

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ORLANDO W. JAMES,

Defendant-Appellant.

UNPUBLISHED

April 14, 1998

No. 200906

Recorder's Court

LC No. 96-000826

Before: Young, Jr., P.J., and Kelly and Doctoroff, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of attempted carjacking, MCL 750.92; MSA 28.287; MCL 750.529a; MSA 28.797(a), assault with intent to commit murder, MCL 750.83; MSA 29.278, armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to two years and six months to five years in prison for the attempted carjacking conviction, twenty to forty years for the assault with intent to commit murder conviction, twenty to forty years for the armed robbery conviction, and two years for the felony-firearm conviction. The first three sentences are to run concurrently with each other and consecutively to the fourth sentence. He appeals as of right. We affirm.

Defendant first argues on appeal that the trial court erred in instructing the jury on the felony-firearm offense under an aiding and abetting theory because there was no evidence to support such an instruction. We disagree. Because defendant failed to object to this instruction below, our review is limited to determining whether manifest injustice has occurred. MCR 2.516(C); *People v VanDorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997). Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.*

To support a felony-firearm conviction, it must be shown that the defendant either personally possessed a firearm during the commission of a felony or that the defendant aided or abetted another in obtaining or retaining possession of a firearm. *People v Witt*, 140 Mich App 365, 368; 364 NW2d

692 (1985). Here, there is evidence that defendant aided in retaining possession of a firearm. Defendant's statement to the police indicated that he knew before the crime occurred that his accomplice, Anthony Hunter, had a gun and that he was going to rob someone. Defendant kept a lookout while Hunter committed the crime. The victim's testimony indicated that defendant personally possessed the weapon while the crime was being committed. It could reasonably be inferred from defendant's statement that he aided Hunter in retaining possession of the gun by keeping watch in order to make sure that no one came along to interrupt Hunter's possession of the weapon during the commission of the crime. The evidence of record thus supported the court's instruction, and manifest injustice has not been shown.

Defendant next argues that the trial court failed to instruct the jury regarding the specific intent element for aiding and abetting as it relates to the underlying specific intent offenses of attempted carjacking, assault with intent to murder, and armed robbery. Since defendant failed to object or request additional instructions below, our review is limited to determining whether manifest injustice occurred. *VanDorsten, supra* at 540

In order to establish the intent required to prove that a defendant aided and abetted in the commission of a specific intent crime, the prosecutor must show either that the aider and abettor himself possessed the requisite intent for the underlying crime, or that the aider and abettor knew that the principal had the requisite intent. *People v King*, 210 Mich App 425, 429; 534 NW2d 534 (1995). Here, the lower court failed to provide such an instruction, and instead told the jury that defendant must have intended to help someone else commit the crime. Although this instruction was imperfect, we find that, read in their entirety, the instructions sufficiently protected the defendant's rights. The instructions conveyed to the jury that defendant's mere presence, with or without knowledge that the crime was going to occur, was not sufficient to convict him as an aider and abettor. See *People v Zak*, 184 Mich App 1, 15-16; 457 NW2d 59 (1990). Therefore, we find that no manifest injustice occurred.

Defendant next argues that the trial court failed to instruct the jury on all of the essential elements of attempted carjacking. We disagree. Our review is again limited to manifest injustice because defendant failed to object below. *VanDorsten, supra* at 540. The trial court's instruction on attempt included all of the essential elements, including the specific intent to commit the underlying offense. *People v Stapf*, 155 Mich App 491, 494; 400 NW2d 656 (1986). Moreover, the trial court's instruction on the underlying carjacking offense comported with the elements set forth in the statute. MCL 750.529a(1); MSA 28.797(a)(1); *People v Terry*, 224 Mich App 447, 454-455; 569 NW2d 641 (1997). Contrary to defendant's assertion, the carjacking statute does not require proof of an intent to permanently deprive. *Id.* at 455.

Defendant next argues that the trial court's instruction to the jury in connection with the assault with intent to murder charge that intent may sometimes be inferred from the use of a dangerous weapon improperly shifted the burden of proof to defendant. We disagree. Our review is again limited to manifest injustice given defendant's failure to object below. The trial court's instruction was proper because the intent to kill may be inferred from the use of a dangerous weapon. *People v DeLisle*, 202 Mich App 658, 672; 509 NW2d 885 (1993). The trial court did not use any mandatory language to indicate that defendant's intent was conclusively presumed from the use of a dangerous weapon. Also,

the court's instruction did not even remotely suggest that defendant had the burden of proof regarding intent. On the contrary, the court instructed the jury that defendant was not required to prove his innocence and that the prosecutor had to prove each element of the crime beyond a reasonable doubt. The burden of proof regarding intent was not shifted to defendant.

Finally, defendant argues that he was denied a fair trial by the prosecutor's statement during rebuttal closing argument that each element of the four offenses had been proven beyond a reasonable doubt because the statement reflected a personal belief in defendant's guilt. We disagree. Because defendant failed to object or request a curative instruction below, our review is limited to determining whether the misconduct was sufficiently egregious that no curative instruction would have counteracted the prejudice to defendant or whether manifest injustice would result from failure to review the alleged misconduct. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Alleged instances of misconduct are reviewed in context to determine whether they denied the defendant a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). A review of the prosecutor's statement in context reveals that he was merely arguing from the evidence and the reasonable inferences arising therefrom that defendant was guilty. Such an argument was proper. *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996); *People v Stacy*, 193 Mich App 19, 37; 484 NW2d 675 (1992). Therefore, the prosecutor's remarks did not deny defendant a fair trial.

Affirmed.

/s/ Robert P. Young, Jr.

/s/ Michael J. Kelly

/s/ Martin M. Doctoroff