STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v.

KEVIN M. ROBINSON,

Defendant-Appellee.

/

Supreme Court Docket No. 126379

Court of Appeals No. 237036

Wayne County Circuit Court 00-9498

/

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DEFENDANT-APPELLEE'S BRIEF ON APPEAL

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STATEMENT OF JURISDICTION

Plaintiff-Appellant's Statement of Jurisdiction is correct, but Defendant-Appellee would add the Court may review a decision of the Court of Appeals pursuant to MCR 7.301(2).

COUNTER-STATEMENT OF QUESTION

May a person be properly convicted of aiding and abetting a second-degree murder where the evidence is insufficient to prove beyond a reasonable doubt that he knew the principal was armed, and knew of the principal's intention to commit a separate and more serious crime?

The Defendant-Appellee answers: "No."

The Plaintiff-Appellant would answer: "Yes."

The Court of Appeals answered: "No."

QUESTIONS FROM THE COURT

What are the elements of accomplice liability under MCL 767.39?

Is the intent to commit great bodily harm sufficient for aiding and abetting second-degree murder?

COUNTER-STATEMENT OF FACTS

Plaintiff-Appellant's Statement of Facts is generally correct and complete for purposes of the appeal.

ARGUMENT

A. A person may not properly be convicted of aiding and abetting a second-degree murder where the evidence is insufficient to prove beyond a reasonable doubt that he knew the principal was armed, and knew of the principal's intention to commit a separate and more serious crime.

B. The elements of accomplice liability under MCL 767.39 are the same as those for a principal.

C. The intent to commit great bodily harm is sufficient for aiding and abetting second-degree murder where the intent coincides with the injuries causing the death, and is insufficient where the injuries or harm results from a separate, independent, and unforeseen act of the principal.

Standards of Review

Plaintiff-Appellant correctly stated the applicable standards of review as **de novo**, for review of the sufficiency of the evidence, in the light most favorable to the prosecution, to determine whether or not a rational trier of fact could find that all of the elements of the charged offense could be found beyond a reasonable doubt, *People v. Wolfe*, 440 Mich. 508, 513; 489 N.W. 2d 748 (1992); *People v. Hampton*, 407 Mich. 354, 366; 285 N.W. 2d 284, cert. den. 449 U.S. 885; *Jackson v. Virginia*, 43 U.S. 307; 99 S. Ct. 2781; 61 L. Ed. 2d 560 (1979), and for questions of law, e.g., statutory construction. *People v. Phillips*, 469 Mich. 390, 394 (2003, revised March 11, 2004). Review of a court's factual findings is for clear error. MCR 2.613(C).

Discussion

There are several facts arising from the trial court which are of great significance to this appeal, and the facts must be kept in mind as the legal questions are examined. Initially, the parties stipulated at trial that the victim died as a result of a single gunshot wound. Second, Mr. Robinson left the house (i.e., the scene of the murder) prior to the shot being fired, returned and was home for a "good five or six minutes" before co-defendant Pannell returned (Plaintiff-Appellant's Appendix ("APP"), 31a). Third, Pannell subsequently confessed *his* actions to Ms. Brewer, and even returned to the scene to examine the success of *his* criminal act (APP 34a – 37a). Mr. Robinson "did not see the gun, didn't know [Pannell] had a gun" (APP, 71(a)). Finally, "it is not the position of the People that Pannell's act of shooting Thomas to death was foreseeable by defendant" (Appellant's Brief on Appeal, p. 38). (Note: there is an apparent typographical error in Appellant's Brief wherein it is stated that Mr. Robinson possessed "the intent to kill," p. 38).

The Trial Court's legal bases for its verdict flowed from the principles it expressed in the phrases of "in for a penny, in for a pound," and [that Mr. Robinson] "got the ball rolling," and that "if you go over there with that intent and someone happens to die, then you can be found guilty (APP, 84a; 87a; 91a). The Trial Court clearly, and mistakenly, posited a strict-liability type of offense. That Court's conclusion echoed the trial-level

prosecutor's argument which essentially posited that were Mr. Robinson there, and a gun were used, then he would be guilty (APP, 74a; and see Appellant's Brief, p. 6, wherein it is noted that "He [the trial-level prosecutor] argued the mere fact a weapon was used and that defendant was involved satisfied the second prong of second-degree murder").

