STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 19, 2001
v	No. 212903 Recorder's Court
WALTER BUDZYN, Defendant-Appellant.	LC No. 93-000667-02

Before: Talbot, P.J., and Doctoroff and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of involuntary manslaughter, MCL 750.321, at his second trial, in 1998. We affirm.

I

The prosecution's theory of the case was that at around 10:20 p.m. on November 5, 1992, Malice Green and Ralph Fletcher were driving in Green's vehicle and stopped and parked outside Fletcher's residence at 3410 West Warren.[1] Officers Budzyn (defendant) and Nevers pulled up behind them even though no traffic violation had been committed and they knew that Green's car was properly registered to him. At around the same time, several persons came out of Fletcher's residence, including Robert "Joe" Hollins, Theresa Pace, and Robert Knox. Knox started to head back to the rear of Fletcher's home; defendant got out of the car and chased him, patted him down, and brought him back to the front of the house. Defendant patted Fletcher down as well, but seized nothing from either man. As Green got out of his car, Nevers asked to see his license. Green proceeded to the passenger side of his car, sat down in the passenger seat with his legs out and feet on the ground, and turned toward the glove compartment. Defendant shined his flashlight on Green and saw Green's fist was clenched. The onlookers, Hollins, Knox, and Pace, assumed Green was holding some sort of cocaine or drugs. Defendant grabbed Green's hand and in an instant, defendant was in Green's car on top of Green, straddling him and striking Green with his flashlight, and telling Green to open his hand. The onlookers told Green to open his hand, and asked Nevers to come and do something about defendant. Nevers came around to the

[1] At several points during trial this address mistakenly was referred to as 3710 W. Warren.

passenger side of Green's car, struck Green on the knee with his flashlight and told Green to give it up. Nevers told the civilians they could go, and they started to leave. Nevers went to the driver's side of Green's car and started beating Green with his flashlight while defendant held Green down. Soon after the civilians were told to leave, two EMS technicians that happened to be driving an EMS vehicle down Warren stopped at the scene to help. The EMS drivers observed Nevers striking Green on the head with his flashlight. At this point, Green's head was hanging out of the driver's side of his car, there was blood everywhere, and Nevers was telling Green to open his hand. A second EMS vehicle stopped to help. The drivers of the second EMS vehicle observed the arrival of Sgt. Freddie Douglas in a marked car; Douglas walked over and told Nevers to "take it easy." Several officers from the Third Precinct arrived, including officer Lessnau, who pulled Green out of the car and down into the street, on his stomach. They attempted to handcuff Green. Several officers, including Lessnau, punched and kicked Green while he was on the ground. Green was handcuffed and EMS personnel began to help him, but Green's condition was already grave and he was not fully conscious. Green suffered a seizure on the street, and his vital signs began to fail in the ambulance en route to the hospital. They stopped, tried to resuscitate him, but got no vital signs. Once at the hospital further resuscitation efforts were unsuccessful. At 10:46 p.m. Green had no vital signs. The only thing that came out of Green's hand was a piece of paper. He was holding car keys in his other hand. Officers remained at the scene for about an hour, during which defendant and Nevers washed blood off their hands with peroxide obtained from EMS. The prosecution asserted that while the officers did not intend to kill Green, they intended some serious harm, and at a minimum subjected him to a high degree of risk of death by repeatedly hitting him in the head, so that defendant was guilty of murder, or at least involuntary manslaughter based on gross negligence.

The defense's theory of the case was that when defendant grabbed Green's hand because he suspected Green had drugs in his clenched fist, Green kicked defendant in the legs, causing defendant to turn around and fall into Green's car backwards, landing on top of Green on his back. The defense maintained that while defendant was in Green's car, defendant was trying to get out and did not know where Nevers was or that Nevers was striking Green on the head. The defense's theory as read to the jury in final instructions was that:

> Walter Budzyn claims that when he encountered and confronted Malice Green on the night of November 5, 1992 he acted within the lawful bounds of his authority as a police officer. That he personally did not use excessive force against Mr. Green. Mr. Budzyn claims that he grabbed Mr. Green's wrist because he had a reasonable suspicion that Malice Green had additional rocks of cocaine in his hand. Mr. Budzyn claims that the limited force he used during the ensuing struggle between he and Mr. Green was justified based upon Officer Budzyn's attempt to subdue Malice Green, in his attempt to place Mr. Green under arrest for the felony possession of cocaine.
>
> Mr. Budzyn claims further that he did not beat or strike Mr. Green. That he did not use a flashlight at all during his physical struggle with Mr. Green. Mr. Budzyn claims further that at no time did he strike Malice Green in the head with a flashlight. That he did not cause any of the injuries to Malice Green's head as described by the medical examiner.

> He claims further that he did not aid or assist Larry Nevers or any other police officer in inflicting any injuries to the head of Mr. Green. He claims further that he was unaware of the brutality and severity of confrontation taking place between Larry Nevers and Malice Green.
>
> Walter Budzyn claims that the force that he used on the night of November 5, 1992 was reasonable, lawful and justified. That he is not responsible for any actions taken by other persons, merely by virtue of his own presence on the scene. Walter Budzyn claims he's not guilty of these charges.

II

Defendant first argues that the trial court reversibly erred in giving the jury the option to convict him of involuntary manslaughter under an aiding and abetting theory, as there was insufficient evidence as a matter of law to support conviction under that theory, and the jury's general verdict did not preclude the possibility that defendant in fact was convicted as an aider and abettor. Defendant concedes that there was sufficient evidence for the jury to convict him of involuntary manslaughter as a principal.

Defendant further contends that the trial evidence, even viewed in a light most favorable to the prosecution, shows there was an independent and voluntary intervening act, i.e., the beating Nevers inflicted on Green, that proximately caused Green's death if it is assumed that defendant did not personally administer the fatal blows and was thus not a principal actor. Defendant contends that it is highly likely that the jury found guilt based on an aiding and abetting theory, rather than as a principal. He argues that the jury instructions "impermissibly allowed the jury to find Budzyn guilty of involuntary manslaughter, even if he did not strike any blows to Green, if he acted with gross negligence during part of the incident that led to Green's death." Defendant asserts that under *People v Zak,* 184 Mich App 1; 457 NW2d 59 (1990), even where a person acts in a grossly negligent fashion or commits acts not intended to cause death, that person is not criminally liable for a death actually and proximately caused by an intervening intentional act of a third person. He argues that the trial court should have granted the defense objection to the involuntary manslaughter instruction at least to the extent of limiting the aiding and abetting theory solely to the charged offense of second-degree murder.

A

The prosecution requested that the jury be instructed on involuntary manslaughter as a lesser offense of murder. Although defendant objected to the involuntary manslaughter instruction, he does not challenge the propriety of that instruction on appeal. Rather, he challenges the jury's being given the option to convict of involuntary manslaughter on an aiding and abetting theory. Defendant did not, however, object to an aiding and abetting instruction, in connection with involuntary manslaughter or otherwise.

At trial, the prosecution proceeded under only one theory of involuntary manslaughter--gross negligence, and the jury instructions given were limited to that theory.[2] See n 3, *infra.*

B

This Court reviews claims of instructional error de novo. *People v Hubbard,* 217 Mich App 459, 487; 552 NW2d 493 (1996). Involuntary manslaughter is a cognate lesser offense of second-degree murder. *People v Heflin,* 434 Mich 482, 496-497; 456 NW2d 10 (1990), *People v Beach,* 429 Mich 450, 477-478 n 13; 418 NW2d 861 (1988). Where a cognate lesser offense jury instruction is requested, the trial court must review the evidence adduced at trial to determine if it would support a conviction of the cognate offense. *People v Bailey,* 451 Mich 657, 668; 549 NW2d 325 (1996), amended 453 Mich 1204; 551 NW2d 163 (1996). Involuntary manslaughter is "the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty." *People v Datema,* 448 Mich 585, 596-597; 533 NW2d 272 (1995), quoting *People v Ryczek,* 224 Mich 106, 110; 194 NW 609 (1923).

One who procures, counsels, aids or abets in the commission of any offense may be tried and convicted as if he directly committed the offense. *People v Greaux,* 461 Mich 339, 344 n 7; 604 NW2d 327 (2000); *People v Kelly,* 423 Mich 261, 278; 378 NW2d 365 (1985); MCL 767.39. To support a finding that a defendant aided and abetted a crime, 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 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." *People v Carines,* 460 Mich 750, 757-758; 597 NW2d 130 (1999), quoting *People v Willie Turner,* 213 Mich App 558, 568-569; 540 NW2d 728 (1995), disapproved in part on other grounds, *People v Mass,* 464 Mich 615, 628; 628 NW2d 540 (2001). A jury instruction on aiding and abetting is appropriate where there is evidence that more than one person was involved in committing a crime and that the defendant's role in the crime may have been less than direct commission of the crime. *People v Bartlett,* 231 Mich App 139, 157; 585 NW2d 341 (1998). An aider and abettor's state of mind may be inferred from all the facts and circumstances. *Willie Turner, supra* at 568.

