

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

APRIL JACKSON,

Defendant-Appellant.

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UNPUBLISHED  
November 5, 1999

No. 205966  
Recorder's Court  
LC No. 96-006409

Before: Whitbeck, P.J., and Saad and Hoekstra, JJ.

PER CURIAM.

Following a bench trial, the court convicted defendant of assault with intent to rob while armed, MCL 750.89; MSA 28.284, under an aiding or abetting theory, MCL 767.39; MSA 28.979, and sentenced her to two concurrent terms of twelve to twenty years' imprisonment. She appeals as of right. We affirm the robbery conviction, but vacate the "aiding and abetting" conviction and sentence.

I

Defendant claims that the prosecution failed to present sufficient evidence to convict her of aiding or abetting the offense of assault with intent to rob while armed. An appellate court will sustain a conviction if there is sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Jermell Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999); quoting *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). The evidence must be viewed in a light most favorable to the prosecution. *Id.*

The crime of assault with intent to rob while armed comprises the following elements: (1) an assault with force and violence; (2) an intent to either rob or steal; and (3) that the defendant was armed at the time of the assault. *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). The offense is a specific intent crime, requiring that the defendant intend to rob or steal from the victim. *Id.*

Pursuant to MCL 767.39; MSA 28.979, one who procures, counsels, aids or abets the commission of a crime may be prosecuted, convicted and punished as if he or she directly committed

that offense. *People v McCray*, 210 Mich App 9, 13; 533 NW2d 359 (1995). Aiding or abetting includes all forms of assistance. *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991). To convict a defendant as an aider or abettor, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted in the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement. *People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999) quoting *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). An aider or abettor's state of mind may be inferred from all of the facts and circumstances of the crime. *Id.* Factors to be considered include a close association between the defendant and the other participants, the defendant's participation in the planning and execution of the crime, and evidence of flight after the crime. *Id.* at 569. To sustain the charge, the guilt of the principal must be shown, but the principal need not be convicted. *Id.* The prosecutor is required only to introduce evidence that the crime was committed and that the defendant either committed it or aided or abetted the crime. *Id.* The amount of aid or assistance is not material, so long as it had the effect of inducing the crime committed. *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992).

Here, the prosecution presented evidence showing that defendant participated in a plan with others to rob her husband and offered assistance to the individuals who committed the charged robbery and assaults. Defendant knew about the planned attack, was home when the assailants arrived, and opened the back door of the house to let the assailants in. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find defendant guilty of aiding or abetting an assault with intent to rob beyond a reasonable doubt.

## II

Defendant contends that her sentence is disproportionate. We disagree. This Court reviews sentencing decisions for an abuse of discretion by applying the principle of proportionality and determining if the sentence imposed is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Defendant was sentenced towards the lower end of the sentencing guidelines minimum sentence range of eight to twenty years. Sentences that fall within the guidelines are presumptively proportionate and, therefore, not an abuse of the trial court's discretion. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997). Here, defendant has not demonstrated that this case presents unusual circumstances to overcome the presumption of proportionality. *Id.*

Defendant further says that her due process rights were violated because the trial court scored the sentencing guidelines on the basis of facts relating to the charges that she was acquitted of at trial. In *People v Mitchell*, 454 Mich 145, 173-178; 560 NW2d 600 (1997), habeas corpus conditionally granted \_\_\_ F Supp 2d \_\_\_ (ED Mich 7/19/1999), the Supreme Court held that, because the sentencing guidelines do not have the force of law, appellate review of a trial court's scoring decision is limited. Claims of legal error in the scoring of the guidelines are not subject to appellate review. *Id.*, 176-177. Here, defendant has failed to state a cognizable claim for which relief may be granted. *Id.*, 177-178.

In any event, we find no merit to defendant's argument. While a sentencing court is not permitted to make an independent finding of guilt and then sentence a defendant in accordance with that finding, it is permitted to consider evidence admitted at trial as an aggravating factor in determining an appropriate sentence. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). Therefore, it is not improper for a court to consider other criminal activities established by the trial evidence, though the defendant was acquitted of those charges. *Id.*

Here, the evidence demonstrated that defendant was involved in the planning of an armed robbery and acquiesced in her accomplices' use of a weapon to commit the planned robbery. Defendant's role in planning the crime helped create the circumstances that allowed the gunmen to shoot both victims. While defendant was not held criminally responsible for the shootings of either victim, it was not improper for the trial court to take the entire criminal transaction into account when fashioning a sentence. The court may also consider this evidence for the effect the crime had on the victims. *Id. Compagnari, supra* at 236; also *People v Granderson*, 212 Mich App 673, 679-681; 538 NW2d 471 (1995). The trial court's consideration of the use of a weapon and the death of one of the victims was limited to defendant's contribution to the circumstances of this crime. The trial court did not make an independent finding that defendant was guilty of these greater offenses. Rather, the court permissibly concluded that her limited involvement in setting up the offense led to some consequences.

Accordingly, defendant's sentence for assault with intent to rob while armed is affirmed. We note, however, that the judgment of sentence incorrectly reflects two separate convictions and sentences, one for assault with intent to rob while armed, and one for "aiding and abetting". The record shows that defendant was convicted of only a single count of assault with intent to rob while armed, under an aiding and abetting theory. Accordingly, we vacate the "aiding and abetting" conviction and sentence, leaving a single conviction and sentence for assault with intent to rob while armed.

We affirm the conviction and sentence for assault with intent to rob while armed. We vacate the "aiding and abetting" conviction and sentence.

/s/ William C. Whitbeck

/s/ Henry William Saad

/s/ Joel P. Hoekstra