

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMONT SHEPHERD,

Defendant-Appellant.

UNPUBLISHED

August 19, 2003

No. 237799

Wayne Circuit Court

LC No. 00-014043-01

Before: Donofrio, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion with intent to commit a larceny, MCL 750.110a(2); unlawfully driving away an automobile (UDAA), MCL 750.413; and receiving stolen property between \$1,000 and \$20,000 (RCSP), MCL 750.535(3)(a). He was sentenced to concurrent terms of ten to twenty years for the home invasion conviction and three to ten years for the UDAA and RCSP convictions, with credit for 242 days served. Defendant appeals as of right. We affirm.

I.

The prosecution alleged that on December 3, 2000, Detroit resident Betty Nunnery locked her home and went to bed at 1 a.m. The next morning, she noticed that her home was in disarray and her car keys, garage door opener, and her 1997 Chrysler automobile were missing. She called the police, who soon located the car. Defendant, among other people, was discovered in a nearby house. Police testified that when defendant was in custody, he signed a statement that he did not break into or enter the complainant's home, but acted as a lookout for a person named "Mike" while he broke into the home. Mike obtained toys and other belongings from Nunnery's residence. Then, Mike and defendant returned to what they referred to as "the drug house." Mike instructed defendant to watch out for him again and he reappeared a few minutes later with Nunnery's Chrysler automobile and several other items, including a stereo. Defendant stated that he received a stereo from Mike for payment for acting as a lookout.

Defendant later claimed that this statement was involuntary because he had crack cocaine, marijuana, alcohol, and medication in his system during the interrogation. Defendant's pretrial motion to suppress the statement was denied. At trial, defendant testified that he was at "the drug house" consuming those substances all night on December 2 and 3, and that he never went to the complainant's home. He also stated that at the time of the interrogation, he had not

slept in two days, he was not alert, and he was vomiting. Consequently, defendant testified, he could not recall the specifics of the interrogation, but denied making the incriminating statement. Defendant acknowledged his signature on the statement, but stated that he did not read the many things he signed that night. According to defendant, he told the police he was sick, but they insisted he sign the confession and explain what happened, so he did.

II.

Defendant first argues that he was deprived of his right to due process, a fair trial, and his right to counsel¹ when trial counsel failed to request a jury instruction concerning the “law of alibi” and the trial court failed to instruct the jury sua sponte on the matter, citing US Const, AM VI, XIV; Const 1963, § 17, art 1, and § 20, art 1.

However, at trial, defense counsel did not request an alibi instruction and instead repeatedly agreed with the trial court’s instructions to the jury. Therefore, this issue is waived unless relief is necessary to avoid manifest injustice. MCL 768.29 and *People v Sabin*, 242 Mich App 656, 657-658; 620 NW2d 19 (2000) (a party waives review of jury instructions to which he accedes at trial, save for manifest injustice); *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000) (the intentional relinquishment of a known right constitutes a waiver which extinguishes any alleged error). Manifest injustice is not apparent on this record.

III.

Next, defendant contends that his rights to trial by jury and due process were violated when the trial court “coerced the jurors by instruction to return a unanimous verdict of either not guilty or guilty without an option to disagree and return no verdict.” We disagree because, again, defendant waived review of the jury instructions, and manifest injustice has not otherwise occurred. See *Sabin, supra*; *Carter, supra*.

IV.

Defendant claims that he was deprived of his right to due process and a fair trial when the trial court gave an improper instruction to the jurors concerning the law of aiding and abetting. We disagree.

Aside from the fact that defendant has also waived this issue, see section II, *supra*, the instruction defendant complains of also was a standard jury instruction. See CJI2d 8.1; see also MCL 767.39; *People v King*, 210 Mich App 425, 428-431; 534 NW2d 534 (1995). Thus, no manifest injustice occurred on this ground either.

V.

¹ Defendant fully raises the ineffective assistance of counsel claim in his eighth issue on appeal. See section IX, *infra*.

Defendant alleges that he was deprived of his right to a fair trial because the prosecutor did not prove beyond a reasonable doubt that defendant had unlawfully driven away the vehicle in question, nor that the vehicle was stolen property.² Again, we disagree.

In a criminal case, a prosecutor must present evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt to satisfy due process. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). This Court decides whether the evidence was sufficient by viewing it de novo in a light most favorable to the prosecutor and determining whether a rational trier of fact could find that the crime was proven beyond a reasonable doubt. *Id.*; *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). However, questions concerning the weight of evidence or the credibility of witnesses are solely within the province of the jury. *People v Elkhoja*, 251 Mich App 417, 442; 651 NW2d 408 (2002), vacated in part on other grounds ___ Mich ___; 658 NW2d 153 (2003).