The rationale underlying the Trial Court's conclusions, and the trial-level prosecutor's argument, was expressly abrogated by this Court in *People v. Aaron*, 409 Mich. 672; 299 N.W. 2d 304 (1980), wherein this Court asked "whether Michigan has a felony-murder rule which allows the element of malice required for murder to be satisfied by the intent to commit the underlying felony or whether malice must be otherwise found by the trier of fact." 409 Mich. at 687. The *Aaron* Court continued, saying:

> "The most fundamental characteristic of the felony-murder rule violates this basic principle [i.e., that criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result] in that it punishes all homicides, committed in the perpetration or attempted perpetration of proscribed felonies whether intentional, unintentional or accidental, *without the necessity of proving the relation between the homicide and the perpetrator's state of mind.* This is most evident when a killing is done by one of a group of co-felons. The *felony-murder rule completely ignores the concept of determination of guilt on the basis of individual misconduct. The felony-murder rule thus "erodes the relation between criminal liability and moral culpability"*. 409 Mich. at 708. (citations omitted, emphasis supplied).

Although the consolidated cases in *Aaron* dealt specifically with felony-murder, the fundamental issue is essentially the same as in the instant case; that is, how far one may extend the culpability of a principal to a co-felon? The underlying rationale of the

common-law felony-murder doctrine, arising in the instant case in the argument of the trial-level prosecutor and the findings and conclusions of the Trial Court, has been described as follows:

> "The rationale of the doctrine is that one who commits a felony is a bad person with a bad state of mind, and he has caused a bad result, so that we should not worry too much about the fact that the fatal result he accomplished was quite different and a good deal worse than the bad result he intended. Yet it is a general principle of criminal law that one is not ordinarily criminally liable for bad results which differ greatly from intended results." LaFave & Scott, *Criminal Law*, p. 560.

In the case of *People v. Bailey*, 451 Mich. 657, 677-678; 549 N.W. 2d 325 (1996), the defendant argued, among other things, that the actions of the co-felon in kicking the victim, after the defendant had struck the victim with a baseball bat, constituted an intervening cause of the fatal injuries. However, this Court found that:

> "While defendant presented testimony of independent kicks administered to the decedent by his brother, the defendant failed to introduce evidence from which the jury could rationally find that the decedent died solely as a result of the second assault. Dispositively, defendant presented no evidence of the injuries that could have resulted from those kicks. Instead, defendant merely presented evidence of a possible additional, contributory cause of the decedent's death." 451 Mich. at 680.

The *Bailey* Court also found that the defendant had admitted to acts (i.e., striking the victim with a baseball bat) consistent with the fatal blunt-force injuries, but further observed that:

> "Where an independent act of a third party intervenes between the act of a criminal defendant and the harm to a victim, that act may only serve to cut off the defendant's criminal liability where the intervening act is the sole cause of harm." 451 Mich. at 677.

An example of such an intervening act may be found in the old case of *People v. Elder*, 100 Mich. 515; 59 N.W. 237 (1894), wherein an earlier panel of this Court found error in the trial court instructing the jury it could find the defendant guilty of manslaughter, where the defendant, a bartender, knocked the victim to the ground during an altercation. A bystander then kicked the victim, inflicting the fatal injury. As recognized in *People v. Podolski*, 332 Mich. 508, 515; 52 N.W. 2d 201 (1952) (while distinguishing the intent of the defendant in *Elder*), "There was no testimony to indicate that defendant Elder intended the death or that defendant intended or expected any intervention by any third person or that the force used by Elder would normally be expected to result in death." In *Podolski*, police responded to a bank robbery. During a gun battle with the robbers one officer shot and killed a second officer. The Court stated that:

> "the jury had a right to consider that defendant had the murderous intent that any innocent resisting person should die as a result of resistance, and the resultant death of officer Kliezewski was within the murderous intent of defendant in the holdup. When a defendant deliberately engenders an affray, *deliberately using therein a lethal weapon, it must be considered to be within his intent that death should result from the affray as a natural and probable consequence of his acts, where the death is directly attributable to the affray and not resulting from some independent intervening cause.*" 332 Mich. at 514-515 (emphasis supplied).

