STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 28, 2006
v	No. 263283 Wayne Circuit Court
GARRETT PATTON, Defendant-Appellant.	LC No. 04-009072-01

Before: Whitbeck, C.J., and Sawyer and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, and four counts of assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced to concurrent terms of 25 to 50 years' imprisonment for the second-degree murder conviction and 6 to 10 years' imprisonment for each of the assault with intent to do great bodily harm less than murder convictions. We affirm.

Defendant first argues that the prosecutor presented insufficient evidence to sustain his convictions and that the trial court erred in denying his motion for a directed verdict on the assault with intent to do great bodily harm less than murder charges. We disagree with both arguments.

This Court reviews insufficient evidence claims de novo, *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002), and reviews 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 Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). Similarly, we review a trial court's decision on a motion for a directed verdict de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

The elements of second-degree murder are (1) a death, (2) caused by the defendant, (3) with malice and (4) with no justification or excuse. *Id.* at 123. "The intent necessary for second-degree murder is the intent to kill, the *intent to inflict great bodily harm*, or the willful and wanton disregard for whether death will result." *People v Robinson*, 475 Mich 1, 14; 715 NW2d 44 (2006) (emphasis in original). The intent to kill may be proven by inference from any facts in

evidence; minimal circumstantial evidence of intent is sufficient. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

Under an aiding and abetting theory, a prosecutor is required to show beyond a reasonable doubt that "the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense." *Robinson, supra*, p 15. "[E]vidence of defendant's specific intent to commit a crime or knowledge of the accomplice's intent constitutes sufficient *mens rea* to convict under our aiding and abetting statute[, MCL 767.39]." *Id*. at 6-7 (emphasis in original). Mere presence, even with knowledge that an offense is about to be committed, is not enough to make one an aider or abettor. *People v Burrel*, 253 Mich 321, 323; 235 NW 170 (1931).

In the present case, the prosecutor presented sufficient evidence to support defendant's conviction for second-degree murder under an aiding and abetting theory. First, the record shows that an eyewitness identified defendant during a pre-trial photographic lineup and at trial as the driver of the burgundy vehicle. Further, the descriptions given by multiple eyewitnesses to the shooting indicated that the driver of the burgundy vehicle was defendant. Thus, regardless of defendant's statement to police indicating that he was in the backseat of the vehicle during the shooting, sufficient evidence existed for a rational fact-finder to conclude that defendant was, in fact, the driver of the vehicle. Moreover, the record evidence indicates that the victim, Jomo Mason, died of a single bullet wound during the shooting.

Second, it can be logically inferred from the substantial circumstantial evidence presented at trial that defendant and the shooter possessed the requisite intent to kill. A review of the record indicates that the shooting may have been prompted by an earlier altercation between two of the occupants of the van and defendant. Both Edward White and Keith Anderson testified that they had known defendant before the shooting. Anderson's testimony revealed that there was an ongoing "conflict" between defendant's "group" and Anderson's "group." Further, Anderson testified that, because of the conflict, there had been "multiple shootouts" between the two "groups" and that Anderson sustained a gunshot wound during a "shootout" that occurred in the same "general area" where the instant shooting took place. Anderson also testified that defendant might want to "kill him" because of the people he "hangs out with."

Furthermore, defendant's and the shooter's intent to kill can be inferred from defendant's driving immediately before the shooting, the number of shots fired by the shooter, the location of the bullets striking the van and the target. The record reveals that defendant may have been aware that he was followed by the brown van before the shooting. Testimony offered at trial showed that defendant in turn followed the van down Montclair and that the burgundy vehicle noticeably slowed before passing the alley where the van was parked. Further, the record shows that defendant stopped the burgundy vehicle in front of the alley, and the shooter pointed a handgun toward the van and fired nine or ten shots into the back of the vehicle. The shooter continued firing while the van attempted to drive away, causing it to crash into a tree. The use of a lethal weapon "support[s] an inference of an intent to kill." *People v Turner*, 62 Mich App 467, 470; 233 NW2d 617 (1975). Therefore, we conclude that the circumstantial evidence presented by the prosecutor was sufficient to show that defendant and the shooter intended to kill the occupants of the van.

