STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 1, 2005
v TIMOTHY SHEPARD, Defendant-Appellant.	No. 251742 Wayne Circuit Court LC No. 02-014804-03

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v LAMAR QUANTRELL ROBERTS, Defendant-Appellant.	No. 252100 Wayne Circuit Court LC No. 02-014804-02

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v HANS LEE THOMAS, Defendant-Appellant.	No. 257557 Wayne Circuit Court LC No. 02-014804-01

Before: Saad, P.J., and Jansen and Markey, JJ.

PER CURIAM.

In these consolidated cases, a jury convicted defendants Timothy Shepard, Lamar Roberts and Hans Thomas after a joint trial before a single jury. Specifically, the jury convicted Shepard, Roberts and Thomas of felony murder, MCL 750.316(1)(b), first-degree home

invasion, MCL 750.110a(2), felony firearm, MCL 750.227b(1), and felon in possession of a firearm, MCL 750.224f(1). Defendants appeal their convictions on numerous grounds. We affirm defendants' convictions, but remand for correction of Shepard's judgment of sentence.

I. Facts

This case arises out of the murder of Sherryfield Abercrombie and an armed robbery at the Southport Apartments in Van Buren Township. In the early morning of November 5, 2002, Van Buren police officers were called to an apartment in Southport that was occupied by Pauline Jackson. Jackson reported that three men entered her apartment, one man who wore a mask pointed a gun at her, the men locked her and her brother in a bathroom, and stole some money. Jackson also told the officers that she was unable to reach her boyfriend, Abercrombie, by telephone. When the police left Jackson's apartment, one officer spotted Abercrombie's van elsewhere in the complex. The officers found Abercrombie inside and a pathologist testified that Abercrombie died from two bullet wounds to the head, fired at close range.

The trial court conducted a jury trial in March 2003, but the proceedings ended in a mistrial because the jury could not reach a unanimous verdict. At defendants' retrial in September 2003, evidence revealed that Abercrombie was a drug dealer and that he exchanged several telephone calls with Roberts and Thomas just before his murder. Jackson also admitted at trial that, in addition to cash, the three men who entered her apartment stole some of Abercrombie's inventory of marijuana and cocaine.

At trial, Jackson recalled that one of the robbers wore a gorilla or monkey mask and that another man held a yellow baby blanket over his face. According to Jackson, the third man wore a caramel hooded sweatshirt that was tightly tied. She testified that, though she could not see each robber's face in its entirety, the gunman who wore the mask was the same height and build as Thomas and that they have similar skin color and hair. She also testified that the two other robbers resembled Shepard and Roberts. Jackson remembered that, in addition to the drugs and money that the robbers stole, the men took some new shoes, including a pair of gray and white Air Jordan tennis shoes.

One of the prosecutor's key witnesses in the case was Jerry Bigham, who testified that he saw Roberts both before and after the robbery and murder. According to Bigham, on November 4, 2002, he and Roberts spent the day together at Bigham's apartment, playing dominoes and smoking marijuana. At some point, Shepard arrived at Bigham's apartment and Roberts left with him. On the morning of November 5, 2002, Roberts called Bigham and asked him to meet him at a Motel 6 to smoke marijuana. According to Bigham, when he arrived, Roberts was wearing a towel and a pair of pants. Roberts asked Bigham to drive him to his brother's house so he could get a pair of underwear. Roberts explained that his clothes had blood on them because he, Shepard, and Thomas committed a robbery the night before, during which a victim was injured. According to Bigham, Roberts expressed fear that Shepard would kill him because he knew that Shepard injured someone during the robbery. Bigham also recalled that Roberts said someone wore a mask during the robbery.

