STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED January 22, 2002
v	No. 219279 Wayne Circuit Court
RONALD B. JORDAN, Defendant-Appellee.	LC No. 98-010345 ON REMAND

Before: Hood, P.J., and Doctoroff and K. F. Kelly

PER CURIAM.

This case is before us on remand from the Supreme Court to consider issues raised but not addressed in our prior opinion.[1] In lieu of granting leave to appeal, our Supreme Court reversed this Court's decision and remanded "for consideration of issues raised but not addressed in its decision."[2] *People v Jordan*, 465 Mich 869; ___ NW2d ___ (2001). We now address those issues and affirm in part, vacate in part and remand for entry of order.

I. Basic Facts and Procedural History

This case arises out of the shooting death of Mr. Cedric Eldridge, on August 5, 1998. The shooting occurred in the basement of a home owned by Mr. Raymond McCarver. At this time, defendant was an occupant of Mr. McCarver's residence. Evidence adduced at trial established that on the night of the fatal shooting, defendant and another unidentified male went to Mr. McCarver's home. Mr. John Dixon, a friend of Mr. McCarver's, let defendant and the

[1] *People v Ronald B. Jordan*, unpublished opinion per curiam of the Court of Appeals, entered [05/11/01] (Docket No. 219279.)

[2] In our earlier opinion, we reversed defendant's conviction and remanded on the grounds that the trial court permitted a police officer to render his professional opinion that based on the witnesses' interviewed, one of the original suspects, Mr. Stanley Harper, was not involved in the crime. We held that by allowing the officer's testimony in this regard, the trial court effectively deprived defendant of the ability to put forth a viable defense especially considering that defendant's theory of the case was that Stanley Harper, not defendant, shot and killed the decedent. In light of our previous disposition, we held that we need not address the other two issues raised on appeal.

other unidentified male inside whereupon both proceeded to the basement together. Thereafter, Mr. Eldridge and Mr. Harper arrived at the house and Mr. Dixon let them in. Mr. Dixon testified that approximately five minutes after defendant arrived, defendant called him down into the basement and inquired whether Mr. Eldridge was upstairs because defendant wanted to speak with him. Pursuant to defendant's request, Mr. Eldridge went down into the basement.

Shortly thereafter, Mr. Dixon testified that he heard a noise coming from the basement and went to investigate. When he proceeded down the landing toward the basement, Mr. Dixon testified that he observed someone half way out the side door brandishing a gun. Mr. Dixon testified that he could not identify the individual that possessed the gun because he only saw the individual's arm and the hand in which the individual held the gun. After the commotion, Mr. Dixon testified that he proceeded into the basement and discovered the victim, Mr. Eldridge, laying on the floor.

Similarly, Ms. Della Gill, Mr. Eldridge's girlfriend, took the stand at trial and testified that on August 5, 1998, she and Mr. Eldridge returned to Mr. McCarver's house after shopping at the mall. Ms. Gill testified that when they entered the home, she proceeded to the bathroom while Mr. Eldridge proceeded down toward the basement. Ms. Davison, another woman at the house that evening, testified that she heard what sounded like arguing coming from the basement and advised Mr. McCarver that he should investigate. Very shortly thereafter, Ms. Gill testified that she heard a sound much like a firecracker. Ms. Gill indicated that when she came out of the bathroom, all she heard was the door and then recalls Mr. Dixon advising that Mr. Eldridge was shot. According to Ms. Gill's testimony, by the time she reached the basement, the only two individuals present were Mr. McCarver and Mr. Eldridge who was lying on the floor.

He testified that he was sitting in the dining room talking for about five or ten minutes when he got up to leave. He testified that as he proceeded to go down the landing to access the side door, he heard something that sounded like a "gun pop." Then, Mr. Harper testified that he crept down the basement stairs and observed defendant bending over the victim who was laying on the floor. Mr. Harper testified that he saw a shiny object in defendant's hand. When defendant noticed Mr. Harper's presence, defendant told him to "get the f--- upstairs."

Defendant was charged with felony murder. Over defense counsel's objection, the trial court provided an instruction to the jury on aiding and abetting. During deliberations, the jury inquired about the application of the aiding and abetting instruction. The trial court advised that aiding and abetting applied to all of the charges and the jury returned to deliberations. Thereafter, the jury returned their verdict finding defendant guilty of voluntary manslaughter and felony firearm. In accord with the jury's verdict, the trial court sentenced defendant as a fourth time offender, to consecutive sentences of seventeen to twenty-five years' imprisonment for voluntary manslaughter and two years for the felony-firearm conviction.

II. The Aiding and Abetting Instruction

On appeal, defendant argues that the prosecutor did not have sufficient evidence to warrant the aiding and abetting instruction. We do not agree. When reviewing challenges to the sufficiency of evidence, this Court "view[s] the evidence in the light most favorable to the prosecutor and determine[s] whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v Izarraras Placante* 246 Mich

App 490, 495; 633 NW2d 18 (2001). See also *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

A person that aids or abets the commission of a crime may be convicted and punished as if that individual committed the offense directly. MCL 767.39; *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). To establish that defendant aided and abetted the commission of a crime, the prosecutor must put forth evidence to prove that:

> (1) [T]he crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the principal in committing the crime, and (3) the defendant intended the commission of the crime or knew that the principal intended its commission at the time he gave aid or encouragement. *People v Norris*, 236 Mich App 411, 419; 600 NW2d 658 (1999).

As one court explained, "[t]he sin qua non of aiding and abetting is that more than one person must be criminally involved either before, during, or after the commission of a crime." *People v Parks*, 57 Mich App 738, 743; 226 NW2d 710 (1975). Indeed, aiding and abetting contemplates "all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime." *Turner*, *supra* at 568. (Citation omitted.) Additionally, it is not necessary to establish the identity of the principal "if the existence of *a* guilty principal is proven." *People v Wilson*, 196 Mich App 604, 611; 493 NW2d 471 (1992) (emphasis in original.) To submit the aiding and abetting issue before the jury, "the evidence need only tend to establish that more than one person committed the crime, and that the role of a defendant charged as an aider and abettor amounts to something less than the direct commission of the offense." *Id*. citing *People v Vaughn*, 186 Mich App 376, 382; 465 NW2d 365 (1991).

In the case at bar, the prosecutor put forth testimony establishing that defendant arrived at the home that evening with an unidentified male and that upon entry, both immediately proceeded to the basement. Further, testimony established that *defendant requested* to speak with the victim and pursuant to defendant's request, the victim went down to the basement. Very shortly thereafter, witnesses for the prosecution testified that they heard a "pop" or something that sounded like a "firecracker." Mr. Dixon testified that after he heard the sound, he caught a glimpse of someone going out the door. Although Mr. Dixon could not identify the individual, he did testify that he observed that individual holding a gun. Similarly, another witness for the prosecution testified that after the shot, he proceeded into the basement and observed defendant bending over the victim who was laying on the floor. This witness also testified that defendant had a shiny object in his hand.

Although mere presence is, in and of itself, insufficient to establish that a defendant aided or abetted the commission of a crime, *Norris, supra* at 419-420, the prosecutor presented testimony sufficient to establish that either defendant committed the crime himself, or alternatively, aided and abetted the principal in accomplishing that feat. As the trial court properly observed, "[t]here is no eye witness to what actually occurred. It could have been either one of them under the evidence presented on the record."

Considering the evidence in a light most favorable to the prosecution reveals that a rational trier of fact could find the essential elements of aiding and abetting beyond a reasonable doubt sufficient to convict defendant on that theory. Accordingly, the trial court did not commit error requiring reversal by providing the aiding and abetting instruction to the jury.

To the extent that defendant argues that the aiding and abetting instruction rendered by the trial court caused the jury undue confusion thus mandating reversal, we similarly disagree. A review of the record reveals that the trial court twice instructed the jury on the theory of aiding and abetting before the jury began deliberations. During its deliberations, the jury expressed confusion as regards aiding and abetting. In response and with both trial counsel in agreement, the trial court advised the jury that the aiding and abetting instruction applied to all charges and advised them that they could refer to the written instructions for assistance. The jury did not express any further confusion regarding the instructions and returned their verdict accordingly.

Reviewing the instructions rendered by the trial court in their entirety, we find that the instructions fairly presented the issues for trial and sufficiently protected the defendant's rights. *Piper, supra* at 642. Accordingly, we do not find error requiring reversal in this regard.

IV. Defendant's Sentence

Finally, defendant argues that the trial court violated the two-thirds rule enunciated in *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972) when it sentenced defendant to seventeen to twenty-five years' imprisonment for voluntary manslaughter. In *Tanner*, the court held that any sentence providing for a minimum which exceeds two-thirds of the maximum is an improper sentence violative of the intermediate sentencing act. *Id*. at 689. In the case at bar, the trial court's seventeen year sentence violated the two-thirds rule by four months. The prosecution agrees.

Imposition of a partially invalid sentence does not mandate setting aside the entire sentence, but rather the offending sentence "is to be set aside only `in respect to the unlawful excess.'" *People v Thomas*, 447 Mich 390, 393; 523 NW2d 215 (1994) (citing MCL 769.24.) Defendant's sentence exceeds the allowable minimum of sixteen years and eight months by exactly four months. Consequently, the original sentence was invalid only to the extent of those additional four months. *Id*. Accordingly, we vacate that part of the trial court's sentencing decision and remand for correction of the sentence to a sixteen year and eight month minimum term of imprisonment and a twenty-five year maximum term of imprisonment. *Id*.

Affirmed in part, vacated in part and remanded to the trial court for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Martin M. Doctoroff
/s/ Kirsten Frank Kelly