Defendant was convicted of UDAA on an aiding and abetting theory. The aiding and abetting statute is MCL 767.39 (entitled “Abolition of distinction between accessory and principal”):

Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

See also *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995) (The aiding and abetting statute encompasses “all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime.”).

We grant defendant that the evidence did not show that he was the individual who unlawfully drove away the complainant’s automobile. His involvement was that of a lookout. See MCL 750.413 and CJI2d 24.1 (elements of UDAA). However, this is precisely the situation in which the aiding and abetting statute applies. See MCL 767.39; *Turner, supra*. Thus, the evidence was sufficient on this element. *Johnson, supra*.

Moreover, the evidence was sufficient that the automobile was stolen. The complainant identified the recovered vehicle as hers, and testified that her car keys and garage door opener were also stolen from her home. According to police, defendant and his companion (Mike), were found together near the Chrysler soon after the theft. Defendant admitted that Mike stole

² We also note that, contrary to the prosecution’s appellate argument, defendant does *not* claim that the evidence was insufficient on the charge of RCSP. Instead, defendant claims that the evidence was insufficient on the fact that the Chrysler itself was stolen (or taken without permission, see MCL 750.413) as that fact related to the UDAA charge against defendant on an aiding and abetting theory.

the automobile. Consequently, the prosecutor proved beyond a reasonable doubt that the automobile was property that was taken without permission. See MCL 750.413; *Johnson, supra*.

VI.

Next, defendant asserts that his rights to due process and a fair trial were violated once more because the prosecutor personally vouched for the credibility or lack of credibility of witnesses, testified to facts not in evidence, and expressed his personal opinion that defendant was guilty. We disagree.

Appellate review of allegedly improper prosecutorial conduct is precluded if, as here, the defendant fails to timely object unless an objection would have been fruitless or a miscarriage of justice would otherwise result. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). The key issue is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). If a prosecutor implies that he has some special way of knowing that a witness is testifying truthfully, the prosecutor is impermissibly vouching for credibility. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Consequently, a prosecutor may not invoke the prestige of his office or his personal knowledge to ask for a conviction. *People v Ignofo*, 315 Mich 626, 631-636; 24 NW2d 514 (1946); *People v Fuqua*, 146 Mich App 250, 254; 379 NW2d 442 (1985), overruled on other grounds in *People v Gray*, 466 Mich 44; 642 NW2d 660 (2002). However, a prosecutor may properly argue from the facts that the defendant or another witness is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Defendant objects to the following relevant portions of the prosecutor's closing argument:

[1] The testimony of Emily Waite will show you that the crimes of receiving concealing happened, if you believe Officer Waite, and again, I believe her testimony was believable. So if Officer Waite went in there and found all the stolen property in the possession of the people in the house, that crime happened, too

[2] . . . I don't know why defendants confess to crime. I don't know why they commit crime. But thank God, sometimes they confess, and if he didn't confess we would never be able to link anybody³ to Ms. Nunnery's home.

³ While the phrase "if he didn't confess we would never be able to link anybody" is troublesome for reasons other than the one defendant raised, defendant does not challenge this portion of the phrase. See *People v Jones*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993) (to properly present an appeal, an appellant must appropriately argue the merits of the issues he identifies in his statement of the questions involved).

Don't you ever, ever believe that any police officer under these circumstances will decide to just pin it on the first guy that he has in his hand. Hey, you, . . . you [sic] drunk and you're on cocaine, we're going to pin it on you, this way the real home invader . . . can break in the next home and the next . . . 'cause I as a police officer don't care as long as I have somebody. Don't believe that.

Further, defendant objects to the following statements in the prosecutor's rebuttal argument:

[3] Who's he trying to take for a ride, who? Defense attorney says he was in his own world. I submit to you, ladies and gentlemen, he still is in his own world. He's still out there thinking he can do it, get away with it and sit up here and tell you it wasn't me. . . .

[4] This man [defendant], really, he's a liar. He sat here and lied to you.

[5] . . . They [the police reports] were not [introduced] into evidence. We only introduce evidence and you only can see evidence as the Rules of Evidence allow

[6] But when somebody breaks in somebody's home when they're sleeping, in the safety of their home, there's no witness. And I can almost say thank God she didn't see him in there. I wouldn't want to think what would have happened to Mrs. Nunnery if she saw strangers in her home that morning. I wouldn't want to think.

