STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT A. COUNCIL,

Defendant-Appellant.

UNPUBLISHED
November 16, 2001

No. 223102
Wayne Circuit Court
LC No. 97-002813

Before: Holbrook, Jr., P.J., and Cavanagh and Gribbs,* JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317. He was sentenced to eleven to twenty-five years' imprisonment. He appeals by leave granted. We affirm.

Defendant first contends that there was insufficient evidence of malice necessary to support a conviction as an aider and abettor for second-degree murder. We disagree.

To be convicted of a crime, including second-degree murder, a defendant may be found to be guilty as a principal or as an aider and abettor. See MCL 767.39. "Where . . . a defendant is being held vicariously liable for a killing committed by another, he must be found to have had the same mens rea required to convict the principal, that is malice . . . ." *People v Spearman*, 195 Mich App 434, 439; 491 NW2d 606 (1992), rev'd in part 443 Mich 870, overruled on other grounds *People v Veling*, 443 Mich 23 (1993). "[I]f an aider and abettor participates in a crime with knowledge of his principal's intent to kill or to cause great bodily harm, he is acting with 'wanton disregard' sufficient to support a finding of malice." *Id*., quoting *People v Kelly*, 423 Mich 261, 271; 378 NW2d 365 (1985).

The evidence established that defendant understood the relationship between the victim and David Brown, the person who shot the victim. Defendant brought the victim to Brown and helped subdue him, aware that Brown was holding the victim at gunpoint. Although defendant denied knowing that Brown was going to shoot the victim, viewing the above evidence in the light most favorable to the prosecution, a rational jury could have found that defendant participated in the crime with knowledge of Brown's intent to kill.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Defendant next contends that the trial court's denial of his request to instruct the jury regarding the lesser misdemeanor offense of assault and battery was error mandating reversal. We review that decision for abuse of discretion. *People v Stephens*, 416 Mich 252, 265; 330 NW2d 675 (1982). "Failure to give such an instruction is an abuse of discretion if a reasonable person would find no justification or excuse for the ruling made." *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993).

In *Stephens, supra*, our Supreme Court stated five conditions for when an instruction on a lesser included misdemeanor offense should be given. A court must instruct concerning a lesser included misdemeanor where (1) there is a proper request, (2) there is an "inherent relationship" between the greater and lesser offense, (3) the requested misdemeanor is supported by a "rational view" of the evidence, (4) the defendant has adequate notice, and (5) no undue confusion or other injustice would result. *People v Corbiere*, 220 Mich App 260, 262-263; 559 NW2d 666 (1996). The first condition is that the party must make a proper request. *Stephens, supra* at 261. In other words, "the party must inform the court of exactly what lesser offenses are being requested." *People v Steele*, 429 Mich 13, 19; 412 NW2d 206 (1987). Defendant requested that the trial court give an instruction on assault and battery. Therefore, the first condition is satisfied.

The second condition is that there must be an inherent relationship between the greater offense and lesser misdemeanor offense. *Stephens, supra* at 262. The inherent relationship requires that the greater offense and lesser misdemeanor offense "relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense." *Id*., quoting *United States v Whitaker*, 144 US App DC 344, 349; 447 F2d 314 (1971).

The purpose of the second-degree murder statute is to protect the person against harm. See *People v Perry*, 460 Mich 55, 62; 594 NW2d 477 (1999). The purpose of the assault and battery statutes are also to protect persons against harm. See *Corbiere, supra* at 264. Therefore, the first part of the second condition is satisfied.

However, the second part of the second condition is not. When the lesser misdemeanor offense was a specific intent crime and the greater offense was a general intent crime, proof of the lesser misdemeanor offense is not established by proof of the greater, general intent offense because criminal intent is a required element in the lesser misdemeanor offense. *Id*. at 266. In this case, the lesser misdemeanor offense (assault and battery) is a specific intent crime, while the greater offense (second-degree murder) is a general intent crime. *People v Datema*, 448 Mich 585, 601; 533 NW2d 272 (1995); *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996). Thus, as in *Corbiere*, proof of the lesser misdemeanor offense is not necessarily or even generally established by proof of the greater offense because, unlike second-degree murder, assault and battery cannot be proved without establishing specific criminal intent. Therefore, the second part of the second condition is not satisfied.