Jury instructions are read as a whole rather than piecemeal to establish error. *People v Bell,* 209 Mich App 273, 276; 530 NW2d 167 (1995). Juries are presumed to have followed the instructions. *People v Graves,* 458 Mich 476, 486; 581 NW2d 229 (1998).

C

We reject defendant's claims of error for several reasons. First, defendant did not object to the giving of the aiding and abetting instruction. He objected to the involuntary manslaughter

---

[2] The trial court ruled pretrial that the prosecution could not proceed to the jury on an involuntary manslaughter theory of failure to act and the jury was instructed accordingly. See n 3, *infra.*

instruction, but he does not challenge the giving of that instruction on appeal. Second, there was evidence to support the giving of the aiding and abetting instruction relating to involuntary manslaughter, and sufficient evidence to convict of aiding and abetting involuntary manslaughter. Third, defendant's contention that the jury might have convicted him of involuntary manslaughter on an aiding and abetting theory although it found that he did not hit Green on the head and that he did not really help Nevers by holding Green down while Nevers hit Green, i.e., that his conduct was more than a failure to act but less than conduct related enough to Green's death to constitute aiding and abetting involuntary manslaughter, is pure speculation. The prosecutor did not argue in the context of involuntary manslaughter that defendant's culpable conduct was setting in motion the course of events that resulted in Green's death. The prosecution's theory of the case was that defendant was guilty of murder and actually hit Green in the head. Alternatively, the prosecution argued that defendant's holding Green down in the car while knowing Nevers was beating Green and to assist in that, constituted aiding and abetting involuntary manslaughter. Fourth, the jury instructions adequately conveyed to the jury the requirement that defendant share the intent to commit the crime or know of Nevers' intent, and the requirement that defendant cause or aid and abet someone in causing the death.[3]

---

[3] The trial court instructed the jury in pertinent part:

> Now, it is the theory of the prosecution here that the defendant is guilty of the charge of second degree murder, as presented in the prosecution's closing arguments.
>
> * * *
>
> I'm going to give you what is called aiding and abetting.
>
> Now, what you – that could be self-explanatory, but aiding and abetting is a theory of law that allows the prosecution to say that the defendant was the main actor himself, or that he aided, abetted, or assisted someone else in doing so. So, when I give you the instructions on second degree murder, on involuntary manslaughter you can look at in the sense of the defendant being the main actor, or aiding and abetting. That again depends on how you view the evidence, and how you decide the facts in the case.
>
> Now, the law basically says that he who aids and abets is considered to be a principal in the eyes of the law. Therefore, it was not necessary for the prosecution to charge the defendant in this case only as a principal. That is, as a person who directly committed the crime. The prosecution is permitted to contend that the defendant was either the principal offender, or an aider and abettor of the crime charged.
>
> In order to aid and abet another to commit a crime it is necessary that the defendant willfully associate himself with the criminal venture, and willfully

(continued…)

(…continued)

participate in it as he would in something he wishes to bring about. That is to say that he willfully seeks, by some act, to make the criminal venture succeed.

An act is willfully done if done voluntarily, and intentionally, and with the specific intent to do something the law forbids.

In this case the defendant is charged with committing the offense of second degree murder or involuntary manslaughter, or intentionally assisting someone else in committing those crimes.

Anyone who intentionally assists someone else 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 abettor. To prove this charge, in terms of aiding and abetting, the prosecution must prove each of the following elements beyond a reasonable doubt.

First, that the alleged crime was actually committed either by the defendant or someone else. It does not matter whether anyone else has been convicted of that crime.

Second, that before or during the crime the defendant did something to assist in the commission of the crime.

Third, the defendant must have intended the commission of the crime alleged, or must have known that the other person intended its commission at the time of giving the assistance.

It does not matter how much help, advice, or encouragement the defendant gave. However you must decide whether he intended to help another commit the crime, and whether his help, advice, or encouragement actually did help, advise, or encourage the crime.

In criminal law the phrase aiding and abetting includes all forms of assistance rendered to the perpetrator of a crime. This terms [sic term] comprehends all words or deeds which may support, encourage, or incite the commission of a crime. It includes the actual [or] constructive presence of an accessory and [sic in] pre-concert with the principal for the purpose of rendering assistance if necessary.

The amount of advice, aid, or encouragement is not material if it had the effect of inducing the commission of the crime.

To be convicted as an aider and abettor the defendant must have had the requisite intent himself, or participated in the crime while knowing that his co-participant possessed the requisite intent.

(continued…)

(…continued)

To be convicted as an aider and abettor of a crime that requires specific intent the defendant must have had the specific intent himself, or participated while knowing that his co-participant had that specific intent.

Even if the defendant knew that the alleged crime was planned or was being committed, the mere fact that he was present when it was committed is not enough to prove that he committed the crime, or assisted in committing in the crime.

Now, in this case, as I said, . . . the Information is in no way evidence of the charges. The Information simply informs as to what the charge is.

The Information charges that . . . . the defendant did with intent to kill, or do great bodily harm, or to act in wanton and willful disregard of the likelihood that the natural tendency of said act would cause death or great bodily harm, kill and murder one Malice Green.

Now, the elements of second degree murder. And again, understand again that the theory of aiding and abetting applies.

* * *

If you find the defendant guilty of second degree murder you do not consider the lesser offense of involuntary manslaughter.

If you find not guilty as to second degree murder, or if you're unable to agree as to that you consider the lesser charge of involuntary manslaughter.

* * *

. . . . *Involuntary manslaughter* is the intentional [sic, the court later corrected itself and said "unintentional"] killing of another without malice, or the death occurs by the commission of some lawful act committed in a grossly negligent manner.

To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt.

First, that the defendant Walter Budzyn caused the death of Malice Green. That is, that Green died as a result of blunt force injury caused by the defendant, or that the defendant aided and abetted someone else in causing the death of Green.

Second, in doing the act that caused Green's death the defendant acted in a manner that was grossly negligent towards human life.

(continued…)

Lastly, there is no legal impediment to a conviction of involuntary manslaughter on an aiding and abetting theory based on the evidence presented at trial.

1

As defendant concedes, there was sufficient evidence at trial from which the jury could have convicted defendant of involuntary manslaughter *as a principal*.[4]

(…continued)

> Involuntary manslaughter does not require an intent to kill, or an intent to cause serious injury, but does require a finding of gross negligence towards life.
>
> Let me define gross negligence.
>
> Gross negligence means more than carelessness. It means willfully disregarding the results to others that might follow from an act.
>
> In order to find that the defendant was grossly negligent you must find each of the following three things beyond a reasonable doubt.
>
> First, that the defendant knew of the danger to another. That is, he knew there was a situation that required him to take ordinary care to avoid injuring another.
>
> Second, that the defendant could have avoided injuring another by using ordinary care.
>
> Third, that the defendant failed to use ordinary care to prevent injuring another when to a reasonable person it must have been apparent that the result was likely to be serious injury.
>
> Third [sic]**,** that the Defendant Budzyn caused the death of Green without lawful excuse or justification. There is no crime if the killing was justified or excused.
>
> Finally, I instruct you that Mr. Budzyn's failure to act, or his failure to intervene in a confrontation between Larry Nevers and Malice Green is not sufficient by itself to constitute the crime of involuntary manslaughter.
>
> The same rule applies whether the defendant . . . is a private citizen or a police officer.
>
> The criminal law requires more than a failure to act for a conviction of this offense, or of the primary offense of second degree murder.

[4] Defendant's appellate brief states:

> The jury had the option to resolve the disputed evidence on whether Defendant actually struck Mr. Green on the head in the prosecution's favor. The medical

(continued…)

Defendant's argument that, as a matter of law, one cannot aid and abet involuntary manslaughter is incorrect. One may be an aider and abettor of involuntary manslaughter where "there exists a common and shared purpose to participate in the act which results in death." *People v Clarence Turner,* 125 Mich App 8, 13; 336 NW2d 217 (1983).[5]

2

There was sufficient evidence from which the jury could have convicted defendant of involuntary manslaughter as an aider and abettor, thus the trial court's reading of an instruction to that effect did not constitute error.

The prosecution presented testimony from civilians who were present during the initial stages of the incident. Ralph Fletcher testified that he and several others were standing by defendant on the passenger side of Green's car when Green went to the passenger side of his

---

(…continued)

> evidence could not distinguish which blows caused death, or which injuries were caused by blows from different persons. . . . a jury could have found that both Defendant Budzyn and Officer Nevers inflicted potentially fatal blows, and thus there were two proximate causes of death. The jury could also have concluded that Officer Budzyn did not have the requisite state of mind for a conviction of second degree murder, but was instead acting in a grossly negligent manner in striking Mr. Green in the head during the struggle in his car.

