STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 23, 1999
v	No. 206966 Wayne Circuit Court
WILLIE J. JONES, Defendant-Appellant.	Criminal Division LC No. 97-002813

Before: Sawyer, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of murder in the second degree. MCL 750.317; MSA 28.549. He was sentenced to twelve to thirty years in prison. We affirm.

Defendant's conviction arises out of the murder of Keith James. Defendant admits that he engaged in an assault and battery of James before James was shot and killed by David Brown, but denies involvement in the murder itself, beyond merely being present at the time of the killing, or knowledge that Brown intended to kill James. Specifically, defendant does not dispute that he and others beat the victim and dragged him outside and down a flight of stairs, dumping him on the ground outside an apartment building, where Brown shot the victim. The jury, however, apparently concluded that defendant did, in fact, aid and abet the murder.

Defendant raises a number of issues on appeal, all of which relate to the instructions given to the jury. He first argues that the trial court erred in the instruction on causation. Specifically, defendant argues that the trial court phrased the instruction on the element of causation in such a way as to remove the issue of causation from the jury. The judge gave the following instruction:

> So, these are the elements: First, that the defendant caused the death of Mr. James; that is that he died as a result of multiple gunshot wounds that were from Dr. Somerset in his telling you the cause and manner,—multiple gunshot wounds was the cause and the manner was homicide.

Clearly, the trial court stumbled a bit over this instruction. While the instruction could be read as the trial court directing the jury to find that causation was established, it can also be read as the trial court instructing the jury that they must conclude that Dr. Somerset's testimony did establish the cause and manner of death in order to convict defendant. In any event, defendant failed to preserve this issue for appellate review by making the appropriate objection in the trial court. *People v Van Dorsten*, 441 Mich 540; 494 NW2d 737 (1993). Not only would there be no manifest injustice from our failure to review this issue, we note that this case represents why there is a requirement that an objection be made: a timely objection would have allowed the trial court to clear up any confusion caused by the instruction.

Defendant raises another instructional issue that is also unpreserved for appellate review: the trial court's failure to *sua sponte* instruct on "When is a separate crime within the scope of a common criminal enterprise?" utilizing CJI2d 8.3. Because defendant failed to request this instruction at trial, we decline to review the issue on appeal. *Van Dorsten, supra*.

An instructional issue that is properly before us is the trial court's refusal to give the defendant's requested instruction on "mere presence." Although the trial court did give an instruction on "mere presence," defendant requested a different instruction. Specifically, defendant argues that the trial court should have given the following instruction:

> Mere presence even with knowledge that an offense is about to be committed or is being committed is not enough to make a person an aider and abettor, nor is mere mental approval, passive acquiescence or consent sufficient. To be convicted as an aider and abettor the defendant must either himself possess the required intent or participate while knowing that the princip[al] possessed the required intent.

The instruction that was actually given, based upon CJI2d 8.5, is as follows:

> The law says that 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 assisted in committing that particular crime.

The trial court also gave the aiding and abetting instruction immediately before the "mere presence" instruction. The final three sentences of the aiding and abetting instruction, which led into the mere presence instruction, were as follows:

> Third, that when the defendant gave his assistance he intended to help somebody else commit that crime. It doesn't matter how much help, advice or encouragement the defendant gave. However, you must decide whether the defendant intended to help another commit the crime and whether his help, advice or encouragement actually did help, advise or encourage that crime.

As we stated in *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995):

> [T]he failure to give a requested instruction is error requiring reversal only if the requested instruction (1) is substantially correct, (2) was not substantially covered in the charge given to the jury, and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense. See, e.g., *United States v Newton*, 891 F2d 944, 949 (CA 1, 1989).

While the prosecutor concedes that defendant's requested instruction accurately states the law, he contends that the instruction actually given substantially covers the point at issue. We agree. When the aiding and abetting instructions and the mere presence instructions are read together, we are satisfied that they substantially cover the point raised by defendant. That is, they adequately inform the jury of the mens rea which defendant had to possess to be guilty under an aiding and abetting theory.

Defendant next argues that the trial court erred in refusing to give an instruction on the lesser misdemeanor offense of assault and battery. We disagree.

For a misdemeanor instruction to be given in a felony trial, five conditions must be met: (1) a proper request is made, (2) an appropriate relationship must exist between the charged offense and the requested misdemeanor, (3) the requested misdemeanor must be supported by a rational view of the evidence at trial, (4) if the instruction is requested by the prosecutor, the defendant must have adequate notice, and (5) the requested instruction must not result in undue confusion or injustice. *People v Steele*, 429 Mich 13, 19-21; 412 NW2d 206 (1987).

The first condition was satisfied as defendant made a request. While we are skeptical that the second condition is met, we will focus on the third condition. A rational view of the evidence will not support conviction for only assault and battery. The flaw in defendant's reasoning is that the evidence of an assault and battery to which he points is not the same physical attack which resulted in the victim's death. Rather, defendant's theory of the case is that, although he did commit an assault and battery upon the victim before the victim was killed, defendant did not participate in the killing itself. That is different than saying that defendant's involvement *in the charged offense* only amounted to an assault and battery.

In other words, there were (at least) two distinct crimes which occurred during the criminal transaction: an assault and battery perpetrated by defendant and, later, a second-degree murder. Defendant admits the former, but denies involvement in the murder. The prosecutor chose not to charge the assault and battery, as is his prerogative, but only charge the murder. Thus, at issue is not whether defendant was guilty of some other, uncharged offense, but whether he was involved in the murder itself. In short, a rational view of the evidence does not support a view that the killing itself only amounted to an assault and battery.

Finally, defendant argues that the trial court erred in instructing the jury that the testimony would not be reread. First, we note that defendant misrepresents the trial court's comments to the jury. The trial court did not tell the jury that testimony could not be reread. Rather, as part of general instructions to the jury before they retired to deliberate, the judge noted that a physical transcript did not exist so it would not be sent into the jury room with the exhibits. The trial court made no comments on the subject

of rereading testimony if requested. In any event, defendant failed to preserve this issue for appeal by making a timely objection in the trial court. *Van Dorsten, supra*. Once again, this issue demonstrates the reason an objection is required to preserve an issue for appeal: had defendant made a timely objection below, the trial court could have corrected any confusion by informing the jury that a physical transcript would not be provided, but it would consider any request to reread testimony.

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Michael J. Talbot