STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUBIN L. MOYA,

Defendant-Appellant.

UNPUBLISHED
June 19, 1998

No. 194799
Oakland Circuit Court
LC No. 94-135671-FC

Before: Sawyer, P.J., and Wahls and Reilly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1) and MCL 750.529; MSA 28.797, involuntary manslaughter, MCL 750.321; MSA 28.553,[1] and assault with intent to rob and steal while armed, MCL 750.89; MSA 28.284. He was sentenced to eight to twenty years' imprisonment for the conspiracy to commit armed robbery conviction, eight to fifteen years' imprisonment for the involuntary manslaughter conviction, and eight to twenty years' imprisonment for the assault with intent to rob while armed conviction. Defendant now appeals as of right. We affirm in part and reverse in part.

Defendant first disputes his conviction for involuntary manslaughter. His argument has two prongs. First, he argues that there was insufficient evidence to convict him of involuntary manslaughter as a principal. Second, he argues that the jury could not have convicted him of involuntary manslaughter as an aider and abettor because (1) it is impossible to aid and abet involuntary manslaughter by a grossly negligent act, and (2) the jury was not instructed on a theory of aiding and abetting.

"When reviewing a claim regarding the sufficiency of evidence, this Court views the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v Quinn*, 219 Mich App 571, 573-574; 557 NW2d 151 (1996). The Michigan Supreme Court has defined involuntary manslaughter as "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, 595-596; 533 NW2d 272 (1995) (citing *People v Ryczek*, 224 Mich 106, 110; 194 NW 609 (1923)). Involuntary manslaughter includes an element of causation. *People v Tims*, 449 Mich 83, 94; 534 NW2d 675 (1995). A defendant is not guilty of involuntary manslaughter unless his acts are a proximate, or legal, cause of the victim's death. See *People v Zak*, 184 Mich App 1, 12; 457 NW2d 59 (1990).

Here, as the prosecutor acknowledged at trial, it was undisputed that defendant never entered the victim's house. The record below makes it clear that the prosecutor did not even suggest that defendant shot the victim. Under these circumstances, we conclude that there was insufficient evidence to allow a rational trier of fact to conclude that defendant was a proximate cause of the victim's death beyond a reasonable doubt. See *id.* at 11-13. Thus, defendant could not properly have been convicted of involuntary manslaughter as a principal.

Defendant argues that it is impossible to aid and abet involuntary manslaughter by a grossly negligent act, and therefore that he could not have been properly convicted on such a theory. We note, however, that this Court has expressly recognized that a defendant *may* be convicted as an aider and abettor to involuntary manslaughter by a grossly negligent act. *People v Turner*, 125 Mich App 8, 10-13; 336 NW2d 217 (1983).

Defendant also argues that the jury in this case was not instructed on a theory of aiding and abetting regarding the crime of involuntary manslaughter, and therefore that his conviction cannot rest on such a theory. We are compelled to agree. It would be illogical and unjust to affirm a defendant's conviction on a theory that the jury was not allowed to consider. Here, while the jury was instructed regarding aiding and abetting as to some of the charges, it was not instructed on the charge of aiding and abetting involuntary manslaughter. Because we have already concluded that there was insufficient evidence to convict defendant of involuntary manslaughter as a principal, his conviction on this charge must be reversed.[2]

Defendant next argues that there was insufficient evidence of his intent to sustain his conviction for assault with intent to rob while armed.[3] We disagree.

> This Court has addressed the intent requirement for aiding and abetting:
> To be held criminally liable for a specific intent crime as an aider or abettor, a defendant must have had either the requisite specific intent or known that the actual perpetrator had the required intent. Intent is a question of fact to be inferred from the circumstances by the trier of fact. It is likewise a factual issue whether a particular act or crime committed was fairly within the intended scope of the common criminal enterprise. [*People v Wirth*, 87 Mich App 41, 46-47; 273 NW2d 104 (1978) (citations omitted).]

See also *People v Harris*, 110 Mich App 636, 642-643; 313 NW2d 354 (1981). This Court has held that a defendant who acts as a lookout can be convicted of assault with intent to commit murder as an aider and abettor. *People v Poplar*, 20 Mich App 132, 139-140; 173 NW2d 732 (1969). A jury

may infer a defendant's knowledge of the principal's intent where the defendant was aware that the principal was carrying a gun during a burglary. *Id.* The panel in *Poplar* reasoned that:

> the jury could reasonably infer from the defendant's knowledge of the fact that a shotgun was in the car that he was aware of the fact that his companions might use the gun if they were discovered committing the burglary or in making their escape. If the jury drew that inference, then it could properly conclude that the use of the gun was fairly within the scope of the common unlawful enterprise and that the defendant was criminally responsible for the use by his confederates of the gun in effectuating their escape. [*Id.* (citations omitted).]

This Court addressed the same issue in *Harris, supra*. There, the defendants took part in a bank robbery, and were convicted of assault with intent to rob while armed. *Id.* at 640. The assault charges against two of the defendants were based on assaults committed by other codefendants. Those two defendants argued that they could not be convicted for the assaults because they lacked the requisite intent. *Id.* at 642. This Court rejected their contention:

> [their] argument ignores the fact that they could be found liable for the assaults of [codefendants] as aiders and abettors.
>
> * * *
>
> From the evidence adduced at trial, the jury could have concluded that all of the defendants had entered into a common enterprise to commit the bank robbery and that each participant was assigned a specific role in the crime. [Codefendants] carried their weapons openly, allowing the inference that all of the defendants knew that these two intended to commit any assault necessary to ensure the success of the endeavor. Thus, a rational trier of fact could have found defendants . . . guilty on an aiding and abetting theory. [*Id.* at 642-643.]