Finally, the evidence supports a finding that defendant assisted the commission of the crime and knew that the principal intended to commit the charged offense. *Robinson, supra*, p 15. "An aider and abettor's state of mind may be inferred from all the facts and circumstances." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (citations omitted). "Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime." *Id*. at 757-758 (citations omitted). As set forth, *supra*, the record shows that defendant followed the van and stopped to allow the shooter to fire multiple times at the vehicle. The evidence further suggests that defendant and the shooter departed together, at a high rate of speed, immediately after the shooting. Flight from an incident may be taken to indicate a guilty mind. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Our review of defendant's statement to police indicates that he was, at a minimum, acquainted with the shooter. Accordingly, the evidence shows more than defendant's mere presence at the crime scene. We conclude that the jury had a sufficient basis to infer that defendant assisted or aided in the crime and was aware that the shooter intended to commit the crime.

Next, we conclude that the prosecutor presented sufficient evidence to support defendant's convictions for assault with intent to do great bodily harm less than murder under an aiding and abetting theory and that the trial court properly denied defendant's motion for a directed verdict. The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or threat with force or violence to do great bodily harm to another, i.e., an assault; and (2) an intent to do great bodily harm less than murder. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). "An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (internal citations omitted).

Here, the record shows that the occupants of the van were "scared" of the shots coming from behind them and that they were aware that the bullets were striking the inside of the van. Further, the record shows that the shooter fired nine or ten times at the van. This evidence supported the inference that the shooter had the specific intent to cause great bodily injury to the occupants of the van. The jury determines, rather than this Court, what inferences can be fairly drawn from the evidence and what weight those inferences are to be accorded. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Furthermore, as discussed, *supra*, defendant's actions before, during and after the shooting were sufficient to show that he assisted or aided in the assault and was aware that the shooter intended to commit the assault. We conclude that the prosecutor presented sufficient evidence for a rational fact-finder to conclude that defendant aided and abetted the assault with intent to do great bodily harm less than murder. Accordingly, the trial court properly denied defendant's motion for directed verdict on these charges.

In spite of eyewitness testimony at trial identifying defendant as the driver of the burgundy vehicle, defendant urges this Court to reverse his convictions because of the minor eyewitnesses' ages and alleged lack of credibility. However, questions of credibility are left to the fact-finder, and this Court will not resolve them anew on appeal. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). The record shows that the jury chose to credit the eyewitnesses' testimony regarding whether defendant was the driver. Moreover, the record

evidence was sufficient to support defendant's convictions. Accordingly, we conclude that defendant's argument is without merit.

Defendant next argues that the trial court improperly granted the prosecutor's request and instructed the jury on assault with intent to do great bodily harm less than murder as a necessarily lesser included offense of assault with intent to murder. We disagree.

Generally, this Court reviews preserved claims of instructional error de novo. *People v Kurr,* 253 Mich App 317, 327; 654 NW2d 651 (2002). However, whether an instruction is applicable to the facts of the case is within the discretion of the trial court. *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003). An abuse of discretion is found if the trial court's decision falls outside the principled range of outcomes. *People v Babcock,* 469 Mich 247, 269; 666 NW2d 231 (2003).

Under MCL 768.32(1), a trial court may instruct only on necessarily included lesser offenses and not on cognate lesser offenses. *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002). "Cognate offenses share several elements, and are of the same class or category as the greater offense, but the cognate lesser offense has some elements not found in the greater offense." *People v Mendoza,* 468 Mich 527, 532 n 4; 664 NW2d 685 (2003). A necessarily included lesser offense is one where "all the elements of the lesser offense have already been alleged by charging the defendant with the greater offense." *Cornell, supra,* p 355, quoting *People v Torres (On Remand),* 222 Mich App 411, 419-420; 564 NW2d 149 (1997). Further, a jury may only be instructed on necessarily included lesser offenses when a rational view of the evidence supports the lesser charge. *Cornell, supra,* p 357.

