COURT OF APPEALS
DECISION
DATED AND FILED

March 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2982-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SHELTON LOVE,

DEFENDANT-APPELLANT,

CRAIG SIMS,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Shelton Love appeals from a judgment of conviction entered after a jury found him guilty of aggravated battery while

armed, as a party to the crime, *see* §§ 940.19(5), 939.63, 939.05, STATS., and armed robbery, as a party to the crime, *see* §§ 943.32(1)(a) & (2), 939.05, STATS. Love argues: (1) that the evidence is insufficient to support his armed robbery conviction; (2) that the prosecutor improperly commented on his failure to testify; (3) that the prosecutor improperly referred to facts not in evidence during his closing argument; and (4) that he is entitled to discretionary reversal because the real controversy has not been tried. We affirm.

BACKGROUND

On August 22, 1995, Love and a friend were talking to each other as they sat in a driveway on North 7th Street in Milwaukee. Thereafter, Love's friend began riding a bike. As Love's friend was riding the bike, Rachel Rodriguez parked her car at a nearby tavern. Before entering the tavern, Rodriguez decided to visit a friend who lived across the street from the tavern. She knocked at her friend's door, but nobody answered; therefore, she headed back to the tavern. As Rodriguez walked toward the tavern, Love's friend approached her on the bike, and told her to give him some money. Rodriguez told him that she did not have any money. Love's friend then swung his bike around and hit Rodriguez in the head with it, knocking her to the ground. He then kicked and beat her. Love then approached Rodriguez, said, "Get off my guy," and shot Rodriguez three times in the legs. Either Love or his friend then took Rodriguez's purse, and the two men walked off together.[1]

[1] At trial, a police officer testified that Rodriguez told him, during an interview shortly after the crime, that the person who shot her took her purse. Rodriguez, however, testified that her first attacker, not the shooter, took her purse.

Although Rodriguez was unable to identify Love as one of her attackers, three eyewitnesses subsequently identified Love as the person who shot Rodriguez. The police arrested Love on September 20, 1995, after a short car chase. When the car finally stopped, Love fled from the passenger side of the car. Under the passenger seat, where Love had been sitting, the police found the gun that had been used to shoot Rodriguez.

Love and his alleged accomplice were tried by a jury in November of 1996. The jury convicted Love, but acquitted his alleged accomplice, who had raised the defense of misidentification. The trial court entered judgment accordingly.

DISCUSSION

Love asserts that the evidence is insufficient to support his armed robbery conviction.[2]

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757–758 (1990) (citations omitted). Thus, "[t]his court will only substitute its judgment for that of

[2] Love does not challenge the sufficiency of the evidence in support of his aggravated battery conviction.

the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible - that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis.2d 199, 218, 458 N.W.2d 582, 590 (Ct. App. 1990).

As noted, Love was convicted of armed robbery, as a party to the crime. Section 943.32(1)(a) & (2), STATS., defines armed robbery as follows:

> **Robbery. (1)** Whoever, with intent to steal, takes property from the person or presence of the owner by either of the following means is guilty of a Class C felony:
>
> (a) By using force against the person of the owner with intent thereby to overcome his or her physical resistance or physical power of resistance to the taking or carrying away of the property[.]
>
> ….
>
> **(2)** Whoever violates sub. (1) by use or threat of use of a dangerous weapon … is guilty of a Class B felony.

Section 939.05, STATS., provides, in relevant part:

> **Parties to crime. (1)** Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act.
>
> **(2)** A person is concerned in the commission of a crime if the person:
>
> (a) Directly commits the crime; or
>
> (b) Intentionally aids and abets the commission of it[.]

Love argues that neither he nor his accomplice directly committed armed robbery because the evidence establishes that Love did not take Rodriguez's purse and that his accomplice was not armed, and therefore, Love asserts, the evidence is insufficient to establish that he was a party to an armed robbery. Love also argues

that there is no evidence that he shot Rodriguez in order to aid his accomplice's taking of her purse, and that, therefore, the evidence is insufficient to sustain his armed robbery conviction as a party to the crime. We conclude that the evidence is sufficient to sustain Love's armed robbery conviction.

Contrary to Love's argument, the evidence was sufficient from which to conclude that he took Rodriguez's purse, and directly committed armed robbery. A police officer testified that Rodriguez told him that the person who shot her then took her purse. Two eyewitnesses testified that Love was the person who shot Rodriguez, and the gun that was used to shoot her was found under the seat of a car in which Love had been riding. The jury could reasonably infer from this evidence that Love had the intent to steal when he took Rodriguez's purse, and that he shot Rodriguez in order to overcome her resistance to his taking of her purse. Love argues that we should give no weight to Rodriguez's statement to the police officer that the shooter took her purse because Rodriguez testified at trial that the shooter did not take her purse. We reject Love's argument, however, because he asks us to determine the weight of the evidence and the credibility of the witnesses; these determinations are to be made by the trier of fact. *See* ***Poellinger***, 153 Wis.2d at 504, 451 N.W.2d at 756. The jury could reasonably have concluded that Rodriguez's statement to the police officer shortly after the shooting was more reliable than her testimony at trial, and thereby concluded that the shooter did in fact take Rodriguez's purse.

