STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v RODNEY O. HARRIS, Defendant-Appellant.	UNPUBLISHED July 27, 2010 No. 287724 Oakland Circuit Court LC No. 91-106220-FC

Before: BANDSTRA, P.J., and BORRELLO and SHAPIRO, JJ.

SHAPIRO, J., (*dissenting*).

I respectfully dissent.

While Michigan law holds that duress is not a defense to murder, see, e.g., *People v Gimotty*, 216 Mich App 254; 549 NW2d 39 (1996); *People v Dittis*, 157 Mich App 38; 403 NW2d 94 (1987), there are no cases that hold that duress is not an available defense to *aiding and abetting* murder. Indeed, at least one case from our Supreme Court suggests that such a defense is permissible. In *People v Garcia*, 448 Mich 442; 531 NW2d 683 (1995), an equally divided Supreme Court resulted in the affirmance of this Court's vacation of the defendant's conviction. Although the issue in that case was whether the defendant's implicit acquittal of first-degree murder operated as an implied acquittal of the predicate offense of armed robbery, Justice RILEY noted that "because defendant was tried on the theory of aiding and abetting, using duress as his defense, the jury may have rejected the verdict of first-degree murder in the exercise of lenity . . . ." *Id.* at 447, 452 (opinion of RILEY, J.). Similarly, unpublished opinions from this Court suggest that duress is not wholly foreclosed as a defense to aiding and abetting first-degree murder. See, e.g. *People v Miller*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2008 (Docket 276589) (Noting in a first-degree felony murder aiding and abetting case that "the prosecutor presented sufficient evidence to disprove the defense of duress"); *People v Santiago*, unpublished opinion per curiam of the Court of Appeals, issued November 8, 2005 (Docket No. 245582) (WHITE, P.J., dissenting) (Noting that there was no question that the defendant's co-defendants "committed the robbery and murder [but that one of the co-defendants] was found not guilty based on his duress defense."); *People v Gordon*, unpublished opinion per curiam of the Court of Appeals, issued September 22, 2005 (Docket No. 254639) (Defendant was convicted of both felony-murder and first-degree premeditated murder "on an aiding and abetting theory" after the jury rejected her duress defense). I would, therefore,

reverse and remand for a new trial at which the duress instruction should be given if proofs consistent with it are introduced.

Further, while admittedly not raised by defendant, I also question whether application of MCL 767.39, which mandates the same sentence for aiding and abetting as for the underlying offense, is consistent with due process in the particular context of first-degree murder. The threshold for aiding and abetting is very low and, while in some cases the intent of the abettor to aid in commission of the underlying crime is clear, in other cases, it is less so. Similarly, the degree of aid provided to the primary actor varies substantially from case to case. Under our system of indeterminate sentencing, these factors can be considered in non-first-degree murder cases in assuring that the principle of proportionality be applied to the aider and abettor based on the facts of the case and his individual role in the crime. However, in the context of first-degree murder, the sentence is not indeterminate. Someone convicted of aiding and abetting a first-degree murder must be sentenced to life without parole no matter how minor his role or the degree to which he hoped the crime would not actually come to fruition. For this reason, I conclude that there is a significant conflict between the principle of proportionality and MCL 767.39 where the primary actor's crime was first-degree murder.

While this issue has not been raised by defendant and so cannot be determinative, I believe it underlines the need to assure that a defendant charged with aiding and abetting first-degree murder at least get a full opportunity to present his case and any viable defenses. Thus, if a defendant asserts, and has evidence to support the assertion, that his actions in abetting the crime were taken under duress, we must allow the jury to consider that defense. To exclude duress as a defense in all such cases as a bright line rule can result in a grossly unjust outcome. An individual who is threatened with serious harm by a potential murder if he does not provide requested or commanded assistance should not have to choose between being a dead hero and being deemed just as guilty as the actual murderer and spending his life in prison without the possibility of parole.

Since the evidence in this case would surely permit a reasonable trier of fact to reject a duress defense, I reject the defendant's insufficiency argument. However, I also conclude, after reviewing the entire trial record, including all of defendant's oral and written statements to the police, that there was sufficient evidence of duress to create a fact question for the jury. Defendant's[1] statements to the police were consistent in his assertion that he was driving a friend, who directed him to pick up two men he did not know. Only after picking up those two men did he learn of their intent to murder someone and, by that time, one of them, who appeared "crazy," had a gun out and told defendant that if he warned the victim, he would be killed himself.[2] I believe that the majority confuses the fact that there was sufficient evidence by which

[1] Defendant was 16 years old, but was charged as an adult pursuant to MCL 764.1f.

[2] It is also worth noting that at defendant's first trial, the jury, by stipulation, learned that defendant had taken a lie detector test that was consistent with his second statement to the police. The first trial ended in a hung jury. At the second trial, the prosecutor declined to so stipulate and the jury did not learn of the polygraph results. While exclusion of the polygraph evidence was proper, the result in the first trial demonstrates that the duress defense was not as far-fetched as plaintiff would suggest.

a jury could reject a duress defense with the idea that a refusal to allow the jury to consider duress at all can be deemed harmless.

I also reject the assertion that this argument has been waived, as I believe defense counsel was not abandoning his request for a duress instruction. Defendant did request such an instruction. However, the prosecutor took the position that such an instruction could only be given as to the charge of accessory after the fact and defense counsel stated that he agreed with the prosecutor that "that is the law." Given defense counsel's erroneous belief that the law barred such an instruction, defendant did not abandon a "known right." See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Moreover, if we construe defense counsel's action as a waiver, this was clearly ineffective assistance of counsel. First, counsel's belief that there was law barring such a defense in an aiding and abetting first-degree murder case was incorrect. Second, the only defense presented at trial was duress. To offer such a defense and then waive it cannot be trial strategy. See *People v Johnson*, 451 Mich 115, 123-124; 545 NW2d 637 (1996).

I would reverse and remand for a new trial with direction that the jury be given the duress instruction upon admission of evidence to support such a defense.

/s/ Douglas B. Shapiro