Bigham testified that, at first, Roberts told him that they committed the robbery in Southfield and that the victim was stabbed. However, Bigham and Roberts watched a local newscast that reported a robbery and murder of Abercrombie at the Southport Apartments and

Roberts appeared to be worried. Bigham admitted that Roberts denied any involvement in the crime, but he also testified that Roberts gave him a new pair of gray Air Jordan tennis shoes, which Pauline Jackson later testified were stolen from her apartment during the home invasion. Furthermore, cellular phone records showed that, around the time of Abercrombie's murder, Roberts, Thomas and Abercrombie made numerous calls to one another.

Roberts testified on his own behalf after the jury deliberated the charges against Shepard and Thomas. Roberts admitted that he participated in the robbery and murder and he again implicated Shepard and Thomas in the crimes. However, he maintained that Shepard and Thomas forced him to take part in the crimes at gunpoint.

II. People v Shepard – Docket No. 251742

A. Confrontation Clause

Shepard claims that the trial court violated his rights under the Confrontation Clause[1] when it permitted Jerry Bigham to testify about Shepard's role in the crimes.[2] The Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court held that, under the Confrontation Clause, "testimonial statements of witnesses absent from trial may not be admitted against a criminal defendant unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant." *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005). The *Crawford* court did not precisely define which statements are "testimonial" for purposes of the new rule. However, Roberts' statement to Bigham does not fall under even the general parameters of a testimonial statement as defined in *Crawford*.

In a case with analogous facts, *People v Shepherd*, 263 Mich App 665, 673; 689 NW2d 721 (2004), this Court considered whether a statement made by the defendant to relatives visiting him in jail was testimonial where jail guards overheard the statement and, at trial, testified about what the defendant said. Specifically, and contrary to his trial testimony, the defendant admitted that he was the driver of a vehicle that fled from police. *Id*. This Court ruled that the statement was not testimonial because the defendant "was speaking to relatives, not to the guards, and made spontaneous, unprompted comments regarding his role in the fleeing and eluding and assault." *Id*. at 675. Accordingly, "[e]ven under the broadest definition of testimonial, it is

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[1] US Const, Am VI

[2] As this Court explained in *People v Walker*, 265 Mich App 530, 533; 697 NW2d 159 (2005):

> The trial court's ruling regarding the admission of evidence is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002); *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling.

unlikely that [the defendant] would have reasonably believed that the statements would be available for use at a later trial." *Id*. at 675-676.

This Court ultimately reversed the defendant's conviction in *Shepherd* because it found that the admission of the defendant's guilty plea (which was wholly unrelated to the jailhouse statements) violated *Crawford*. Our Supreme Court reversed *Shepherd* because it held that the admission of the defendant's guilty plea was harmless beyond a reasonable doubt. *People v Shepherd, supra*, 472 Mich 343. However, the Supreme Court observed that "[t]he Court of Appeals correctly found that the corrections officers' testimony about [the defendant's] *nontestimonial* statements to his visitors was properly admitted under MRE 804(b)(3)." *Id*. at 350 n 7 (emphasis added).

Here, Roberts' statement to Bigham regarding the murder and robbery does not constitute a testimonial statement for several reasons: (1) Roberts made the statement to a close friend who was completely uninvolved in the offense, not to a government employee, (2) Roberts made the statement voluntarily and without prompting, (3) Roberts' statement cannot reasonably be construed as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Further, the statement is far more akin to a casual remark to an acquaintance than a formal statement to government officers. *Crawford, supra*. The statement also does not fall, even broadly, under any of the guidelines set forth in *Crawford*: Roberts did not make a statement in an affidavit, custodial examination, or as testimony in a prior proceeding. Moreover, because he made the statement to a good friend, and implicated himself and his co-defendants in the crime, it is unlikely that Roberts believed that the statement would be available for use at a later trial. Accordingly, that Shepard did not have an opportunity to cross-examine Roberts did not render Bigham's testimony inadmissible under the Sixth Amendment.

Shepard argues, alternatively, that the trial court should not have admitted Roberts' statement under state hearsay law. Specifically, he contends that Roberts' statement does not bear adequate indicia of reliability to be admitted as a statement against penal interest under MRE 804(b)(3). We disagree.