[5] In *Turner, supra,* the defendant was found guilty as an aider and abettor of statutory involuntary manslaughter (death from firearm pointed intentionally but without malice), MCL 750.329, following a bench trial. On appeal, he argued that aiding and abetting presupposes an intent and, because intent is not an element of involuntary manslaughter, one cannot be convicted of aiding and abetting involuntary manslaughter. This Court rejected that argument and affirmed, noting that "[a]lthough proof of specific intent is essential for aider and abettor liability for specific intent crimes, it does not follow that there can be no aider and abettor liability for a crime which requires neither specific intent nor malice." *Id.* at 11. This Court concluded:

> The extent of defendant's complicity in the instant case is clearly sufficient to render him liable as an accomplice to involuntary manslaughter. While he may not have intended that Ms. Thompson shoot and kill the victim, defendant did direct Ms. Thompson to point the loaded gun at the victim and clearly intended that she do so. Defendant was not merely present; his procuring of the weapons and verbal encouragement had the effect of inducing the commission of the crime.
>
> *We conclude one may be an aider and abettor of involuntary manslaughter where, as here, there exists a common and shared purpose to participate in the act which results in death*—the pointing of a loaded firearm at another individual. [*Clarence Turner, supra* at 12-13. See also Saltzman, Michigan Criminal Law: Definitions of Offenses (2d ed), § 4-2(b)(2), pp 265-266.]

vehicle to look in the glove compartment, and sat down with his feet outside on the ground. Fletcher testified that defendant shined his flashlight on Green and asked Green what he had in his hand. Fletcher testified that Green had his hand clenched and he (Fletcher) could not see what was in it. Fletcher testified that defendant then got in the car, straddled Green, and started hitting Green's hand with a flashlight and telling Green to open his hand. Fletcher testified that he (Fletcher) said to Green at that point "whatever it is open your hand," and that he said to Nevers "tell your boy to stop. Tell him to stop." Fletcher testified that after a few minutes, Nevers told him and the others to leave, that after they started walking away they turned around, and that he saw Nevers hit Green with his flashlight twice, and that he could hear the blows, although he could not see Green. Fletcher testified that when Nevers was striking Green with the flashlight, defendant was on top of Green. Nevers saw that Fletcher saw him striking Green and Nevers then pointed for Fletcher to get in the house. Fletcher testified that after he went in the house, he came out again when he saw EMS coming, and saw Green "laying in the street like he was going through a seizure or something. Blood everywhere." Fletcher testified that he saw Nevers, defendant and Lessnau push Green's car forward and that he saw "all three of 'em" take peroxide and wash the blood off their hands. Fletcher testified that he did not see Green strike or kick defendant, did not see Green spin defendant around or see defendant go into the car on his back, and that he (Fletcher) was standing right there, five or six feet from the car and that he could see into the car. Fletcher testified that he did not see defendant strike Green in the head, and did not see defendant drop his flashlight.

Emmanuel Brown testified that he observed defendant shine his flashlight into Green's car in Green's direction, and that after Green opened the glove compartment and felt around the dashboard, Brown heard defendant ask Green what was in his hand. At that time, Nevers was on the driver's side of the police car. After defendant asked Green what he had in his hand, defendant leapt into the car through the passenger side and he and Green began struggling somewhat, as if Green was trying to keep his hand toward his body and defendant was trying to pull it away from his body. Brown testified that "as the struggle got more intense," defendant began to wrestle with Green. He testified that he could see through the rear window that defendant had Green's head "almost in a headlock kind of position" with his left arm, that they began wrestling even more, and then defendant started striking Green's body with the flashlight in his right hand. When asked whether he could see where the flashlight was hitting Green, Brown responded, "[o]nly thing I seen was the reaction on Malice Green go back as the motion of the flashlight was going towards his body. As far as me actually seeing any contact, no, I do not." Brown testified that he saw defendant strike Green multiple times, maybe seven to ten of them. Brown testified that he did not see Green strike defendant or see Green act aggressively. Brown testified that about five minutes into the struggle, Nevers came around to the passenger side of Green's car, reached in and tried to pull Green's hand out, and struck Green's hand several times with a flashlight, while defendant was on top of Green. After Nevers struck Green's hands with the flashlight, he struck him in the knee area a couple of times with his flashlight, while defendant was still in the car on top of Green. Nevers then went to the driver's side of Green's vehicle, opened the rear door and shone his flashlight as though he were looking for something, and then opened the front driver's door and began to pull Green towards him, while defendant was still on top of Green and "keeping him pinned down in the seats." Nevers struck Green a number of times, in a location Brown could not see directly but assumed was Green's head area, while defendant was on top of Green, and Nevers then left the driver's side of

the vehicle, came around to the passenger side of the vehicle and told Brown, Joe Hollins, Ralph Fletcher, Robert Knox, and Theresa Pace that they could leave. Brown testified that around the time defendant crawled inside the car and struck Green, Hollins and Fletcher "were telling Officer Nevers to get his partner, and also telling Malice Green that whatever he had to give it to him." As Brown started heading home, he saw EMS pull up. He sat on his porch for several minutes and then walked back to the scene, where he observed Green lying on his back in a pool of blood. Brown testified that he saw Nevers wiping blood off his hands, and that he believed that defendant might have wiped blood off his hands too. Brown testified that twenty or thirty minutes before the incident, he had smoked one ten dollar package of crack cocaine, about the size of a pencil eraser, that the effect lasted about five or ten minutes, and that he had been convicted of retail fraud over $100.

On cross-examination, Brown testified that defendant and Nevers had arrested him before the incident in question, and that he had been smoking crack cocaine off and on for five or six years before November 5, 1992, including on that date.

Robert Hollins testified that he had known Green, Fletcher and Knox since childhood, and that Pace was his girlfriend on November 5, 1992. Hollins testified that he, Knox, and Pace were standing on the sidewalk by Green's car. Green started to go through the glove compartment, defendant grabbed Green's hand, which was clenched, and struck it with a flashlight while telling Green to open his hand. Hollins testified that he and Fletcher asked Green to open his hand, and asked Nevers to control defendant. Nevers said to them "if it ain't nothing but a little cocaine ain't nobody going to jail." Hollins testified that defendant wrestled Green on his back in the front seat of Green's car, which had bucket seats. He testified that Green's upper body was raised up and his head was in the driver's seat. Defendant and Green were face to face in the car, and while defendant was on top of Green, defendant was swinging his flashlight with an overhand motion, apparently hitting Green on the head, and hitting the steering wheel and the dashboard as he swung. Nevers came around to the passenger side of Green's car and struck Green on the knees with his flashlight, and told the civilians to leave. The last thing Hollins saw was defendant and Nevers still struggling with Green. Hollins testified that Green did not strike, threaten, or kick defendant or Nevers and that defendant did not spin and fall backwards into the car.

On cross-examination, Hollins testified that he saw defendant swinging his flashlight at Green but did not see any of defendant's swings make actual contact with Green's head.

Robert Knox's December 1992 preliminary examination testimony was read into the record, as he died before the instant trial. Knox testified regarding Green's going to the passenger side of his car, and that defendant asked Green to open his hand and when Green did not, defendant hit him on the hand with his flashlight. Knox testified that he (Knox) said to Nevers to tell his partner to be cool, and that Nevers did not respond. Defendant continued hitting Green, and progressively forced his way up on Green, at some point getting half his body in Green's car. Green was sitting in the car, slumped back, and he and defendant were face to face. Knox testified that he saw Nevers swinging the flashlight at Green's upper body three or four times, but could not see where the blows struck. Green could not get up because defendant was over him and had his weight on him. He testified that he did not see Green fight back. After

Nevers told the onlookers to leave, Knox testified that he went back in Fletcher's house and when he came out later Green was laying in the street, with a lot of blood coming from his head. At that point he saw defendant strike Green about three times in the stomach with his flashlight.

Theresa Pace testified that defendant grabbed Green's wrist and hit it with his flashlight after Green would not open his hand. Defendant's legs were still outside the car when he was hitting Green's hand with the flashlight, but he later got on top of Green "like in a straddle form." She testified that Green was laying back across the whole driver's seat, and that defendant "started beating him in the head with his flashlight." When asked if she could see actual contact being made, she responded that she could not, "but if you were seeing what I saw there's no place else he could have been hitting." Pace testified that she was about ten or twelve steps away from the passenger side of Green's car when these events occurred. She testified that she could not say for sure what was in Green's clenched hand, and that she thought maybe it was a baggie that you put crack rocks in. Pace testified that she heard Green say something like "why are you doing this to me," and did not see him kick or fight back. She testified that Green was not moving after defendant got on top of him in the car. She testified that the others asked Nevers several times to get his partner, and that he went around to the passenger side of Green's car and tapped Green on the knee a couple of times. Nevers then told the onlookers to leave, which they did. Pace testified that she did not see Nevers strike Green other than on the knees. Pace's credibility was vigorously challenged by defendant. Evidence was presented that she had given somewhat contradictory statements, that she had received money from the police, and that her description of defendant's actions was physically impossible.

