STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

STANLEY DAVIDSON, JR.,

Defendant-Appellant.

UNPUBLISHED
May 11, 2001

No. 204447
Macomb Circuit Court
LC No. 96-000370-FC

Before: Wilder, P.J., and Holbrook, Jr., and McDonald, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of unarmed robbery, MCL 750.530; MSA 28.798. Defendant's convictions stem from the attempted robbery of Nationwide Warehouse, a Roseville furniture store. During the course of the robbery, the store manager was shot and killed. Defendant was sentenced to two concurrent terms of five to fifteen years' imprisonment. We reverse and remand.

On appeal, the prosecution concedes that the trial court erred in refusing to give the requested instruction on the lesser included offense of larceny from a person.[1] MCL 750.357; MSA 28.589. However, the prosecution asserts that this error had a "negligible effect" on the outcome of the case, given that defendant never contested that force was used in the attempted robbery. Because the use of force distinguishes the crimes of unarmed robbery (for which force is an essential element) and larceny from a person (for which force is not an essential element), the prosecution asserts that the jury could not have been influenced by the failure to instruct on the lesser included crime. Therefore, the prosecution contends the error was harmless. We disagree.

Defendant was charged with the crimes of first-degree felony murder, MCL 750.316; MSA 28.548, and armed robbery, MCL 750.529; MSA 28.797. The jury was instructed that they could also consider the lesser-included crimes of second-degree murder, MCL 750.317; MSA

[1] The prosecution argued at trial against defendant's request to have the jury instructed on larceny from a person.

28.549, unarmed robbery, and the common law crime of accessory after the fact, MCL 750.505; MSA 28.773. Defendant raises no issue regarding either murder charge.

In order to be convicted of armed or unarmed robbery, the state must establish that at the time a defendant took property away from the complainant, the defendant specifically intended to permanently deprive the owner of that property. CJI2d 18.2(6) and CJI2d 18.1(7). The same is true of the crime of larceny from a person. CJI2d 23.3(6). The crime of accessory after the fact is also a specific intent crime. *People v Lucas*, 402 Mich 302, 304; 262 NW2d 662 (1978). To convict a defendant of being an accessory after the fact, the prosecution must prove that a defendant intended to hinder the detection, arrest, trial, or punishment of a felon. *Id.*

The prosecution's harmless argument presumes that the jury was properly instructed on the crime of unarmed robbery. After reviewing the record, we conclude that this presumption is erroneous. The jury was given the following instruction for the crime of unarmed robbery:

> To prove this charge, the prosecutor must prove each of the following element[s] beyond a reasonable doubt:
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> First, that the defendant assaulted James Freeman and Dion Oliver or used force or violence or put James Freeman or Dion Oliver in fear. The defendant must have either attempted or threatened to do immediate injure [sic] to James Freeman and Dion Oliver and was able to do so or the defendant must have committed a forceful and violent act that made James Freeman and Dion Oliver reasonably afraid of being injured at the time or otherwise have put James Freeman and Dion Oliver in fear;
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> Second, that by doing so, the defendant took money that did not belong to him. It does not matter how much money was taken;
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> Third, that the money was taken from the person of James Freeman and Dion Oliver or in his presence. This can occur even if the property was not in the same immediate area as [James Freeman] and Dion Oliver.
>
> Fourth, that the money was moved. Any movement is enough and it can have been moved by anyone as long as it is moved under the direction of the defendant;
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> Fifth, that at the time he took money, the defendant intended to take it away from James Freeman and Dion Oliver permanently.

Unfortunately, the trial court then immediately instructed the jury on specific intent as follows:

> The crimes of armed robbery, unarmed robbery, and accessory after the fact require proof of a specific intent. This means that the prosecution must prove not only that the defendant did certain acts, but that he did the acts with the intent to cause particular result. For the crime of armed robbery and unarmed robbery, this

> means that the prosecution must prove that the defendant intended to commit robbery *or gave help after the robbery to avoid arrest, punishment, discovery, or trial*. [Emphasis added.]

