

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTOINE DION WILKINS,

Defendant-Appellant.

UNPUBLISHED

January 17, 2003

No. 229697

Eaton Circuit Court

LC No. 99-020358-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK ALLEN LANG,

Defendant-Appellant.

No. 232989

Eaton Circuit Court

LC No. 99-020356-FC

Before: Murray, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Following a joint jury trial, defendants Antoine Dion Wilkins and Patrick Allen Lang were each convicted of numerous offenses committed during a multi-county crime spree that began in Mulliken, Michigan, and continued to Detroit, during the early morning hours of November 14, 1999.¹

Defendant Wilkins was convicted of first-degree home invasion, MCL 750.110a(2), two counts of armed robbery, MCL 750.529, two counts of kidnapping, MCL 750.349, eight counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(c), unlawfully driving away a

¹ Two other codefendants, David Nealy and Craig Battiste, were also convicted of numerous offenses committed during this crime spree. Codefendant Nealy was tried along with defendants Wilkins and Lang, and codefendant Battiste was tried separately. Neither Nealy nor Battiste are parties to this appeal.

motor vehicle (UDAA), MCL 750.413, possession of a firearm during the commission of a felony, MCL 750.227b, and conspiracy to commit first-degree home invasion, conspiracy to commit armed robbery, conspiracy to commit kidnapping, and conspiracy to commit first-degree CSC, MCL 750.157a. He was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 120 to 360 months each for the home invasion and conspiracy to commit home invasion convictions, 240 to 400 months each for the armed robbery, kidnapping, and conspiracy to commit armed robbery, conspiracy to commit kidnapping, and conspiracy to commit first-degree CSC convictions, 280 to 400 months each for the first-degree CSC convictions, 24 to 90 months for the UDAA conviction, and a consecutive two-year prison term for the felony-firearm conviction.

Defendant Lang was convicted of first-degree home invasion, MCL 750.110a(2), two counts of armed robbery, MCL 750.529, two counts of kidnapping, MCL 750.349, bank robbery, MCL 750.531, fourteen counts of first-degree CSC, MCL 750.520b(1)(e), UDAA, MCL 750.413, felony-firearm, MCL 750.227b, and conspiracy to commit first-degree home invasion, conspiracy to commit armed robbery, conspiracy to commit kidnapping, and conspiracy to commit first-degree CSC, 750.157a. He was sentenced to concurrent prison terms of 150 to 240 months for the home invasion conviction, 400 to 720 months each for the first-degree CSC convictions, 300 to 480 months each for the armed robbery and kidnapping convictions, 225 to 480 months for the bank robbery conviction, 24 to 60 months for the UDAA conviction, 95 to 240 months for the conspiracy to commit first-degree home invasion conviction, 210 to 480 months for the conspiracy to commit armed robbery conviction, 260 to 480 months each for the conspiracy to commit kidnapping and conspiracy to commit first-degree CSC convictions, and a consecutive two-year prison term for the felony-firearm conviction.

Defendants Wilkins and Lang now appeal as of right. Their appeals have been consolidated for this Court's review. We affirm.

I.

Both defendants argue that the trial court erroneously denied their motion for a change of venue due to pretrial publicity. We disagree. We review a trial court's decision on a motion for change of venue for an abuse of discretion. *People v Jendrzejewski*, 455 Mich 495, 500; 566 NW2d 530 (1997).

Criminal defendants are generally tried in the county where the alleged crime occurred. *Id.* at 499; MCL 600.8312. However, a trial court may order a change of venue when the pretrial publicity is so highly inflammatory and unrelenting that the entire community is presumed to have been prejudiced by it. *Jendrzejewski, supra* at 499-501; MCL 762.7. Mere exposure to media reports about the defendant and the alleged crime does not automatically establish that a defendant was denied a fair trial. Rather, a reviewing court must closely examine the entire voir dire to determine if an impartial jury was impeached. *Jendrzejewski, supra* at 516-517. Due process only demands that jurors act with a "lack of partiality, not an empty mind." *Id.* at 519.

In this case, the record discloses that the jurors were sequestered during voir dire to determine their exposure to the case. On appeal, defendants refer to the fact that several jurors admitted having heard about the case, but neither defendant discusses the actual amount and extent of publicity that existed. In addition, neither defendant has shown that the coverage was

other than factual. Thus, defendants have not demonstrated that media coverage created a potential for prejudice through an inflammatory account of the events. See *Jendrzejewski, supra* at 506-507, 516-517.

Furthermore, our review of the jury voir dire leads us to conclude that an impartial jury was impaneled. Of the fourteen jurors finally chosen, each stated that they would be able to judge the case impartially, notwithstanding any previous information they had heard about the case. Although defendants complain that they were required to collectively exhaust their peremptory challenges in order to obtain a jury unbiased by pretrial publicity, we note that none of the defendants requested additional peremptory challenges under MCR 6.412(E)(2).

Under the totality of the circumstances, defendants have failed to present sufficient evidence of either extensive and inflammatory media coverage, or deep-seated predisposition on the part of a significant number of the jurors, nor have they met their burden of demonstrating either actual prejudice or a pattern of deep and bitter prejudice. *Jendrzejewski, supra*. The trial court did not abuse its discretion in denying defendants' motion for change of venue.

II.

Defendant Wilkins argues that the prosecution failed to present sufficient evidence to support his convictions. He asserts that he was not a direct participant in most of the charged offenses and lacked the requisite knowledge and intent to establish his guilt as an aider and abettor to the charged offenses. We disagree.

