

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT DWIGHT BARGER,

Defendant-Appellant.

UNPUBLISHED

January 17, 1997

No. 190014

Jackson Circuit Court

LC No. 95-072612-FC

Before: Smolenski, P.J., and Michael J. Kelly and J.R. Weber,* JJ.

MEMORANDUM.

Defendant was convicted by a jury of aiding and abetting an assault with intent to rob while armed, MCL 750.89; MSA 28.284 and MCL 767.39; MSA 28.979, and sentenced to three to twenty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant argues that the trial court's failure to instruct the jury with CJI2d 8.3 constituted error requiring reversal. Specifically, defendant argues that it is appropriate to instruct a jury with CJI2d 8.3 if a defendant is criminally liable as an aider and abettor for a crime committed during the course of a criminal enterprise. Here, on January 28, 1995, defendant drove Steven Barger and Paul Conant to a Hungry Howie's restaurant so that Barger and Conant could rob the restaurant. Defendant had knowledge of Barger's and Conant's intent. However, defendant claims that he was unaware that Barger and Conant were armed and that, therefore, he should have only been convicted of the lesser-included offense of assault with intent to rob while unarmed. Defendant argues that the court's failure to instruct the jury with CJI2d 8.3 unfairly precluded such a conviction. We disagree.

Jury instructions are reviewed de novo to determine whether the issues to be tried were fairly presented and the defendant's rights were adequately protected. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). The failure of a trial court to include a requested jury instruction is "error requiring reversal only if the requested jury instruction (1) is substantially correct; (2) was not substantially covered in the charge given to the jury, and; (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense."

* Circuit judge, sitting on the Court of Appeals by assignment.

People v Moldenhauer, 210 Mich App 158, 159-160; 533 NW2d 9 (1995). In this case, CJI2d 8.3 was substantially correct and concerned an important point in the trial. However, the trial court instructed the jury on aiding and abetting and the lesser-included offense of assault with intent to rob while unarmed. Thus, defendant's theory of the case, i.e, that he was guilty of only assault with intent to rob while unarmed, was substantially covered by the charge given to the jury. Therefore, defendant's ability to effectively present his defense was not seriously impaired. Accordingly, we find no error requiring reversal where the issues to be tried were fairly presented and defendant's rights were adequately protected.

Affirmed.

/s/ Michael R. Smolenski

/s/ Michael J. Kelly

/s/ John R. Weber