In other words, the trial court told the jury they could convict defendant of unarmed robbery if the prosecution proved that defendant had acted with the intent required to be an accessory after the fact. Although defendant did not object to the forgoing instructional error, we choose to review the issue because we believe that this was a plain error that seriously affected the fairness and integrity of the trial. *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A trial court's misdescription of a crime's requisite specific intent is a trial error, *Arizona v Fulminate*, 499 US 279, 306-307; 111 S Ct 1246; 113 L Ed 2d 302 (1991), and is therefore subject to harmless error analysis. *Neder v United States*, 527 US 1, 10; 119 S Ct 1827; 144 L Ed 2d 35 (1999); *Johnson v United* States, 520 US 461, 469; 117 S Ct 1544; 137 L Ed 2d 718 (1997); *People v Duncan*, 462 Mich 47, 51: 610 NW2d 551 (2000). Like the failure to instruct altogether on an element of the crime, *Neder, supra* at 9, the misdescription of an element does not "necessarily render a trial fundamentally unfair." *Rose v Clark*, 478 US 570, 577; 106 S Ct 3101; 92 L Ed 2d 460 (1986). Accord *Johnson, supra* at 469.[2] Where, as here, a defendant does not object to the misdirection, we review the matter under the plain error rule. *Id.* at 466. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice . . . ." *Carines, supra* at 763. Accord *Olano, supra* at 732. If these three elements are established, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'"seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence."'" *Carines, supra* at 763-764, quoting *Olano, supra*

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[2] The *Neder* Court observed that

> we have found an error to be "structural," and thus subject to automatic reversal in a "very limited class of cases." *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d (1963) (complete denial of counsel); *Tuney v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed.2d 749 (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); *McKaskle v Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (denial of public trial); *Sullivan v Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (defective reasonable-doubt instruction). [*Neder, supra* at 8.]

To this list, the Michigan Supreme Court has added the failure of a trial court to instruct on any elements of a criminal charge. *Duncan, supra* at 48.

at 736-737 (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

We believe that the first three prongs of the *Carines/Olano* rule are clearly established in the record. The failure to properly instruct the jury on the requisite specific intent element of unarmed robbery was plain error. We also conclude that this error prejudiced defendant by adversely affecting his Sixth Amendment right to trial by jury.[3] In his concurring opinion in *California v Roy*, 519 US 2; 117 S Ct 337; 136 L Ed 2d 266 (1996), Justice Scalia observed that "a criminal defendant is constitutionally entitled to a jury verdict that he is guilty of the crime . . . . A jury verdict that he is guilty of the crime means, of course, a verdict that he is guilty of each necessary element of that crime." *Id.* at 7, citing his authored majority opinions in *Sullivan v Louisiana*, 508 US 275; 113 S Ct 2078; 124 L Ed 2d 182 (1993), and *United States v Gaudin*, 515 US 506; 115 S Ct 2310; 132 L Ed 2d 444 (1995). As in *Roy*, such a verdict was never rendered in the case before us because the jury was not given the proper intent instruction for unarmed robbery, the crime for which defendant stands convicted.

The issue therefore rests on the fourth and final prong of the *Carines/Olano* rule. Although decisions of the United States Supreme Court evidence a deep division on how an appellate court should approach the evidentiary record when the trial court's misdescription has been preserved for appellate review, see, e.g., *Neder, supra*,[4] there is agreement that when the

[3] The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." US Const, Am VI.

[4] In his opinion concurring in part and concurring in the judgment in *Neder*, Justice Stevens wrote that "[t]here is . . . a distinction of true importance between a harmless-error test that focuses on what the jury did decide, rather than on what appellate judges think the jury would have decided if given an opportunity to pass on an issue." *Neder, supra* at 27. Justice Stevens' approach is essentially the same as that announced by Justice Scalia in his majority opinion in *Sullivan:*

> Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. . . . The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered . . . would violate the [Sixth Amendment's] jury-trial guarantee. [*Sullivan, supra* at 279].