Again, Roberts made the statement voluntarily to a good friend shortly after the crime. Further, Roberts gave the statement willingly and without prompting. Moreover, though defendants contend that Roberts' statement was unreliable because there were inconsistencies in Bigham's testimony and because Roberts had a motivation to lie, these are not recognized reasons to exclude the evidence under MRE 804(b)(3). Accordingly, the trial court correctly admitted Roberts' statements through Bigham's testimony at trial.

Shepard further argues that the trial court violated his Confrontation Clause rights by limiting defense counsel's cross-examination of Bigham.[3] Contrary to Shepard's arguments,

[3] "Under MRE 613, subject to certain restrictions, a witness may be examined concerning a prior inconsistent statement for impeachment purposes." *People v Rodriguez*, 251 Mich App 10, 34; 650 NW2d 96 (2005). However, "the Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " *People v Chavies*, 234 Mich App 274, 283; 593 (continued…)

however, the record shows that defense counsel clearly made the point to the jury that (1) Bigham failed to disclose this fact in prior statements and proceedings, and (2) Bigham previously testified that he did not think the defendants usually spent time together. Accordingly, the jury had the opportunity to assess Bigham's credibility on this basis and further cross-examination on this point would have been cumulative. Accordingly, we reject defendant's claim that the trial court violated his Confrontation Clause rights.

B. Motion for Mistrial

Shepard complains that the trial court abused its discretion when it denied his motion for a mistrial when Bigham spontaneously referred to Shepard's prior bad acts. Specifically, when the prosecutor asked Bigham how he knows Shepard, Bigham replied, "I know him from -- they ran him off the south side, and I think he got away with a couple of murders or something." Shepard's attorney objected to Bigham's statement and the trial court struck the comment and instructed the jury to disregard it.

The parties agree that Bigham's comments were unsolicited and that they were not prompted by improper questions from the prosecutor. Indeed, the prosecutor merely asked Bigham how he knew each defendant, questions that were not designed to elicit inappropriate answers from Bigham. As this Court explained in *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995):

> The trial court's grant or denial of a mistrial will not be reversed on appeal in the absence of an abuse of discretion. *People v McAlister*, 203 Mich App 495, 503; 513 NW2d 431 (1994); *People v Vettese*, 195 Mich App 235, 245-246; 489 NW2d 514 (1992). A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, *People v Siler*, 171 Mich App 246, 256; 429 NW2d 865 (1988), and impairs his ability to get a fair trial, *People v Barker*, 161 Mich App 296, 305; 409 NW2d 813 (1987). **Nevertheless, an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial**. *People v Gonzales*, 193 Mich App 263, 266-267; 483 NW2d 458 (1992); *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988); *People v McKeever*, 123 Mich App 533, 538; 332 NW2d 596 (1983). [Emphasis added.]

Here, Bigham's comments were not grounds for a mistrial because they were not elicited by the prosecutor's questions and the remarks were volunteered, unresponsive answers to appropriate questions. Further, the trial court immediately struck the comments from the record and instructed the jury to disregard them. Moreover, because "[j]urors are presumed to follow their instruction, and instructions are presumed to cure most errors," defendants have not shown a level of prejudice sufficient to justify a new trial. Accordingly, though Bigham's remarks were inappropriate and provocative, the trial court's decision to deny their motion for new trial did not, in any sense, amount to a gross error that deprived defendants of a fair trial. *People v Wells*,

(…continued)

NW2d 655 (1999), quoting *United States v Owens*, 484 US 554, 559; 108 S Ct 838; 98 L Ed 2d 951 (1988) (further citations omitted).