In reviewing a claim that insufficient evidence was presented to support a conviction, this Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each essential element of the crime was proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (citations omitted). This Court will not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999); *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). In order to convict a defendant under an aiding and abetting theory, the prosecution must show: (1) that the crime was committed by the defendant or another; (2) that the defendant performed acts or gave encouragement that aided or assisted the commission of the crime; and (3) that the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time the defendant gave the aid or assistance. MCL 767.39; *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993). Assistance includes anything that might be inferred as words or actions that support, encourage, or incite the commission of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (citations omitted). Further, "[a]n aider and abettor's state of mind may be inferred from all the facts and circumstances." *Id.*

We disagree with Wilkins' claim that the evidence failed to support his convictions for the offenses occurring at the complainants' home because the prosecutor failed to prove that he had the requisite knowledge and intent to commit those offenses. Although Wilkins did not enter the home, there was evidence that he, along with the three other codefendants, all discussed committing a robbery and, toward that objective, acquired duct tape, which they intended to use

to forcibly confine their victims. Insofar that defendant Wilkins argues that the evidence failed to establish his guilt for the sexual offenses that occurred within the home, appellate relief is not warranted, because the record indicates that he was neither charged with nor convicted of those offenses. Viewed most favorably to the prosecution, however, the evidence was sufficient to prove that Wilkins acted with the requisite knowledge and intent to convict him of aiding and abetting the remaining offenses at the complainants' home. *Jones, supra*.

Defendant Wilkins also argues that the prosecution failed to present sufficient evidence of his knowledge and intent regarding the offenses that occurred after the group left the complainants' home. He argues that the evidence failed to show that he was aware that the victim's presence was involuntary. We disagree.

The victim testified that after she and the others entered the car, codefendant Lang, in Wilkins' presence, began arguing with codefendant Battiste about bringing her along with them, to which Battiste explained that he did so because he was concerned that the victim would call the police if the codefendants did not bring her with them. The victim also testified that, during the automobile ride, Lang attempted to put his penis in her mouth and, when she refused, he asked, "where's the gun," causing the victim to submit to his assault. The victim further testified that she asked Wilkins for permission to leave the car when the group arrived in Detroit. Additionally, while the group was at a restaurant, she told the others that she had to go to the bathroom, whereupon Wilkins accompanied her into the bathroom. Wilkins also admitted in one of his police interviews that he knew the victim was not with him and the others in the motel room voluntarily. When viewed most favorably to the prosecution, the evidence was sufficient to allow the jury to determine that Wilkins participated in the charged offenses with knowledge that the victim was being held and forced to act against her will. Thus, the prosecution presented sufficient evidence to support Wilkins' convictions.

III.

Defendant Wilkins argues that he is entitled to resentencing because his sentences violate the principle of proportionality under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Because defendant's crimes were committed after January 1, 1999, the statutory sentencing guidelines were used to determine defendant's sentences. MCL 769.34(1) and (2); *People v Oliver*, 242 Mich App 92, 99; 617 NW2d 721 (2000). Defendant was sentenced within the guidelines recommended sentence range for each offense, and he does not allege a scoring error or argue that his sentences were based on inaccurate information. Under these circumstances, we must affirm defendant's sentences. MCL 769.34(10); *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001); *People v Lerversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

IV.

Defendant Lang argues that he was denied a fair trial because the prosecutor improperly used his jury voir dire examination as a substitute for an additional opening statement. We find no merit to this issue. The trial court sustained defendant's objections to the improper argumentative questioning during voir dire. Further, the trial court instructed the jury that the attorneys' statements were not evidence, and the challenged remarks concerned evidence that the prosecution later presented at trial. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229

(1998); *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Accordingly, defendant was not denied a fair trial on this basis.

V.

Defendant Lang next argues that his right to a fair trial was violated because he was tried jointly with codefendants Nealy and Wilkins. Defendant's failure to provide the transcript of the hearing on the prosecutor's motion for joinder, despite a request from this Court, constitutes a waiver of this issue. MCR 7.210(B)(1)(a); *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995); see also *People v Wilson*, 196 Mich App 604, 615; 493 NW2d 471 (1992).

VI.

Defendant Lang next argues that the admission of statements by codefendants Nealy and Wilkins, neither of whom testified at trial, denied him a fair trial. A review of the record reveals that the trial court offered defendants Nealy, Wilkins, and Lang separate juries in order to dispel any prejudice in this regard. Each defendant stated on the record that, after discussing the matter with their attorneys, they had decided to forgo a separate jury as a matter of strategy. Moreover, when subsequently asked whether he objected to the admission of redacted statements by codefendants Nealy and Wilkins, counsel for defendant Lang specifically stated that he had no objection to their introduction. On this record, we conclude that defendant Lang affirmatively waived any claim of error. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

VII.

Finally, both defendants argue that their respective trial attorneys were constitutionally ineffective. Because there was no *Ginther*² hearing, our review is limited to errors apparent on the existing record. *Avant, supra* at 507. In order to reverse an otherwise valid conviction due to ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness compared to professional norms and that the deficient performance so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 311; 613 NW2d 694 (2000), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant Lang has not established entitlement to relief due to ineffective assistance of counsel. Indeed, as noted previously, defendant Lang has failed to provide the transcript of the hearing at which the court considered the question of severance, and the record discloses that defendant Lang personally consented to a trial before a single jury as a matter of trial strategy. Further, defendant has failed to establish that the failure to object to the introduction of his codefendants' redacted statements so prejudiced him that, but for any error, the result of the proceedings would have been different, as the statements were cumulative of evidence already admitted. *Toma, supra*.

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Defendant Wilkins' discussion of this issue is confusing and cursory. Additionally, it lacks citation to appropriate supporting authority, as well as appropriate factual development. As such, we deem the issue abandoned. *Watson, supra* at 587.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald