STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 3, 1999
v	No. 205212 Washtenaw Circuit Court
MELANISE NICOLE PATTERSON, Defendant-Appellant.	LC No. 96-005659 FC

Before: Sawyer, P.J., and Hood and Whitbeck, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, but was acquitted of conspiracy to commit murder, MCL 750.157a; MSA 28.354(1). She was sentenced to life imprisonment for the second-degree murder conviction and now appeals as of right. We affirm.

I

Defendant first argues that there was insufficient evidence to support her conviction. We disagree. When reviewing the sufficiency of the evidence in a criminal case, we "must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997), citing *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified 441 Mich 1201 (1992). In this case, viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find that the elements of second-degree murder were proved beyond a reasonable doubt.

The elements of second-degree murder are "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998) (citation omitted).

> The malice element of second-degree murder is satisfied by showing that the defendant possessed the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with the knowledge that death or great bodily harm would be the probable result. Malice can be inferred from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm. [*People v Djordjevic*, 230 Mich App 459, 461-462; 584 NW2d 610 (1998) (citations omitted).]

In this case, defendant was prosecuted as an aider and abettor. MCL 767.39; MSA 28.979 provides:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

In *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995), this Court stated:

> To support a finding that a defendant aided and abetted a crime, the prosecutor 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 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 he gave aid and encouragement. An aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime.

" 'Aiding and abetting' describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime." *Id.* at 568.

> [I]f the aider and abettor participates in a crime with knowledge of his principal's intent to kill or to cause great bodily harm, he is acting with 'wanton and willful disregard' sufficient to support a finding of malice . . . [*People v Kelly*, 423 Mich 261, 278-279; 378 NW2d 365 (1985).]

From the testimony and evidence presented at trial, the jury could have determined that defendant aided and abetted in the murder. There was evidence that defendant and the victim engaged in a physical altercation the night before the murder. The victim thereafter stole defendant's car and car keys. Defendant was upset and met with codefendant Tedario Reece and her friend, Leah Richardson, in the kitchen of Barbara Reece's house. Witness Heather Walker, who was at the Reece home at the time of the meeting, testified that she was told to stay out of the kitchen, defendant was upset when she went into the kitchen, and, after the trio met in the kitchen for approximately one hour, defendant came out and was calm. The evidence further showed that, on the following evening, defendant arrived unannounced at the victim's apartment complex. She arrived in a red Cavalier, which was driven by Richardson and contained witness Dawnya Thomas as a passenger. The Cavalier was followed to the apartment complex by a Ford Escort driven by Lee Washington. Anthony Latham, the shooter, was in the Escort as was Tedario Reece, whom defendant had asked to come along to the victim's apartment. The Escort, which was missing its license plate,[1] backed into a parking spot away from the victim's apartment. After defendant exited the Cavalier with Richardson,[2] she knocked on the victim's door, apparently, to make sure he was home. After gaining entry and ascertaining that the victim was home, defendant left the apartment and approached the Escort. Shortly thereafter, she was observed returning to the apartment. She was with the shooter, and perhaps one other male. Defendant motioned for the person who was with her to stand off to the side while she knocked on the door again. When the victim opened the door, defendant and her companion or companions rushed inside the apartment, and the victim was shot almost immediately. Defendant and the others fled from the victim's apartment and hastily left the parking lot in the Cavalier and the Escort. This testimony was sufficient to sustain defendant's conviction for second-degree murder based on a theory of aiding and abetting. *Hoffman, supra*.

II

Defendant next argues that the verdict was against the great weight of the evidence. This issue is not preserved because defendant failed to move for a new trial below. *People v Johnson*, 168 Mich App 581, 585; 425 NW2d 187 (1988). Therefore, we decline to review the issue. Moreover, we note that defendant has failed to demonstrate that the verdict was against the great weight of the evidence.

