STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 1, 2009
v KEVIN EVERSON, Defendant-Appellant.	No. 289103 Wayne Circuit Court LC No. 08-010486-FJ

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v JONTE DIAZ EVERSON, Defendant-Appellant.	No. 289135 Wayne Circuit Court LC No. 08-010486-FC

Before: Saad, C.J., and Sawyer and Borrello, JJ.

PER CURIAM.

In Docket No. 289103, defendant Kevin Everson (defendant Kevin), appeals by leave granted the trial court's order reinstating the charge of felony murder, MCL 750.316(1)(b), and adding that charge to the information. Similarly, in Docket No. 289135, defendant Jonte Diaz Everson (defendant Jonte), appeals by leave granted the trial court's order reinstating the charge of felony murder, MCL 750.316(1)(b), and adding that charge to the information. We affirm.

Defendants argue that the district court did not abuse its discretion in dismissing felony-murder charges against them and amending the information to reflect charges of manslaughter against both defendants. We disagree.

"The decision to bind over a defendant may only be reversed if it appears on the record that the district court abused its discretion. This Court . . . reviews the bindover decision de novo to determine whether the district court abused its discretion. Thus, this Court gives no deference to the circuit court's decision." *People v Henderson*, 282 Mich App 307, 313; __ NW2d __ (2009) (internal citations omitted). An abuse of discretion occurs if the trial court's decision

results in an outcome not within the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

"The primary function of the preliminary examination is to determine whether a crime has been committed and, if so, whether there is probable cause to believe that the defendant committed it." *Henderson, supra* at 312. A magistrate can find probable cause and still have doubts about the defendant's guilt. *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003). Thus, the defendant should still be bound over for trial even if the evidence conflicts or raises a reasonable doubt, because those are questions that are to be resolved by the trier of fact. *Henderson, supra*. However, the prosecutor must provide some evidence of each element of the crime. *Id.* Circumstantial evidence and reasonable inferences from the evidence will suffice. *Id.*

In this case, at the preliminary examination, the prosecution moved to bind over defendants on felony murder, based on an attempt to commit larceny, under an aiding and abetting theory. "First-degree felony murder is the killing of a human being with malice 'while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [MCL 750.316(1)(b)],' " including larceny. *People v Ream*, 481 Mich 223, 241; 750 NW2d 536 (2008), quoting *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999). Malice has been defined as: intent to kill, intent to do great bodily harm, or wanton and willful disregard of the likelihood that the natural tendencies of one's act is to cause death or great bodily harm. *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997). "The facts and circumstances of the killing may give rise to an inference of malice." *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000). Moreover, an underlying felony need not be contemporaneous with the murder, the defendant only had to intend to commit the underlying felony at the time the homicide occurred. *People v Kelly*, 231 Mich App 627, 643; 588 NW2d 480 (1998).

In this case, 44-year-old Robert Hopkins was killed as a result of blunt-force trauma to the head suffered during a beating by a group of teenagers on July 4, 2008, at a gas station in Detroit, Michigan. A witness testified that a group of five to six individuals surrounded Hopkins, and after the first boy hit Hopkins, both defendants followed suit, as did all of the other boys. The witness explained that Hopkins was hit "close to seven" times because "they kept hitting him," aiming for his face until he fell. This testimony is enough to establish probable cause that both defendants acted with malice, i.e., that, at the very least, both defendants, by taking part in a group beating, acted with wanton and willful disregard of the likelihood that the natural tendencies of a group beating is to cause death or great bodily harm. *Dumas, supra*. In addition, defendant Jonte's statement (used only against him), indicated that he had prior knowledge that the person identified only as "FB" was going to hit Hopkins. While defendant Jonte did not admit to throwing a punch, he admitted that he was part of a group that surrounded Hopkins. Therefore, we agree with the prosecutor that the district court abused its discretion in finding that there was no evidence of malice.

The next issue is whether there is evidence of an underlying felony to support a charge of felony murder. Defendant Kevin argues that none of the witnesses saw him pat down Hopkins or assist anyone in patting down Hopkins. Defendant Jonte similarly argues that he had no knowledge of, or involvement in, the attempted larceny, and therefore, charges of felony murder were not warranted. We disagree.

In this case, as mentioned, the prosecutor stated that the underlying felony was an attempted larceny, under an aiding and abetting theory. "The basic elements of larceny are (1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the subject matter must be the goods or personal property of another, (5) the taking must be without the consent and against the will of the owner." *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999). Pursuant to MCL 750.92, "an 'attempt' consists of (1) an attempt to commit an offense prohibited by law, and (2) any act towards the commission of the intended offense." *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001).

" 'Aiding and abetting' describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime." *Carines, supra* at 757. The three elements necessary for a conviction under an aiding and abetting theory are "(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 that [the defendant] gave aid and encouragement." *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006), quoting *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004). Regarding intent, referred to in the third element, "[a]n aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in planning or executing the crime, and evidence of flight after the crime." *Carines, supra* at 757-758.

In this case, two witnesses testified that some boys went through Hopkins's pockets after he was knocked to the ground, unconscious, and one can infer that the boys were looking for something of value to take. The testimony does indicate that after the boys beat Hopkins, they ran away and a group of boys of which neither defendant was a part came back to look through Hopkins's pockets. Therefore, the group of boys could have assaulted Mr. Hopkins for an unknown reason and the larceny was only an afterthought. However, when testimony indicates that five or six boys surround a victim and up to seven punches are thrown, a reasonable inference could be that there was a concerted effort to knock the victim down so that whatever items of value he had could be taken. Further, defendant Kevin himself indicated that he knew that another accomplice in the assault, identified only as FB, felt that Hopkins owed him money, and during the assault, he heard FB say to Hopkins, "you owe me money." Therefore, it can be reasonably inferred that an attempted larceny was committed, both defendants performed acts that aided in the commission of the attempted larceny, and both defendants intended the larceny to be committed or provided aid when they knew that another member of the group intended the larceny to be committed. Accordingly, probable cause that both defendants aided and abetted an attempted larceny was established, and any conflicting questions are to be resolved by the trier of fact. Thus, the district court abused its discretion in not finding evidence of an underlying felony of larceny.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Stephen L. Borrello