STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ECOUVILLON IRBY,

Defendant-Appellant.

UNPUBLISHED
May 19, 1998

No. 198189
LC No. 95-052964-FC

Before: Young, Jr., P.J., and Kelly and Doctoroff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of the common-law crime of being an accessory after the fact to assault with intent to commit murder, MCL 750.505; MSA 28.773, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to one year and two months to five years' imprisonment on the accessory after the fact conviction, to be served consecutively to a two-year prison term on the felony-firearm conviction. Defendant appeals as of right. We reverse.

Defendant was originally charged with assault with intent to commit murder, MCL 750.83; MSA 28.278, not with being an accessory after the fact. The prosecution proceeded at trial on an aiding and abetting theory. On appeal, defendant argues that the jury should not have been instructed on the common-law crime of accessory after the fact because it was not charged in the information. We agree.

The applicable legal principles are well-established. In *People v Quinn*, 136 Mich App 145; 356 NW2d 10 (1984), this Court explained:

> A trial court has no authority to convict a defendant of an offense not specifically charged unless the defendant has had adequate notice. The notice is adequate if the latter charge is a lesser included offense of the original charge. A trial court may not instruct a jury on a cognate lesser included offense unless the language of the charging

> document gives the defendant notice that he could [at the same time] face [the] lesser offense charge. *People v Chamblis*, 395 Mich 408, 418; 236 NW2d 473 (1975). [*Id*. at 147 (some citations omitted).]

We recognize that there is an apparent conflict between this Court's decisions in *People v Usher*, 196 Mich App 228; 492 NW2d 786 (1992), and *People v Perry*, 218 Mich App 520; 554 NW2d 362 (1996), on the issue whether accessory after the fact can be a cognate lesser offense of aiding and abetting. In *Usher*, a panel of this Court held that, depending on the particular facts of the case, accessory after the fact can be a cognate lesser offense of aiding and abetting. *Id*. at 232-234. *Usher* explained that "[t]he distinction between the two crimes depends upon when the defendant's intent was formed and whether the assistance was rendered before, during, or after the completion of the crime." *Id*. at 233. In *Perry*, *supra* at 535, a subsequent panel dismissed such language as dicta:

> In *Usher*, the defendant sought an instruction with respect to accessory after the fact before the trial court ruled on his motion for a directed verdict with respect to murder. Then, after having prevailed with respect to his motion for a directed verdict, and in the course of the trial on the charge of being an accessory after the fact to murder, the defendant *pleaded guilty* to being an accessory after the fact. Thus, *Usher* represents nothing more than an application of the well-established doctrine that a properly tendered and accepted unconditional guilty plea operates as a waiver of irregularities in the prior proceedings, absent a jurisdictional or similar defect. Were accessory after the fact to be considered a cognate lesser offense of murder, the prosecutor correctly points out that in every case in which murder is charged and there is any evidence that the defendant assisted in the destruction of evidence or evasion of detection an instruction on accessory after the fact would be required. We believe that not only would such a rule be unwise policy, but also that such an instruction is not required because the offense of being an accessory after the fact is not a lesser cognate offense of murder, as tested by [*People v Hendricks*, 446 Mich 435; 521 NW2d 546 (1994).] [Emphasis in original; some citations omitted.]

Although we too question the analysis contained in *Usher*, we believe that the *Perry* panel erred in failing either to follow or distinguish the *Usher* decision, which constitutes binding precedent under what was, at the time *Perry* was decided, Administrative Order 1996-4 (now MCR 7.215(H)). In any event, we need not join that affray because it is clear that the information in the case at bar contains no facts even remotely giving defendant notice that he could face a charge of being an accessory after the fact to assault with intent to commit murder.[1] Accordingly, the trial court erred in granting the prosecution's request at trial for an instruction on that offense. *Chamblis*, *supra*. Defendant's conviction of being an accessory after the fact to assault with intent to commit murder must be reversed.

Reversal of defendant's accessory after the fact conviction also means that the jury's finding that defendant was an accessory after the fact to assault with intent to commit murder may no longer be

relied upon. Absent this finding, defendant's felony-firearm conviction must also be reversed. *People v Burgess*, 419 Mich 305, 310; 353 NW2d 444 (1984).

Reversed.

/s/ Robert P. Young, Jr.
/s/ Michael J. Kelly
/s/ Martin M. Doctoroff

[1] The information charged defendant as follows:

> **COUNT 1** ASSAULT WITH INTENT TO MURDER
>
> [Defendant] did make an assault upon Lamar Benton with intent to commit the crime of murder; contrary to MCL 750.83; MSA 28.278. [750.83].
>
> * * *
>
> **COUNT 2** WEAPONS-FELONY FIREARM
>
> [Defendant] did carry or have in his possession a firearm, to-wit: a pistol, at the time he committed or attempted to commit a felony; contrary to MCL 750.227b; MSA 28.424(2). [750.227B-A].