Justice Scalia, echoed these sentiments in his concurring opinion in *Roy:* "The absence of a formal verdict on this point cannot be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise. To allow the error to be cured in that fashion would be to dispense with trial by jury." *Roy, supra* at 7 (Justice Ginsburg concurring in this part of Justice Scalia's opinion). Guided by these principles, Justice Scalia articulated the following test in *Roy:* "The error in the present case can be harmless only if the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict did find without finding this point as well." *Id.* Justices Stevens, Scalia, and Ginsburg,

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error is unpreserved, courts should look to the evidentiary record and consider whether a reasonable jury would have reached the same verdict had it been properly instructed. *Neder*, *supra* at 19 (opinion of the court), and 39 (Scalia, Souter, and Ginsburg, JJ., concurring in part and dissenting in part).

After a careful review of the record, we are unable to reach the conclusion that the jury's verdict would have been the same had it been given the proper intent instruction for unarmed robbery. The issue of what defendant knew and when he came to know it was a central issue at trial. As the prosecution acknowledges in its brief on appeal, defendant's "defense was that he did not know that his codefendant's were going to rob Nationwide Warehouse." On this issue, both sides point to defendant's statement to the police. In this statement, defendant repeated over and over that he did not know his companions planned on robbing the store until they got there:

> *Defendant*: [W]hen I first went up there with them and they was talkin' about it on the way, that's when I finally caught on. I knew they was gonna' rob the place.
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> *Police*: On the way there?
>
> *Defendant*: When I had got there and they got out. I didn't know he went in there with a gun but he was talkin' about hittin' my man, hit this.
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> ***
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> *Defendant*: . . . I did not know they was gonna rob until he came out runnin' and said at first, . . . hit him, don't forget to hit him. I did not know this. . . . I'll probably go to jail for this, just because I was an accessory. I know the law. I mean, but, I did not know that this was goin' to happen, I just, he just wanted me to go out there and help him pick up some money. Just pick up his check. That's all he said, cause he worked there. And then when we got there he said hit him, just hit him.
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(…continued)

joined by Justice Souter, once again championed this approach in *Neder*. *Neder*, *supra* at 27 (Stevens, J., concurring in part and concurring in the judgment), and 31-40 (Scalia, Souter, and Ginsburg, JJ., concurring in part and dissenting in part).

The *Neder* majority, however, approached the evidentiary record differently. Analogizing to cases involving the erroneous admission and exclusion of evidence, *Neder*, *supra* at 18, the majority framed the role of an appellate court this way:

> If, at the end of [a thorough examination of the record], the court cannot conclude beyond a reasonable doubt that they jury verdict would have been the same absent error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless. [*Id.* at 19.]

Police: You knew on the way there that they were gonna rob the place.

Defendant: When I got there.

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Police: How many other places did he rob?

Defendant: I don't know. Like I said I didn't know they robbin' . . . .

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Defendant: . . .All I did was drive, I didn't know that they were actually gonna rob there.

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Police: And as soon as you got there . . .

Defendant: . . . when they got there they started talkin' about don't forget to hit him and don't forget to hit him. That's all they said. . . .

As the prosecution correctly observes, the primary difference between the crimes of larceny from a person and unarmed robbery is the use of force, either through violence or intimidation. *People v Leflore*, 96 Mich App 557, 561; 293 NW 2d 628 (1980). The crime of unarmed robbery is both a crime against possession and a crime against the person. As instructed, the jury could have concluded that while defendant had no knowledge of the crime until either the moment his companions exited the car and entered the store or when they exited the store after the shooting, defendant was nonetheless guilty of unarmed robbery because he had assisted his companions "after the robbery to avoid arrest, punishment, discovery, or trial." The erroneous instruction was the vehicle by which this result could be obtained.

