

**STATE OF WEST VIRGINIA**  
**SUPREME COURT OF APPEALS**

**STATE of WEST VIRGINIA,**  
**Plaintiff below, Appellee**

**vs.) No. 35448 (Wirt County 08-F-8)**

**HOWARD KENNETH MURRAY,**  
**Defendant below, Appellant.**

**FILED**  
**January 20, 2011**  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**MEMORANDUM DECISION**

Following a jury trial in the Circuit Court of Wirt County, Howard Kenneth Murray (hereinafter “the defendant”) was convicted of first degree felony-murder, one count of burglary, two counts of battery and one count of destruction of property. The circuit court sentenced him to life with mercy for the first degree murder conviction and the defendant timely appealed.<sup>1</sup> After carefully reviewing the record provided, the briefs and oral arguments of the parties, and taking into consideration the relevant standards of review, the Court determines that the circuit court committed no prejudicial error. The Court further finds that this case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On the night of February 6, 2008, Brent Butler and his pregnant wife Devon were at their trailer in Elizabeth, West Virginia, and were joined by two friends, Jamie Wine and Ashlea Angely. Around 9:30 that evening, Mr. Wine called a friend of his, Corey Robinson, and arranged to buy marijuana from him. Devon Butler drove Mr. Wine to meet Corey Robinson in a parking lot to purchase the marijuana. When the two met in the parking lot, an altercation ensued and Mr. Wine took the marijuana from Corey Robinson without paying for it.<sup>2</sup> After this altercation, Corey Robinson called his marijuana supplier, Oscar Gibson,

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<sup>1</sup> The defendant’s appeal only concerns the first-degree murder conviction, he does not challenge the burglary, battery and destruction of property convictions.

<sup>2</sup> There was some discrepancy over the amount of marijuana that was stolen. Jamie Wine testified that the agreed upon quantity was one-half ounce of marijuana for

and informed him that Mr. Wine had stolen his marijuana. Robinson then picked up Oscar Gibson, who asked the defendant, a friend of his, to accompany them to recover the stolen marijuana.

The three men drove to the Butlers' trailer park. There was conflicting testimony about how they gained entry to the Butlers' trailer. Robinson, Gibson and the defendant testified that they knocked on the door and Brent Butler let them in. Ashlea Angely testified that the trailer door was kicked in and flew open. West Virginia State Police Sergeant Travis D. Corbitt testified that there was damage to the front door consistent with it being kicked in. Upon entering the trailer, the three men found that Devon Butler and Jamie Wine had not yet returned. Oscar Gibson brandished a pistol at Brent Butler, slapped him and demanded to know the whereabouts of his wife and Jamie Wine. The defendant then kicked Brent Butler. When the assault on Brent Butler began, Ashlea Angely attempted to leave the trailer and the defendant pushed her down, causing her to suffer an injury to her knee. Following this altercation, the three men left the trailer and were pulling out of the trailer park when they spotted Devon Butler and Jamie Wine pulling into the trailer park. Upon seeing these three men, Devon Butler turned her truck around and drove back into town, looking for the police. Robinson, Gibson and the defendant pursued Devon Butler and Jamie Wine and the car chase eventually ended with Devon Butler returning to the trailer park and stopping her truck in front of her trailer.

Once inside the trailer park, Mr. Wine jumped out of Devon Butler's truck and ran into the Butlers' trailer. At about the same time, the defendant and Oscar Gibson exited Corey Robinson's vehicle and ran over to Devon Butler's truck. The defendant opened her door and began yelling and screaming at her, demanding to know the location of the marijuana. Mr. Wine then emerged from the trailer with a pair of "numchucks" and a "mace", a weapon of ancient origin consisting of a handle and a chain with a metal spiked ball attached to the chain. In response, Oscar Gibson pointed his pistol at Jamie Wine, who then retreated back into the trailer and attempted to lock the trailer door but could not do so because the locking mechanism was broken due to the door previously being kicked in. Gibson began kicking and beating the trailer door, "trying to force his way into it,"<sup>3</sup> but was unable to gain entry to the trailer because Jamie Wine was holding the door shut from the inside.

While Gibson was trying to gain entry to the trailer, the defendant continued to keep

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\$75. Corey Robinson testified that the two had agreed that he would deliver two ounces of marijuana to Mr. Wine for \$400.

<sup>3</sup> According to the testimony of Corey Robinson.

Devon Butler restrained in her truck. Brent Butler apparently observed his wife being restrained and exited the trailer from somewhere other than the front entrance. Once outside, Brent Butler approached the defendant from behind and cut his neck with a spear.<sup>4</sup> A struggle ensued and the defendant called for Oscar Gibson, who ran over and struck Brent Butler on the head. Brent Butler attempted to flee and the defendant grabbed the spear and pursued him. The defendant caught up with Brent Butler and stabbed him through the left leg with the spear, cutting his femoral artery, causing Mr. Butler to bleed to death.

Following his conviction, counsel for the defendant filed the present appeal, alleging that the trial court committed error by (1) instructing the jury as to the concerted action principle; (2) failing to give a jury instruction proposed by the defendant that the State had to prove he had the specific intent to commit attempted burglary of the trailer in order to find him guilty of felony-murder; and (3) asserting that the evidence presented during the trial did not justify the jury's verdict.

The offense underlying the felony-murder charge was the attempted burglary that resulted from the second trip to the trailer park in which Oscar Gibson attempted to gain entry to the trailer, while the defendant restrained Devon Butler in her truck. The defendant argues that he did not have the specific intent to commit this attempted burglary, and the trial court therefore erred by instructing the jury as to the concerted action principle.

Our review indicates that the concerted action instruction was proper in this case and the trial court's instruction came directly from our prior case law. In *Syllabus Point 11 of State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989), we held, “[u]nder the concerted action principle, a defendant who is present at the scene of a crime and, by acting with another, contributes to the criminal act, is criminally liable for such offense as if he were the sole perpetrator.” In the present matter, the defendant accompanied Oscar Gibson to the trailer for the purpose of recovering the stolen marijuana. The defendant restrained Devon Butler in her truck and shouted at her in order to locate the marijuana. While this was occurring, Oscar Gibson attempted to break into the trailer to recover the marijuana. There was substantial evidence presented that these two were acting together to accomplish the same goal: the recovery of the marijuana. It was proper for the trial court to instruct the jury on the concerted action principle in this case and upon being properly instructed, it was a question of fact for the jury to determine whether the defendant was acting with Oscar Gibson and contributing to the underlying criminal act, the attempted burglary of the trailer.

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<sup>4</sup> Brent Butler had a collection of medieval weapons including a spear, numchucks and a mace.

The trial court also properly refused to give the defendant's proposed jury instruction stating that specific intent must be proven in order to convict him of felony- murder by attempted burglary. In *State v. Foster*, 221 W.Va. 629, 639, 656 S.E.2d 74, 84 (2007), this Court stated:

To be convicted as an aider and abetter, the State must demonstrate that the defendant "shared the criminal intent of the principle in the first degree." *State v. Harper*, 179 W.Va. 24, 29, 365 S.E.2d 69, 74 (1987) (citations omitted). "In this regard, the accused is not required to have intended the particular crime committed by the perpetrator, but only to have knowingly intended to assist, encourage, or facilitate the design of the criminal actor." *Fortner*, 182 W.Va. at 356, 387 S.E.2d at 823 (citations omitted).

In the present matter, the trial court instructed the jury that:

The State must demonstrate that the Defendant *shared the criminal intent of the principal in the first degree*. In this regard, *the accused is not required to have intended the particular crime committed by the perpetrator, but only to have knowingly intended to assist, encourage or facilitate the design of the criminal actor*.

(Emphasis added).

This instruction is a correct statement of law and is applicable to the facts of this case. The defendant's position that an aider and abetter must have the specific intent to commit the crime that the principle in the first degree commits is plainly at odds with our case law.

The defendant's final assignment of error is that the evidence presented during the trial was insufficient to justify the jury's verdict. In Syllabus Point 8 of *State v. Fortner*, *supra*, we stated:

Where a defendant is convicted of a particular substantive offense, the test of the sufficiency of the evidence to support the conviction necessarily involves consideration of the traditional distinctions between parties to offenses. Thus, a person may be convicted of a crime so long as the evidence demonstrates that he acted as an accessory before the fact, as a

principal in the second degree, or as a principal in the first degree in the commission of such offense.

The defendant argues that it was unjust for the jury to convict him of first degree felony-murder because he “did not commit the attempted burglary.” There was sufficient evidence presented, however, for a reasonable jury to conclude that the defendant knowingly intended to assist the design of Oscar Gibson and that he acted as a principal in the second degree during the commission of the attempted burglary.<sup>5</sup> Accordingly, we reject the defendant’s assertion that the evidence did not justify the verdict.

For the foregoing reasons, we find no error in the decision of the circuit court and the conviction is hereby affirmed.

Affirmed.

**ISSUED: January 20, 2011**

**CONCURRED IN BY:**

**Chief Justice Margaret L. Workman**

**Justice Robin Jean Davis**

**Justice Brent D. Benjamin**

**Justice Menis E. Ketchum**

**Justice Thomas E. McHugh**

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<sup>5</sup> Syllabus Point 4 of *Foster* sets forth the definitions of principal in the first and second degrees. It states, “[a] person who is the absolute perpetrator of a crime is a principal in the first degree, and a person who is present, aiding and abetting the fact to be done, is a principal in the second degree.” (Citation omitted).