Podolski was a pre-*Aaron* case, and the mandatory nature of the inference of malice was

therefore abrogated. The *Podolski* facts are, in any event, quite distinguishable from the instant facts, which are more closely analogous to those found in *Elder*. The records shows that Mr. Robison knocked Thomas to the ground, and Pannell then kicked Thomas. However, the instant facts are more favorable to Mr. Robinson than *Elder*'s were to Elder. That is, the undisputed facts in the instant case show that Mr. Robinson was not even present at the time of the intervening and fatal shot, and which, *as the People have recognized* (Appellant's Brief, p. 38), was an act not foreseeable to Mr. Robinson, who had no fore-knowledge of the presence of the weapon. Mr. Robinson cannot reasonably be held culpable for the unanticipated and independent acts (i.e., possessing and using a firearm) of Pannell, even under *Podolski*. "It is fundamentally unfair and in violation of basic principles of individual criminal culpability to hold one felon liable for the unforeseen and unagreed-to results of another felon." *Aaron*, supra, 409 Mich. at 731.

The Appellant's argument latches onto "great bodily harm" ("GBH") and would carry it through to a strained and inapposite connection to the murder. The GBH act, for which Mr. Robinson stands convicted (and the sufficiency of which is admitted only for purposes of argument, as absent the shooting-death of Thomas by Pannell there likely would be insufficient evidence to sustain a conviction greater than an aggravated assault), was a crime separate and distinct from the murder committed by Pannell, and was completed, with non-fatal (if any) injury to the victim. The proofs show only that Mr.

Robinson knew he was participating in an assault/battery; not a murder.

Requisite Intent for an Aider and Abettor.

The aiding and abetting statute, MCL 767.39, abolished the historic distinction between a principal and accessories before the fact, and provides the following:

> Every 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.

The "requisite intent" for an aider and abettor sufficient to sustain a conviction "is that necessary to be convicted as a principal." *People v. Kelly*, 423 Mich. 261, 278; 378 N.W. 2d 365 (1985); *People v. Mass*, 464 Mich. 615, 628; 628 N.W. 2d 540 (2001). The individual liability of each co-felon must be proven. *Kelly*, 423 Mich. at 279. The prosecution must therefore establish beyond a reasonable doubt that that (1) the crime was committed by the defendant or another, (2) the defendant performed acts or gave encouragement assisting in the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge of the principal's intention to commit the crime at the time the aid or encouragement was given. *People v. Knapp*, 26 Mich. 112 (1872) ("There can be no criminal responsibility for any thing not fairly within the common enterprise"); *People v. Carines*, 460 Mich. 750, 758; 597 N.W. 2d 130 (1999); *People v. Barrera*, 451 Mich. 261, 294; 547 N.W. 2d 280 (1996); *Kelly*, supra, 423 Mich. at 287-290 (LEVIN, J., concurring in part and dissenting in part)(Justice Levin noted that

even where a defendant knows of the principal's intention to commit a crime, that is not necessarily sufficient evidence to convict the defendant as an aider and abettor); *People v. Riley*, 468 Mich. 135; 659 N.W. 2d 611 (2003); *People v. Turner*, 213 Mich. App. 558, 567; 540 N.W. 2d 728 (1995); *People v. Tanner*, 255 Mich. App. 369, 418-419; 660 N.W. 2d 746 (2003). Where murder is the charge, and malice the element to be proven, it thus must be established that the aider and abettor possessed the intent to kill, the intent to cause great bodily harm or wantonly and willfully disregarded the likelihood of the natural tendency of his behavior to cause death or great bodily harm. *Kelly*, 423 Mich. at 278, citing *Aaron*, 409 Mich. at 733; *People v. Langworthy*, 416 Mich. 630, 650; 331 N.W. 2d 171 (1982)(involving an examination of whether voluntary intoxication might mitigate the second-degree murder wanton and willful element); *Hill v. Hofbauer*, 337 F. 3d 706 (CA 6, 2003).

In *Kelly* the defendant argued that an instruction improperly allowed the jury "to apply an objective standard of foreseeability on the issue of intent." *Kelly*, 423 Mich. at 278. The Court, noting that the objection was not properly preserved, reviewed only for manifest injustice. As the Court found the evidence of the intent necessary to establish guilt as an aider and abettor "overwhelmingly evident from the record," the Court found no injustice in that case. 423 Mich. at 280.

