

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
February 22, 2011

v

STEVEN TODD KENNEDY,  
  
Defendant-Appellant.

No. 293828  
Wayne Circuit Court  
LC No. 08-016050-FC

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Before: BORRELLO, P.J., and JANSEN and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals by right his bench-trial convictions of three counts of first-degree felony murder, MCL 750.316(1)(b), and one count of armed robbery, MCL 750.529. He was sentenced to life in prison without parole for the murder convictions and 225 months to 50 years in prison for the armed robbery conviction. We affirm.

The evidence established that defendant was hired by an acquaintance named Darius to participate in a preplanned robbery at a drug house on Detroit's west side. Specifically, the evidence showed that defendant was offered \$900 if he would wait at the drug house and open the door for Darius and Darius's brother when they knocked. Darius and his brother planned to rob Ivan, nicknamed "Ive," a marijuana dealer operating out of the drug house in question. It was apparently known that Ivan would have a large quantity of drugs or cash in his possession on October, 12, 2008.

Defendant gave three different versions of events to the police. But in one of his written statements, defendant informed the police that Darius had called him on the afternoon of October 12, 2008, and had asked him whether he "was going to be ready tonight." According to defendant, Darius then called a second time and "said he would be [at the drug house] around 10:00 p.m."

Defendant, who was well acquainted with Ivan, went to the drug house at about 8:00 p.m. and waited. Two unrelated individuals arrived at the house at about 10:30 p.m. to buy marijuana. About twenty minutes later, there was a knock on the door. Defendant opened the door, and

Darius and his brother entered the house. According to defendant, Darius was carrying a .9-millimeter semi-automatic handgun<sup>1</sup> and Darius's brother was carrying a .22-caliber revolver. Defendant informed the police that Darius first demanded money from Ivan and then shot and killed Ivan. Defendant reported that he then ran from the drug house and returned to his own home.<sup>2</sup> Defendant did not report having seen Darius or Darius's brother kill anyone else. However, three bodies were ultimately discovered in the house. The bodies of all three victims were surrounded by .9-millimeter and .22-caliber spent shell casings. The medical examiner recovered either .9-millimeter or .22-caliber slugs from all three bodies. Defendant told the police that he had agreed to participate in the robbery because he was "poor as hell" and needed the money.

The trial court then viewed a videotape of the police interview with defendant. The defense did not present any witnesses of its own.

Following presentation of the evidence, the trial court found that defendant had aided and abetted the killing of the three victims by willfully participating in the armed robbery and thereby creating a substantial risk of death or serious bodily harm. Based on the evidence presented at trial, the trial court pointed out that although defendant knew Darius was frequently armed with a .9-millimeter handgun, he nonetheless agreed to assist him and his brother in committing an armed robbery at a drug house. The trial court also pointed out that any witnesses, including Ivan, would have been able to link defendant, Darius, and Darius's brother to the robbery. Therefore, the court determined that defendant should have known of the likelihood that Darius and his brother would kill Ivan and the other witnesses. In sum, the court determined that defendant knew or reasonably should have known "that death or such harm would be the likely result of his actions." On an aiding and abetting theory, the court convicted defendant of three counts of first-degree felony murder and one count of armed robbery.

On appeal, defendant argues that there was insufficient evidence presented at trial to establish beyond a reasonable doubt that he aided and abetted the murders of the three victims. He also argues that his convictions should be reversed because he willfully abandoned the crimes prior to their completion. We cannot agree.

When reviewing the sufficiency of the evidence in a criminal case, we view the evidence presented at trial in a light most favorable to the prosecution to determine whether any rational trier of fact could have found that all essential elements of the offense were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). In this case,

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<sup>1</sup> Defendant reported that he had seen Darius carry this same .9-millimeter handgun in the past and that he knew Darius frequently carried the gun on his person.

<sup>2</sup> Defendant informed the police that he awakened the following morning with the intent to obtain his \$900 from Darius. However, it does not appear that defendant ever got the \$900 he had been promised.

defendant was tried by the court rather than by a jury. “Findings of fact by the trial court may not be set aside unless they are clearly erroneous.” *Id.*

Defendant’s guilt turns on his liability as an aider and abettor. Michigan’s aiding and abetting statute, MCL 767.39, provides:

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.

In Michigan, “a defendant who intends to aid, abet, counsel, or procure the commission of a crime, is liable for that crime as well as the natural and probable consequences of that crime.” *Robinson*, 475 Mich at 3 (emphasis in original). “[A]iding and abetting is not a separate substantive offense.” *Id.* at 6. “Rather, ‘being an aider and abettor is simply a theory of prosecution’ that permits the imposition of vicarious liability for accomplices.” *Id.*, quoting *People v Perry*, 460 Mich 55, 64 n 20; 594 NW2d 477 (1999).

The elements of first-degree felony murder are: (1) the killing of a human being, (2) malice, and (3) the commission, attempted commission, or assisting in the commission of one of the felonies enumerated in MCL 750.316(1)(b), among them robbery. *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999). To prove felony murder on an aiding and abetting theory, the prosecution must show that the defendant (1) performed acts or gave encouragement that assisted the killing of a human being, (2) with malice, (3) while committing, attempting to commit, or assisting in the commission of the predicate felony. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003).