Here, defendant confessed to planning the robbery with the other men, to supplying some of the guns used, to being the driver, and to acting as a lookout. This evidence was enough to allow the jury to infer that defendant knew that codefendants intended to assault anyone as necessary to complete the robbery, and that they intended to use the guns if they met resistance. Thus, there was sufficient evidence to show the requisite intent for aiding and abetting assault with intent to rob while armed.

Defendant next argues that the jury instructions regarding aiding and abetting assault with intent to rob while armed were erroneous. Defendant failed to object to the jury instructions, thus waiving review absent manifest injustice. *People v Paquette*, 214 Mich App 336, 339; 543 NW2d 342 (1995). "Manifest injustice occurs where the erroneous or omitted instructions pertain to a basic and controlling issue in the case." *People v Johnson*, 187 Mich App 621, 628; 468 NW2d 307 (1991). Put another way, "[w]here the charge of the judge to which exception is taken is not strictly correct, but the court can clearly see that the jury could not have been misled by it, to the injury of the party

excepting, a new trial will not be granted for that error." *People v Scott* (syllabus), 6 Mich 287 (1859).

Any person who "procures, counsels, aids or abets" the commission of a crime may be held liable "as if he had directly committed such offense." MCL 767.39; MSA 28.979.

> To support a finding that a defendant aided and abetted a crime, the prosecutor 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 Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).]

Here, the trial court instructed the jury as follows regarding the intent necessary for aiding and abetting assault with intent to rob while armed:

> To prove the charge as to that crime, the prosecutor must prove each of the following elements beyond a reasonable doubt as to assault with intent to rob while armed:
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> * * *
>
> Third, that when the defendant gave his assistance, he intended to help someone else commit the crime. *To prove that the defendant assisted in assault with intent to rob while armed, the prosecutor must prove that the defendant intended to rob Rene Guerrero or intended to do great bodily harm to Rene Guerrero.*

The emphasized portion of this instruction was obviously erroneous, because it suggested that a finding that defendant intended to do great bodily harm to the victim would satisfy the intent requirement for the crime of assault with intent to rob while armed. In fact, assault with intent to rob while armed requires a showing that defendant had an intent to rob. *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991); *People v Federico*, 146 Mich App 776, 790; 381 NW2d 819 (1985). The only remaining question is whether this error requires reversal.[4]

We note that erroneous instructions may be harmless, even where they pertain to the essential elements of a crime. *People v Vaughn*, 447 Mich 217, 235-239; 524 NW2d 217 (1994). However, we cannot conclude that the error in this case was harmless. First, it is impossible to tell whether the jury relied on the improper intent instruction. See *People v Grainger*, 117 Mich App 740, 755; 324 NW2d 762 (1982). Second, the only real issue at trial was whether defendant intended the crimes committed by his codefendants. Therefore, the trial court's erroneous intent instruction pertained to a basic and controlling issue at trial, and represents manifest injustice. Thus, we conclude that defendant is entitled to reversal of his conviction for aiding and abetting assault with intent to rob while armed.[5]

Finally, we agree that defendant is entitled to have his judgment of sentence corrected to indicate that he was convicted of involuntary manslaughter rather than felony murder.[6]

Defendant's convictions for involuntary manslaughter and assault with intent to rob while armed are reversed. His conviction for conspiracy to commit armed robbery is affirmed. We remand for a new trial on the charge of aiding and abetting assault with intent to rob while armed. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Myron H. Wahls
/s/ Maureen Pulte Reilly

[1] The judgment of sentence incorrectly indicates that defendant was convicted of first-degree felony murder, MCL 750.316(b); MSA 28.548(b). In fact, defendant was originally charged with first-degree felony murder, but was convicted of the lesser included offense of involuntary manslaughter.

[2] Because the prosecutor could have requested an aiding and abetting instruction at trial, but failed to do so, we conclude that double jeopardy precludes a retrial on this theory. Any other result would effectively violate the "same transaction" test adopted in *People v White*, 390 Mich 245; 212 NW2d 222 (1973), which requires a prosecutor to join at one trial all charges stemming from the same transaction. *Id.* at 252-259.

[3] Defendant makes the same argument regarding his involuntary manslaughter conviction. However, because we have already concluded that this conviction must be reversed, we need not address that issue.

[4] We note that, at one point during the instructions, the trial court also gave a correct instruction on this element. However, this Court has held that, where a jury is given conflicting instructions, one of which is improper, the jury is presumed to have followed the improper instruction. *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995); *People v Neumann*, 35 Mich App 193, 195-196; 192 NW2d 345 (1971).

[5] "[T]he Double Jeopardy Clause does not preclude the retrial of a defendant whose conviction is set aside because of any error in the proceedings leading to conviction other than the insufficiency of the evidence to support the verdict." *People v Langley*, 187 Mich App 147, 150; 466 NW2d 724 (1991). Thus, defendant may be retried on this charge.

[6] Having already reversed defendant's involuntary manslaughter conviction, we recognize that this issue is essentially moot. We resolve it only to make clear that defendant is entitled to a judgment of sentence that accurately reflects his convictions. See *People v Paintman*, 139 Mich App 161, 175-176; 361 NW2d 755 (1984).