

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEREK ALLEN DINKINS,

Defendant-Appellant.

UNPUBLISHED

January 13, 1998

No. 186241

Recorder's Court

LC No. 94-011861

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SANDERS PITTS CARTER, a/k/a SANDERS
PITTS CARTER, JR.,

Defendant-Appellant.

No. 186242

Recorder's Court

LC No. 94-011861

Before: Smolenski, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Defendants were tried before a single jury for assault with intent to murder, MCL 750.83; MSA 28.278, and armed robbery, MCL 750.529; MSA 28.797. Both defendants were convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and armed robbery. For those respective convictions, defendants received sentences of three to ten years' imprisonment and seven to twenty years' imprisonment. Those sentences were vacated and new terms of fifteen to thirty years' imprisonment were imposed because of defendants' status as habitual offenders—defendant Dinkins as a fourth habitual offender, MCL 769.12; MSA 28.1084, and defendant Carter as a third habitual offender, MCL 769.11; MSA 28.1083. Defendants filed separate appeals as of right, which were consolidated for our review. We affirm.

The charges in this matter arose out of an assault upon the victim as he was driving to a friend's house in the early morning hours. According to the victim, defendant Carter flagged down the victim's car and when the victim tried to drive away, defendant Carter grabbed the steering wheel while defendant Dinkins smashed the passenger-side window. After the two men got inside the victim's car, they assaulted him. A third participant in this incident, Leavy DeVoe, used his van to block the victim from driving away. DeVoe then got into the victim's car and cut the victim's neck with a broken bottle. After struggling with the men, the victim was able to run to a friend's house and obtain help. Personal items taken from the victim included his leather jacket, his watch, and a new pair of car speakers. Within a few minutes of the incident, the police stopped DeVoe's van in the area, and all three men were in the van. Items taken from the victim were found inside DeVoe's van.

At trial, defendant Dinkins did not testify. Defendant Carter testified and alleged that he had provided drugs to the victim, but the victim tried to drive off before paying for the drugs. Defendant Carter was dragged by the victim's car as defendant Carter hung onto the steering wheel. DeVoe intervened to stop the victim and to get the drugs back. Defendant Carter denied that he took any of the victim's property.

I

Defendant Dinkins first argues that the trial court erred in submitting the charge of assault with intent to murder to the jury because there was insufficient evidence that he acted with an intent to kill the victim. We disagree.

This Court decides whether there was sufficient evidence to sustain a conviction by reviewing the evidence in a light most favorable to the prosecution and determining whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). Although defendant Dinkins failed to move for a directed verdict in the trial court, we will nonetheless address the merits of this issue. *Id.* at 516, n 6. The crime of assault with intent to kill requires evidence of (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would have made the killing murder. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995).

According to the victim, defendant Dinkins made threats to kill the victim during the assault. Defendant Carter and DeVoe also threatened to kill the victim. These threats, coupled with the orchestrated attack on the victim, were sufficient to find that defendant Dinkins possessed the requisite intent to kill. See *People v John Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The trial court did not err in submitting this charge to the jury.

II

Both defendant Dinkins and defendant Carter cite error with the trial court's supplemental instructions to the jury on aiding and abetting. The decision to provide additional instructions at the request of the jury is a matter within the trial court's discretion. *People v Martin*, 392 Mich 553, 558; 221 NW2d 336 (1974). The trial court did not abuse its discretion in this case.

The jury requested reinstruction on the definition of aiding and abetting. The court reread the instructions found at CJI2d 8.1. Both defendants asked the court to also reread CJI2d 8.3, 8.4, and 8.5 because those instructions involved the defense theories regarding aiding and abetting. The trial court's supplemental instructions on aiding and abetting were responsive to the jury's request for the definition of aiding and abetting. While it might have been prudent for the court to read all of the instructions related to aiding and abetting, the court's supplemental instructions were adequate and were not unbalanced or prejudicial. We therefore find no abuse of discretion by the trial court. *Id.*

III

Defendant Dinkins next contends that the trial court's comments to his counsel in front of the jury denied him a fair trial. We disagree.

Defendant Dinkins made only one objection regarding the court's comments. For the claims of error that were not properly preserved below by objection, this Court may review the matter if manifest injustice would result from our failure to review. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

A trial court has wide, but not unlimited, discretion and power regarding the conduct of a trial. *Id.* The record should be reviewed as a whole and the comments of the court should not be read out of context. *Id.* A trial court's conduct pierces the veil of judicial impartiality when its comments or conduct unduly influence the jury and, as a result, the defendant is denied a fair and impartial trial. *Id.*

The comments to which defendant Dinkins objected concerned the court's instructions to counsel to stand at the podium, to keep the volume of his voice up, and to address his comments to the court. There is no evidence that the court was demeaning towards defense counsel. The record shows that the court had problems hearing defendant Dinkins' attorney from the beginning of the trial. The court did not have a problem hearing the other attorneys. We find that the court's comments did not unduly influence the jury against defendant Dinkins.

