

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW MARTIN MULVANEY,

Defendant-Appellant.

UNPUBLISHED

April 25, 2000

No. 208634

Saginaw Circuit Court

LC No. 97-013370-FH

Before: Bandstra, C.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of first-degree criminal sexual conduct (CSC), MCL 750.520b; MSA 28.788(2), one count of second-degree CSC, MCL 750.520c; MSA 28.788(3), and one count of accessory after the fact, MCL 750.505; MSA 28.773. The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to concurrent terms of fifteen to fifty years' imprisonment for the first-degree CSC conviction, ten to thirty years' imprisonment for the second-degree CSC conviction, and five to ten years' imprisonment for the accessory conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court erred in reversing the district court's determination that the evidence was insufficient to bind over defendant on the CSC charges.¹ A district court must bind a defendant over for trial when the prosecutor presents competent evidence constituting probable cause to believe that (1) a felony was committed and (2) the defendant committed that felony. MCL 766.13; MSA 28.913; MCR 6.110(E). We review the circuit court's decision de novo to determine whether the district court abused its discretion in deciding whether the prosecution established probable cause to believe that the defendant committed the charged offense. *People v Coutu (On Remand)*, 235 Mich App 695, 708; 599 NW2d 556 (1999).

The prosecutor argued that defendant aided and abetted Carlo Sanchez' repeated sexual assault of the complainant. One who procures, counsels, aids, or abets in the commission of an offense may be convicted and punished as if he committed the offense directly. MCL 767.39; MSA 28.979;

People v Norris, 236 Mich App 411, 419; 600 NW2d 658 (1999). To establish that a defendant aided and abetted a crime, the prosecutor must prove that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the principal in committing the crime, and (3) the defendant intended the commission of the crime or knew the principal intended its commission at the time he gave aid or encouragement. *Id.* An aider and abettor's state of mind may be inferred from all the facts and circumstances. *People v Carines*, 460 Mich 750, 758; 597 NW2d 130 (1999), quoting *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).

At the preliminary examination, the complainant's mother testified that her daughter was twelve years old. The complainant testified that Sanchez assaulted her in the bedroom of defendant's apartment over a period of approximately four hours. The complainant stated that there was no door between the living room and the bedroom in the apartment. Because Sanchez threatened to kill her, the complainant did not call out, although at one point she said, "Ow" or "Ouch." She could hear the living room television and defendant talking on the telephone. Sanchez told defendant not to use names. Defendant came into the bedroom twice during the course of the assaults; each time, the complainant and Sanchez were on a mattress on the floor and were both naked.

Detective Clark testified that defendant told him that he had been in the apartment watching television when he heard a knock on the door. Defendant answered the door and saw Sanchez and "a girl" with a coat over her head. The girl was "whimpering" or "crying." Sanchez said that he needed to use a room, and defendant let the pair inside. Sanchez and the girl went into the bedroom. Defendant admitted that he went into the bedroom when Sanchez and the girl were there. Defendant stated that he eventually told Sanchez to leave because his girlfriend was coming over, and she and Sanchez did not get along. When the two were leaving, defendant heard Sanchez tell the girl to keep a towel over her head. Clark stated that defendant's apartment was very small and that there was no door between the bedroom and the living room.

Considering this testimony, we agree with the circuit court that the district court abused its discretion in refusing to bind over defendant on the CSC counts. The evidence presented provided probable cause to believe that defendant aided and abetted Sanchez in the commission of first-degree CSC and second-degree CSC. See MCL 766.13; MSA 28.913; MCR 6.110(E). Defendant allowed Sanchez to enter his apartment with a twelve-year-old girl whose head was covered by a coat and who was "whimpering" or "crying." Sanchez took the girl into the bedroom and performed multiple sex acts while defendant remained in the living room. There was no door between the two rooms, and the complainant testified that she could hear what was going on in the living room. Defendant twice entered the bedroom where Sanchez and the girl were lying naked on a mattress. Sanchez told defendant not to use names. When defendant wanted Sanchez to leave, he simply said so and Sanchez complied. This evidence was sufficient to indicate that defendant assisted Sanchez in the commission of the crimes by providing a place for Sanchez to commit the sexual assaults. See *Norris, supra*.