Scott Walsh, an EMS employee, testified that he and his partner arrived on the scene after another EMS unit, and that he saw Nevers on the driver's side of the car, standing over a man, whom he later learned was Malice Green. Green was between Nevers' legs, laying face down with his lower half of his body on the floorboard of the car, and a large amount of blood underneath him. Nevers had Green's left arm and was yelling at him to drop what he had in his hands, and then Nevers struck Green in the back of the head. Walsh testified that when he observed Nevers straddling the man on the ground, defendant was on the passenger side of the car, standing on the curb. Walsh testified that the puddle of blood was already there beneath Green before Walsh witnessed any blows. Walsh testified that he saw that Green had keys in his right hand. After Nevers struck Green on the back of the head once with the flashlight, Walsh saw Nevers strike Green with the flashlight on the right chest and right abdomen. Walsh testified that Sergeant Freddie Douglas was at the scene at the time. Walsh testified that then a uniformed officer, whom he later learned was Officer Lessnau, came and dragged Green from the car, that Green's head did not strike the pavement when Lessnau dragged him from the car, and that Lessnau dragged Green, positioned him on the ground and knelt into his back. Walsh saw Nevers hit Green's hands with a flashlight and strike him in the right side again with the flashlight. At the same time that Nevers was striking Green on the hands, Lessnau punched Green on the left side with a closed fist. Walsh testified that at some point, the process of handcuffing Green began, and once he was handcuffed, Lessnau got up and kicked Green in the upper back, near the neck area. Walsh testified that he did not see Green take any offensive action toward or verbally threaten the police officers, and that Green "wasn't responding to anything." Walsh testified that something took his attention away for a moment, and when he turned back, he and his partner, Mr. Martinez, began treatment, put a cervical collar around

Green's neck and attempted to bandage his head. Walsh noticed that Green's respiration rate was slowing and that he was using his abdomen, rather than his chest, to breathe. Walsh testified that that was usually a sign of either a head injury or a central nervous system injury. He assisted in getting Green into the other EMS unit. Walsh testified that when they started to put the cervical collar on Green, he started having a seizure, his whole body shaking for about thirty seconds. Walsh testified that Green's head did not strike the pavement when he had the seizure because they were protecting his head. Walsh testified that after the companion EMS unit left the scene, defendant came up to him and asked him whether he had anything with which to clean up blood, stating that his partner had blood on him and wanted to clean up. Walsh gave defendant peroxide and gauze, but did not see anyone use those items. Walsh testified that he was not sure whether defendant was in a position to observe the blows he (Walsh) had seen delivered to Green.

Dr. Bader Cassin, at the time Chief Medical Examiner, testified that Green died of "multiple blunt injuries delivered to the head," he opined between nine and twelve or so blows to the head. He testified that Green had injuries on the face as well as the scalp, that the facial injuries included a split in the foreskin through the right eyebrow, a roughly horizontal split in the skin and underlying tissue over the left eyebrow, scraping on the left side of the cheek, and several splits at the hairline and continuing beyond the hairline into the scalp. Dr. Cassin testified that certain injuries "were deep enough to expose the surface of the skull." When asked his opinion as to the number of blows given to create these injuries, Dr. Cassin responded that the photographs showed ten separate injuries and that there were other injuries not depicted in the photographs, on the right side of the scalp. When asked his opinion as to the type of object used to inflict the head injuries, Dr. Cassin testified that the object was blunt edged as opposed to a knife-like object, that it was elongated and fairly straight, and that the injuries were consistent with the metal flashlight introduced into evidence, which was wrap-like and weighed several pounds. Dr. Cassin testified regarding other injuries to Green's body, including to the elbow, both hands, and knees. He testified there was swelling and bruising in the elbow area and streak-like scrapes on the back of the elbow, which could have been produced by something striking the elbow or the elbow striking an object, as from a fall. Dr. Cassin testified that Green's left hand was swollen and bruised on the back as well as on the tops of the fingers and knuckles, which could have been caused by multiple impacts to the hand or multiple impacts of the hand against some hard surface. He could not say how many impacts caused the bruising to the hands and knuckles, other than to say that it was a fairly complex injury pattern, and that he expected that it was two or three blows at least. Dr. Cassin testified that Green's right hand was also swollen, particularly around the knuckles, was bruised to a lesser extent than the left hand, and was scraped. He opined that these injuries were caused by at least a couple of impacts. Both of Green's knees had scrapes similar to his right elbow, which could have been inflicted by the flashlight.

Dr. Cassin testified that when the brain sustains injuries like those Green received, it can react in several ways, including by seizure, which Green was reported to have had minutes before his death. He testified that there was actual observable injury to Green's brain. He opined that the multiplicity of blows, perhaps as many as twelve or more

> caused a multiplicity of insult areas. The brain bouncing around inside the skull which is likewise moving very rapidly and suddenly in jerking fashion causing bleeding into the surface and generalized swelling. This sort of insult to the brain, by virtue of the bleeding and irritation it causes with the constriction of small blood vessels, as well as the squeezing of the brain by generalized swelling causes pressure and abnormal blood circulation in the brain, can result directly in death, or death via some other mechanism; such as seizure.

Dr. Cassin further testified regarding the blows to Green's head:

> *Q*. Now when you looked at the blows to the head, is there any way you would be able to form an opinion as to the sequence of blows, or the order in which the blows were administered to the person?
>
> *A*. In this particular case no. In some cases yes, but only because there have – there's a different character to some of the blows. If there had been, for instance, some healing. In this case they all appeared to have been delivered at about the same time, or within a fairly close range of time.

Dr. Cassin testified that there was a trace of alcohol present in Green's urine, that Green probably had had alcohol within the last twelve hours, and that cocaine was present in the blood and probably was taken in the three to four hours before death.

Dr. Cassin testified that he could not form an opinion as to how many different rod like instruments were used to create Green's injuries, that they could have been caused by two or more flashlights, and that some of the less deep injuries to the head could have been caused by a flashlight that would not have gotten blood on it.

Defendant testified on direct examination that he and Nevers had been partners on occasion before the incident, and were partners for three or four weeks before the incident. On November 5, 1992, he and Nevers worked from 4:00 p.m. to midnight, and both were in plain clothes. They were answering radio runs, and Nevers was driving. Around 10:20 p.m., a red Ford crossed in front of them and he noticed it had bullet holes in the front passenger door area. Nevers said something about the car resembling a car that had been taken in a carjacking. They were in the area of Warren Avenue and 23rd Street. Defendant testified that the vehicle had not done anything improper, but they wanted to stop the vehicle because it fit the description of the vehicle from the car jacking and it had bullet holes. He testified that he saw a man running, who turned out to be Mr. Knox, and that he chased him, but had not seen him leave the car, had not seen him commit a crime, and had not seen a weapon. Defendant caught up with Knox, stopped him, and did a quick pat down for offensive weapons. Knox cooperated. Defendant testified that there were several persons standing around and there was a person in the vehicle, that he patted down one of them, Mr. Fletcher, and found no weapons. Defendant then noticed that the driver, who turned out to be Malice Green, was coming around the vehicle behind him, walking toward the passenger side. Defendant turned to Green and asked for his license. Green sat down in the front passenger seat of the vehicle, with his feet out of the vehicle, and put a wallet and what defendant thought was a driver's license right next to his leg; his other hand was clenched into a fist resting on his leg. Defendant testified that Green reached across to open the glove box and

when he turned his hand something that looked similar to a dime rock of cocaine fell onto the floor of the vehicle. Defendant testified that he was standing right in front of Green at that time, close enough to touch him, and that he believed Green was trying to hide the rock. He could see the rock on the vehicle floor because he was shining his flashlight into the vehicle. He was holding his flashlight in his left hand because his .38 revolver was holstered on his right side. In addition to the revolver, he had handcuffs, but no other weapons.

Defendant testified that when he saw the rock fall he grabbed Green's right arm at the wrist area, and Green kicked defendant's left leg. When Green kicked him in the knee, defendant spun around and fell backwards into the car on top of Green, and the flashlight hit the car and fell to the ground. Defendant was holding Green's arm with both hands and told him to give up the dope. Green said nothing and did not open his hand. Defendant testified that "[a]bout that time Larry came to the passenger side of the vehicle and he got into the car on top of us, and now we're squashed." Defendant testified that his gun was right next to Green, that he told Nevers that Green had some more dope, and that Nevers started hitting Green on the knuckles with his flashlight. Green did not open his hand and was swinging his arm, Nevers pried Green's fingers apart "and another rock of cocaine fell out between them." Defendant testified that about that time he and Green "we're halfway across the seat and he [Green] pulls his arm out." Defendant testified that at that point he had no more control of Green, that "the dope could end up disappearing," by Green eating it or throwing it, and that Green was behind him and could access defendant's weapon. Defendant testified that he did not understand why Green "was struggling so much over the dope."