As for defendant Dinkins' other claims of error in this regard, we find that manifest injustice would not result if we do not review them. The court's comments reflected its attempts to control the trial proceedings and to move the trial along. *Id.*

IV

Defendant Dinkins argues that he was denied the effective assistance of counsel. During the pendency of this appeal, this Court remanded the matter to the trial court for an evidentiary hearing on defendant Dinkins' claims of ineffective assistance of counsel. After reviewing the evidence from that hearing, we agree with the trial court that defendant Dinkins has not shown that his trial counsel was constitutionally defective.

In order for this Court to reverse a conviction due to the ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied the right to a fair trial.

People v Pickens, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant Dinkins has cited some errors made by his counsel during the course of these proceedings. However, he has not shown the resulting prejudice necessary to sustain his claim.

While defendant's trial counsel may have made some errors in his representation of defendant Dinkins, the record does not support a finding of prejudice. When defense counsel did not appear for the preliminary examination, other counsel was present to represent defendant. Defense counsel did not appear at a motion hearing on a motion to suppress evidence. However, defendant has not shown that the motion had merit. Defendant did not personally meet with his counsel except before court hearings. Because there were numerous telephone calls between defendant and his attorney, the failure to personally meet with counsel did not prejudice defendant's case. Any misconduct of defense counsel at trial due to his courtroom behavior was not so serious or pervasive as to have impacted the proceedings. Defendant has also not demonstrated prejudice caused by his counsel's failure to move to suppress defendant's prior criminal record given that defendant refused to testify, apparently for other reasons.

The findings of the Attorney Discipline Board's hearing panel also do not support the conclusion that defendant was prejudiced by his counsel's conduct. The matter before the hearing panel did not concern the impact any professional misconduct may have had on the trial itself. *People v Pubrat*, 451 Mich 589, 596-599; 548 NW2d 595 (1996). Even if a suspension based on the representation at hand demonstrates performance below an objective standard of reasonableness, defendant has failed to show the second prong of constitutionally defective representation, which is that the representation so prejudiced him that he was denied the right to a fair trial. *Pickens, supra* at 338.

Defendant Dinkins' primary argument regarding prejudice involves his counsel's failure to present evidence of defendant's sprained ankle, suffered just two days before the incident that comprises the charges in the present case. According to defendant, with this evidence, he could have impeached the victim's testimony that defendant Dinkins was able to kick in the victim's passenger window when this was medically impossible due to defendant's sprained ankle. Because there was no evidence that this injury was disabling to defendant Dinkins at the time of the assault and robbery, or that defendant Dinkins was physically unable to kick out the window, defendant has not shown that the failure to present this evidence prejudiced his right to a fair trial.

In summary, defendant Dinkins has not shown that his counsel's performance, while possibly deficient, was prejudicial to his right to a fair trial.

V

Defendant Carter argues that the prosecutor's cross-examination violated his Fifth Amendment, US Const, Am V, right to remain silent and his right to due process and a fair trial, US Const, Am XIV, 1963 Const, § 17, art 1. We do not believe error requiring reversal occurred.

On cross-examination, defendant Carter was asked by the prosecutor if the trial was the first time anyone had heard his version of this incident, to which defendant Carter responded affirmatively. There was no objection to the prosecutor's question.

Defendant Carter correctly cites the rule that a defendant's silence, after being advised of his *Miranda*¹ rights, may not be used as evidence, including impeachment evidence, to show that the defendant failed to inform the police of his version of an incident, because such evidence infringes on the defendant's right to remain silent. *People v Bobo*, 390 Mich 355, 359; 212 NW2d 190 (1973); *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976). However, a defendant's pre-arrest and post-arrest silence before being advised of his *Miranda* rights may still be used to impeach a defendant's testimony. *People v Alexander*, 188 Mich App 96, 102-103; 469 NW2d 10 (1991).

In her original question to defendant, the prosecutor did not specify a time period. Therefore, it was not clear if the question involved pre-arrest silence or post-arrest silence. Because the prosecutor's question was not directed at a specific time period and defendant did not object to the question, we do not believe that error requiring reversal occurred. Had defense counsel objected to the prosecutor's question, the prosecutor would still have been permitted to impeach defendant with his pre-arrest and post-arrest silence before being advised of his *Miranda* rights. Instead of objecting to the prosecutor's question, defense counsel asked defendant why he did not tell the police his version, and defendant explained that he did not tell the police because he had been advised of his right to remain silent. It therefore was defense counsel who brought out the fact that defendant chose to assert his right to remain silent. On these facts, we do not believe error requiring reversal occurred since it was defense counsel who focused the issue on defendant's post-*Miranda* silence. Furthermore, there was no objection, and the prosecutor did not refer to this evidence in her closing argument. The error, if any, was harmless. *Greer v Miller*, 483 US 756, 760; 107 S Ct 3102, 3106; 97 L Ed 2d 618 (1987).