238 Mich App 383, 390; 605 NW2d 374 (2000). Therefore, we affirm the trial court's denial of the motion for mistrial.

C. Closing Arguments

Shepard claims that he was prejudiced when, in closing arguments, the prosecutor and Shepard's attorney stated that the robbery victim, Pauline Jackson, testified that all three of the perpetrators were black when, in fact, she was unable to testify about the race of the third perpetrator. Shepard did not object at trial and, therefore, review of this issue is precluded unless "an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). On Shepard's ineffective assistance of counsel claim, to merit relief, 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." *Walker, supra* at 545.

As the record reflects and the prosecutor concedes, it was error for the prosecutor and Shepard's counsel to argue to the jury that Pauline Jackson testified that the third perpetrator had black skin because the evidence did not support this assertion. However, we will not review the prosecutor's error further because Shepard did not object to the reference in the trial court and a simple jury instruction could have easily cured the prosecutor's error. If the trial court simply advised the jury that Pauline Jackson testified that she could not identify the skin color of the third robber, any possible prejudice would have been alleviated.

With regard to the error by Shepard's counsel, we reject Shepard's claim. Defendant has simply not shown "that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Walker, supra*. As the prosecutor asserts, Shepard can only speculate that the jurors relied on the attorneys' summaries to conclude that Shepard committed the crime because Pauline Jackson described a black perpetrator and Shepard is black. Shepard's argument also ignores Bigham's testimony that Roberts implicated Shepard in the crime and, in fact, told Roberts that Shepard murdered Abercrombie and that Pauline Jackson's description of the perpetrator matched Shepard's height, weight and build. Further, as the prosecutor notes, the trial court instructed the jurors that they should not consider the attorneys' remarks in making a decision and that it should rely on their memories of the evidence presented at trial. Accordingly, had the error by Shepard's attorney never occurred, it was not reasonably probable that Shepard would have been acquitted.

D. Convictions Underlying Felony Murder

Finally, Shepard requests that we vacate his armed robbery and home invasion convictions and sentences because he was convicted of felony murder. "Convictions and sentences for both felony murder and the predicate felony violate the multiple punishments prohibition of the Double Jeopardy Clause." *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995). See also *People v Wilder*, 411 Mich 328; 308 NW2d 112 (1981). Though the trial court noted the convictions and imposed sentences for home invasion and armed robbery, the trial court stated on Shepard's judgment of sentence that the underlying felonies are "merged" with Shepard's felony murder conviction. Accordingly, as a practical matter, the trial

court recognized that the offenses should not be considered individually. Nonetheless, the convictions and sentences for the underlying offenses should not be reflected on Shepard's judgment of sentence. Accordingly, we remand for the trial court to delete those convictions and sentences from Shepard's judgment of sentence.

III. People v Roberts – Docket No. 252100

A. Sufficiency of the Evidence

Roberts contends that the prosecutor presented insufficient evidence to support his convictions.[4] Roberts was charged with aiding and abetting the robbery and murder. As our Supreme Court explained in *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Turner*, 213 Mich App 558, 569; 540 NW2d 728 (1995), rev'd in part on other grounds *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001):

> "Aiding and abetting" describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime . . . . To support a finding 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. An aider and abettor's state of mind may be inferred from all the facts and circumstances. 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.

Moreover, with regard to the felony murder conviction, "[a] jury may infer that the defendant aided and abetted the killing by participating in the underlying offense." *People v Bulls*, 262 Mich App 618, 625; 687 NW2d 159 (2004).

Much of Roberts' argument is based on his own trial testimony that Shepard and Thomas forced him to participate in the crimes by directing him at gunpoint. However, the jury was free to accept or reject Roberts' version of events or claim of duress. *People v Dewald*, 267 Mich App 365; __ NW2d __ (2005). Roberts' testimony, however, did serve to eliminate any defense

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[4] This Court reviews sufficiency of the evidence claims de novo. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2003). As our Supreme Court recently explained in *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005):

> When determining if sufficient evidence was presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution. It must determine whether any rational trier of fact could have found that the essential elements of the crime were proven as required.

that he may not have been present at the crime scene: He admitted that he facilitated Shepard's meeting with Abercrombie and that he was in Abercrombie's van when Shepard shot him. Roberts also admitted that he, Thomas, and Shepard entered Pauline Jackson's apartment with keys, presumably taken from Abercrombie after he was shot.