Taking these statements in turn, defendant claims that the first and second statements improperly vouched for witnesses. With regard to the first statement, the prosecutor specifically said to the jury, "*if* you believe Officer Waite" (emphasis added), acknowledging the jury's choice to believe or disbelieve witnesses. The prosecutor did not cite any "special" knowledge concerning the officer's credibility. See *Bahoda, supra*; *Ignofa, supra*. Nor did the prosecutor invoke the prestige of his office to vouch for any witness's credibility. See *Ignofa, supra*.

Concerning the second statement, again, the prosecutor permissibly advocated for his witness. In addition, the prosecutor was simply commenting on the admitted fact of defendant's confession. It was no surprise to anyone by that point in the trial that defendant had confessed to the crime; in fact, he essentially retracted the confession on the stand. Thus, the prosecutor did not run afoul of *Bahoda* or *Ignofa, supra*. Moreover, a prosecutor may argue that defendant is not worthy of belief. *Launsburry, supra*.

Defendant claims that the third and fourth statements were also attacks on defendant's credibility. Indeed, the prosecutor used strong language, particularly in the fourth statement. However, this is not a basis for new trial. See *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995) (a prosecutor need not use the least prejudicial language in his argument); see also *Bahoda, supra*; *Ignofa, supra*. Further, in this case the prosecutor's challenged remarks

regarding defendant lying were made in reference to defendant's inconsistent testimony at trial with respect to whether defendant remembered making the confession in custody and the circumstances surrounding it. The prosecutor argued that the facts and evidence demonstrated that defendant was not credible. In this context, the remarks were not improper. *People v Lawton*, 196 Mich App 341, 353-354; 492 NW2d 810 (1992) (prosecutorial comments must be read as a whole and evaluated in context with other statements and evidence presented at trial).⁴

Defendant complains that the fifth and sixth statements contain the prosecutor's testimony concerning facts from his own personal knowledge, but not in evidence. The fifth statement was a true statement and not improper. The sixth statement, although containing conjecture not at issue, did not reach the level of being unfairly prejudicial. The jury was instructed to decide the case based on the evidence presented at trial, not the attorneys' arguments. They were well aware that the complainant in fact did not awake to discover strangers in her home. Thus, no error occurred on this ground either. See *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001) (a miscarriage of justice will not be found if the prosecutor's comments could have been ameliorated by a timely instruction); *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998) (in general, juries are presumed to have followed their instructions).

VII.

Defendant argues that the trial court improperly instructed the jury that they could convict if they were "satisfied" that defendant was guilty, and that if the jury found that defendant did not make the alleged incriminating statement, that they "should" not consider it. We disagree because once again defendant failed to object to these instructions and, rather, explicitly approved of them. Thus, this issue is also waived and no manifest injustice is apparent. See MCL 768.29; *Sabin, supra*.

VIII.

Defendant contends that the prosecutor failed to prove beyond a reasonable doubt that the person who unlawfully drove away the automobile intended to permanently deprive the owner of the automobile.⁵ We disagree.

Defendant's argument on this sufficiency-of-the-evidence claim is meritless because "[i]t does not matter whether the defendant intended to keep the vehicle" for proof that the crime of UDAA was committed. See CJI2d 24.1(5); see also MCL 750.413. Again, defendant was properly convicted on an aiding and abetting theory because he assisted Mike in stealing the

⁴ We note that in unpublished cases, other panels of this Court have upheld a prosecutor's comment that the defendant is a "liar." See, e.g., *People v Snodgrass*, unpublished opinion per curiam of the Court of Appeals, issued October 28, 1997 (Docket No. 194675), and *People v Stewart*, unpublished opinion per curiam of the Court of Appeals, issued March 18, 2003 (Docket No. 236363); see also MCR 7.215(C)(2) (only published opinions are precedential).

⁵ The prosecution frames this argument as a double jeopardy claim; however, we do not see it as one.

automobile, no matter whether Mike intended to keep it. See also MCL 767.39; *Turner, supra*. Thus, the evidence was sufficient on this issue as well. See *Johnson, supra*.

IX.

Finally, defendant claims that trial counsel was constitutionally ineffective when counsel failed to prevent or object to the alleged errors discussed above in this opinion, sections II through VIII. Once more, we disagree.