VI

Next, defendant Carter argues that his trial counsel was ineffective because counsel failed to object to the prosecutor's line of questioning involving defendant Carter's failure to make an exculpatory statement consistent with his trial testimony before trial. Defendant Carter has not overcome the presumption that his counsel's performance did not fall below an objective standard of reasonableness and that counsel's failure to object at trial was a matter of trial strategy.

By not objecting to the prosecutor's question, defense counsel appeared to provide the jury with a valid reason why defendant Carter did not tell the police his version of this incident not only after he was advised of his rights, but also prior to his arrest and prior to being advised of his right to remain silent. This left the jury with the impression that defendant could not be impeached for his failure to speak up about this incident at any time. While the more common course of action may be for defense counsel to object to prosecutorial questions of this nature, we cannot conclude on the record available that defendant Carter's counsel's conduct was constitutionally defective. *Pickens, supra* at 338.

VII

Defendant Carter also argues that he was denied the right of allocution when the trial court did not personally ask him whether he had anything to say before sentence was imposed. We find no error.

The trial court did not personally ask defendant Carter if he had anything to say to the court before sentence was imposed because defendant Carter's counsel asked defendant if he wished to address the court. Defendant Carter declined to make a statement.

The trial court complied with the requirements of MCR 6.425(D)(2)(c) on the facts of this case because it gave defendant Carter the opportunity to advise the court of any circumstances he believed the court should consider. While ordinarily the trial court must personally address the defendant to determine if the defendant has something to say at sentencing, *People v Berry*, 409 Mich 774, 781; 298 NW2d 434 (1980), the court rule does not require that the court personally address the defendant. Accordingly, resentencing is not required.

VIII

Next, defendant Carter argues that the trial court's instructions on the intent for aiding and abetting were erroneous. We disagree.

Defendant Carter failed to object on the record to the trial court's instructions on aiding and abetting. However, this Court may review unpreserved instructional issues to avoid manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). We find no injustice under these facts.

The trial court instructed the jury consistent with CJI2d 8.1. We recognize that there has been some debate in this Court regarding the intent necessary to convict a defendant of aiding and abetting. However, contrary to defendant Carter's position, CJI2d 8.1 still represents a proper statement of the law. To convict a defendant of aiding and abetting, the prosecution need only prove that the defendant either possessed the specific intent required of the principal actor or that the defendant knew that the principal had that intent when the defendant offered his aid or assistance. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995); *People v King*, 210 Mich App 425, 431; 534 NW2d 534 (1995). Thus, a jury is not required to find that the defendant possessed the specific intent for the underlying offense in order to convict the defendant as an aider and abettor. The court's instructions in the present case were thus consistent with the law, and defendant has not shown that the trial court erred.

IX

Finally, defendant Carter argues that the recently amended statute on procedures for sentencing habitual offenders, MCL 769.13; MSA 28.1085, is unconstitutional under the Due Process Clauses of the state and federal constitutions, US Const Am XIV, 1963 Const, art 1, § 17. We disagree.

The statute for the sentencing of habitual offenders, MCL 769.13; MSA 28.1085, was amended in 1994 on the procedural aspects of habitual offender proceedings. Based upon the amendments, there is no longer a right to a jury trial, but the court decides the validity of any prior convictions at a separate hearing. MCL 769.13(5), (6); MSA 28.1085(5), (6). The prosecutor need not provide proof beyond a reasonable doubt for a court to enhance a defendant's sentence under the habitual offender laws. The defendant has the initial burden of producing prima facie evidence that a prior conviction is inaccurate or constitutionally invalid. The prosecution must then prove that the conviction is valid by a preponderance of the evidence. MCL 769.13(6); MSA 28.1085(6).

In *People v Zinn*, 217 Mich App 340, 344-347; 551 NW2d 704 (1996), this Court held that the changes to the habitual offender law did not violate the defendant's right to a trial by jury. Furthermore, proof beyond a reasonable doubt was not a requirement because the habitual offender laws are merely sentence enhancements, not substantive crimes. *Id.* While defendant Carter argues that his due process rights were violated by the amendment, the substance of his argument appears to mirror the arguments addressed in *Zinn*.

Defendant Carter does not specify how his due process rights were violated. Due process requires that a sentence must be based on accurate information and that a defendant have a reasonable opportunity to challenge the information. *Id.* at 348. Because the amended statute includes specific procedures to allow a defendant the opportunity to challenge the accuracy of prior invalid convictions, the amended version of the statute comports with due process requirements.

Affirmed as to both defendants.

/s/ Michael R. Smolenski

/s/ E. Thomas Fitzgerald

/s/ Hilda R. Gage

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).