“[O]ne who aids and abets a felony murder must have the requisite malice to be convicted of felony murder, but need not have the same malice as the principal.” *Robinson*, 475 Mich at 14. “[M]alice is the intention to kill, the intention to do great bodily harm, or the wanton and willful disregard of the likelihood that the natural tendency of [the] defendant’s behavior is to cause death or great bodily harm.” *People v Kelly*, 423 Mich 261, 272-273; 378 NW2d 365 (1985), quoting *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980). “[M]alice is an essential element of any murder . . . whether the murder occurs in the course of a felony or otherwise.” *Kelly*, 423 Mich at 273, quoting *Aaron*, 409 Mich at 728. Thus, to be convicted of aiding and abetting murder, it must be shown that the aider and abettor (1) had the intent to kill, (2) had the intent to cause great bodily harm, or (3) 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.

The evidence presented at trial established that defendant performed acts that assisted the killing of three human beings. See *Riley*, 468 Mich at 140. It is uncontested that defendant was hired to wait at the drug house and let Darius and his brother into the house so that they could commit the planned robbery inside. If Darius and his brother had never gained entry into the house, they would not have been in a position to kill the three victims in this case. It therefore follows that by participating in the scheme and allowing Darius and his brother into the house, defendant performed acts that assisted in the killing of the victims.

The evidence also established that defendant acted with the requisite malice. See *id.* A rational trier of fact could have found beyond a reasonable doubt that defendant 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. Defendant knew that Darius and his brother were planning a robbery at the drug house and that Darius was frequently armed with a handgun. It was therefore reasonable for the trial court to infer that defendant either knew or should have known that Darius and his brother would be armed when they arrived for the planned robbery. By assisting Darius and his brother with the armed robbery, defendant set in motion a force likely to cause death or great bodily harm. *Carines*, 460 Mich at 760. Even if defendant did not personally use a weapon, the trier of fact could have logically inferred that he acted with malice by participating in a robbery that involved the use of handguns. *Id.* This evidence was sufficient to show that defendant acted with a wanton and willful disregard of the possibility that death or great bodily harm would result. *Id.*

Lastly, the evidence was sufficient to allow a rational trier of fact to find beyond a reasonable doubt that defendant assisted in the commission of the predicate felony. See *Riley*, 468 Mich at 140. Robbery is one of the predicate felonies enumerated in MCL 750.316(1)(b). See *Carines*, 460 Mich at 768. The evidence established that defendant knew that Darius and his brother planned to rob Ivan on October 12, 2008, and that defendant had agreed to participate in the robbery in exchange for \$900. Specifically, defendant agreed to wait at the drug house and let Darius and his brother into the house when they knocked on the door. “‘The amount of advice, aid or encouragement is not material if it had the effect of inducing the commission of the crime.’” *People v Smock*, 399 Mich 282, 285; 249 NW2d 59 (1976) (citation omitted). Here, the trier of fact properly concluded that defendant’s acts had the effect of inducing the commission of the robbery. Indeed, if defendant had not let Darius and his brother into the house, the robbery may never have occurred. In the words of our Supreme Court, “[t]his not a case of ‘guilt by association’ or ‘mere presence at the scene.’” *Id.* Rather, by choosing to cooperate with Darius and his brother in the commission of a robbery, defendant “lent active support to the criminal enterprise.” *Id.* The prosecution presented sufficient evidence to allow the trier of fact to conclude beyond a reasonable doubt that defendant “procure[d], counsel[ed], aid[ed], or abet[ted]” the commission of an armed robbery within the meaning of MCL 767.39.<sup>3</sup>

Nor can we agree with defendant that there was insufficient evidence to support his convictions as an aider and abettor because he abandoned the crimes before their completion. “Abandonment is an affirmative defense, and the burden is on the defendant to establish by a preponderance of the evidence voluntary and complete abandonment of a criminal purpose.” *People v Cross*, 187 Mich App 204, 206; 466 NW2d 368 (1991). The trial court correctly determined that defendant failed to establish the abandonment of his criminal purpose. The evidence showed that defendant agreed to participate in the robbery in exchange for \$900. In particular, defendant told the police that he had agreed to let Darius and his brother into the drug

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<sup>3</sup> For these same reasons, there was also sufficient evidence to support defendant’s conviction of armed robbery on an aiding and abetting theory.

house because he was “poor as hell” and needed the money. Defendant also told the police that, even on the day after the robbery and murders, he still believed that Darius would bring the \$900 to his house as promised. However, as noted previously, it does not appear that Darius ever gave the money to defendant.

From these facts, a rational trier of fact could infer that defendant did not abandon his criminal purpose, but instead supplied aid and assistance to Darius and Darius’s brother with the expectation that he would be paid for his role in the robbery. *People v Akins*, 259 Mich App 545, 555; 675 NW2d 863 (2003). Moreover, there is no evidence that defendant “repent[ed]” or experienced a “genuine change of heart” in this case. *Cross*, 187 Mich App at 206. After all, if defendant had truly repented as he now asserts, he would not have awakened on the morning after the murders still expecting full payment for his participation in the crime. See *Akins*, 259 Mich App at 555. The evidence established that defendant did not abandon his criminal purpose.

We conclude that the prosecution presented sufficient evidence to allow a rational trier of fact to find beyond a reasonable doubt that defendant was guilty of three counts of felony murder and one count of armed robbery on an aiding and abetting theory.

Affirmed.

/s/ Stephen L. Borrello  
/s/ Kathleen Jansen  
/s/ Karen M. Fort Hood