. Defendant correctly notes that the evidence suggests the victim drank a majority of the vodka while defendant and the victim's sister were out of the room. However, the alcohol had already been furnished to the victim by that point in time and there is no evidence that the victim was told to stop drinking the vodka when defendant and the victim's sister left the room. Thus, the original furnishing of alcohol to the victim was a direct and substantial cause of his death. Accordingly, there is sufficient evidence to support defendant's conviction of furnishing alcohol to a minor resulting in death. *Lundy*, 467 Mich at 257; *Wolfe*, 440 Mich at 515.

Defendant also challenges the trial court's jury instruction on "furnishing," asserting that it expanded the proper definition of the word. We review questions of law, including questions of the applicability of jury instructions, de novo on appeal. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003); *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). When properly preserved, "jury instructions [are reviewed] in their entirety to determine if error requiring reversal occurred." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if instructions are imperfect, reversal is not required if they fairly present the issues to be tried, and sufficiently protect the defendant's rights. *People v Chapo*, 283 Mich App 360, 373; 770 NW2d 68 (2009); *Aldrich*, 246 Mich App at 124.

"Furnishing" liquor to a minor means "letting a minor have liquor." A person furnishes liquor to a minor if the liquor belongs to the person, or is under his control, and he consents or through connivance allows the minor to drink it. It is immaterial whether the person hands it directly to the minor, or through another person. *Bambino v Dunn*, 166 Mich App 723, 728; 420

NW2d 866 (1988), citing *People v Neumann*, 85 Mich 98, 102; 48 NW 290 (1891). The disputed jury instruction comports with this authority interpreting the word "furnish." The instruction, given as a whole, fairly presented the issues to be tried, and sufficiently protected the defendant's rights. *Chapo*, 283 Mich App at 373; *Aldrich*, 246 Mich App at 124. The instruction was not erroneous.

Next, defendant argues reversal is required because it is impossible to determine whether the jurors were unanimous in convicting him either as a principal or as an aider and abettor in furnishing alcohol to the victim resulting in death. We disagree.

A defendant is entitled to a unanimous verdict; it is the trial court's duty to instruct a jury as to the unanimity requirement. *People v Cooks*, 446 Mich 503, 511; 521 NW2d 275 (1994). The common law distinction between a principal and an aider and abettor was abolished by the Legislature in 1927. MCL 767.39. Furthermore, when there is sufficient evidence to support a verdict under either theory, a jury does not have to be unanimous on whether a defendant was a principal or an aider and abettor, so long as they all agreed he participated in the crime either as a principal or an aider and abettor. *People v Smielewski*, 235 Mich App 196, 201-209; 596 NW2d 636 (1999).

The jury was instructed on the crime of furnishing alcohol to a minor resulting in death, and also intentionally assisting someone else in committing it. The jury was further instructed that the verdict must be unanimous and that the jurors must all agree on the verdict.

To support a finding that a defendant aided and abetted a crime, it must be shown that (1) the crime 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 Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993). The jury may be instructed about aiding and abetting when there is evidence that (1) more than one person was involved in committing a crime, and (2) the defendant's role in the crime may have been less than direct participation in the wrongdoing. *People v Head*, 211 Mich App 205, 211; 535 NW2d 563 (1995).

In this case, there was sufficient evidence to support submission of both theories to the jury. While defendant was involved in the purchase of alcohol, the victim's sister actually paid for it. Although defendant denied knowing the victim's age, the prosecutor presented evidence that he failed to make diligent inquiry as to whether the victim was a minor. MCL 436.1701(1). Clearly, though, the victim's sister was aware of the victim's age and nevertheless allowed him drink alcohol. Moreover, while evidence was presented that defendant and the victim passed the bottle of vodka back and forth, it was the victim's sister who initially gave the victim permission to drink beer in the hotel room. An aiding and abetting instruction was appropriate under these facts because a jury could have determined that defendant's role in the crime was less direct than the victim's sister's role. *Head*, 211 Mich App at 211. Because there was sufficient evidence to support guilt under either theory, the general unanimity instruction given to the jury was sufficient to protect defendant's right to a unanimous verdict. *Smielewski*, 235 Mich App at 209.

