

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL L. MCFALL,

Defendant-Appellant.

UNPUBLISHED

January 24, 2003

No. 230895

Wayne Circuit Court

LC No. 99-005356

Before: Zahra, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of unarmed robbery, MCL 750.530. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to eight to fifteen years imprisonment. Defendant appeals as of right, and we affirm.

This case stems from allegations that defendant aided and abetted codefendant Terrance Christian¹ in assaulting, robbing, and carjacking the complainant. During trial, defendant maintained that he was merely present during the incident.

I.

Defendant first alleges that there was insufficient evidence to support a conviction of unarmed robbery, and therefore, the trial court erred by denying his motion for a directed verdict. We disagree. This Court reviews a trial court's decision of a motion for a directed verdict de novo to determine whether the evidence, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of the witnesses. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

¹ Defendant and codefendant Christian were tried jointly.

The elements of unarmed robbery are: (1) a felonious taking of property from another; (2) by force, violence, assault, or putting in fear; and (3) being unarmed. MCL 750.530; *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994). At trial, the prosecution relied on an aiding and abetting theory. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39. “To support a finding that a defendant aided and abetted a crime, the prosecution must show 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 commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement.” *People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001), quoting *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).

“Aiding and abetting” describes all forms of assistance made available to the perpetrator of a crime and includes all words or deeds that might support, encourage, or incite the commission of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). “The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime.” *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). An aider and abettor’s state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, the defendant’s participation in the planning or execution of the crime, and evidence of flight after the crime. *Carines, supra* at 757-758. However, a defendant’s mere presence at a crime, even with knowledge that the offense is about to be committed, is not enough to make him an aider and abettor. *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999).

Viewed in a light most favorable to the prosecution, sufficient evidence was presented from which a jury could infer all the necessary elements of unarmed robbery. *Aldrich, supra*. The complainant stopped at an apartment complex to visit a friend. When no one answered the friend’s door, he began walking toward his employer’s van and noticed defendant and the codefendant standing nearby. The complainant would not have stopped and talked to the men, but defendant called out to him, indicating that defendant was an acquaintance. As the complainant attempted to get into the van, the codefendant offered to sell him some drugs. When the complainant stated that he was not interested, the codefendant struck him in the face, knocking him to the ground. The codefendant continued to beat and kick the complainant and demanded money. During the entire assault, defendant was standing three to four feet away and was “looking around.” Eventually, the codefendant went into the complainant’s pockets, taking his eleven dollars and his keys. The complainant overheard defendant and the codefendant laughing and talking about taking the van. Then, the codefendant got into the driver’s side of the van and, without any prompting from the codefendant, defendant walked around and got into the passenger side. The men then left together in the van.

Contrary to defendant’s claim, although he never touched the complainant, his conduct before, during, and after the incident was sufficient to enable the jury to find, beyond a reasonable doubt, that he assisted the codefendant in the commission of the crime with knowledge of the codefendant’s intent. The trial court did not err in denying defendant’s motion for a directed verdict. *Aldrich, supra*.

We decline to review defendant's challenge to the aiding and abetting instruction. Defense counsel twice indicated on the record his satisfaction with the trial court's instructions. Defendant's affirmative approval of the trial court's instructions waived any error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Consequently, reversal of defendant's conviction is not warranted on this basis. *Carter, supra* at 219-220.²

III.

Defendant next alleges that the trial court denied him due process and a fair trial by answering a jury note, sent during deliberations, without making a record of the answer it was providing and in the absence of defendant's presence. We disagree. Our review of an unpreserved instructional claim is for plain error affecting substantial rights, i.e., error affecting the outcome of the proceedings. *Carines, supra* at 763-764. Contrary to defendant's claim, the trial court and all counsel discussed, on the record, the jury's note and the proper response. Moreover, contrary to the statement made in defendant's appellate brief, the jury's note, containing the trial court's response, is in the lower court record. Accordingly, defendant's challenge to the handling and preservation of the jury question is without merit.

Defendant's request for a new trial because he was not present for the discussion regarding the jury note is also without merit. Defendant correctly states that a criminal defendant has the right to be present at every stage of trial where his substantial rights may be affected. See *People v King*, 210 Mich App 425, 432-433; 534 NW2d 534 (1995). However, a defendant's absence from a part of the trial does not require reversal of his conviction unless there is a reasonable probability that the absence was prejudicial. *People v Morgan*, 400 Mich 527, 536; 255 NW2d 603 (1977). Defendant has failed to establish any reasonable probability of prejudice related to the discussion of the note outside his presence. Defense counsel was present, the question involved a purely legal issue, and there is a record of the proceedings. Indeed, defendant does not even suggest what prejudice was caused by his absence. Accordingly, defendant has failed to demonstrate a plain error, and thus, reversal is not warranted on the basis of this issue. *Carines, supra*.

IV.