The third condition is that "the requested misdemeanor must be supported by a rational view of the evidence adduced at trial." *Stephens, supra* at 262. Defendant argues that it was possible to find that he participated in beating the victim but had no knowledge of the impending murder and that therefore a rational view of the evidence supported the instruction. However,

this overlooks the evidence that the victim was beaten *and* killed, and the prosecutor chose to charge defendant only for the second of these crimes. The third element requires not only evidence of the lesser crime, but a differentiation sufficient to allow a jury to consistently find the defendant innocent of the greater and guilty of the lesser included offense. *Stephens*, *supra* at 262-263. In the present case, the jury could have convicted defendant of either or *both* crimes; therefore, the third condition is not satisfied. Because we have concluded that conditions two and three have clearly not been satisfied, we need go no further in assessing the other two factors.

Defendant also argues that reversal is required because the court's refusal to give the assault and battery instruction deprived the jury of the option of returning a conviction consistent with defendant's theory of the case. The general rule that a court must instruct on defendant's theory of the case is not aptly applied here for two reasons. The first reason is that our Supreme Court provided a specific framework in *Stephens, supra*, for evaluating when an instruction on a lesser misdemeanor offense should be given. The second reason is because of the rationale expressed above, that there were two distinct crimes and the issue in this case was not whether defendant was guilty of some other uncharged offense, but whether he was involved in the murder itself. Therefore, we reiterate our conclusion that the trial court did not abuse its discretion in refusing to give the assault and battery instruction.

Defendant's final argument on appeal is that the trial court, at sentencing, stated that because defendant was convicted of second-degree murder, a score of twenty-five points was mandated for offense variable three, and thus, the trial court failed to exercise its discretion and consider instruction B prior to scoring offense variable three. Defendant contends that, therefore, he is entitled to resentencing. We disagree.

"Appellate review of scoring decisions is very limited." *People v Hoffman*, 205 Mich App 1, 24; 518 NW2d 817 (1994). "This Court affirms a scoring decision if evidence exists to support the score." *Id*. Because defendant's crime was committed on March 6, 1997, the Supreme Court's sentencing guidelines apply. See MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

Under the sentencing guidelines in effect at the time, the relevant instruction for OV 3 for "Intent to Kill or Injure" instructs to score twenty-five when there is an "[u]npremeditated intent to kill; or intent to do great bodily harm; or the creation of a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result[.]" Michigan Sentencing Guidelines (2d ed, 1988), p 77. This is the intent necessary for second-degree murder, the crime for which defendant was convicted. Therefore, a score of twenty-five is proper unless instruction B is applicable.

Instruction B of the guidelines states, "[s]core '10' where a killing is intentional within the definitions of murder second degree or voluntary manslaughter but the death occurred in a combative situation or in response to victimization of the offender by the decedent." *Id*. In *Hoffman*, *supra* at 24, where the defendant argued that OV 3 should have been scored at ten, rather than twenty-five points, this Court stated that "[a] score of ten points is proper where the killing is intentional, but death occurred in a combative situation or in response to victimization. In stating that it had no discretion to score other than twenty-five points, the court only meant

that the factors showing a combative situation or response to victimization were not present on this record. No error arose in the scoring of the offense variables." *Id*.

Similarly, in the instant case, defendant argues that the trial court failed to exercise its discretion and consider instruction B, which requires a score of ten, when it stated that a score of twenty-five was mandated and did not mention instruction B at all. However, we find this analogous to *Hoffman*, *supra*; the trial court's reference to a score of twenty-five being mandated only meant that the factors showing a combative situation or response to victimization were not present on the record.

The evidence was that the victim was beaten and dragged down the stairs by defendant and another man, and then shot by Brown. Thus, the record supports the trial court's finding that there was no combative situation or response to victimization. Therefore, this Court affirms the trial court's scoring decision.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh
/s/ Roman S. Gribbs