As a general matter, a defendant must show the following to establish an ineffective assistance of counsel claim: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *United States v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). A trial court's factual findings in this regard are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

First, defendant argues that his trial counsel should have requested an instruction on "the law of alibi." The Use Notes for the standard criminal jury instructions state that the alibi instructions "are *not* to be given 'where the defendant is charged as an aider or abettor, or in similar situations.'" *People v Matthews*, 163 Mich App 244, 246; 413 NW2d 755 (1987) (emphasis added), quoting Use Notes for former CJI 7:2:1 and 7:02:02.⁶

[I]t appears that the Use Notes are based on the fact that an aider and abettor is not always physically present at the time when the crime for which he is charged is committed. *Tomlinson v United States*, 93 F 2d 652, 655-656 (1937). Thus, according to 75 Am Jur 2d, Trial, § 729, pp 656-657, a defendant is entitled to have the court instruct the jury on the defense of alibi "unless the crime charged does not require the presence of the defendant at the time and place of its commission, as where he is charged as an aider and abettor." See also, 23A CJS, Criminal Law, § 1203, p 526. [*Matthews, supra* at 247-248.]

This describes the circumstances surrounding the charge of UDAA against defendant. Thus, the trial court did not err in refusing to issue an alibi instruction, and defendant's trial counsel could not have been unconstitutionally ineffective for failing to request an inapplicable jury instruction. See *Cronin* and *Rodgers, supra* (prejudice is required to reverse a conviction on the basis of ineffective assistance of counsel); see also *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not required to advocate a meritless position).

⁶ The current alibi jury instruction with like language is CJI2d 7.4.

Second, defendant claims that his trial counsel should have objected to the jury instructions given with regard to deliberations. However, the trial court's instruction in this regard⁷ was a standard criminal jury instruction. See CJI2d 2.25, 3.11(2)-(4).⁸ Therefore, no prejudice occurred in this respect either. See *Cronic, Toma, and Snider, supra*.

Third, defendant contends that his counsel should have objected to the aiding and abetting instruction. However, because the instruction given also was a standard jury instruction, CJI2d 8.1, no ineffectiveness claim may lie on this issue. See also MCL 767.39; *King, supra*.⁹

Fourth, defendant premises his ineffectiveness allegation on counsel's failure to object when the prosecution did not prove beyond a reasonable doubt that defendant committed UDAA and that the Chrysler in question was stolen. As we stated in section V, *supra*, because defendant was convicted of UDAA on an aiding and abetting theory, see MCL 750.413, the evidence was sufficient to prove defendant's guilt beyond a reasonable doubt. See *Johnson, supra*. Thus, defendant's argument is meritless.

Fifth, because we hold that the prosecutor did not commit misconduct, see section VI, *supra*, defendant's ineffectiveness contention on this basis is also without merit. See *Cronic and Toma, supra*.

Sixth, even if defendant had not waived this claim, it would be denied by this Court. To repeat, the jury instructions defendant challenges closely track the language of the standard criminal jury instructions.¹⁰ See CJI2d 3.2(1), 2.5, 2.6, and 4.1.¹¹ Although these instructions

⁷ The instruction at issue was as follows:

It is your duty as jurors to talk to each other and make every reasonable effort to reach agreement. Express your opinions and the reasons for them, but keep an open mind as you listen to your fellow jurors. Rethink your opinions and do not hesitate to change your mind if you decide you were wrong. Try your best to work out your differences. However, although you should try to reach agreement, none of you should give up your honest opinion about the case just because other jurors disagree with you or just for the sake of reaching a verdict. In the end, your vote must be your own and you must vote honestly and in good conscious [sic].

⁸ See also, e.g., *People v Sullivan*, 392 Mich 324, 341-342; 220 NW2d 441 (1974) and *People v Pollick*, 448 Mich 376, 381-382; 531 NW2d 159 (1995) (adopting similar language as the American Bar Association's Minimum Standard for Criminal Justice 5.4, sometimes called the "deadlocked jury" instruction).

⁹ See also section IV, *supra*.

¹⁰ The instructions defendant challenges are as follows, using defendant's emphasis:

(continued...)

are not binding law, see *People v Stephan*, 241 Mich App 482, 495; 616 NW2d 188 (2000), we find them to be persuasive and choose to employ them in this case. See, e.g., *People v Canales*, 243 Mich App 571; 624 NW2d 439 (2000). Accordingly, no error occurred here.

Seventh and finally, as a consequence of the fact that we have already decided that the prosecutor need not prove as an element of UDAA that the driver intended to permanently deprive the owner of the automobile, see section VIII, *supra*, defendant sustained no prejudice by his counsel's failure to insist on this proof. See *Cronic* and *Toma*, *supra*.

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell

(...continued)

[1] This presumption [of innocence] continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are *satisfied* beyond a reasonable doubt that he is guilty.

[2] If you find the Defendant did not make the statement [to the police] at all, you *should* not consider it.

¹¹ Defendant claims that the court's use of the word "should" in the second instruction was improper, and that the term "must" is proper because it alone would strongly forbid use of defendant's statement. This is a distinction without a meaningful difference. See *Random House Webster's College Dictionary* (2001).