Defendant next alleges that the prosecutor denied him a fair trial by arguing facts not in evidence during closing and rebuttal arguments. We disagree. A claim of prosecutorial misconduct is reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We decide issues of prosecutorial misconduct on a case by case basis, reviewing the pertinent portion of the

² Even if counsel had not waived this issue, the trial court's instruction was proper. It clearly conveyed the necessary elements of aiding and abetting, including the required intent. See *Carines, supra* at 770. Furthermore, the trial court's aiding and abetting instruction was virtually identical to CJI 8.1 of the standard jury instructions. Although the Michigan Criminal Jury Instructions do not have the official sanction of the Michigan Supreme Court, *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985), they are useful in evaluating the propriety of the instructions given.

record and examining the prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The remarks must be read as a whole and evaluated in light of defense arguments and the relationship to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). While the prosecutor may not make a statement of fact unsupported by the evidence, the prosecutor may argue the evidence and all reasonable inferences arising from the evidence as related to the theory of the case. *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001). Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *Watson, supra*. To avoid forfeiture of an unpreserved claim, the defendant must demonstrate plain error that was outcome determinative. *Id.* Error requiring reversal will not be found where the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Id.*

After reviewing the record, we conclude that the prosecutor's remarks regarding defendant's knowledge and role in the robbery were reasonable inferences arising from the evidence as related to the prosecutor's theory of the case. *Schultz, supra*. However, we agree with defendant that there was no evidence presented to support an inference that the complainant's sexual orientation was known to defendant and was a basis for the attack despite the prosecutor's attempt to make that correlation. Nevertheless, viewed in context of the complete closing argument, the prosecutor's isolated comment was not so inflammatory that defendant was prejudiced. Moreover, the trial court instructed the jury that the lawyers' comments were not evidence and that the jury should not be influenced by sympathy or prejudice. The instructions were sufficient to cure any prejudice, and reversal is not warranted. *People v Long*, 246 Mich App 582; 588; 633 NW2d 843 (2001).

V.

Defendant next alleges that he is entitled to a new trial because the prosecutor impermissibly elicited the complainant's personal opinion that defendant was a "lookout" for the codefendant, and the trial court failed to give a curative instruction and strike the testimony. We disagree. Although defendant objected to the prosecutor's question, he failed to request a curative instruction or otherwise request any other action by the trial court. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Accordingly, this Court's review of this unpreserved claim is limited to plain error affecting substantial rights. *Carines, supra*.

We conclude that it is highly improbable that defendant was prejudiced by the prosecutor's question or the lack of a curative instruction. Following the complainant's testimony, defense counsel immediately objected, and the court implicitly sustained the objection. The court directed the prosecutor that the witness had to testify as to "exactly what [defendant] did," and that "the jury is to decide if [defendant] was an aider and abettor." The prosecutor did not pursue the complainant's opinion regarding defendant's role any further or mention it during closing argument. Further, before the challenged colloquy, which occurred during redirect examination, the complainant had testified during direct examination that, while the attack was occurring, defendant was standing three to four feet away, "looking around." Finally, in its final jury instructions, the court directed the jury to consider only properly admitted evidence, follow its instructions, and decide the case based only on the evidence. Accordingly, there was no plain error that affected defendant's substantial rights and, thus, this issue does not require reversal. *Carines, supra*.

VI.

Defendant next alleges that the trial court denied him a fair trial by denying the codefendant's request to cross-examine the complainant regarding a prior arrest. This issue has been waived. Defense counsel had no objection to the trial court's evidentiary ruling as it related to the codefendant, and specifically stated that defendant had no intention of raising the issue of the complainant's prior arrest. Having affirmatively relieved the trial court of having to rule on this matter as it related to him, defendant has waived this issue on appeal. *Carter, supra* at 214. "A defendant may not waive objection to an issue before the trial court and then raise it as an error on appeal." *Id.* (citation omitted). Accordingly, defendant is not entitled to appellate relief on the basis of this issue.

VII.

Defendant also argues that the prosecutor did not prove he was guilty of three prior offenses, and therefore, he was denied due process when the trial court sentenced him as a fourth-offense habitual offender. We disagree. The existence of a defendant's prior convictions may be established, as it was in this case, by information contained in the presentence report. MCL 769.13(5); *People v Green*, 228 Mich App 684, 700; 580 NW2d 444 (1998). Further, due process is satisfied if the sentence is based on accurate information, and the defendant had a reasonable opportunity to challenge the information at sentencing. *People v Zinn*, 217 Mich App 340, 347-348; 551 NW2d 704 (1996).

Here, defendant was arraigned on an information that included a notice of enhancement for habitual offender, fourth offense, including the description and date of conviction for each prior offense. Defendant concedes on appeal that he did not challenge the prosecutor's notice to seek an enhanced sentence, or the validity of the prior convictions below despite extensive discussion about his prior felony convictions at sentencing. Accordingly, the trial court properly relied on the uncontested information to sentence defendant as an habitual offender, and defendant is not entitled to resentencing. *Green, supra*.

VIII.

Defendant's final claim is that he is entitled to a new trial because defense counsel was ineffective. We disagree. Because defendant failed to make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

We reject defendant's claims of ineffective assistance of counsel. Contrary to defendant's claim, the trial court's aiding and abetting instructions clearly conveyed the necessary elements of aiding and abetting, including the required intent. See *Carines, supra* at 757; *Izarraras-Placante, supra*. Because the instructions were not improper, any objection would have been futile. Counsel is not required to make a frivolous objection, or advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000); *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Further, as discussed in part III, the trial court indicated on the record how the jury's question would be answered, there was a record of the colloquy between the court and counsel, and the note, containing the court's response to the jury, is a part of the lower court record. Therefore, any challenge in this regard would have been futile. Finally, because defendant failed to show that the prosecutor's conduct denied him a fair trial, he has likewise failed to establish that defense counsel's failure to object prejudiced him. In sum, defendant has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged deficiencies, the result of the proceeding would have been different. *Effinger, supra*. Accordingly, defendant is not entitled to a new trial on this basis.

Affirmed.

/s/ Brian K. Zahra
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood