

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES HARRISON FOX,

Defendant-Appellant.

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UNPUBLISHED

September 21, 2010

No. 293131

Ingham Circuit Court

LC No. 08-000199-FC

Before: BORRELLO, P.J., and JANSEN and BANDSTRA, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of torture, MCL 750.85, and unlawful imprisonment, MCL 750.349b. The trial court sentenced him as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 20 to 70 years for the torture conviction and 10 to 50 years for the unlawful imprisonment conviction. We affirm.

I

Defendant first argues that there was insufficient evidence presented at trial to support his convictions of torture and unlawful imprisonment. Specifically, defendant contends that the prosecution presented insufficient evidence to prove that he willingly participated in the torture and unlawful imprisonment of the victim. We disagree. We review the evidence presented at trial in a light most favorable to the prosecution to determine whether any rational trier of fact could have found that all essential elements of the charged offenses were proven beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002); *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Circumstantial evidence and the reasonable inferences arising therefrom can constitute sufficient proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). “This Court will not interfere with the trier of fact’s role of determining the weight of the evidence or the credibility of witnesses.” *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007). “All conflicts in the evidence must be resolved in favor of the prosecution.” *Id.*

In the present case, defendant was charged with torture, MCL 750.85, and unlawful imprisonment, MCL 750.349b. The evidence adduced at trial established that defendant and two

other men, Octavio Santiago and Marquis Hightower,<sup>1</sup> inflicted serious physical injuries on the victim by beating her, burning her, and attacking her with a razor and a pair of pliers after binding her with duct tape. It was the prosecution's theory that defendant, Santiago, and Hightower inflicted these injuries in an effort to force the victim to divulge the whereabouts of a man who had been supporting her financially. According to the prosecution, defendant, Santiago, and Hightower desired to extort the man for their own financial gain, and therefore set out to obtain his contact information from the victim by means of torture. At the close of trial, the jury was instructed concerning both principal liability and aiding-and-abetting liability with regard to each of the two charged offenses.

## A

A person commits the felony of torture if he or she, "with the intent to cause cruel or extreme physical or mental pain and suffering, inflicts great bodily injury or severe mental pain or suffering upon another person within his or her custody or physical control . . ." MCL 750.85(1); see also *People v Schaw*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2010). First, defendant suggests that he did not personally inflict any bodily injury on the victim.<sup>2</sup> Specifically, he asserts that he never touched the razor or pliers that were used to assault the victim. He points out that the DNA sample collected from the razor was inconclusive. He further argues that although the forensic testing could not exclude him as a donor of the DNA sample collected from the pliers, this should not be surprising given the fact that the pliers belonged to him and he had used them in the past.

As noted previously, the jury was instructed not only as to principal liability, but also as to aiding-and-abetting liability. Aiding and abetting consists of any type of assistance given to the perpetrator of a crime by word or deed intended to encourage, support, or incite the commission of the offense. *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004). "[A]iding and abetting is not a separate substantive offense. Rather, 'being an aider and abettor is simply a theory of prosecution' that permits the imposition of vicarious liability for accomplices." *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (citation omitted). An aider and abettor may be convicted and punished as if he or she directly committed the offense. MCL 767.39. To establish guilt under an aiding-and-abetting theory, a prosecutor must show that the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he or she gave aid and encouragement. *Robinson*, 475 Mich at 6.

The obvious problem with defendant's argument is that even if he had been definitively excluded as a source of the DNA recovered from the razor and the pliers, this would not have precluded the jury from convicting him on an aiding-and-abetting theory. It goes without saying that an aider and abettor may encourage or incite another person to torture a victim without ever directly placing a hand on the actual implements of torture. Indeed, as an aider and abettor, defendant would not have had to touch the razor or pliers at all. Thus, defendant's argument concerning the DNA samples collected from the razor and pliers is simply unpersuasive.

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<sup>1</sup> Defendant was tried separately from Santiago and Hightower.

<sup>2</sup> Defendant does not argue that the victim was not within his control or custody.

Defendant also argues that he did not *willingly* participate in the victim's torture, either as a principal or as an aider and abettor, but that he was forced to participate in the offense by Santiago and Hightower, who allegedly threatened him, held firearms to his head, and otherwise coerced him to assist in the crime. In support of his argument, defendant points out that he was the individual who ultimately called 911, that the victim was his girlfriend whom he planned to marry, that Hightower was heard threatening to murder him if he did not participate in the crime, and that he simply did what he was required to do given the fact that a gun was pointed at his head. However, defendant presented these same arguments to the jury, and the jury was fully instructed with regard to the defense of duress. Notwithstanding certain pieces of evidence that might have tended to support defendant's account of the events, the jury did not believe that defendant had been forced or coerced to participate in the victim's torture, and rejected his duress defense. We will not interfere with the jury's determinations concerning the weight of the evidence or the credibility of the witnesses. *Passage*, 277 Mich App at 177. The jury was free to accept or reject defendant's duress defense, *People v Schumacher*, 276 Mich App 165, 180; 740 NW2d 534 (2007), and we will not second-guess the jury's determination on appeal, see *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992).

We find sufficient evidence from which a rational jury could have concluded beyond a reasonable doubt that defendant willfully participated in the torture of the victim. The evidence showed that defendant invited Santiago and Hightower into his house, that defendant assisted in binding the victim with duct tape, that defendant moved the victim to an upstairs room, that defendant either blindfolded the victim or covered her head, and that defendant gave commands to the victim throughout the commission of the crime. And while the victim could not be certain which of the three men had actually inflicted her injuries, she later told the police that "her boyfriend and his two friends must have been the ones that did this to her." The jury rejected defendant's duress defense, as it was entitled to do, *Schumacher*, 276 Mich App at 180, and ultimately concluded that defendant directly participated in the torture of the victim. We are required to draw all reasonable inferences and make all credibility choices in support of the jury's verdict. *People v Gonzalez*, 468 Mich 636, 640-641; 664 NW2d 159 (2003). Taking the abovementioned evidence in a light most favorable to the prosecution, as we must, we conclude that the prosecution presented sufficient evidence to prove beyond a reasonable doubt that defendant was guilty of torturing the victim, either as a principal or as an aider and abettor. *Hardiman*, 466 Mich at 421.

## B

We similarly conclude that the prosecution presented sufficient evidence to prove beyond a reasonable doubt that defendant was guilty of unlawfully imprisoning the victim. A person commits the felony of unlawful imprisonment if he or she knowingly restrains another person under one of the following circumstances: (1) "[t]he person is restrained by means of a weapon or dangerous instrument," (2) "[t]he restrained person was secretly confined," or (3) "[t]he person was restrained to facilitate the commission of another felony or to facilitate flight after commission of another felony." MCL 750.349b(1); see also CJI2d 19.8. The evidence presented at trial established that the victim was bound by duct tape and kept upstairs during the commission of the offense. Accordingly, the victim was clearly "restrain[ed]" within the meaning of the statute. MCL 750.349b(3)(a). Moreover, it is beyond dispute that the victim's

confinement was additionally accomplished through the use of “a weapon or dangerous instrument” in this case. MCL 750.349b(1)(a).

With regard to the charge of unlawful imprisonment, the jury was instructed as to both principal liability and aiding-and-abetting liability. The jury was also fully instructed on defendant’s defense of duress. As with the torture charge, the jury rejected defendant’s duress defense, as it was entitled to do. We will not second-guess the jury’s determination on this matter. See *Wolfe*, 440 Mich at 514-515. Nor do we perceive any error in the jury’s finding that defendant willfully participated in the unlawful imprisonment of the victim. The proofs showed that defendant assisted in binding the victim with duct tape and assisted in taking the victim upstairs. Additionally, defendant gave commands to the victim, instructing her to comply with Santiago’s and Hightower’s demands, and explaining to her the consequences that would follow if she failed to do so. Viewing this evidence in a light most favorable to the prosecution, we conclude that the prosecution presented sufficient evidence to prove beyond a reasonable doubt that defendant was guilty of unlawfully imprisoning the victim, either as a principal or as an aider and abettor. *Hardiman*, 466 Mich at 421.