Further, evidence showed that Roberts called Bigham the morning after that crime and said he had blood on his clothing from a robbery that he committed the night before. Moreover, Roberts had thousands of dollars on the morning after the robbery and he gave Bigham a pair of new tennis shoes that Pauline Jackson later testified were stolen from her apartment during the robbery. Based on evidence that Roberts kept items stolen from the apartment, the jury could reject Roberts' claim that he was present during the crimes only because Shepard and Thomas forced him.[5] Further, because Roberts admitted to Bigham that he participated in the offense by acting as a lookout, the jury could reasonably conclude that Roberts performed acts or gave encouragement which assisted in the commission of the robbery and murder.[6]

B. Prior Bad Acts Instruction

Roberts avers that the trial court erred when it failed to give an instruction regarding how the jury should consider the prior bad acts evidence provided by Bigham. He also contends that his defense counsel was ineffective for failing to request the instruction. However, were we to find that error occurred, Roberts has not established that it affected his substantial rights or "that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Carines, supra*. During his testimony, Roberts admitted that his co-defendants solicited his participation in the crime because of his close friendship with Abercrombie through their drug dealing activities. Though he claimed that Shepard and Thomas forced him to participate in the robbery and murder, given the ample evidence of his role in the crimes through Bigham's testimony about Roberts' confession, there was no reasonable probability that he was innocent or that he would not have been convicted if the jury was told that his drug activity should not be considered substantive evidence. Accordingly, Roberts is not entitled to any relief on this issue.[7]

IV. People v Thomas – Docket No. 257557[8]

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[5] Pauline Jackson also testified that one of the robbers matched Roberts' skin color, build and height.

[6] Further, to the extent Roberts asserts that insufficient evidence supported his felony-firearm and felon in possession of a firearm convictions, Jeffrey Coward, who was in the apartment during the armed robbery, testified that all three men who committed the robbery were carrying guns. Accordingly, and because sufficient evidence established that Roberts was one of the robbers, his felony-firearm and felon in possession convictions are affirmed.

[7] Roberts also challenges the trial court's denial of a mistrial based on Bigham's unsolicited remark that Roberts sold drugs in the past. For the reasons set forth in *People v Shepard, supra*, Roberts' claim is without merit.

[8] As Shepard argued, Thomas contends that Bigham's testimony regarding Roberts' statements (continued…)

A. Severance

Roberts maintains that the trial court and defense counsel denied Thomas a fair trial when they severed Roberts' trial because it found that defendants had antagonistic defenses. "The decision as to whether codefendants will be tried separately or jointly rests within the sound discretion of the trial judge and will not be reversed on appeal absent an abuse of that discretion." *People v Hicks*, 185 Mich App 107, 117; 460 NW2d 569 (1990). As the *Hicks* Court further explained:

> A motion to sever should be granted where the codefendants' separate defenses are antagonistic, such as where it appears that one defendant may testify to exculpate himself and to incriminate his codefendant. When a defendant moves for severance, he bears the burden of proving that he has substantial rights which will be prejudiced in a joint trial. [Citation omitted.]

Our Supreme Court explained when severance is appropriate in *People v Hana*, 447 Mich 325, 349-350, 524 NW2d 682, amended 447 Mich 1203 (1994), "[i]nconsistency of defenses is not enough to mandate severance; rather, the defenses must be "mutually exclusive" or "irreconcilable." (Citations omitted.)

The record reflects that the defenses offered by Thomas and Roberts were irreconcilable. Also, because Roberts' testimony was directly contrary to Thomas' position at trial, his attorney was not ineffective for failing to object. The trial court permitted the severance after most of the proofs were presented to the jury. The only remaining evidence was Roberts' testimony regarding his memory of the crime. Further, the jury reached a verdict with regard to Thomas and Shepard before Roberts took the stand.