III

Defendant next argues that her sentence is disproportionate. Despite a request, defendant failed to provide this Court with a copy of her presentence investigation report (PSIR) as required by MCR 7.212(C)(7). Thus, she has waived review of the proportionality of her sentence. See *People v Rodriquez*, 212 Mich App 351, 355; 537 NW2d 42 (1995).[3]

IV

Defendant next argues that she was deprived of the effective assistance of counsel. We disagree. There was no *Ginther*[4] hearing held in this case and thus, our review is limited to errors that are apparent from the record. *People v Nantelle,* 215 Mich App 77, 87; 544 NW2d 667 (1996). In order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway,* 446 Mich 643, 687-688; 521 NW2d 557 (1994). Defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive her of a fair trial. *People v Pickens,* 446 Mich 298, 303; 521 NW2d 797 (1994). Defendant must overcome the presumption that challenged actions might be considered sound trial strategy. *People v Tommolino,* 187 Mich App 14, 17; 466 NW2d 315 (1991), citing *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

In this case, defendant makes numerous claims of ineffective assistance of counsel. She does not, however, explain how she was prejudiced by any of the alleged errors. She also fails to support that there was a reasonable probability that the outcome of her trial would have been different if her counsel had not engaged in the complained of conduct. We note that most of the claimed errors are merely listed in defendant's brief without any accompanying argument. For these reasons, we find that defendant has failed to meet her affirmative burden of demonstrating that she was provided with the ineffective assistance of counsel, or that the decisions made by her trial counsel were not sound trial strategy.

In reaching this conclusion, we would be remiss if we did not specifically address one of defendant's claims. Defendant contends that her counsel failed to disclose his relationship with the victim's family and the victim. The record reveals that, at the sentencing hearing while defense counsel was attempting to explain the abusive relationship between the victim and defendant, he indicated that he knew the victim's aunt and grandmother and respected them. At the same hearing, the victim's aunt indicated that she had known defense counsel for years. Other than those two instances, there are no references in the record concerning the relationship between the victim's family and defense counsel. Certainly, there is no indication whatsoever that defense counsel knew the victim himself. And, because there was no *Ginther* hearing, we do not have sufficient information as to the particular nature of the relationship or when defense counsel became aware that he was acquainted with the victim's family. Notably, the aunt who made a victim impact statement did not have the same name as the victim. It is possible that defense counsel was not aware of who the victim's family was until after the trial. Moreover, our review of the record does not reveal that defendant was prejudiced in any manner by the fact that defense counsel was acquainted with some members of the victim's family. To the contrary, a review of the record demonstrates that defense counsel was vigilant and aggressive in his defense of defendant.

V

Defendant next argues that it is a denial of due process to charge an aider and abettor as a principal, and that it is improper to allow an aider and abettor to be convicted of a lesser degree of murder than the principal. This issue is not preserved because it was not raised and considered by the trial court. *People v Connor,* 209 Mich App 419, 422; 531 NW2d 734 (1995). We address the issue, however, because it raises a constitutional question. *People v Wilson,* 230 Mich App 590, 593; 585 NW2d 24 (1998).

It is not a denial of due process to charge an aider and abettor as a principal. In *People v Hooper,* 50 Mich App 186, 191; 212 NW2d 786 (1973),[5] this Court specifically stated:

> It is well settled that an aider and abettor may be indicted, tried, and on conviction, punished as a principal *and no denial of due process results from charging an aider and abettor as a principal*. [Emphasis added.]

It is also well settled that an aider and abettor can be convicted of a lesser crime than that upon which the principal was convicted. MCL 767.39; MSA 28.979 provides:

> Every person concerned in the commission of an offense whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

In interpreting this section, our Supreme Court has stated:

> Before the enactment of this statute, the conviction of the principal was essential to the prosecution of the accessory. Now all are principals, and the guilt of one does not depend upon the guilt of the other. The effect of our statute is to permit the prosecution of one who aids and abets, without regard to the conviction or acquittal of one who, under the common law, would have been called the principal. That is what the statute intended to accomplish in abrogating the common-law rule. [*People v Mangiapane*, 219 Mich 62, 65-66; 188 NW 401 (1922).]