## II

Defendant next argues that the trial court erred by assessing 50 points for offense variable (OV) 7, MCL 777.37, and that he is accordingly entitled to be resentenced. We cannot agree. The Legislature has provided that 50 points may be scored for OV 7 if “[a] victim was treated with sadism, *torture*, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(1)(a) (emphasis added). Defendant relies on an unpublished opinion of this Court for the proposition that “[t]he Legislature intended the scoring of OV 7 to be based on conduct *beyond that necessary to commit the [underlying] offense.*” (Emphasis added.) Thus, he argues that because he was convicted of the crime of “torture,” MCL 750.85, it was improper for the trial court to assess 50 points for “torture” under OV 7.

Even assuming arguendo that defendant is correct in arguing that “[t]he Legislature intended the scoring of OV 7 to be based on conduct beyond that necessary to commit the [underlying] offense,” we conclude that he would not be entitled to resentencing. On defendant’s Sentencing Information Report (SIR), the probation officer recommended a score of zero points for OV 4 and recommended a score of 15 points for OV 10. In addition to the other recommended OV scores, including the recommended score of 50 points for OV 7, this would have given defendant a total OV score of 145, placing him in OV Level VI on the Class A felony grid. MCL 777.62. At the sentencing hearing, however, the trial court rescored OV 4 by adding 10 points and rescored OV 10 by deducting 5 points. Neither defendant nor his attorney objected to either of these changes in the scoring of the guidelines.

The net effect of these two changes was to give defendant a final, total OV score of 150 (5 points higher than the initially recommended total OV score of 145). Consequently, even if we were to agree with defendant’s argument that he should have been assessed zero points rather than 50 points for OV 7, he would still fall within OV Level VI on the Class A felony grid. MCL 777.62. In other words, rescoring OV 7 from 50 points to zero points would not affect defendant’s guidelines range, and defendant is therefore not entitled to be resentenced. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

### III

In a supplemental brief filed *in propria persona*, defendant argues that the prosecution committed several instances of misconduct, denying him a fair trial. We disagree. Because defendant did not object to the alleged instances of prosecutorial misconduct at trial, we review his claims for outcome-determinative plain error. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002).

#### A

Defendant first contends that the prosecutor failed to correct the victim's false testimony. The victim testified at trial that she had never met Santiago or Hightower before the date of the offense. Specifically, when asked "[w]ho was with [defendant]" on the day of the offense, the victim responded, "Two guys I didn't know." Defendant asserts that the victim's testimony in this regard was a "damaging lie" because the victim had, in fact, met Santiago prior to the date of the crime. He therefore argues that the prosecution was under an obligation to correct the testimony.

It is true that a prosecutor must not present testimony that he or she knows to be false. *People v Canter*, 197 Mich App 550, 558; 496 NW2d 336 (1992). However, we perceive no evidence in the record to suggest that the prosecutor knew that the victim's testimony was in any way untrue. See *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998). Moreover, defense counsel could have attempted to impeach the victim's credibility on this matter at trial. *Id.* Further, at its core, defendant's argument is more akin to an attack on the victim's credibility than to a genuine claim of prosecutorial misconduct. Matters of witness credibility are for the jury, *Passage*, 277 Mich App at 177, and we will not second-guess the jury's determination of a witness's credibility on appeal, see *Wolfe*, 440 Mich at 514-515. We find no outcome-determinative plain error in this regard. *Rodriguez*, 251 Mich App at 32.

#### B

Defendant next contends that the prosecution committed misconduct by failing to present his accuser, Marquis Hightower, at trial. Defendant argues that Hightower was available at the time of trial, as an inmate in the Ingham County jail, and that the prosecutor therefore violated his constitutional right of confrontation by failing to produce Hightower. But defendant misunderstands the nature of the constitutional right of confrontation. The Confrontation Clause bars the admission of testimonial statements of a witness who is absent from trial unless the witness is unavailable and the defendant has had a prior opportunity for cross-examination. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Because no testimonial statements by Hightower were used at defendant's trial, the Confrontation Clause did not require Hightower to be present.

