

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COREY LATRELL CREWS,

Defendant-Appellant.

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UNPUBLISHED

April 18, 1997

No. 181405

Genesee Circuit Court

LC No. 94050821 FC

Before: Sawyer, P.J., and Marilyn Kelly and D.A. Burrell,\* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316; MSA 28.548, assault with intent to commit murder, MCL 750.83; MSA 28.278, armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The judge sentenced him to concurrent terms of life imprisonment without parole for the murder conviction, fifty to seventy-five years' imprisonment for the assault with intent to murder conviction, and twenty-five to fifty years' imprisonment for the armed robbery conviction. He also sentenced defendant to a consecutive prison term of two years for felony-firearm. Defendant now appeals as of right. We affirm in part and reverse in part.

Defendant's convictions arise from the shooting of Santana Nesbitt and Tiffany Simmons. Defendant and Stefon Felton were spending the evening at Nesbitt's apartment. According to Simmons and Felton, defendant shot and killed Nesbitt as she slept. Simmons was also shot but survived. Defendant took money and crack cocaine when he left the apartment.

I

Defendant first argues that the trial court erred by permitting the prosecutor to elicit four hearsay statements made by Simmons and Felton from two officers and Felton's girlfriend which bolstered their version of the events. Because defendant failed to preserve three of the alleged hearsay statements by

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\* Circuit judge, sitting on the Court of Appeals by assignment.

objecting below and, as we do not find that defendant's substantive rights were adversely affected, we decline to review these statements. MRE 103(d).

Defendant objected to Officer Rodriguez's testimony regarding Simmons' statement. He based the objection on the contention that the statement was not an excited utterance under MRE 803(2) and, therefore, was inadmissible hearsay. On appeal, defendant argues that the testimony constituted an improper use of a prior consistent statement. Because defendant did not base his objection on improper use of a prior consistent statement, the issue is unpreserved. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Moreover, after reviewing the record, we find the statement was admissible as an excited utterance. MRE 803(2).

## II

Defendant next argues that there was insufficient evidence to convict him of first-degree felony murder, because the prosecution failed to prove the underlying felony of armed robbery. We disagree. In reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecutor. We determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Turner*, 213 Mich App 558, 565; 540 NW2d 728 (1995).

The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548. *Turner, supra* at 566. In this case, the underlying felony used to support defendant's first-degree felony murder conviction is armed robbery. It is enumerated in the act. The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute. *Id.*

Specifically, defendant challenges the assault element of armed robbery arguing that, because Nesbitt was asleep, he was unaware of any assault on his person. An assault may occur where there is an attempt to commit battery or from an unlawful act which places another in reasonable apprehension of receiving an immediate battery. *People v Joeseype Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979); *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996). Here, the assault was the attempted-battery type of assault. The fact that Nesbitt was sleeping is of no consequence under the attempted-battery type of assault. See *United States v Bell*, 505 F2d 539, 540 (CA 7, 1974), cert den *Bell v United States*, 420 US 964, 95 S Ct 1357; 43 L Ed 2d 442 (1975). To prove an attempted-battery type of assault, the prosecutor was required to prove an intent to cause physical injury to the victim. *Terry, supra*. LaFave and Scott, Criminal Law (2d ed), § 7.16, pp 692-693.

Here, Simmons and Felton awoke to the sound of two gunshots, observed defendant holding a gun, and realized that Nesbitt was dead. Therefore, there was sufficient evidence to prove that defendant intended to injure Nesbitt. See *People v Drayton*, 168 Mich App 174, 178; 423 NW2d 606 (1988). Viewing the evidence in the light most favorable to the prosecution, there was sufficient

evidence to prove an assault to support the underlying felony, armed robbery, which in turn supports defendant's felony murder conviction.

### III

Defendant next argues that the trial court's failure to instruct the jury on the order of deliberations was reversible error. Because defendant failed to request an instruction regarding the order of deliberations on the charges, we decline to address the merits of the claim. MCL 768.29; MSA 28.1052. See *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982).

### IV

Defendant's final argument is that he was deprived of a fair and impartial trial due to prosecutorial misconduct. We disagree. Review of prosecutorial misconduct claims is done on a case-by-case basis. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). This Court examines the pertinent record from the lower court and evaluates the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *Legrone, supra* at 82-83.

Defendant argues that the following statement by the prosecutor during rebuttal deprived him of a fair trial:

Comparing the statements of Corey Crews and Stefon Felton, just keep in mind again that Stefon Felton, the bulk of his account of what happened was in by July 16th. And the account that we hear from Corey Crews after all this testimony has come in about prints and all that doesn't come until today.

Defendant argues that it was improper for the prosecutor to imply that defendant had an obligation to make a statement before trial. In certain situations, prosecutorial comment that infringes on a defendant's right not to testify may constitute error. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). However, examined in context, the prosecutor's remark was a proper response to defendant's closing argument that defendant was more credible than Felton, because Felton's testimony was motivated by a deal he made with the prosecutor. See *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Therefore, defendant was not deprived of a fair and impartial trial.

### V

Even though the issue was not raised by defendant, we note that the fact that defendant was convicted for both first-degree felony murder and armed robbery violates his right against double jeopardy. *People v Allen*, 201 Mich App 98, 105-106; 505 NW2d 869 (1993). Accordingly, we vacate defendant's armed robbery conviction and sentence. *Id.* at 106.

Affirmed in part and reversed in part.

/s/ David H. Sawyer

/s/ Marilyn Kelly

/s/ Daniel A. Burrell