STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED May 20, 2004
v	No. 245944 Wayne Circuit Court
RICHARD SCOTT SEELY, Defendant-Appellee.	LC No. 02-500042

Before: Cooper, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

The prosecutor appeals by leave granted from the circuit court order reversing defendant's district court conviction of assault and battery, MCL 750.81.[1] We reverse and remand to the trial court for further proceedings consistent with the stipulation by the parties at oral argument.[2]

This case arises from defendant's, a police officer, response to a domestic disturbance call while on duty. When defendant arrived at the home, he is alleged to have beaten the suspect with a flashlight. As defendant was hitting the suspect, another officer, who was on top of the suspect, slipped and was struck in the eye by defendant's flashlight. The suspect had an altercation with another officer and was brought to the station to be booked. As the suspect was being brought into the station, he was either pushed through the door or he tripped over a step, but in either event, his head went through the window in the door. Following an initial cover-up of the facts, an officer came forward and testified against defendant.

Defendant raises several issues on appeal. He first argues that aiding and abetting is a cognate lesser offense of aggravated assault and that instructions on cognate lesser offenses are

[1] Defendant was originally charged with aggravated assault, MCL 750.81a.

[2] Ordinarily, we would reverse the opinion of the trial court and reinstate the conviction of the defendant. However, at oral argument, counsel for the defendant stated that there were other issues pending before the circuit court. Because the prosecution had no objection to a remand for adjudication of those issues, we remand to the circuit court to decide the remainder of defendant's issues.

impermissible under *People v Cornell*, 466 Mich 335, 341; 646 NW2d 127 (2002). Next, he contends that the evidence did not support an aiding and abetting instruction. Finally, he argues that the prosecution's late assertion of this offense deprived defendant of his right to due process.

We first address defendant's claim of instructional error. Claims of instructional error are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002), on rem 256 Mich App 674; 671 NW2d 545 (2003). A trial judge must instruct the jury regarding the applicable law and fully and fairly present the case to the jury in an understandable manner. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). Even if somewhat imperfect, instructions do not create error if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

MCL 767.39 provides:

> [E]very person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense. [*Id*.]

The elements that the prosecutor needed to show to establish aiding and abetting are: (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement which 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 Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001). To sustain an aiding and abetting conviction, the principal's guilt must be shown beyond a reasonable doubt, but the principal need not be convicted. *People v Tanner*, 255 Mich App 369, 419; 660 NW2d 746 (2003), rev'd on other grounds 469 Mich 437; 671 NW2d 728 (2003). The prosecutor needed only introduce sufficient evidence that the crime was committed by a principal and that the defendant aided and abetted it. *Id.*

An assault is an attempt to commit battery or an unlawful act that places the victim in reasonable apprehension of receiving an immediate battery. *People v Milton*, 257 Mich App 467, 473; 668 NW2d 387 (2003). Battery is the consummation of an assault. *Id.* Both assault and battery are specific intent crimes for which there must be an intent to injure or an intent to put the victim in reasonable fear or apprehension of an immediate battery. *People v Datema*, 448 Mich 585, 602; 533 NW2d 272 (1995). An aggravated assault is an assault which results in serious or aggravated injury to the victim. *People v Brown*, 97 Mich App 606, 610-611; 296 NW2d 121 (1980).

Defendant's assertion that aiding and abetting is a cognate lesser included offense of the crime charged against defendant fails because aiding and abetting is not a separate offense but an alternative theory of the prosecution. The aiding and abetting statute, MCL 767.39, did not create a distinct crime, *People v Greaux*, 461 Mich 339, 344; 604 NW2d 327 (2000), but abolished the common-law distinction between an accessory before the fact (aider and abettor) and a principal, *People v Smielewski*, 235 Mich App 196, 202-203; 596 NW2d 636 (1999). Being an aider and abettor is simply a theory of the prosecution and not a separate, substantive

offense. *People v Perry*, 460 Mich 55, 63 n 20; 594 NW2d 477 (1999). Thus, the instruction was not barred by *Cornell*, *supra*.