> *Q.* At that point in time, from the moment that you described for us with both hands on Mr. Green's arm, what physical contact, other than that, while you're still inside that car did you have with Mr. Malice Green?
>
> *A.* Just that I was sitting on top of him.
>
> *Q.* Were you hitting him?
>
> *A.* No.
>
> *Q.* At that—you've indicated that while you were still outside the car Mr. Green kicked you two times.
>
> *A.* Yes.
>
> *Q.* Did he kick at all when you were inside the car?
>
> *A.* No.
>
> *Q.* You've indicated that he did hit you on the back a couple of times?
>
> *A.* Yes.
>
> *Q.* A fair statement that wasn't something that caused injury or anything like that to you?

A. No.

Q. Okay. As Malice Green moves back towards the driver's side of the car what did you do?

A. At that point I fell in between the two seats. I was holding myself up with my right arm on the back seat.

Q. For what purpose?

A. So I wouldn't fall all the way over.

Q. Alright [sic].

A. He was still moving and he was lifting me.

Q. What were you trying to do?

A. I was trying to get control of him, but I couldn't.

Q. Did you know where Larry was?

A. No, I didn't.

Q. Did you have any sense of where Larry was at the point in time that we've just gotten to now?

A. No.

Q. Could you see him?

A. No.

Q. Did you hear anything about that point in time that might or might not have indicated that at least somebody else was around you and Mr. Green?

A. No.

Defendant testified that after he made two radio calls for assistance, someone whom he believed was Nevers opened the driver's door, although defendant did not see him do it. The dome light in the car was not working, so it was dark. Defendant heard the driver's side door open and testified that "there was scuffling going on by it." He testified that he "heard a couple of thumps" while Green was still moving and struggling underneath him. Defendant testified that he did not know Green was being hit at that time, and that Green said nothing. Defendant tried to get out of the vehicle and finally did. Just before he got out of the car he heard sirens coming, he testified he started to pry himself out from between the seat, pulled himself out of the vehicle, and confirmed that he still had his weapon and radio. He saw his flashlight lying on the passenger side floor, bent down to get it and as he bent down "I saw [Nevers'] flashlight come

down and land on Mr. Green's head and stop there. Larry [Nevers] was holding him like from falling out of the car."

> *A.* As I looked through the light was coming down and Larry was holding him by his hair.
>
> *Q.* You're holding the flashlight in your right hand.
>
> *A.* Yes.
>
> *Q.* You're indicating with your left hand how you saw Larry Nevers holding onto Mr. Green; is that correct?
>
> *A.* Yes.
>
> *Q.* Alright. Now would you, just as best you can, demonstrate the speed and the trajectory of that flashlight as you saw it as you looked through that car.
>
> *A.* It came down and it stopped. It was like he was holding his head.
>
> *Q.* How many times did you see Larry Nevers do that?
>
> *A.* Just once.
>
> *Q.* Do you know yourself, Mr. Budzyn, how many times Larry Nevers may have hit Malice Green?
>
> *A.* No, I don't.

Defendant testified that at no time did he have Green in a headlock, at no time did he hit Green with his flashlight or with anything else, and that he had a tight grip on Green's arm when they were struggling. Defendant testified that he saw Nevers had bloody hands, saw blood on Green's head, and that he then saw Officer Robert Lessnau pull Green out of Green's car with his hands. Defendant testified that he did not see what happened to Green when he was pulled out of the car, and that he heard Sgt. Douglas say loudly to Nevers, "Take it easy, Larry." Defendant testified that he could not see Nevers at the time because he (defendant) was bent over picking up his flashlight, four rocks of suspected crack, a pen and cigarettes from the floor of the vehicle. After leaving the vehicle, he saw Nevers leaning on Green's vehicle "huffing and puffing," with blood on his hands and coat. Defendant asked Nevers if he was okay, Nevers nodded, and defendant then went to their police car and wrapped the dope in a paper. He then went back to Nevers because Nevers was saying "under the seat, under the car." Defendant testified that he did not see Green at that time, and that they moved Green's car forward to look for more dope but there was nothing there. Defendant then went back to the EMS unit and asked for something to get the blood off Nevers' hands, because he was concerned about possible contamination from the blood. Defendant testified that Nevers had a lot of blood on his hands, coats, pants, and shoes. Defendant saw that Nevers' flashlight had a fair amount of blood on it. One of the EMS technicians gave him a bottle of peroxide and a cloth, and he took the bottle to Nevers, who held out his hands with his flashlight, and defendant "just started pouring it all over him." Defendant

then went to the patrol car to get his book because Douglas said he wanted the names of everybody at the scene, and wanted the area protected. Defendant testified there was no blood on him, and that he made no effort to wipe his own flashlight. Sgt. Douglas then drove defendant and Nevers to the Homicide Department downtown and defendant and Nevers were separated.

Based on the foregoing, the jury could have concluded that defendant aided and abetted involuntary manslaughter by holding Green down while Nevers inflicted blows to his head. The jury could have concluded based on defendant's conduct that he shared Nevers' intent to see Green subdued, even through the infliction of severe blows to the head, and that he held Green down to assist in that effort. Because there was evidence from which a reasonable jury could reach this conclusion, it was proper to give the aiding and abetting instruction in connection with involuntary manslaughter. Further, because the evidence, when viewed in the light most favorable to the prosecution, is sufficient to support such a conclusion, defendant was properly convicted on this theory.

3

Defendant's reliance on *Zak, supra,* in support of his argument that he could not properly be convicted of involuntary manslaughter under an aiding and abetting theory because one cannot recklessly aid and abet a crime, is misplaced. First, the question in *Zak* was whether the evidence supported the giving of an involuntary manslaughter instruction, and the Court's decision was based on the evidence presented at trial. In *Zak,* this Court concluded that the trial court correctly denied the defendant's request for such an instruction. Zak argued that the instruction would have been proper because his sale to the shooter of the weapon that was used to kill the victim was the negligent performance of a lawful act because Zak knew the shooter was unstable and should not have access to a weapon. This Court rejected Zak's argument on the basis that the evidence did not support that his conduct in this regard was grossly negligent and, even if it was, such conduct was not the cause of the death. *Id.* at 7-8. This Court noted:

> Similarly, we do not believe that the fact that Zak assisted defendant Anderson in gaining access to the victim's apartment constitutes a grossly negligent act upon which a finding of involuntary manslaughter can rest. In essence, defendant argues that Anderson would never have been able to gain access to the apartment if Zak had not accompanied him and that Zak knew that the victim might react violently in a confrontation over the permit issue and further knew that Anderson was armed at the time. This, Zak contends, constitutes grossly negligent conduct by Zak. We disagree. Again, *Zak does not provide us with any authority for the proposition that gross negligence includes the commission of an act which is not otherwise harmful but which provides the opportunity to another to commit a criminal act. Rather, we believe the correct analysis is that either Zak knew Anderson was going to commit a murder, in which case Zak would be equally guilty of the murder as Anderson on the basis of accessorial responsibility, or he was unaware that a crime was afoot, in which case he would have no criminal culpability. In sum, we do not believe that acts which are not negligent by themselves become negligent merely because they afford another a better opportunity to commit a crime.*

> *However, even if one can term Zak's conduct as constituting gross negligence, a theory of involuntary manslaughter being committed by Zak must nevertheless fail due to a lack of causation between the negligent acts and the homicide. For there to be criminal responsibility, the defendant's acts must have caused the harm, that is, the killing.* [*People v*] *Sealy,* [136 Mich App 168, 175; 356 NW2d 614 (1984)]; see also *People v Aaron,* 409 Mich 672, 708; 299 NW2d 304 (1980).
>
> * * *
>
> *Zak would, in essence, have us conclude that one can negligently or recklessly aid or abet a murder, with such negligence establishing involuntary manslaughter. Such a conclusion, however, would be contrary to the rules concerning accessorial liability. A person is guilty as an aider and abettor if he possesses the same intent as the principal. People v Kelly,* 423 Mich 261, 278; 378 NW2d 365 (1985). Thus, to be guilty of first-degree murder as an aider and abettor, the defendant must possess the intent to kill. See *id.* Without such an intent, there would be no criminal responsibility. [*Zak, supra* at 8-13.]