Defendant relies on *People v Burrel*, 253 Mich 321, 323; 235 NW 170 (1931), in which the Supreme Court reversed a conviction of statutory rape on the ground that Burrel's mere presence in the car in which the act of intercourse occurred was not sufficient to make him an aider or abettor, even

though he was both the owner and the driver of the car. Defendant asserts that, because the Supreme Court found that Burrel, who must have been aware of what was occurring in the back seat of his car, was not an aider and abettor, he likewise does not qualify as an aider and abettor. However, the *Burrel* holding “does not authorize reviewing courts to thwart the factfinder from drawing permissible inferences from a defendant’s presence at the scene of a crime” or “in compromising circumstances.” *People v Wolfe*, 440 Mich 508, 536; 489 NW2d 748 (1992) (Boyle, J., concurring). Defendant misses the salient distinction between Burrel and himself, namely, that no evidence was presented that Burrel was aware that the girl was underage or that his codefendant intended to commit a crime. Because in the present case the complainant was twelve years old, her head was covered by a coat, and she was “whimpering” or “crying,” a factfinder could reasonably infer that defendant knew that Sanchez was not engaging in lawful conduct.

In any case, the gist of defendant’s argument is that the circuit court abused its discretion by substituting its judgment for that of the district court and reversing the latter’s decision against bindover on the CSC charges. However, the jury (not the circuit court judge) determined that defendant was, in fact, guilty of two counts of aiding and abetting CSC, and sufficient evidence was presented at trial to support that conclusion. See discussion *infra*. Accordingly, the error, if any, in the circuit court’s reversal of the district court’s bindover decision would be harmless. See *People v Torres*, 452 Mich 43, 60; 549 NW2d 540 (1996); *People v Hall*, 435 Mich 599, 600-601; 460 NW2d 520 (1990).

Defendant also claims that the circuit judge erred in considering her own knowledge, obtained during Sanchez’ trial, that the complainant is a “very tiny girl,” as that was not part of defendant’s preliminary examination. However, the error, if any, was harmless because sufficient evidence was presented during the prosecutor’s case-in-chief to support defendant’s convictions. See *Torres, supra*; *Hall, supra*.

II

Defendant next argues that the trial court committed error requiring reversal by refusing the defense request that the jury be given the committee commentary to the “mere presence” standard jury instruction, CJI2d 8.5. This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. Even if jury instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant’s rights. *People v Whitney*, 228 Mich App 230, 252; 578 NW2d 329 (1998).

After carefully reviewing the trial court’s instructions, we conclude that defendant is not entitled to any relief. First, the Michigan Criminal Jury Instructions themselves do not have the official sanction of our Supreme Court, and their usage is not required. See *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1976). That being the case, we can hardly find that a trial court’s refusal to read the general committee commentary to a particular instruction constitutes error requiring reversal. Second, the focus of our inquiry is whether the trial court fulfilled its obligation to instruct the jury so that it could correctly and intelligently decide the case. *People v Clark*, 453 Mich 572, 583; 556 NW2d 820 (1996). Although it is possible that the jurors would have found the commentary helpful, it was not necessary to allow them to reach a correct and intelligent decision, as the trial court’s instructions fairly

presented the issues to be tried and sufficiently protected defendant's rights. See *Whitney, supra*. Furthermore, the trial court did not abuse its discretion in failing to repeat the instructions on aiding and abetting, as that was not the area covered by the jury's specific question. See *People v Parker*, 230 Mich App 677, 681; 584 NW2d 753 (1998).