Moreover, we conclude that the evidence is also sufficient from which to conclude that Love committed armed robbery as a party to the crime, by aiding and abetting his accomplice's forcible taking and carrying away of Rodriguez's purse.

> The elements of aiding and abetting are that a person (1) undertakes conduct (either verbal or overt action) which as a matter of objective fact aids another person in the execution of a crime, and further (2) he consciously desires or intends that his conduct will yield such assistance. Where one defendant knows another is committing a criminal act, he should be considered a party thereto "when he acted in furtherance of the other's conduct, was aware of the fact that a crime was being committed, and acquiesced or participated in its perpetration." "[D]efendants may be found guilty of being concerned in the commission of a crime if, between them, they perform all the necessary elements of the crime with mutual awareness of what the other is doing."

Frankovis v. State, 94 Wis.2d 141, 149, 287 N.W.2d 791, 795 (1980) (citations omitted) (brackets in original), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis.2d 493, 451 N.W.2d 752 (1990); *see also* ***State v. Hecht***, 116 Wis.2d 605, 620, 342 N.W.2d 721, 729 (1984). The evidence discloses that Love and his accomplice were sitting in a driveway talking to each other before Love's accomplice began riding the bike. Love's accomplice later approached Rodriguez on the bike, demanded money from her, and attacked her after she told him that she had no money. During the attack, Love came over, said, "Get off my guy," and shot Rodriguez three times. According to Rodriguez's testimony at the trial, Love's accomplice then took her purse, and both Love and his accomplice walked away together. Contrary to Love's argument, the jury could reasonably infer from this evidence that Love intentionally aided and abetted his accomplice's forcible taking and carrying away of Rodriguez's purse.

Our conclusion is supported by the supreme court's analysis in ***Frankovis***, where the supreme court rejected the defendant's argument that the evidence was insufficient to support his conviction as a party to the crime of robbery. In ***Frankovis***, 94 Wis.2d at 150, 287 N.W.2d at 795, the evidence established that the defendant and an accomplice attacked a man as he entered a

bar, and that the defendant's accomplice took the victim's wallet during the attack. The defendant argued that the evidence was insufficient to support a finding that he had the intent to aid in the taking of the victim's wallet. *See* ***id.***, 94 Wis.2d at 147, 287 N.W.2d at 794. In rejecting the defendant's argument, the supreme court explained, "Even if the defendant had no prior intent to rob [the victim], the evidence and the inferences support the conclusion that, as soon as [the accomplice] reached towards [the victim's] right, rear pocket, the defendant became aware of [the accomplice's] intent and also aware that [the accomplice] did take [the victim's] wallet." ***Id.***, 94 Wis.2d at 150, 287 N.W.2d at 795. Thus, the supreme court held that the evidence that the defendant was aware of his accomplice's taking of the wallet was sufficient from which to conclude that the defendant had the intent to aid and abet the robbery. *See* ***id.***, 94 Wis.2d at 150–151, 287 N.W.2d at 795.

Similarly, we conclude that as soon as Love's accomplice reached for and took Rodriguez's purse, Love became aware of his accomplice's intent and aware that his accomplice was robbing Rodriguez. Love's use of force against Rodriguez and his continued action in concert with his accomplice aided the taking and carrying away of Rodriguez's purse by overcoming her physical resistance to the taking and carrying away. Indeed, Love joined in his accomplice's forcible attack on Rodriguez, and thereafter the two men continuously acted in concert to complete the robbery; according to Rodriguez, Love's accomplice took her purse immediately after Love shot her, and the two men then walked away together. This evidence is sufficient from which to conclude that Love aided and abetted an armed robbery. *See* ***id.***, 94 Wis.2d at 151, 287 N.W.2d at 795 (rejecting defendant's argument that the evidence indicated an intent to injure rather than an intent to rob, because the defendant's use of force

against the victim aided in overcoming the victim's physical resistance to the taking, thus facilitating the robbery).