In the instant case, there was testimony that after Green went to the passenger side of his car, sat in the seat and was looking or went to look through the glove compartment, defendant grabbed Green's arm, told him to drop what was in his hand, hit Green's hands with his flashlight when Green would not open his hand, got on top of Green and straddled him, struggled and hit Green with his flashlight on a location that appeared to several of the eyewitnesses to be on Green's head, and that while defendant was holding Green down in the car, Nevers came to the passenger side of the car, struck Green on the knees with his flashlight, and then went to the driver's side and struck Green on the head with his flashlight. A number of eyewitnesses reported that before Green was dragged out of the car, there was a lot of blood on and around him, and on Nevers. Consequently, in contrast to Zak, there was evidence here that defendant's conduct constituting gross negligence, either hitting Green in the head or sitting on him to assist Nevers in his beating, was causally connected to Green's death. Nevers' actions in continuing the beating after Green was removed from the car cannot be seen as a separate intervening event as a matter of law. There was no evidence the subsequent blows alone caused Green's death. See discussion of *Bailey, infra.*

Defendant's involvement could be seen as being similar to that held to be inadequate to constitute involuntary manslaughter in *Zak, supra,* if defendant's version of the events is taken as true and the focus is confined to defendant's conduct in initiating the arrest. However, because the jury was not obliged to accept defendant's version of the events in the face of contrary testimony, and there was evidence from which the jury could conclude that defendant willfully restrained Green so that Nevers could continue to beat him, the trial court did not err in giving the aiding and abetting instruction.

4

During the discussion of jury instructions, defense counsel sought to clarify that as to the involuntary manslaughter charge, the act that would support the conviction would be "the blunt force injury caused by the defendant or the same blows which the defendant aided, aids and abets" "[t]hat it would not be the starting up of the encounter or the illegal stop, or the grabbing of the hand." The court responded "yes," but the prosecutor argued that he should not be restricted to asserting that only certain acts were grossly negligent. Defense counsel responded that there had to be a nexus between the unlawful conduct and the death, and asked that the only permissible argument for the prosecutor on involuntary manslaughter be that the unlawful act be the cause of death. The court focused on the requirement that the grossly negligent act cause death, and the prosecutor stated that the jury would be so instructed. After further discussion, the court seemed to draw the distinction between the prosecution's theory and what the jury had to find to convict, and clarified that while the prosecutor could argue about all of defendant's conduct and assert that he was grossly negligent, the jury would have to find that the death was caused by the grossly negligent act of delivering the blunt force injuries. The court and counsel then discussed the permissible theories of involuntary manslaughter.

Notwithstanding these discussions regarding permissible arguments and theories of manslaughter, the prosecution later withdrew its request to have the jury instructed on the "unlawful act not amounting to a felony" prong of involuntary manslaughter, and, most importantly, never asserted in argument that any conduct short of inflicting blows or purposely staying on top of Green knowing that Nevers was beating him would constitute gross negligence supporting involuntary manslaughter. In fact, the prosecutor specifically disavowed any argument that the conduct in investigating the house or drugs was gross negligence, stating "I'm saying that when it gets to excessive force, and you're beating somebody's brains out and you're helping by staying on them, and you're part of that, that's the gross negligence."

Further, the instructions pertaining to intent and causation did not permit the jury to find defendant guilty of aiding and abetting involuntary manslaughter on the basis that he initiated an unlawful arrest or set in motion the sequence of events that led to Nevers beating Green, but without the intent that he do so. The instructions made clear to the jury that in order to convict defendant of aiding and abetting involuntary manslaughter, the jury had to find that defendant *willfully associated himself with the criminal venture, and willfully participated in it as he would in something he wished to bring about; that he willfully sought, by some act, to make the criminal venture succeed.* The court explained that defendant was charged with committing second-degree murder or involuntary manslaughter, or with *intentionally assisting* someone else in committing those crimes. The jury was further instructed that to convict of aiding and abetting, the jury had to find that *defendant intended the commission of the crime or knew that the other person intended to commit it at the time of giving the assistance,* and that defendant had the requisite intent himself, or participated in the crime while knowing that his co-participant possessed the requisite intent.

Regarding involuntary manslaughter, the court instructed that it is the killing of another without malice, or the death occurs by the commission of some lawful act committed in a grossly negligent manner. The court further instructed that to convict defendant, the jury must find that defendant *caused the death of Green, that is,* that Green *died as a result of blunt force injury caused by defendant, or* that defendant aided and abetted someone else *in causing Green's death.*

The jury was instructed that it had to find that *in doing the act that caused Green's death* defendant acted in a manner that was grossly negligent towards human life. Thus, the court adequately conveyed to the jury that to find defendant guilty the jury had to find that defendant either administered blunt force injuries that caused death or aided and abetting Nevers in causing the death, and that to conclude that he aided and abetted Nevers, the jury would have to conclude that he either shared Nevers' intent or knew of Nevers' intent at the time he took the acts that aided and abetted him. These instructions would not support a conviction if the jury believed that defendant was not intentionally restraining Green in the car, but was on top of him on his back because he was pulled into the car after he was spun around by Green's kick, and that he did not know that Nevers was administering blows and was not attempting to facilitate Nevers' doing so. Nor would the instructions support a conviction if the jury concluded that defendant wrongly confronted Green and the others, but did not participate in, or facilitate the acts causing death.[6]

5

Defendant's reliance on *Bailey, supra,* 451 Mich 657, for his argument that he could not legally have been convicted of involuntary manslaughter under an aiding and abetting theory is misplaced, as the *Bailey* Court noted:

> In assessing criminal liability for some harm, it is not necessary that the party convicted of a crime be the sole cause of that harm, only that he be a contributory cause that was a substantial factor in producing the harm. The criminal law does not require that there be but one proximate cause of harm found. Quite the contrary, all acts that proximately cause the harm are recognized by the law.
>
> > *If a certain act was a substantial factor in bringing about the loss of human life, it is not prevented from being a proximate cause of this result by proof of the fact that it alone would not have resulted in death, nor by proof that another contributory cause would have been fatal even without the aid of this act.* [Perkins & Boyce, Criminal Law (3d ed), p 783.]
>
> * * *
>
> Where an independent act of a third party intervenes between the act of a criminal defendant and the harm to a victim, that act may only serve to cut off the defendant's criminal liability where the intervening act is *the sole cause of harm*. Perkins & Boyce, *supra* at 784; *People v Elder,* 100 Mich 515; 59 NW 237 (1894) (The trial court erroneously instructed the jury that it could find the defendant guilty of manslaughter for knocking the decedent to the ground and putting him in a position in which he could be kicked by a third party even if the kick was the

---

[6] While defense counsel mentioned CJI2d 16.15 during argument, the failure to give that instruction is not raised as a claim of error, and, in any event, the instructions given adequately covered the issue of causation.

sole cause of death and there was no concert of action between the assailants.) [*Bailey, supra* at 676-678.]

Here, there was evidence from which the jury could conclude that Green died of the beating inflicted by both defendant and Nevers while they acted together to arrest him, or by the beatings inflicted by Nevers both while defendant was on top of Green and after. A defendant may be convicted of a crime if his culpable conduct was a proximate cause of death. *People v Tims*, 449 Mich 83, 99; 534 NW2d 675 (1995). In light of the eyewitnesses' testimony, the jury reasonably could have disbelieved defendant's account that he did not know Nevers was striking Green on the head while he (Budzyn) was on top of Green in Green's car. Further, the evidence was such that the jury could have concluded that the strikes to Green's head by Nevers were not the sole proximate cause of Green's death, but rather, defendant's holding Green down during Nevers' strikes to his head or defendant's own strikes to Green's head were also a proximate cause of Green's death. There was ample evidence to support a conviction of involuntary manslaughter, including on the issue of causation. Further, under *People v Smielewski*, 235 Mich App 196, 208-209; 596 NW2d 636 (1999), the trial court was not required to instruct the jury regarding unanimity of the theory upon which their verdict rested, and the jury need not be unanimous regarding whether it was convicting defendant as a principal or as an aider and abettor.