This Court has reiterated that the guilt of an aider and abettor is not contingent upon the prosecution, conviction or acquittal of the principal. It is settled that an aider and abettor can be found guilty of a lesser offense than the principal. In *People v Buck*, 197 Mich App 404, 409; 496 NW2d 321 (1992), defendant Geick, an aider and abettor, was convicted of voluntary manslaughter while the principal, codefendant Holcomb, was convicted of second-degree murder. In *People v Brown*, 120 Mich App 765, 772; 328 NW2d 380 (1982), this Court upheld the defendant's conviction for second-degree murder even though the principal was acquitted by the same jury in a joint trial. In *People v Folkes*, 71 Mich App 95, 97-98; 246 NW2d 403 (1976), the jury convicted the principal of first-degree murder, but the codefendant, who was prosecuted for first-degree murder as an aider and abettor, was convicted of manslaughter. In concluding that an aider and abettor does not have to be convicted of the same offense as the principal, this Court stated:

> [T]he better rule is that an aider and abettor can be convicted of an offense lower in degree than the offense of which the principal is convicted. It is reasoned that the guilt of the aider and abettor may depend upon his own actions, intent and state of mind. . . . But even where the evidence does not reveal substantial differences in the actions or states of mind of the defendants, an aider and abettor can properly be convicted of a lesser crime than the perpetrator. [*Folkes*, *supra* at 98 (citations omitted).]

The rule that an aider and abettor may be convicted of a different crime than the principal recognizes that the aider and abettor's conviction rests on the actions of the aider and abettor and not necessarily those of the principal. *Id.* It also recognizes, however, "the power of a jury to return verdicts that may be inconsistent with the evidence presented at trial." *Buck*, *supra* at 421; *Folkes*, *supra* at 98-99. Juries often, "because of obvious extralegal factors or for no apparent reason," find defendants guilty of lesser degrees or classes of crime than that shown by the evidence. *Id.*, citing *People v Finch*, 213 Cal App 2d 752, 77; 29 Cal Rptr 420, 453 (1963). Because the rule of law is well settled that an aider and abettor need not be convicted of the same degree of offense as her principal and defendant has completely failed to offer any authority or rational argument to support that this rule of law should be changed, we reject defendant's argument and uphold her conviction.

VI

Finally defendant argues that the jury should have been instructed on the lesser included offenses of voluntary manslaughter, involuntary manslaughter and negligent discharge of a firearm resulting in death. We disagree. Defendant failed to request instructions for voluntary manslaughter and negligent discharge of a firearm resulting in death. Thus, these issues are not preserved. Our review is limited to the issue of whether relief is necessary to avoid manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). We find no manifest injustice where there was no evidence presented which would have supported an instruction for either voluntary manslaughter or negligent discharge of a firearm.

With regard to an instruction for involuntary manslaughter, the record is unclear as to whether defense counsel wanted the instruction included or omitted. For this reason, we address the issue as if the instruction had

been requested. "This Court reviews the record adduced at trial to determine whether the evidence was sufficient to convict the defendant of a cognate lesser included offense." *People v Sullivan*, 231 Mich App 510, 517; 586 NW2d 578 (1998), citing *People v Cheeks*, 216 Mich App 470, 479-480; 549 NW2d 584 (1996). If the evidence presented would have supported a conviction of a cognate lesser offense, the trial court, if requested, is required to instruct on it. *Sullivan*, *supra* at 517-518. Our review of the record reveals that there was insufficient evidence to support an instruction for involuntary manslaughter. All of the testimony, outside of that given by defendant, supported that there was an intentional killing done either with malice or premeditation. Defendant's version of the crime was that she was an innocent bystander who did not know that the victim was going to be shot and was surprised when it happened. Under defendant's version of the facts, there was insufficient evidence to support a conviction for involuntary manslaughter because she was not committing, or aiding in the commission, of any unlawful act not amounting to a felony or naturally tending to cause death or great bodily harm. She also was not negligently doing a lawful act or omitting to perform a legal duty. She simply entered the victim's apartment to get some of her things back from him. Thus, there was no testimony or evidence to support an instruction for involuntary manslaughter.

Affirmed.

/s/ David S. Sawyer
/s/ Harold Hood
/s/ William C. Whitbeck

[1] There was testimony that the license plate was either missing or obscured.

[2] Thomas testified that she did not go to the victim's door with defendant and Richardson. Defendant testified that she did.

[3] Although defendant did attach the narrative portion of the PSIR to her brief on appeal, the relevant portion regarding the scoring of the variables was not presented, thereby precluding our review of this issue. We note, however, that we find the sentence proportionate considering the offense and the offender.

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[5] We note that defendant cites to *Hopper*, *supra* and *People v Bills*, 53 Mich App 339; 220 NW2d 101 (1973), to support her claim that it is a denial of due process to charge an aider and abettor as a principal. These cases stand for the exact opposite proposition.