We further reject Love's assertion that he did not aid and abet an armed robbery because his accomplice was not armed, and thus did not directly commit an armed robbery. As noted, Love may be found guilty as a party to the crime if, between Love and his accomplice, "they perform[ed] all the necessary elements of the crime with mutual awareness of what the other [was] doing." ***Id.***, 94 Wis.2d at 149, 287 N.W.2d at 795. The evidence clearly establishes that Love and his accomplice together performed all of the necessary elements of armed robbery, and that they had mutual awareness of what the other was doing.[3]

Love next asserts that his convictions should be reversed because the prosecutor improperly referred to his failure to testify. The Fifth Amendment to the United States Constitution forbids comment by the prosecution on the accused's failure to testify. *See* ***State v. Johnson***, 121 Wis.2d 237, 244, 358 N.W.2d 824, 827 (Ct. App. 1984). "The test for determining whether remarks are directed to a defendant's failure to testify is 'whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" ***State v. Lindvig***, 205 Wis.2d 100, 107, 555 N.W.2d 197, 200 (Ct. App. 1996) (citation omitted). "'Questions about the absence of facts in the record need not be taken as

[3] In support of his argument that he did not aid and abet an armed robbery, Love asserts that because the jury acquitted his co-defendant they must have concluded that Rodriguez's attackers did not act in concert. We disagree. As noted, Love's co-defendant raised a misidentification defense; thus, the acquittal of Love's co-defendant does not indicate that the jury concluded that the attackers did not act in concert. Moreover, the fact that Love's alleged accomplice was acquitted does not preclude Love's conviction. "An aider and abettor may be convicted as a party to a crime even though the principal was not identified or convicted." ***State v. Doney***, 114 Wis.2d 309, 311, 338 N.W.2d 852, 853 (Ct. App. 1983) (citation omitted).

comment on the defendant's failure to testify.'" ***Johnson***, 121 Wis.2d at 246, 358 N.W.2d at 828 (citation omitted).

During rebuttal closing argument, the prosecutor responded to the arguments of defense counsel point by point, attacking the defense counsel's characterization of the evidence. In doing so, the prosecutor said, "[I]f the defense has an explanation of how those casings got at the scene and that gun got under Mr. Shelton Love's seat when he was fleeing from the police a month later, I haven't heard it." Love's counsel objected to this comment, but the trial court overruled the objection, agreeing with the prosecutor's characterization of the comment as a reference to defense counsel's failure to explain how the casings and gun evidence fit into his theory of the defense. We conclude that the trial court properly rejected Love's argument that the comment impermissibly referred to his failure to testify. When viewed in context, it is clear that the language used was neither manifestly intended to refer to Love's failure to testify, nor of such character that the jury would naturally and necessarily take it to be a comment on Love's failure to testify. The comment was properly offered to emphasize defense counsel's inability, during his closing argument, to discount the significance of the casings and gun that connected Love to the crime.

Love further asserts that the prosecutor improperly referred to facts not in evidence during his closing argument, and that those remarks constitute plain error. During closing argument, without objection, the prosecutor said that many other cases result in convictions even though the victim cannot identify her attacker.

"The trial court has discretion to determine whether counsel's remarks during closing argument are appropriate. However, when no objection is

made to an alleged error, the trial court has no opportunity to exercise its discretion, and the error is deemed waived." ***State v. Seeley***, 212 Wis.2d 75, 81, 567 N.W.2d 897, 900 (Ct. App. 1997) (citations omitted). In order to circumvent waiver of the issue, Love asserts that the prosecutor's comments constitute plain error.

If an error constitutes plain error and affects the defendant's substantial rights, the defendant's failure to object does not preclude our review of that error. *See* ***State v. Street***, 202 Wis.2d 533, 552, 551 N.W.2d 830, 839 (Ct. App. 1996). In order to constitute plain error, an error must be obvious and substantial, and so fundamental that a new trial or other relief must be granted. *See* ***id.*** "'The plain-error rule is reserved for cases in which it is likely that the error denied the defendant a basic constitutional right.'" ***Id.*** (citation omitted). We conclude that the prosecutor's reference to other cases did not substantially prejudice the defendant, and does not rise to the level of plain error. The comment merely emphasized to the jury the obvious fact that they could properly convict Love even though Rodriguez did not personally identify Love as the person who shot her.

Love's final argument is that he is entitled to discretionary reversal of his convictions based upon the prosecutor's reference to other cases because, he alleges, the real controversy has not been fully tried. Section 752.35, STATS., provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the

> proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

If we conclude that the real controversy has not been fully tried, we may grant a request for a new trial based upon that conclusion alone, *see* ***State v. Betterley***, 191 Wis.2d 407, 424–425, 529 N.W.2d 216, 223 (1995); if we conclude that it is probable that justice has miscarried, however, we must also determine that there is a substantial probability that that a new trial would produce a different result, *see* ***State v. Martinez***, 210 Wis.2d 396, 403, 563 N.W.2d 922, 925 (Ct. App. 1997). As noted, the prosecutor's reference to other cases did not substantially prejudice Love. We therefore reject Love's assertion that the real controversy has not been fully tried, and deny his request for discretionary reversal.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.