6

Defendant's argument rests on the proposition that the jury convicted him of aiding and abetting involuntary manslaughter although it actually concluded that he did not hit Green in the head and did not deliberately assist Nevers in holding Green down. This argument is pure speculation. First, the verdict did not state that the jury convicted defendant as an aider and abettor. The verdict form was silent regarding whether defendant was convicted as an aider and abettor or a principal. Second, the theory of guilt now adopted by defendant was not argued below. The prosecutor did not argue a theory of guilt based on conduct short of defendant inflicting blows or intentionally restraining Green while Nevers inflicted blows. The prosecution's closing argument focused on the discrepancy between the eyewitnesses' account of defendant's interaction with Green, especially regarding the manner in which defendant entered the car (intentionally and forward facing) and was positioned with respect to Green (straddling him), and defendant's testimony that he spun around and fell into the car on his back when Green kicked him, and that he remained on his back and stuck between the seats and was unable to observe what Nevers was doing. The prosecutor also focused on certain blood-splatter evidence[7] and on the conduct expected of a police officer. The prosecutor argued that defendant and Nevers acted together, that the beating was inflicted with an intent to cause great bodily harm or with knowledge that the blows created a high degree of risk of death, and that defendant was thus

[7] There was conflicting expert testimony regarding the blood spatter inside Green's vehicle. The prosecution's expert testified that the blood spatter evidence was consistent with Green being hit while inside his vehicle, as well as being hit while his head was hanging out of the driver's side of the vehicle, while the defense's experts opined that the blood spatter evidence was consistent with Green's being hit by someone standing outside the driver's side door.

guilty of murder. In applying the involuntary manslaughter instruction to the case, the prosecutor argued:

> But that basis of it is is [sic] that the defendant knew that there was a danger in and of it [sic?], and that there was a situation that required him to take ordinary care to avoid injuring another.
>
> That he could have avoided injury by using ordinary care. That he failed to use ordinary care to prevent injuring another. When to a reasonable person it must have been apparent that the result was likely to be serious. So, it's like a less of a standard.
>
> *I suppose a way you could arrive at that conclusion in this case would be to conclude that he never hit the man. Walter Budzyn never hit the man. But he was on top of him knowing that Larry Nevers was hitting him, and held him down to assist in that. Now, you could arrive at something like that that way. But, it's my argument to you that the facts are not going to lead you to this involuntary manslaughter, but it's going to lead you to murder.*

III

Defendant next argues that the trial court abused its discretion in denying his motion for mistrial after the prosecution misstated the law under which the jury could convict defendant of involuntary manslaughter.

The trial court held before trial that the prosecution could not proceed to the jury on an involuntary manslaughter theory of a failure to act; however, the prosecution referred to the failure to act theory in closing argument and used a demonstrative exhibit that included that theory as part of the law of involuntary manslaughter. Defendant contends that his motion for mistrial on that basis should have been granted because the prosecution's misconduct was deliberate or flagrantly negligent, and in the context of this case, was highly prejudicial. He asserts that even though the trial court gave a cautionary jury instruction, the error was not harmless because there was undisputed evidence that defendant did not attempt to intervene when Nevers was striking Green in the head with his flashlight, and evidence had been introduced that the DPD's policy on use of excessive force to effectuate arrests stated that officers had a duty to prevent other officers from using improper levels of force. Defendant argues that the prosecution's misconduct denied him a fair and impartial trial. We disagree.

We review the court's denial of the motion for mistrial for abuse of discretion. *People v Wolverton,* 227 Mich App 72, 75; 574 NW2d 703 (1997). An abuse of discretion will be found only where the denial of the motion deprived the defendant of a fair and impartial trial. *Id.* The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette,* 214 Mich App 336, 342; 543 NW2d 342 (1995). Although defendant asserts that reversal is automatic because "the error [was] so offensive to the maintenance of a sound judicial system as to require reversal," no structural error undermining the reliability of the

proceedings was involved here. Further, our Supreme Court has stated that "[t]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *People v Gearns*, 457 Mich 170, 188; 577 NW2d 422 (1998), overruled in part on other grounds *People v Lukity*, 460 Mich 484, 492-494; 596 NW2d 607 (1999), quoting *Smith v Phillips*, 455 US 209, 219; 102 S Ct 940; 71 L Ed 2d 78 (1982).

Although the prosecution's references to the failure to act theory were clearly improper, the trial court did not abuse its discretion in denying defendant's motion for mistrial. The trial court interjected immediately after the prosecutor's remark during closing argument regarding a failure to act, and corrected the prosecutor. Moreover, after interjecting, the trial court cautioned the jury that it was to ignore the prosecutor's remark.[8] The final jury instructions were tailored to

[8] The events unfolded as follows:

> MR. BAKER: [ ] You are going to be instructed on this gross negligence, which is involuntary manslaughter. You're going to be shown that it's more than careless. It means willfully disregarding the results to others that might follow from an act or failure to act.
>
> To find gross negligence you have to find that the defendant knew the danger to another. That is, he knew there was a situation that required him to take ordinary care.
>
> THE COURT: Excuse me, Mr. Baker. If I heard that correctly, please, you said a failure to act.
>
> MR. BAKER: Pardon me?
>
> THE COURT: You said something about a failure to act. That is not correct. Okay.
>
> MS. STANYAR: It's on the board and he used the words.
>
> THE COURT: Yes. You used the words failure to act. That's not correct.
>
> Members of the Jury, ignore that part.
>
> MR. BAKER: But –
>
> MS. STANYAR: Your Honor, could we have the instruction read as well now, because the board also doesn't include the last part of the instruction.
>
> THE COURT: No. They've already been told that. I will give them the law on this. We'll get to that. . .
>
> [Prosecutor continues with closing argument.]

(continued…)

(…continued)

Immediately after the prosecutor finished his closing argument, the trial court cautioned the jury:

> Members of the Jury, I will give you an instruction later. But, again, *ignore* that part of the, *what was just said about failure to act*. *That's not a part of the gross negligence*. I will give you the instruction.

After the jury was excused, defense counsel moved for a mistrial:

> MS. STANYAR: Your Honor, the being here [sic] is whether to move for a mistrial at this point. The debate is between Mr. Howarth [co-counsel] and myself.
>
> This is what he showed the jury in blow up form, okay. I guess the Court ordinarily presumes good faith on the part of a prosecutor. But when you blow up something to this size, when you make all the efforts to do this I find it hard to believe that the inclusion of the failure to act phrase in here is completely innocent.
>
> I think for us to have to then stand up during, you know, to object to that when clearly we had discussed it. There was a pre-trial ruling. There was an appeal. There has been a post-trial ruling. The Court is going to add additional language and still he puts a blow up that says, not only did he put it in there he reads it to the jury. He reads the term or failure to act. I think that it can't be understated how prejudicial this is. This kind of a statement, I think we all in this courtroom understand that if there's any possibility of a compromise verdict it's going to be in the area of the involuntary manslaughter, and it's going to be focusing on precisely that language.
>
> I don't think this is a small error. I don't believe that it's unintentional. It is – I can go back and point to two other occasions at least where this Court has ruled and Mr. Baker has gone on and said things. Certainly I've been reprimanded for that on the one occasion that I've been guilty of that, but we have now had, this is the third time. This is just not a small thing.
>
> THE COURT: Okay.
>
> I am certainly perturbed, you know, by this. After we went through all of this, taking such care throughout the entire case, from the very beginning, from the outset and again yesterday. I know that when we had the discussions yesterday about this that Mr. Baker was not present, Mr. Donaldson from the prosecution side, and Ms. Stanyar with someone else was here from the defense side when we talked about this. I had corrected, you know, my copy of this and I made the

(continued…)

the gross negligence theory of involuntary manslaughter on which the case was submitted to the

(…continued)

> assumption, you know, that was being done on both sides. I certainly didn't know – I think what I'm going to ask to be done from this point on, before anything is shown to the jury I want to see it first and have the other side, you know, see it first. You know, it just irks me to no end to think that we would get this far in this case and something to come up that would cause some problem that could have easily, you know, be prevented.
>
> I take your motion, you concern as a motion for mistrial. However, I would deny it. I think that a curative instruction, that I caught it right then and I said it to the jury, and I said it then. In addition I will give the curative instruction that you worded and requested, Ms. Stanyar on that. The prosecution did object to the strength of that as being something that they didn't want, but I think I see definitely more even the need for it now. So, that – your instruction definitely will be given. I think that with what I said and that that should be enough.
>
> MR. DONALDSON: Your Honor, if I might make a record.
>
> THE COURT: Go ahead.
>
> MR. DONALDSON: This was no fault of Mr. Baker's. It was I who created the exhibit. I think the record from yesterday will reflect that it was I who suggested that language be stricken from Ms. Stanyar's instruction.
>
> When I came in this morning I pulled the instruction and blew it up and through inadvertence; and, indeed, did leave the language in it. So, whatever blame there is it falls in my lap.
>
> THE COURT: Well, I can't accept that totally, Mr. Baker (sic). You're working together. You were aware of it. That makes me even more concerned because you were the one that was here yesterday when we talked about that. So, for you to blow that up like that, you know, and then present [sic]. But more than that, Mr. Baker knows also that – we've talked about that particular part of this as not being something that the jury can consider. So, I cannot accept any excuse for it.
>
> MR. DONALDSON: I'm not suggesting anything other than it was inadvertent. There's been an allegation that it was something deliberate.
>
> THE COURT: I understand. I appreciate that. Okay.

The court then went off the record. Once back on the record, defense counsel requested that the trial court read the additional involuntary manslaughter instruction regarding failure to act immediately, as well as at the end of the case. The trial court denied the request to read the instruction immediately, stating that it would include the additional instruction in its final jury instructions.

jury, and included instructions that failure to act or failure to intervene in a confrontation between Nevers and Green was not sufficient by itself to constitute the crime of involuntary manslaughter, and that the criminal law required more than a failure to act to convict of either involuntary manslaughter or of the primary offense of second-degree murder. See n 3, *supra*.

