STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 12, 2001
v	No. 214722 Wayne Circuit Court
DESHAWN CRENSHAW, Defendant-Appellant.	Criminal Division LC No. 98-001840

Before: Sawyer, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions for the first-degree murder of Michael Brown, MCL 750.316, MSA 28.548, assault with intent to commit the murder of Kimberly Samuels, MCL 750.83, MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b, MSA 28.424(2). Defendant was sentenced to life without parole on the murder conviction, to parolable life on the assault conviction, and to the mandatory two-year term on the felony-firearm conviction. We affirm.

This case arises out of the shooting of Brown and Samuels on October 31, 1997. Samuels, who was shot eight times that evening, testified at trial that defendant shot her with a handgun immediately after defendant's brother shot Brown in the head. Brown died as a result of the gunshot wounds he suffered. The prosecution pursued an aiding and abetting theory to convict defendant of the first-degree murder of Brown.

Defendant first claims that he was denied the effective assistance of counsel at his trial. We disagree.

Defendant's argument centers on a statement which defendant's brother gave to police after he was arrested for murdering Brown. In that statement, he admits shooting Brown that evening, but denies that defendant had any involvement in the assault on Samuels. At trial, defendant's attorney did not seek to have defendant's brother testify nor did he seek to have the statement given to police admitted into evidence. Because we are satisfied that defense counsel's reason for excluding the statement and testimony was sound trial strategy, we do not find that defendant was denied the effective assistance of counsel.

At the *Ginther*[1] hearing held in this case, defense counsel testified that he was aware of defendant's brother's statement, but that he believed it was unwise to tie defendant and his brother together in the minds of the jury. In addition, defense counsel had questions about the veracity of defendant's brother's statement, and was concerned that his confession to one of the murders might negatively influence defendant's case. Instead, defense counsel concentrated on forcing the prosecution to prove its case and on attacking the credibility of the lone eyewitness, Samuels. As this Court has said, we will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Our finding that defendant was not deprived the effective assistance of counsel is buttressed by the fact that there were serious doubts about the credibility of the statement and that defendant's brother later largely recanted his statement. Moreover, the trial strategy employed by defense counsel was supported by evidence; there were substantial contradictions in the various accounts Samuels made to police and prosecution, along with other questions about Samuels' credibility. Thus, because we find that defense counsel's decision not to call defendant's brother to testify or to have his statement admitted at trial was sound trial strategy, we conclude that defendant was not denied the effective assistance of counsel. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997); *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Defendant next asserts that the trial court erred when it refused to instruct the jury on the crime of accessory after the fact. We find that being an accessory after the fact is not a cognate lesser included offense of first-degree murder, and therefore conclude that defendant's argument is without merit.

"Cognate lesser included offenses are those that share some common elements, and are of the same class or category as the greater offense, but have some additional elements not found in the greater offense." *People v Hendricks*, 446 Mich 435, 443; 521 NW2d 546 (1994). Our Supreme Court in *People v Perry*, 460 Mich 55; 594 NW2d 477 (1999), examined whether murder and accessory after the fact are within the same class or category of offense. Finding that the murder statutes were designed to protect human life and that accessory after the fact was akin to the charge of obstruction of justice, the Court concluded its analysis by noting that "[l]aws forbidding the obstruction of justice clearly serve a different purpose than those that forbid the taking of a life." *Id*. at 62. Thus, our Supreme Court held that the trial court had not erred in denying the instruction on accessory after the fact. *Id*. at 66.

Defendant's argument mistakenly seeks to compare the elements necessary to find a defendant guilty of aiding and abetting a crime with those necessary to prove that a defendant was an accessory after the fact. The Court's decision in *Perry* rejects this argument, however, by noting that "being an aider and abettor is simply a theory of prosecution, not a separate substantive offense." *Id*. at 63 n 20. Thus, the correct comparison is between first-degree murder and accessory after the fact. Because we agree with our Supreme Court that these two offenses are not of the same class or category, we find that it was not error for the trial court to deny defendant's request for the instruction on accessory after the fact.

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[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant also contends that the prosecutor misstated the law in her opening statement and her closing arguments and that her misstatements deprived defendant of a fair trial. We do not believe that the comments misstated the law of aiding and abetting and therefore we find no error[2].

Defendant urges this Court to find that the prosecutor's comments impermissibly allowed the jury to find that defendant aided and abetted the first-degree murder of Brown when the facts proved at most that he had simply been an accessory after the fact. The comments to which defendant objects center on the prosecutor's statements that if the jury believed that defendant shot Samuels in an attempt to cover up Brown's murder, it could find defendant guilty as an aider and abettor of Brown's murder. Concluding that the evidence necessary to prove defendant aided and abetted Brown's murder was presented to the jury, we find helpful this Court's statement in *People v Karst*, 118 Mich App 34, 40; 324 NW2d 526 (1982):

> The distinction between aiders and abettors and accessories after the fact is not always clear, and, given the facts, even less so in this case. Acts undertaken subsequent to the commission of a breaking and entering do not necessarily limit a defendant's liability to that of an accessory after the fact, as consideration must be taken of the intent of the actors.

We have reviewed the record and we conclude that there was sufficient evidence for the jury to find that defendant knew that Brown was to be murdered before the crime was actually committed. Furthermore, the fact that Samuels was shot immediately after Brown does not compel the conclusion that defendant was an accessory after the fact of Brown's murder. At trial, Samuels testified that defendant and his brother, along with "Dirty Curt," went into the bathroom shortly before the shootings. When they came out of the bathroom, Samuels testified that defendant's brother shot Brown and that defendant then immediately shot Samuels. From this testimony, the jury could certainly believe that Dirty Curt, defendant, and defendant's brother planned to kill both Brown and Samuels. Intent or knowledge that the crime was to be committed could properly have been inferred by the jury from these facts. *People v Sharp*, 57 Mich App 624, 626; 226 NW2d 590 (1975).

We also find that defendant aided and abetted Brown's murder by attempting to murder Samuels. The aiding and abetting statute, MCL 767.39; MSA 28.979, "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." *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). Attempting to murder a witness to another murder falls within this broad definition of aiding and abetting. Thus, we do not believe the prosecutor made improper comments to the jury when she suggested that if the jury found that defendant shot Samuels to cover up a crime, it could find defendant guilty of aiding and abetting Brown's murder. We also

[2] We do not address defendant's ineffective assistance of counsel argument, which is premised on the assertion that defense counsel failed to preserve the claims of prosecutorial misconduct, because we conclude that defendant's challenges to the prosecutor's statements were properly preserved and therefore defendant was not denied the effective assistance of counsel. *Mitchell, supra*, 454 Mich at 156.

note that in this case, the trial court properly instructed the jury as to the elements necessary to find defendant guilty of aiding and abetting first-degree murder before the jury began its deliberations.

Defendant's final issue on appeal concerns his life sentence for his conviction of assault with intent to murder. He claims that the trial court mistakenly believed that it had no discretion to sentence defendant. We disagree.

During the sentencing hearing, the trial court indicated that it had no discretion to sentence defendant. The trial court did not clarify for the record which conviction it was referring to when it stated that it had no discretion. However, the trial court did prepare and sign a Sentencing Information Report for the assault conviction, which recommended a term of years sentence. Therefore, the record does reflect that the trial court did understand that it had discretion in sentencing defendant on the assault conviction.

To the extent that defendant also argues that the trial court failed to properly consider the guidelines or explain its departure, we note that defendant is serving life without parole on his murder conviction. Therefore, any error on the assault sentence is harmless.

Affirmed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Hilda R. Gage