This Court recently held that assault with intent to commit great bodily harm less than murder is a necessarily lesser included offense of assault with intent to murder. *People v Brown,* 267 Mich App 141, 151; 703 NW2d 230 (2005). In reaching its conclusion, the *Brown* Court reasoned that

> it is impossible to commit the offense of assault with intent to commit murder without first committing the offense of assault with intent to do great bodily harm less than murder. Because the lesser *mens rea* of intent to do great bodily harm is included in the greater *mens rea* of intent to kill in the context of assault offenses, the elements of assault with intent to do great bodily harm less than murder are completely subsumed in the offense of assault with intent to commit murder. [*Id*. at 150-151.]

Accordingly, we conclude that the trial court did not abuse its discretion when it instructed the jury that it could consider the offense of assault with intent to commit great bodily harm as a lesser included offense of assault with intent to commit murder. Moreover, a rational view of the evidence supports the lesser charge of assault with intent to commit great bodily harm. Based on the evidence presented at trial, the jury could have reasonably concluded that defendant aided the shooter in intentionally and knowingly inflicting great bodily harm less than murder.

Defendant raises a related argument on appeal and contends that the prosecutor had an affirmative duty to request that the trial court instruct the jury that assault with intent to murder

and assault with intent to do great bodily harm less than murder were alternative counts. However, defendant has failed to present any authority supporting this argument. "This Court ordinarily declines to review issues for which a party has failed to provide authority, and will not search for authority to support or contradict a party's argument." *People v Harlan*, 258 Mich App 137, 140; 669 NW2d 872 (2003). Regardless, we note that the prosecutor could properly request assault with intent to do great bodily harm less than murder as a necessarily lesser included offense based on the foregoing analysis in *Brown.*

Defendant next argues that he was denied the effective assistance of counsel because defense counsel failed to request a lesser included charge of manslaughter. We disagree.

Because defendant failed to move for a new trial or a *Ginther*[1] hearing below, our review is limited to facts contained in the lower court record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). To establish a claim of ineffective assistance of counsel, a defendant must show "(1) that his trial counsel's performance fell below an objective standard of reasonableness and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *People v Walker*, 265 Mich App 530, 545; 697 NW2d 159 (2005). A defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

The decision to request a lesser included charge may be a matter of trial strategy. See *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). In light of the circumstantial evidence presented in the present case, defense counsel may have concluded that the jury would be more likely to convict defendant on the lesser charge of manslaughter if defense counsel had requested the same. See *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982) (noting that "[t]he decision to proceed with an all or nothing defense is a legitimate trial strategy.") Moreover, "a voluntary manslaughter conviction requires proof sufficient to sustain a conviction of second-degree murder along with evidence of provocation as a mitigating factor." *People v Darden*, 230 Mich App 597, 602; 585 NW2d 27 (1998) (emphasis deleted). Because there was no evidence presented at trial that showed that defendant or the shooter acted with provocation, a voluntary manslaughter charge was not warranted. Further, the trial court would have denied any request by defense counsel. "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003). Accordingly, we conclude that defendant's argument is without merit.

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

Finally, defendant, an African-American, argues that he was denied a fair trial because the jury was composed entirely of non-African-Americans. Defendant contends that a *Batson*[2] violation occurred and that he was denied his constitutional rights. However, "a timely objection is necessary to preserve a *Batson* question for appellate review." *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). We note that defendant failed to properly preserve this issue by raising a *Batson* violation below. Further, we conclude that defendant has waived any challenge to the manner in which jury voir dire was conducted because he failed to object and then expressed satisfaction with the chosen jury. *People v Ho*, 231 Mich App 178, 183-185; 585 NW2d 357 (1998). Accordingly, defendant's waiver extinguished any error that may have occurred. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant also argues that the trial court should have sua sponte raised the issue. Our Supreme Court has recently held that a trial court may raise a *Batson* issue sua sponte. See *People v Bell*, 473 Mich 275, 285-286; 702 NW2d 128 (2005). However, in light of the limited record presented, it is unclear whether the trial court erred in failing to raise the *Batson* issue sua sponte. Moreover, contrary to defendant's argument on appeal, "[t]he mere fact that no member of the defendant's race ended up sitting on the jury is . . . insufficient to make a prima facie showing of discrimination." *Williams, supra*, p 137.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kathleen Jansen

[2] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).