#### C

Defendant also argues that the prosecutor improperly used evidence of his poverty and unemployment to establish his guilt. We acknowledge that the prosecutor elicited certain testimony regarding money and the respective financial positions of the parties in this case. However, this testimony was not used as substantive evidence of defendant's guilt; nor was it

introduced to prove that defendant was a bad person or that he had a propensity for crime. Instead, it was introduced to show why defendant, Santiago, and Hightower might have had a motive to torture the victim. After all, it was the prosecution's theory that defendant, Santiago, and Hightower wished to torture the victim until she revealed the contact information of the man who had been financially supporting her so that they could extort the man for their own financial gain. Viewed against this backdrop, the evidence concerning defendant's poverty and unemployment was certainly relevant to show that he might have had a motive to commit the offenses in question with the goal of obtaining money from the victim's financial backer. See MRE 401; see also *People v Flynn*, 93 Mich App 713, 721; 287 NW2d 329 (1979) (observing that "[e]vidence of motive which suggests the doing of the act, or the purpose for which it is done, is always admissible"). Moreover, any prejudice resulting from the testimony concerning defendant's poverty and unemployment could have been alleviated by a timely objection and a request for a limiting instruction. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). We perceive no plain error requiring reversal on this issue.

#### D

Finally, defendant asserts that the prosecutor "improperly used MRE 609 impeachment evidence in [his] closing arguments." This one sentence represents the sum and total of defendant's argument on this issue. Defendant does not specify what the allegedly improper evidence was; nor does he point us to the portion of the prosecutor's closing argument in which the allegedly improper evidence was referenced. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims; nor may he give only cursory treatment of an issue with little or no citation of supporting authority. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). This argument has been abandoned. *Id.* At any rate, we note that we have reviewed the trial transcripts and have discovered no overwhelming improprieties in the prosecutor's closing statement that would rise to the level of outcome-determinative plain error. *Rodriguez*, 251 Mich App at 32. Reversal is not warranted.

#### IV

Also in his supplemental brief filed *in propria persona*, defendant argues that he received ineffective assistance of trial counsel. Specifically, he contends that his trial attorney was ineffective for failing to call a DNA expert witness at trial and for failing to object to the introduction of certain statements that he made to the police. We disagree. For the reasons stated earlier, presentation of a DNA expert by defense counsel would have been of little or no assistance to defendant. As explained previously, even if defendant's DNA had been definitively excluded from the razor and pliers, this would not have precluded the jury from convicting him of both charged offenses on an aiding-and-abetting theory. As an aider and abettor, defendant would not have had to touch the razor or pliers at all. The decision to call an expert witness is a matter of sound trial strategy for which this Court will not substitute its judgment. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Defense counsel's failure to call a DNA expert witness in this case simply did not deprive defendant of a substantial defense. See *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

Defendant also claims that trial counsel was ineffective for failing to object to the introduction of certain statements that he made to the police, including an audio-visual recording of his actual police interrogation. Defendant does not suggest that his statements to the police

were made involuntarily, that they were given under coercive circumstances, that they were given in violation of his Sixth Amendment rights, or that he was not provided with a *Miranda*<sup>3</sup> warning before making the statements. Instead, he merely argues that it was prejudicial for the prosecution to show the recording of his interrogation and to refer to his statements to the police, and that his trial attorney therefore should have objected. Defendant's statements to the police constituted admissions by a party opponent, and were properly admissible under MRE 801(d)(2). See *People v Kowalak (On Remand)*, 215 Mich App 554, 556-557; 546 NW2d 681 (1996). Counsel is not ineffective for failing to raise a futile objection. *Ackerman*, 257 Mich App at 455. We perceive no ineffective assistance of counsel in this case.

Affirmed.

/s/ Stephen L. Borrello  
/s/ Kathleen Jansen  
/s/ Richard A. Bandstra

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<sup>3</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).