STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME ANTHONY TENNYSON,

Defendant-Appellant.

UNPUBLISHED
July 22, 1997

No. 191398
Washtenaw Circuit Court
LC No. 94-3046-FC

Before: Taylor, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of armed robbery, MCL 750.529; MSA 28.797. Defendant, who drove the getaway car, was convicted as an aider and abettor in the armed robbery of an Arby's restaurant. Defendant was sentenced as an habitual offender-third offense, to 12½ to 25 years in prison. We affirm.

Defendant first argues that he was denied a fair trial because the trial court failed to adequately instruct the jury that mere presence at the crime was insufficient to convict defendant as an aider and abettor. More specifically, defendant contends that the instruction given by the court, to which he did not raise any objection, failed to caution the jurors that they must find that defendant possessed the same intent as Askew, the principal offender. Rather, defendant asserts, the court's instruction suggested that he could be found guilty by mere association. We disagree.

Because defendant was charged as an aider and abettor, if he in any way provided assistance, supported, encouraged, or incited Askew to rob the Arby's restaurant, he could be convicted and punished as if he directly committed the offense himself. MCL 767.39; MSA 28.979; *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). Furthermore, Michigan case law requires that the defendant either intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid, and requires something in addition to mere presence. *Turner, supra*; *People v Daniels*, 172 Mich App 374, 383-385; 431 NW2d 846 (1988).

Defendant argues that the court's instructions to the jurors allowed them to disregard his contention that although he was present, he was unaware of Askew's intent to rob Arby's and in no

way intended to assist Askew. Defendant also suggests that the jury was allowed to ignore the element of intent, and specifically finds fault with the following instruction given by the court:

> The mere fact that he was present when it was committed is not enough to prove that he assisted in committing it.

Defendant failed to object to the instruction given at trial, and our review of the record provides no support for defendant' contention of error or manifest injustice. When raised on appeal, jury instructions are reviewed in their entirety to determine whether they sufficiently protect the defendant's rights and fairly present the issues to be tried, *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995); *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989), cert den 498 US 853; 111 S Ct 147; 112 L Ed 2d 113 (1990), and while the portion of the jury instructions defendant now questions does not specifically refer to the requisite intent needed for conviction, it is part of a larger set of instructions which clearly and accurately presented the element of intent.

The jurors were instructed more than once that they must find that defendant "intentionally assisted," that "he intended to help someone else commit the crime," and that he "knowingly aided and abetted." We conclude that at the least, the instructions given cautioned the jury concerning the requirement that defendant intentionally assisted Askew, and in no way suggested that defendant could be found guilty by association, as defendant contends. In fact, we find that the portion with which defendant finds fault, itself, negates such a conclusion. Therefore, defendant is not entitled to a new trial on this ground.

Next, defendant argues that he was denied a fair trial because the court failed to give, in the absence of a request from him, a sua sponte instruction concerning his duress defense. We disagree.

First, we note that according to MCR 2.516(B)(3), the court is required to instruct the jury concerning a party's theory of the case, only after that party specifically requests the instruction. See also MCR 2.516(A)(2). Moreover, a failure to instruct on a point of law is not grounds for setting aside a verdict where, as in this case, the defendant has failed to specifically request the instruction, MCL 768.29; MSA 28.1052, and manifest injustice will not be found where the alleged error or omission is not outcome determinative. *People v McVay*, 135 Mich App 617, 618; 354 NW2d 281 (1984).

Here, we conclude that because defendant failed to request an instruction on the defense of duress and failed to object to its omission, and because the absence of the instruction was harmless at most considering the overwhelming evidence presented at trial to negate such a defense, this Court need not further address the issue in order to avoid an injustice to defendant.

Third, defendant contends that he was denied a fair trial because his trial counsel was ineffective in that despite his opening remarks introducing the theory of duress, and defendant's subsequent testimony supporting the theory, counsel failed to request a jury instruction on duress. Defendant asserts that counsel had no tactical reason for withholding such a request, and that he was clearly prejudiced by the absence of the instruction. We again disagree.

In the absence of an objection from defendant, and because an evidentiary record does not exist regarding this claim, our review is limited to the record as it stands, without the benefit of additional facts pertaining to defendant's allegations. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Because the record does not contain sufficient detail to support defendant's position, we decline to afford this issue further review. *People v Sharbnow*, 174 Mich App 94, 106; 435 NW2d 772 (1989). Aside from the fact that this Court will not second-guess matters of trial strategy in hindsight, *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987), we refuse to find error where, as in this case, counsel's failure to assert and support defendant's defense theory was not outcome determinative. Defendant was not denied a fair trial in this case. See, e.g., *People v Pickens*, 446 Mich 298, 302; 521 NW2d 797 (1994); *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996); *McVay*, *supra*, 618.

Last, defendant argues that he was denied a fair trial and his constitutional right to an impartial jury because the process by which the jurors were selected in his case systematically excluded African-Americans. We decline to review this issue because defendant not only failed to object to the jury array before his jury was impaneled and sworn, he has also failed to substantiate his claim or provide any evidence upon which this Court could effectively decide the propriety of the issue raised. See *People v Hubbard (After Remand)*, 217 Mich 459, 465; 552 NW2d 493 (1996); *Brown v Drake-Willock Int'l*, 209 Mich App 136, 146; 530 NW2d 510 (1995).

Affirmed.

/s/ Clifford W. Taylor
/s/ Harold Hood
/s/ Roman S. Gribbs