The probability that the jury could have thus convicted defendant of unarmed robbery is heightened by the following instruction given on how to approach the various charges while in the jury room:

> In this case there are several different crimes that you may consider. When you discuss the case, you must consider the crime or [sic] armed robbery first. If you all agree that the defendant is guilty of that crime, you may stop your discussions and return your verdict. If you believe that the defendant is not guilty of armed robbery or if you cannot agree about that crime, you should consider the less serious *crime of unarmed robbery plus accessory after the fact.* You can go back to armed robbery after discussing unarmed robbery and accessory after the fact if you want to. [Emphasis added.]

We believe it is reasonable to understand this instruction as conflating the crime of unarmed robbery and accessory after the fact.

Of course, a jury can convict a person of unarmed robbery on a theory of aiding and abetting. However, the record shows that while the jury in the case at hand was instructed on aiding and abetting with respect to the crimes of armed robbery and felony murder, the link was never made with the crime of unarmed robbery:

> In this case, the defendant is charged with committing armed robbery plus felony murder or intentionally assisting someone else in committing it.
>
> Anyone who intentionally assists someone in committing a crime is as guilty as the person who directly commits it and can be convicted of that crime as an aider and abetter. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt . . . . [The elements of aiding and abetting were then presented.]

The trial court then instructed the jury on the elements of accessory after the fact. At the conclusion of this instruction, the trial court drew a distinction between aiding and abetting and accessory after the fact.

> The difference between aider and abetter and accessory after the fact: You must decide the defendant is guilt of armed robbery as an aider and abetter or is guilty of being an accessory after the fact to the felony of armed robbery, or, if he is not guilty. If the prosecutor's proven beyond a reasonable doubt that before or during the armed robbery [defendant] gave his encouragement or assistance, intending to help another commit that crime, then you can find the defendant guilty of aiding and abetting the crime.
>
> If the prosecutor has proven beyond a reasonable doubt that the defendant knew about the armed robbery and helped the person who committed it avoid discovery, arrest, trial, or punishment after the crime ended, you may find the defendant guilty of being an accessory after the fact. The felony of arm [sic] robbery ends when the defendants leave.

With respect to the crimes of unarmed robbery and accessory after the fact, the jury instruction was as follows: "[W]ith regards to Stanley Davidson, you may also consider the less serious crime of unarmed robbery or accessory after the fact." The elements of the crimes had previously been given.

We cannot conclude that given the context in which the instructions on aiding and abetting was placed, the jury nonetheless intuitively understood that they could have found defendant guilty of unarmed robbery on an aiding and abetting theory. Given the circumstances of the robbery, it also seems unlikely that the jury would do so in light of the fact that they found defendant not guilty of armed robbery on the aiding and abetting theory. Further, the erroneous unarmed robbery instruction also directly implicates and undermines the conviction on an aiding and abetting theory given that the prosecution would have to prove that defendant possessed either the requisite intent or acted knowing that his accomplices did. See *People v Spry*, 74 Mich App 584, 596; 254 NW2d 782 (1977).

Therefore, we believe that the erroneous unarmed robbery instructions "'"seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the

defendant's innocence."'" *Carines, supra* at 763-764, quoting *Olano, supra* at 736-737 (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]). Accordingly, the prosecution's argument that the failure to instruct on larceny from a person is harmless is correspondingly undermined. Further, this is not a situation where the error to instruct on larceny from a person can be dismissed as harmless because "the jury had the choice of a lesser offense and rejected in favor of conviction of a higher offense." *People v Beach*, 429 Mich 450, 493; 418 NW2d 861 (1988). Because the instructions conflate the crimes of accessory after the fact and unarmed robbery, we believe jurors following those instructions could reasonably conclude that once they found defendant had acted as an accessory after the fact, they necessarily should find him guilty of unarmed robbery. In such a situation, the rule of *Beach* is inapplicable.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald