STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 5, 2002
v	No. 211368 Recorder's Court
ROBERT RILEY, Defendant-Appellant.	LC No. 97-005401 ON REMAND

Before: Cavanagh, P.J., and Holbrook, Jr. and White[*], JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree felony murder, MCL 750.316(1)(b). In our previous opinion, we reversed defendant's conviction on the ground that the trial court reversibly erred in admitting hearsay testimony and, absent that testimony, there was insufficient evidence to convict defendant of first-degree felony murder. *People v Riley*, unpublished opinion per curiam of the Court of Appeals, issued July 21, 2000 (Docket No. 211368). We remanded for entry of judgment of conviction and for sentencing on the underlying offense, larceny in a building. *Id*. at 4. In lieu of granting the prosecution leave to appeal, our Supreme Court reversed our judgment, holding that defendant affirmatively waived his right to a trial free of hearsay testimony, and remanded this case to our Court "for consideration of the other issues raised by the defendant in that court." *People v Riley*, 465 Mich 442, 450; 636 NW2d 514 (2001). Again, we reverse and remand for entry of judgment of conviction on larceny in a building.

In our previous opinion we reviewed defendant's sufficiency of the evidence claim together with his claim that hearsay testimony was improperly admitted. We held that the hearsay testimony was inadmissible and, without that testimony, there was insufficient evidence to convict defendant of first-degree felony murder. *Riley*, *supra* slip op at 2-4. We also held that there was sufficient evidence to support defendant's conviction on the underlying felony, larceny in a building. *Id*. at 4. In light of our Supreme Court's holding that any error in the admission of the inculpatory hearsay testimony was extinguished, we conclude that, on the whole record and viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find the elements of first-degree felony murder proved beyond a reasonable doubt. See *People v*

[*] Judge White has been substituted for Judge Kelly on remand.

Johnson (On Rehearing), 208 Mich App 137, 140-141; 526 NW2d 617 (1994); *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992).

The essential elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [the statute, including larceny in a building]. *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995). To establish 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." *Id*. at 568. An aiding and abetting conviction of felony murder requires the prosecutor to show that "the person charged had both the intent to commit the underlying felony and the same malice that is required to be shown to convict the principal perpetrator of the murder." *Id*. at 567, quoting *People v Flowers*, 191 Mich App 169, 176-179; 477 NW2d 473 (1991); see, also, *People v Barrera*, 451 Mich 261, 295; 547 NW2d 280 (1996). An aider and abettor who participates in a crime with knowledge of his principal's intent to kill or to cause great bodily harm acts with wanton and wilful disregard of the likelihood of the natural tendency of the behavior to cause great bodily harm sufficient to support a finding of malice. *Id*. at 294, quoting *People v Kelly*, 423 Mich 261, 278-279; 378 NW2d 365 (1985); *Turner*, *supra*.

In this case, drawing all reasonable inferences from the circumstantial evidence and making credibility choices in support of the jury verdict, *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000), the evidence would permit a jury to find defendant guilty of felony murder as an aider and abettor. The evidence, particularly the hearsay testimony of David Ware's mother, included that defendant was in the victim's apartment with Ware when the victim was subdued and bound, with defendant's assistance, and strangled to death by Ware. An aider and abettor's state of mind may be inferred from all the facts and circumstances. *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999), quoting *Turner*, *supra* at 568-569. A jury could infer that defendant acted with malice when he provided assistance to Ware by helping to subdue the victim after he saw Ware choke the victim until he was unconscious and stopped breathing but before Ware choked the victim for a second time, resulting in his death. If defendant did not initially know of Ware's intent to kill or cause great bodily harm to the victim, he at least became aware of Ware's intent during the first choking incident and, thus, acted with wanton and wilful disregard of the likelihood of the natural tendency of the behavior to cause great bodily harm. See *Barrera*, *supra*; *People v Feldmann*, 181 Mich App 523, 533; 449 NW2d 692 (1989). Further, the prosecutor presented sufficient evidence that defendant participated in the larceny when the victim was killed. See *Carines*, *supra* at 760-761; *People v Kelly*, 231 Mich App 627, 643; 588 NW2d 480 (1998). Consequently, on the whole record, there was sufficient evidence to justify a rational jury to find that defendant was guilty of aiding and abetting felony murder. See *Carines*, *supra* at 759.

Defendant also argues that the trial court erred in failing to sua sponte direct a verdict of acquittal on the felony murder charge. We disagree. MCR 6.419(A) provides that a trial court may, on its own initiative, direct a verdict of acquittal following the prosecution's case if there is

insufficient evidence to support a conviction. The rule does not *require* the trial court enter a directed verdict of acquittal sua sponte. Further, defendant failed to cite, and this Court was unable to locate, any authority to support his contention that the trial court was obligated to sua sponte enter a directed verdict. See *People v Harris*, 113 Mich App 333, 336; 317 NW2d 615 (1982).

Next, defendant argues in his supplemental brief filed in propria persona that he was denied the effective assistance of counsel because his counsel failed to move for a directed verdict of acquittal. We agree. Because a *Ginther*[1] hearing was not conducted, this Court's review is limited to errors apparent on the record. *People v Lee*, 243 Mich App 163, 183; 622 NW2d 71 (2000).

To establish a claim of ineffective assistance of counsel, a defendant must affirmatively show that his counsel's performance fell below an objective standard of reasonableness. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Further, a defendant must establish that, but for defense counsel's errors, there was a reasonable probability that the result of the proceedings would have been different and that the result of the proceedings was fundamentally unfair and unreliable. *Id*.; *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). Effective assistance of counsel is presumed and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

A defendant may move for a directed verdict after the prosecution has rested, after the defendant presents his proofs, or after a jury verdict is rendered. See MCR 6.419(A) and (B). If the evidence presented by the prosecution up to the time the motion is made, considered in the light most favorable to the prosecution, is insufficient to justify a reasonable trier of fact to find guilt beyond a reasonable doubt, a directed verdict or judgment of acquittal must be entered. See *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998). Circumstantial evidence and reasonable inferences drawn from such evidence may be sufficient to prove the elements of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Questions regarding the credibility of witnesses and the weight of the evidence are to be left to the trier of fact. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997).

Here, the prosecutor's theory of the case appears to have been that defendant must have at least assisted in the murder because (1) defendant was in the victim's apartment when the victim was killed, (2) the victim's apartment was ransacked, (3) the victim was strangled to death, and (4) the victim was somewhat larger than defendant and Ware, thus, it would have taken two people to subdue and murder the victim. However, the medical examiner testified that the victim had no bruises, contusions, or abrasions on his body, other than on his neck as a consequence of the strangulation and on his wrists and ankles where he had been bound and, therefore, does not support the prosecutor's theory of a physical altercation or struggle between defendant, Ware, and the victim. Further, a next door neighbor who was in his apartment and had his front door open during the time the victim was murdered testified that he did not hear any noise coming from the victim's apartment. Moreover, defendant's statement to police, which was read to the jury, indicated that the victim was rendered unconscious after Ware choked him

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

the first time which permitted Ware the opportunity to tape and bind the victim's wrists and ankles.

Further, the prosecutor failed to present evidence that could reasonably lead to the conclusion that (1) the larceny was planned, (2) the murder was within the scope of a common plan to commit the larceny, (3) a weapon was used, (4) defendant assisted in any way in the murder, or (5) defendant intended, or knew that Ware intended, to kill or cause great bodily harm to the victim during the course of the larceny. In sum, the prosecution failed to present evidence that could establish beyond a reasonable doubt that defendant was the principal or that he aided and abetted in the commission of felony murder. Although the prosecution presented defendant's statement to police which indicated that he was present and saw Ware strangle the victim, merely being present during the commission of a crime is insufficient to establish that a defendant aided or assisted in the commission of the crime, and, in this case, the murder. See *People v Nix*, 453 Mich 619, 631; 556 NW2d 866 (1996); *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999).

Although we rejected defendant's challenge to the sufficiency of the evidence above, the focus of a directed verdict claim is on the evidence presented by the *prosecution*. In this case, defense counsel failed to move for a directed verdict and, instead, presented the witness testimony of Ware's mother, Mary McKinney. McKinney, however, provided inculpatory hearsay testimony, contrary to her own corrected written statement, which included that Ware told her that defendant assisted him in subduing the victim during the murder. However, this testimony would not have been introduced by defendant if his counsel had moved for a directed verdict because the evidence presented by the prosecution was insufficient to justify a reasonable trier of fact to find defendant guilty of felony murder, either as a principal or aidder and abettor, and a directed verdict or judgment of acquittal would have been required. See *Lemmon*, *supra*.

Consequently, defense counsel's performance, in particular the failure to move for a directed verdict, fell below an objective standard of reasonableness. Further, but for defense counsel's failure to move for a directed verdict, there was a reasonable probability that the result of the proceeding would have been different, i.e., defendant would have been acquitted of the felony murder charge. See MCR 6.419(A); *Lemmon*, *supra*. Moreover, in light of the weakness of the prosecution's evidence against defendant regarding the felony murder charge, we conclude that the result of the proceedings was fundamentally unfair and unreliable.

The remedy on an ineffective assistance of counsel claim must be tailored to the injury suffered. See *People v Whitfield*, 214 Mich App 348, 354; 543 NW2d 347 (1995). In this case, because the prosecution's evidence did not support a felony murder conviction, entitling defendant to a directed verdict, we conclude that the appropriate remedy is to reverse defendant's felony murder conviction and remand for entry of judgment of conviction for larceny in a building. See *Lemmon*, *supra*.

Reversed and remanded for entry of judgment of conviction for larceny in a building and for sentencing on the conviction. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Donald E. Holbrook, Jr.