Defendant challenges the adequacy of the cautionary instructions to the jury, arguing that the trial court should have instructed that the alleged failure to act should play no part in their deliberations and that they were limited to resolving whether defendant's affirmative actions were grossly negligent. It appears, however, that defendant submitted the instruction he now challenges,[9] and it does not appear that defendant requested a change in the instruction after argument. Defendant's appellate brief does not cite to the record in support of this argument.

Our conclusion that the court did not err in denying the motion for mistrial is not altered by defendant's argument that the error was not harmless because Lt. Deborah Robinson, the prosecution's expert on police procedures, had testified that the DPD's policy on use of excessive force to effectuate arrests stated that officers had a duty to prevent other officers from using improper levels of force. The jury was instructed that this duty was a matter for departmental discipline only, and not a statement of the law. Further, the prosecution did not argue that defendant was guilty of gross negligence in failing to intervene to protect Green from Nevers.

Under the circumstances, the prosecutor's conduct did not deny defendant a fair and impartial trial.

IV

Defendant next argues that the trial court reversibly erred in denying his motion under MRE 404(B) to admit evidence of the decedent's prior history of physically resisting arrests, while permitting the prosecution to present evidence under MRE 404(B) of defendant's alleged activities during prior investigations.

A

The trial court permitted the prosecution to present testimony that 1 ½ weeks before the incident in question, defendant and Nevers entered Mr. Fletcher's residence without a search warrant, to demonstrate a pattern of behavior by defendant and Nevers toward Fletcher's house, outside of which Green's death occurred. Defendant contends that the trial court permitted the prosecution to introduce evidence of an allegedly illegal prior entry into Fletcher's residence as a

---

[9] The lower court record contains proposed jury instructions marked up by the trial court. The instruction defendant challenges has the same type face as the typed theory of the case defendant submitted to the trial court. Further, review of the trial transcript reveals that, although the defense objected to the jury being instructed on involuntary manslaughter generally, and the case was indeed submitted to the jury on the gross negligence theory of involuntary manslaughter only, it was defendant that proposed the instructions defendant challenges (stating that a failure to act is not sufficient by itself to constitute the crime of involuntary manslaughter).

"pattern of conduct," but refused to allow the defense to show Green's pattern of physical resistance to arrests, which was relevant to defendant's description of how Green's resistance was the cause of his entry into Green's car. Defendant contends that either both areas of testimony should have been admitted, or neither motion should have been granted.

This Court reviews the trial court's determination whether to admit other acts evidence for abuse of discretion. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205; 520 NW2d 338 (1994). To be admissible under MRE 404(b), other acts evidence must be offered for a proper purpose, be relevant under MRE 402 as enforced through MRE 104(b), the probative value of the evidence must not be substantially outweighed by its potential for unfair prejudice, and the trial court may, on request, provide a limiting instruction to the jury. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998), citing *VanderVliet*, *supra* at 55. Error in the admission of other acts evidence does not require reversal unless it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001), citing *Lukity*, *supra* at 495-496.

Two witnesses testified at trial regarding this evidence. Ralph Fletcher testified that about 1 ½ weeks before November 5, 1992, he was at home in the kitchen with Michael Jackson and Robert Hollins, and defendant and Nevers came in his door. Fletcher testified that he did not keep his door locked, but that it was closed, that the officers had not been invited in, did not show him a search warrant and did not seize anything from the house or arrest anyone. Fletcher testified that the officers said that they were looking for a woman, and that defendant went to the front of the house where a woman named Nicky Pitts was in a bedroom, while Nevers remained in the kitchen with Fletcher and his friends and asked them for identification. Fletcher testified that Nevers said to Jackson, "So Michael Jackson get on the floor and do a break dance. We laughed, you know, that was it." On cross-examination, Fletcher testified:

> *Q*. Okay.
>
> While Officer Nevers was in your home, is it fair to say, that he was joking with you?
>
> *A*. Yes.
>
> *Q*. You were joking back with him.
>
> *A*. We were laughing at his jokes.
>
> *Q*. Okay. But you were joking back with him; right?
>
> *A*. Um hum. Yes.
>
> *Q*. Is that yes? It was not hostile between the two of you?
>
> *A*. No it wasn't.

Q. Okay. Now I understand what you're saying that—let me back up. Back at that time is it fair to say that people came in and out of your house --

A. Yes.

Q. --pretty freely?

A. Yes. Still do.

Q. A lot of people did?

A. Still do.

Q. They still do. Okay. And, Officer Nevers didn't kick down the door, he walked in; is that right?

A. He pushed the door open.

Q. Okay. Well, you have to do something to get the door open.

A. Okay.

Q. He pushed the door open. Okay. Did you tell him get out?

A. No I didn't.

Robert Hollins testified similarly. He testified that he was not searched, nothing was seized from the house, no search warrant was shown, no one was arrested, Green was not there that day, and no one told defendant and Nevers to leave. Hollins testified that he spoke in a friendly manner with Nevers:

Q. Alright. Did you talk to him?

A. Yes.

Q. Friendly or unfriendly?

A. Friendly. He asked me a question.

Q. He asked you where somebody was: didn't he?

A. He asked who was that person.

Q. Okay. But there was nothing unfriendly about this meeting with yourself and -

A. No.

Defendant testified that before the incident in question he had gotten information that prostitution and drug activity went on at the building at 3410 West Warren and that it "was like a

crack house." He testified that around the end of March 1992 he and Nevers were working together when a description and plate number of a car thought to be involved in a holdup came over the radio. He testified that he and Nevers ran the plate on the computer, found that the car was registered in their precinct, and went to the address looking for the vehicle. They did not find the vehicle there, they started checking the narcotics houses and spotted the car at Warren and 23rd, parked in front of Fletcher's residence, and kept it under constant surveillance. Eventually a male and a female came out of 3410 West Warren and went to the vehicle. He testified that the two persons matched the description of the perpetrators, that they were patted down, a blue steel revolver and money were recovered, and they were arrested.

Defendant also testified that a DPD special order was issued around 1992 stating that officers should check known narcotic residences, investigate the persons there, make notes, and turn the notes in at the end of the day. Regarding being at Fletcher's residence 1 1/2 weeks before the incident in question, defendant first testified that he did not remember being there, and then that he was not there. After being shown his testimony at his first trial that he might have been there, he testified that he could have been, but did not remember being there.

Even assuming that the evidence regarding the earlier visit to Fletcher's house was erroneously admitted, reversal would not be warranted because it cannot be said that the error was outcome determinative. *Lukity, supra.* Although the jury could have inferred from the evidence that defendant and Nevers did illegally enter Fletcher's house, the jury could as easily have concluded that the officers were on legitimate police business looking for a person when they came in Fletcher's unlocked door, and that they were simply doing their jobs and did nothing illegal once in the Fletcher household. Fletcher's testimony that he and his friends were joking with Nevers, and Fletcher's and Hollins' testimony that the interaction between the officers and those present in Fletcher's kitchen was "friendly" would seemingly undermine that defendant was prejudiced by admission of this evidence. There was no dispute at trial that Fletcher gave persons access to his house for smoking crack cocaine, for which Fletcher was paid. There was no dispute that Fletcher lived in an area known for crime, where prostitution and drug use occurred regularly. There was testimony that Fletcher's residence was known to have been involved in illegal activity. The jury could have concluded that defendant and Nevers' coming in Fletcher's house 1 ½ weeks before the incident in question was not unusual given these circumstances, and did not cast defendant in a bad light.

Assuming that the jury interpreted the testimony as reflecting negatively on defendant, it is highly unlikely that the testimony convinced the jury of defendant's guilt of involuntary manslaughter. It is unlikely that the jury reasoned that defendant's conduct in entering the residence somewhat forcefully and without a warrant established that he was a "renegade cop" who was determined to "get" the persons associated with that residence at any cost, including engaging in the conduct alleged to have occurred with respect to Green. It is unlikely that the outcome of the trial would have been different had this testimony not been admitted. Reversal is not warranted under these circumstances.

B

Defense counsel argued below that the proposed evidence of Green's prior conduct should be admitted because it showed, under MRE 404(b), 405 and 406, that Green had a pattern

of resisting arrest, becoming combative with the officers, refusing to give up narcotics to officers, and injuring officers.

We find no reversible error. The witnesses to the incident uniformly testified that Green would not open his clenched hand when ordered to do so by both defendant and Nevers. The witnesses also testified that although Green did not strike defendant, he struggled with defendant in the front seat of the car, and continued to struggle even after his friends urged him to open his hand. Thus, there was no real dispute that Green, to that extent, "resisted" arrest. Under these circumstances, defendant has not shown that exclusion of the other acts evidence, assuming it was error, affected the outcome.

Affirmed.

/s/ Michael J. Talbot
/s/ Martin M. Doctoroff
/s/ Helene N. White