The precise meaning of "F—k him up," the plan at issue in the instant case, was never defined in the record. If, for purposes of argument, it is accepted that the meaning is

synonymous with an intent to do great bodily harm, it is a specific intent that must be proven on the part of Mr. Robinson; great bodily harm is a specific intent offense. See, for example, *Langworthy*, supra, 416 Mich. at 656 (LEVIN, J. (dissenting); *People v. Miller*, 91 Mich. 639 (1892). Where the added element of aiding and abetting is alleged, the intent to assist in a particular offense is required. For example, we find in CJI 2d 8.1, the following:

> (1) In this case, the defendant is charged with committing _____ or *intentionally* assisting someone else in committing it.
>
> (2) Anyone who *intentionally* assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of *that* crime as an aider and abettor.
>
> (3) To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> (a) First, that the alleged crime was actually committed, either by the defendant or someone else. [It does not matter whether anyone else has been convicted of the crime.]
>
> (b) Second, that *before or during the crime*, the defendant did something to assist in the commission of the crime.
>
> (c) Third, the defendant *must have intended* the commission of *the* crime alleged or must have known that the other person intended *its* commission at the time of giving the assistance. (emphasis supplied).

The Trial Court erred in finding Mr. Robinson guilty of second-degree murder after specifically finding there was no intent to kill, and no wanton and willful disregard (the first and third prongs of the definition), and nothing on Mr. Robinson's part other than his involvement in the initial assault (APP, at 84a). The Trial Court recognized that the intent was offense-specific, and limited to the initial, non-fatal assault. The verdict of

guilt for the separate and independent murder offense, however, does not naturally or logically flow from the amorphous "F - - k him up" intent, and the Trial Court's so finding, apparently because "someone happen[ed] to die," was clearly erroneous.

The Trial Court's determination that Mr. Robinson's actions allowed Pannell "to get the upper hand" (APP, at 88a), an argument continued by the People in Appellant's Brief, is without support in the record. Pannell was the one armed with a weapon; had he a formulated or developed intent to kill when they arrived at the house he certainly could have shot the victim immediately upon the victim opening the door. There is no "upper hand" issue when Pannell had the gun. The Trial Court's verdict actually is an echo of the pre-*Aaron* felony-murder rationale in its application against Mr. Robinson, finding Mr. Robinson guilty regardless of his actual knowledge or actual intent. It is a strict-liability culpability imposed because "someone happen[ed] to die," without proper regard for any individual culpability on the part of Mr. Robinson. It is understandable that society would want and, indeed, need, that the guilty be brought to justice. However, "[W]hile it is understandable that little compassion may be felt for the criminal whose innocent victim dies, this does not justify ignoring the principles underlying our system of criminal law." *Aaron*, supra, 409 Mich. at 710.

As noted above, a fundamental principle underlying our system of criminal law is "that criminal liability for causing a particular result is not justified in the absence of

some culpable mental state in respect to *that result*." *Id.*, at 708 (emphasis supplied). It would be manifestly unjust on this record to allow a murder conviction to stand against Mr. Robinson, where he neither caused the result, nor entertained the requisite mental intent to support or commit the offense.

The aiding and abetting statute abolished the distinctions between accessories before the fact and principals; the difference is a matter of prosecution theory, as aiding and abetting is not a separate offense. *People v. Perry*, 460 Mich. 55, n. 20; 594 N.W. 2d 477 (1999) ("being an aider and abettor is simply a theory of prosecution, not a separate substantive offense"). However, as noted above, the individual liability of each co-felon must be proven. *Kelly*, 423 Mich. at 279. In some cases the aider and abettor's guilt may be expressly shown, for example, by specific acts, and in other cases the guilt may be shown by inference, for example, by proof of an implicit agreement to do the act.

In *Riley*, supra, the Court found sufficient proof of aiding and abetting a murder. The defendant admitted to taking the principal to the victim's apartment, and to being present at the time of the murder. The principal strangled the victim, who was then bound, and then strangled a second time after he had resumed breathing. A neighbor, suspicious of the events, knocked on the door twice, with the defendant each time answering and providing a story. The defendants tried to leave in the victim's car, into which they had placed various items taken from the apartment, but then fled together when the car would

not start. The Court noted that the defendant necessarily would have become aware of the principal's intent before the second strangling incident, even if he had not previously been aware; also, the defendant's acts at the door further facilitated the completion of the crime and the defendants' escape.

The instant case is readily distinguishable, in that Mr. Robinson was not present at the time Pannell committed the murder, and had no knowledge prior to the shooting that Pannell was armed. There was no combined activity when the victim was killed, and no combined escape activity.

In the case of *People v. Flowers*, 191 Mich. App. 169; 477 N.W. 2d 473 (1991), lv. den. 439 Mich. 876, a circuit court order remanding the case to the district court for reinstatement of a felony-murder charge was affirmed. The defendant had offered someone money to beat up the victim, and further offered an additional $50.00 for each bone that was broken; the defendant provided the perpetrator with the victim's address and photograph. The perpetrator killed the victim with a single gunshot to the head; there was no beating. The Court of Appeals examined whether the defendant's offer to pay the additional $50.00 for each broken bone "impliedly authorized the defendant's agents to kill Donald May, regardless of the means employed." 191 Mich. App. at 178. The district court had refused to bind over because the defendant lacked an intent to kill. The Court of Appeals, affirming the circuit court's order of remand, held that the questions of

intent and whether or not an act or crime was within the intended scope of the common criminal enterprise, were questions of fact, and the district court had erred because there was sufficient evidence to support a finding of probable cause that the defendant was an aider and abettor in the murder. The *Flowers* case is readily distinguishable from the instant case, in that the type of evidence supporting a finding of Flowers' guilt, i.e., an implied authorization, is completely lacking and refuted by the facts in this record. Not only did Mr. Robinson do nothing to authorize an escalation of violence by any means, he expressly tried to limit the violence done to the victim to those several blows and kicks.

Another example of aiding and abetting may be found in *People v. Spearman*, 195 Mich. App. 434, 491 N.W. 2d 606 (1992)(overruled in part on other grounds, *People v. Rush*, 443 Mich. 870; 504 N.W. 2d 185 (1993), there was a planned robbery, or ambush, of a pizza-delivery person; the Court of Appeals found that even though Spearman participated in planning the robbery, had ordered the pizza, was a lookout, and had fled the scene of the crime, the Court could not conclude that the evidence "was ... so overwhelming that we can say that the error [the trial court's having used a co-defendant's confession against Spearman] was harmless beyond a reasonable doubt", and vacated the conviction and remanded for consideration by the trial court of only the proper evidence against the defendant.

In the case of *Hopson v. Foltz*, 818 F 2d 866 (CA 6, 1987), the Sixth Circuit Court of

Appeals found the following facts:

> "The prosecution's sole witness who claimed personal knowledge of the shooting was Elaine Peterson. Peterson testified that just prior to the shooting she saw Hopson and Hagwood standing on a street corner arguing, although she also said she did not actually hear Hopson say anything. She then saw Fred Thompson arrive in a car and take a gun out of his trunk. She heard shots but could give no particulars as to the shooting itself. An off-duty policeman who also heard the shots observed Hopson leave an alley and walk to his house a short distance away.
>
> Hopson appeared to hand something to a person inside. The prosecution's theory was that because of the rapid succession of shots heard by witnesses, the shotgun used in the killing automatically ejected shell casings. No casings were found at the scene, therefore one could infer that the objects carried by Hopson were the spent shells."

The *Hopson* Court concluded that the "testimony of Peterson indicates at most that Hopson was present at the shooting, that he may have argued with the victim during the evening prior to the shooting, that he may have known that someone else intended to harm Hagwood, and that he may have taken the empty shell casings after the shooting. No proof was given that Hopson acted in pre-concert with Thompson to commit the murder or that he said or did anything" to support the crime. The *Hopson* scenario is closely analogous to the instant case, wherein there is even less evidence to establish support for the crime.

Federal Aiding and Abetting.

The federal rule is not so confused as Appellant argues in its Brief. The aiding and abetting statute, 18 U.S.C. §2, was enacted in 1909, and provides that "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." That has

been interpreted to require that the defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." See *United States v. Searan*, 259 F. 3d 434 (CA 6, 2001), quoting *United States v. Peoni*, 100 F. 2d 401, 402 (2d Cir. 1938); see, also, *Nye & Nissen v. United States*, 336 U.S. 613, 619; 69 S. Ct. 766; 93 L. Ed. 919 (1949); *United States v. Morrow*, 977 F. 2d 222, 230 (CA 6, 1992) (en banc)(the defendant's conviction for aiding and abetting the principal's carrying a firearm was upheld, where the defendant and principal both tended a marijuana field while wearing camouflage, masks, and the principal kept the firearm in a visible holster); *Rattigan v. United States*, 151 F. 3d 551 (CA 6, 1998)(involving a charge as an aider and abettor, of using a firearm). The federal rule is clear, and shows that a conviction may be secured only where there is sufficient proof of an aider and abettor's knowledge and participation.

Conclusion.

Under both federal and state precedent, it would be unjust to convict Mr. Robinson of a murder spontaneously committed by another, where the proofs are insufficient to establish beyond a reasonable doubt that he in any way knew of the principal's intent or plan of action.

RELIEF REQUESTED

WHEREFORE, Defendant-Appellee Kevin Robinson respectfully requests this Honorable Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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