III

Next, defendant maintains that he was denied a fair trial because of prosecutorial misconduct. Defendant cites numerous instances of allegedly improper argument or comments. For the most part, defendant did not object to the challenged remarks below. Absent timely and specific objections to the alleged instances of misconduct, reversal is warranted only if a curative instruction could not have eliminated the prejudicial effect of the remarks or failure to review the issue would result in a miscarriage of justice. *People v Messenger*, 221 Mich App 171, 179-180; 561 NW2d 463 (1997).

After reviewing the record in its entirety, we conclude that the vast majority of the challenged comments were well within the bounds of permissible argument. A prosecutor is free to argue the evidence and all reasonable inferences from the evidence as they relate to the prosecution's theory of the case. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). The prosecutor does not shift the burden of proof by commenting on the improbability of the defendant's theory or evidence. *People v Fields*, 450 Mich 94, 116; 538 NW2d 356 (1995). The prosecutor did not improperly inject the issue of race into the trial by stating that the complainant heard a voice with an Hispanic accent. See *People v Bahoda*, 448 Mich 261, 266; 531 NW2d 659 (1995).

The few instances of improper argument do not require reversal of defendant's convictions, particularly in light of the trial court's instruction that the arguments of the attorneys are not evidence. See *id.* at 281. A prosecutor should avoid references to infamous defendants, as the prosecutor here did by mentioning Oklahoma City bomber accomplice Terry Nichols, even when merely illustrating a legal principle. See *People v Pullins*, 145 Mich App 414, 422-423; 378 NW2d 502 (1985). The prosecutor's misstatement concerning defendant's admission to the police detective that the complainant was a "child" was a minor error; according to the detective, defendant called the complainant a "girl" and said that she looked "young." Because the prejudicial effect of each of the above remarks could have been eliminated by a curative instruction, had one been requested, reversal is not warranted. See *Messenger, supra*.

IV

Defendant further contends that the trial court erred in denying his motions for a directed verdict of acquittal at the close of the prosecutor's opening statement and at the close of the prosecution's case-in-chief. A directed verdict of acquittal is appropriate only if, considering all the evidence in the light most favorable to the prosecution, no rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998).

Defendant stresses that, as a matter of law, his mere presence in the apartment is insufficient to support his aiding and abetting convictions. In addition, defendant correctly asserts that he was under no legal duty to stop a crime in progress or report the commission of a crime. Defendant asserts that his convictions are based on the fact that he opened his door when Sanchez knocked. We cannot agree. Defendant's convictions are based on neither his mere presence at the scene, nor his opening of his door to Sanchez, nor his failure to prevent or report the crimes. Rather, the convictions are based on defendant's performance of an act which affirmatively assisted the principal in committing the crimes, namely, the provision of a private place in which Sanchez could perform the sexual assaults on the complainant. Cf. *People v Gray*, 121 Mich App 788, 791; 329 NW2d 493 (1982) (holding that the defendant was properly convicted of aiding and abetting first-degree CSC because he participated in the act that "rendered the victim helpless against her assailants").

Defendant emphasizes that there was no evidence that defendant and Sanchez planned the assaults in advance. Nevertheless, the jury could properly infer that defendant, at a minimum, became aware of Sanchez' intent to commit a sexual assault either when Sanchez arrived at defendant's door with the complainant or soon afterward. See *Carines, supra* at 760-761. The relevant evidence supporting this inference includes the following facts: (1) the close association of defendant and Sanchez, as demonstrated by the fact that defendant opened his door after Sanchez knocked and announced, "it's me," (2) Sanchez was accompanied by a prepubescent girl who was whimpering and whose head was covered with a coat, (3) defendant's proximity to the bedroom during the approximately four-hour period in which Sanchez committed the sexual assaults, (4) defendant's two visits to the bedroom where Sanchez and the complainant were lying naked on a mattress, (5) defendant's provision of a towel to facilitate the discreet removal of the complainant from the premises, and (6) defendant's admission to Clark that he attempted to destroy evidence of the crime by disposing of the bloodstained blanket.² See *Norris, supra*.

In sum, considering all the evidence in the light most favorable to the prosecution, a rational trier of fact could find defendant aided and abetted Sanchez by performing an act that assisted the latter in the commission of first- and second-degree CSC. Accordingly, the trial court did not err in denying defendant's motions for a directed verdict of acquittal. See *Lemmon, supra*.

V

Next, defendant maintains that trial counsel was ineffective in failing to challenge the validity of the notice of intent to seek sentence enhancement pursuant to the habitual offender statutory provisions. Defendant claims that the notice was not timely filed. However, this contention is without merit because it is based on mistaken facts. On July 2, 1997, the circuit court issued its written opinion and order reversing the district court's bindover decision and reinstating six of the seven dismissed charges. On September 8, 1997, the prosecutor filed an amended information including the reinstated charges, along with a supplemental information alleging defendant's status as an habitual offender, third offense. On that same date, defendant was arraigned before the circuit court on the amended information. Accordingly, the supplemental information was timely filed, and counsel was not ineffective for failing to challenge it. See *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997) ("Defense counsel was not required to raise a meritless objection.").

VI

In addition, defendant contends that his sentence is disproportionate. This Court reviews the imposition of a particular sentence for an abuse of discretion. *People v Cain*, 238 Mich App 95, 130; 605 NW2d 28 (1999).

Defendant maintains that the trial court improperly punished him for maintaining his innocence. A defendant's absolute lack of remorse and low potential for rehabilitation are valid considerations in determining a sentence, but a sentencing court may not impose a more severe sentence merely because a defendant refuses to admit guilt. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995); *People v Wesley*, 428 Mich 708; 411 NW2d 159 (1987). Here, viewing the sentencing court's comments in context, we are satisfied that the trial court based its decision on relevant and permissible factors.

Defendant also contends that his sentences are so severe as to constitute cruel or unusual punishment, in violation of Const 1963, art 1, § 16. However, because the sentences properly reflect the seriousness of the circumstances surrounding the offense and the offender, they are proportionate. See *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Accordingly, defendant's sentences are not excessive and do not constitute cruel or unusual punishment. See *People v Bullock*, 440 Mich 15, 37; 485 NW2d 866 (1992); *People v Lorentzen*, 387 Mich 167, 176; 194 NW2d 827 (1972). The trial court did not abuse its discretion in sentencing defendant.

VII

Defendant next asserts that he was denied a new trial by the cumulative effect of the errors that occurred at trial. We disagree. As already discussed, the few instances of prosecutorial impropriety were of little consequence and do not warrant reversal of defendant's convictions. Defendant was entitled only to a fair trial, not a perfect trial. *People v Kelly*, 231 Mich App 627, 646; 588 NW2d 480 (1998). Defendant received a fair trial.

VIII

Finally, defendant argues that he is entitled to a new judge on remand. We have not found that remand is required. We briefly note, however, that even if remand were necessary, we would not find that disqualification of the trial judge is warranted. The record does not reflect a showing of actual bias or prejudice against defendant. See *People v Fox (After Remand)*, 232 Mich App 541, 559; 591 NW2d 384 (1998). Contrary to defendant's argument, repeated rulings against a litigant do not require disqualification of a judge. See *id.*

Affirmed.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra

¹ The district court bound defendant over for trial on one count of accessory after the fact, but declined to bind him over on five counts of first-degree CSC, one count of second-degree CSC, and one count of kidnapping, MCL 750.349; MSA 28.581. The circuit court sustained the district court with regard to the kidnapping charge but reversed with regard to the six counts of CSC.

² We recognize that if defendant had learned of Sanchez' criminal offense after its occurrence and only then aided Sanchez, defendant's after-the-fact conduct, standing alone, would not support his convictions of aiding and abetting CSC. See *People v Karst*, 118 Mich App 34, 41; 324 NW2d 526 (1982). However, evidence of such after-the-fact conduct, in conjunction with the other evidence, supports the inference that defendant adopted Sanchez' criminal intent when he allowed Sanchez to take the complainant to the bedroom.