At trial, Thomas' attorney took the position that Thomas did not participate in the crime. Thus, he defended Thomas by pointing out the lack of solid evidence linking Thomas to both the robbery and murder. In contrast, during his testimony in the severed case, Roberts stated that Shepard and Thomas not only participated in the crimes, they forced Roberts to participate at gunpoint. In other words, had Roberts testified during the joint portion of the trial, Roberts would be yet another witness to positively identify Thomas as a full participant in the criminal acts, which would have been directly contrary to Thomas' defense at trial. Because the defenses asserted by Thomas and Roberts were clearly antagonistic, the trial court did not abuse its discretion by severing Roberts' trial. Further, Thomas' counsel's failure to object to the severance was sound trial strategy to prevent further evidence from implicating Thomas in the robbery and murder. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

B. Sufficiency of the Evidence

(…continued)

violated his Confrontation Clause rights. For the reasons set forth in *People v Shepard*, *supra*, Thomas' claim is without merit. Moreover, for the reasons set forth in *Shepard*, we also reject Roberts' argument that the trial court should have granted his motion for a new trial.

Thomas also complains that the prosecutor presented insufficient evidence to support his convictions. As in *People v Roberts*, Thomas was charged with aiding and abetting the murder, robbery and home invasion. He argues that Bigham's testimony regarding Roberts' statements that implicated him in the crimes was not credible because Bigham smoked marijuana when Roberts told him that he, Thomas, and Shepard committed the robbery and murder. However, it is well-settled that "[t]his Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses." *People v Bulmer*, 256 Mich App 33, 36; 662 NW2d 117 (2003). Accordingly, we will not second guess the jury's decision on this basis.

Moreover, evidence from defendants' cellular phone records established that Thomas and Roberts repeatedly communicated just prior to their contact with Abercrombie and just before he was murdered. Bigham told the police and testified at trial that Roberts told him that Thomas participated in the robbery and that Thomas "grabbed the girl," presumably referring to Pauline Jackson during the home invasion. Jackson also testified that one of the robbers wore a mask, but that his hair, height, build, and skin color matched Roberts. According to Jackson, the masked intruder pointed a gun in her face and stole money and drugs, then locked her in the bathroom. Viewing the evidence in a light most favorable to the prosecutor, the evidence was sufficient to establish that Thomas, at the very least, assisted in the perpetration of the robbery and murder.[9]

C. Second-Degree Murder Instruction

Thomas next asserts that the trial court erred when it declined to give the jury a second-degree murder instruction, as a lesser included offense of felony murder. However, as the trial court correctly concluded, pursuant to *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), a lesser included offense instruction is only appropriate "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." *Id*. at 357.

A rational view of the evidence did not support an instruction on the lesser included offense in this case. Again, Thomas was charged as an aider and abettor in the crimes and none of the parties disputed whether a felony occurred or whether Abercrombie's murder occurred during the commission of that felony. Rather, Thomas took the position that someone else must have committed the robbery or home invasion and that he was misidentified as a suspect in the crime. Accordingly, here, the evidence presented tended only to support the felony murder charge and a second-degree murder instruction would have been improper. *Cornell, supra*.

[9] Thomas also complains that the verdict was against the great weight of the evidence. However, he fails to set forth or describe any evidence that suggested he was *not* involved in the crimes. To determine whether the verdict was against the great weight of the evidence, "[t]he test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Milstead*, 250 Mich App 391, 403 n 7; 648 NW2d 648 (2002). Accordingly, Thomas' claim must fail because he has not established that the evidence presented at trial preponderated heavily against the verdict.

For the reasons stated, we affirm defendants' convictions in each case, but remand for correction of Shepard's judgment of sentence. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Jane E. Markey