Finally, defendant argues he was denied the effective assistance of counsel because: 1) his prior criminal record and parole status were introduced by defense counsel during his opening statement and explored further without objection by the prosecutor, and 2) defense counsel failed to object to the prosecutor's closing argument, in which he allegedly injected his personal belief in defendant's guilt. This claim is without merit.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v Grant*, 470 Mich 477, 484-485; 684 NW2d 686 (2004). Because defendant did not raise this issue in a motion for a new trial or request for a *Ginther*[1] hearing, our review is limited to mistakes apparent from the existing record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Generally, to establish ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002); *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). A defendant can overcome the presumption by showing that counsel failed to perform an essential duty and that the failure was prejudicial to the defendant. *People v Reinhardt*, 167 Mich App 584, 591; 423 NW2d 275 (1988), remanded on other grounds 436 Mich 866 (1990).

Defense counsel has wide discretion as to matters of trial strategy. *Odom*, 276 Mich App at 415. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich at 58. Decisions as to when to make an opening statement, what evidence to present, whether to call or question witnesses, and on what to focus in closing argument are presumed to be matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008); *Odom*, 276 Mich App at 416; *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The fact that a strategy does not work does not render its use ineffective assistance of counsel. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008).

Defense counsel's opening statement disclosure of defendant's parole status did not constitute ineffective assistance of counsel. *Strickland*, 466 US at 688; *Odom*, 276 Mich App at 416. The disclosure was clearly a matter of trial strategy. *Odom*, 276 Mich App at 416. The evidence that defendant conspired with the victim's sister and the victim's friend to hide the

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

bottles after finding the victim dead, and agreed with them to tell the police that the victim was already intoxicated when he arrived at the hotel, supported the inference that defendant hid the bottles and lied because he knew he was guilty of furnishing liquor to a minor. Defense counsel's strategic introduction of defendant's parole status allowed counsel to offer the alternative explanation that defendant hid the bottles because it was a violation of a condition of defendant's parole to have alcohol. This Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *Matuszak*, 263 Mich App at 58.

Defendant's additional claim that the prosecutor improperly questioned him about his prior record and alcohol-related misconduct ticket while in prison is unpreserved. In any event, an objection to the questions could have led the jury to believe defendant was trying to hide something, when in fact the strategy was meant to offer a reason for his false statement to the police originally, as well as the attempted cover-up. The fact that this strategy did not work does not render it ineffective assistance of counsel. *Petri*, 279 Mich App at 412.[2]

Defense counsel's failure to object to the prosecutor's closing argument did not constitute ineffective assistance of counsel. *Strickland*, 466 US at 688; *Odom*, 276 Mich App at 416. Although the prosecutor used the pronoun "we" during his closing argument to summarize the testimony (e.g., "[W]e know from [the victim's sister]'s testimony and [the victim's friend]'s testimony that the defendant was supplying . . . [t]he defendant was providing this alcohol."), this Court has previously held, "[w]here the prosecutor's argument is based upon the evidence and does not suggest that the jury decide the case on the authority of the prosecutor's office," the use of first-person pronouns is not improper." *People v Swartz*, 171 Mich App 364, 370-371; 429 NW2d 905 (1988). Consequently, counsel cannot be ineffective for failing to raise a meritless objection to the closing argument. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

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[2] Defendant erroneously argues that a theft offense like breaking and entering is not an impeachable offense, its introduction was prejudicial, and not a sound trial strategy. Such an offense is admissible under MRE 609 following a balancing test. See *People v Johnson*, 474 Mich 96, 103; 712 NW2d 703 (2006). Defendant correctly notes that such a balancing test was never conducted in the instant matter. However, it was defense counsel who raised defendant's parole status during opening argument as a matter of trial strategy to offer a reason for why defendant tried to help cover-up his prior night drinking game with the victim. Defendant cannot utilize the information as a matter of trial strategy and then argue it constituted reversible error due to the absence of a balancing test. "Under the doctrine of invited error, a party waives the right to seek appellate review when the party's own conduct directly causes the error." *People v McPherson*, 263 Mich App 124, 139; 687 NW2d 370 (2004). Accordingly, even if the trial court had erred by admitting such evidence, defendant cannot raise such a claim on appeal.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Jane E. Markey
/s/ Kurtis T. Wilder