Further, there was sufficient evidence to support the trial court's instruction on aiding and abetting. The victim's wife testified that defendant beat the victim with a flashlight at the victim's home while arresting him. This testimony alone is sufficient to establish defendant's intent to injure the victim. Defendant testified that, at the police station, he saw another officer take the victim out of the police car by his hair, slap him a couple of times, and shove him into the wall. This testimony establishes the other officer's intent to injure the victim and defendant's knowledge that the other officer intended to injure the victim. The other officer and the victim testified that defendant grabbed the back of the victim's head and smashed it through window of the police station door. This testimony establishes that defendant aided the other officer in his assault on the victim. While this version of events would require the jury to select what portions of each witness's testimony to believe, a jury is free to believe or to disbelieve all or part of any of the evidence presented. *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999).

Next, defendant argues that he was not given adequate notice of the aiding and abetting theory and was thereby deprived of his due process rights. Defendant cites *People v Darden*, 230 Mich App 597, 600-601; 585 NW2d 27 (1998), for the proposition that the trial court's instruction to the jury on aiding and abetting, where the charging document does not articulate this charge, is reversible error. While *Darden* articulates the legal principle that a trial judge may not instruct on lesser included offenses over a defendant's objection unless the language of the charging document is sufficient to give the defendant notice that he could face the lesser included offense, this rule of law does not assist defendant's cause on appeal. Here, the challenged instruction is not one concerning a lesser included offense but is an aiding and abetting instruction, which, as discussed, is an alternative prosecution theory.

In *People v Johnson*, 116 Mich App 452, 458; 323 NW2d 439 (1982), rev'd on other grds 422 Mich 554; 375 NW2d 1 (1985), this Court held that it was not a violation of a defendant's due process right for the prosecutor to argue in his opening statement that the defendant was a principal and then change to an aiding and abetting theory for closing argument. Contrary to defendant's assertions, *Johnson* is not factually distinguishable from the instant case. Therefore, defendant was not deprived of his right to due process when the prosecutor switched from a theory of defendant as principal to a theory of defendant as aider and abettor during the course of the trial.

Finally, we review defendant's unpreserved challenge to the assault and battery instruction and find that the instruction was appropriate as a lesser included offense of aggravated assault and that the instruction was supported by the evidence. Under the Code of Criminal Procedure, a requested instruction on a necessarily included lesser offense, whether a felony or a misdemeanor, is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense, and a rational view of the evidence would support it. MCL 768.32(1); *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002); *Cornell, supra*. A necessarily included offense is one which must be committed as part of the greater offense; it would be impossible to commit the greater offense without first having committed the lesser. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001); *People v Reese*, 242 Mich App 626, 629-630; 619 NW2d 708 (2000), aff'd 466 Mich 440 (2002). To be supported by a rational view of the evidence, a lesser included offense must be justified by the

evidence. Proof on an element differentiating the two crimes must be sufficiently in dispute to allow the jury to consistently find the defendant not guilty of the charged offense but guilty of the lesser offense. *People v Steele*, 429 Mich 13, 20; 412 NW2d 206 (1987), overruled in part on other grds *Cornell*, *supra*.

Here, the circuit court found that the district court erred in giving an instruction on assault and battery as a lesser included offense of aggravated assault, reasoning that the only element differentiating aggravated assault from assault and battery was that of serious or aggravated injury and that the evidence at trial was undisputed that the victim suffered serious injury when his head went through the window at the police station. While there is no dispute that the victim suffered an aggravated injury from the assault at the station, the jury could have focused on the testimony regarding the events at the victim's residence and found defendant guilty of assault and battery based on the evidence of the events at the victim's house during the arrest. The victim and his wife testified that defendant beat the victim with a flashlight while the victim was lying on the floor of his home. The victim's wife testified that after this beating, when the victim was being led away by defendant, there was no visible sign of injury. Based on this testimony, the jury could have found defendant guilty of assault and battery, deciding that the serious injury sustained by the victim when his head went through the glass happened because he tripped and fell into the glass due to his intoxication as defendant testified. The trial court's instruction to the jury on assault and battery was therefore appropriate because a rational view of the evidence supported a finding of assault and battery that did not result in serious injury from the events at the victim's house. The circuit court erred in reversing defendant's conviction on this basis.

Reversed and remanded to the circuit court for consideration of the other issues raised by defendant. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello