STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY DARNELL HUGHES,

Defendant-Appellant.

UNPUBLISHED
June 26, 1998

No. 191776
Recorder's Court
LC No. 94-005655

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN CORY COJOCAR,

Defendant-Appellant.

UNPUBLISHED

No. 193961
Recorder's Court
LC No. 94-005655

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEANGELO JONES,

Defendant-Appellant.

UNPUBLISHED

No. 196142
Recorder's Court
LC No. 94-005655

Before: Hood, P.J., and MacKenzie and Doctoroff, JJ.

PER CURIAM.

Defendants Hughes and Jones were convicted at a joint jury trial of assault with intent to rob while armed, MCL 750.89; MSA 28.284. They were both sentenced to prison terms of forty to sixty years. Defendant Cojocar was convicted by a jury of first-degree felony murder, MCL 750.316; MSA 28.548, assault with intent to rob while armed, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Cojocar was sentenced to life imprisonment without the possibility of parole for the first-degree felony murder conviction, life imprisonment for the assault with intent to rob while armed conviction, and a consecutive two-year term for the felony-firearm conviction. All three defendants appeal as of right. We affirm defendant Hughes' conviction but vacate his sentence and remand for resentencing. We vacate defendant Cojocar's conviction and sentence for assault with intent to rob while armed but affirm his convictions and sentences for first-degree felony murder and felony-firearm. We affirm defendant Jones' conviction and sentence.

I

Defendant Hughes argues that he should not have been bound over for trial on the felony murder charge because there was insufficient evidence to show that he intended to commit a robbery or had the intent to commit murder. We disagree. Review of the record below reveals ample evidence indicating that Hughes knew that Cojocar intended to commit an armed robbery and that Cojocar intended to pursue a course of action that would create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995). Therefore, the district court did not abuse its discretion in binding defendant over for trial on a charge of felony murder.

II

Defendant Hughes argues that the trial court erred by denying his motion to sever his trial from that of codefendant Jones. Because Hughes has not shown that he and Jones presented mutually exclusive or irreconcilable defenses, the trial court did not abuse its discretion in denying his request for separate trials. *People v Hana*, 447 Mich 325, 349; 524 NW2d 682 (1994).

III

Defendant Hughes argues that the trial court erred by failing to give a jury instruction regarding the necessarily included lesser offense of assault with intent to rob while unarmed. Regardless of the evidence in a given case, the trial court must instruct the jury on necessarily included lesser offenses. *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997). An offense is a necessarily included lesser offense if it is impossible to commit the greater without first having committed the lesser offense. *People v Bailey*, 451 Mich 657, 667; 549 NW2d 325 (1996).

Assault with intent to rob while armed contains the same elements as assault with intent to rob while unarmed, with the exception of the additional element that the defendant was armed. See *People*

v Cotton, 191 Mich App 377, 391; 478 NW2d 681 (1991); *People v Chandler*, 201 Mich App 611, 614; 506 NW2d 882 (1993). Therefore, assault with intent to rob while unarmed is a necessarily included lesser offense of assault with intent to rob while armed, and the trial court erred in failing to give the requested instruction. *Lemons, supra* at 254; *Bailey, supra* at 667. However, reversal is not required because the error was harmless. *People v Mosko*, 441 Mich 496, 502-503; 495 NW2d 534 (1992). Hughes and other witnesses knew that Cojocar was armed with a pistol before the robbery. Hughes also knew that Cojocar was planning to rob a man believed to have guns and money in his home. Hughes' claim that he did not know that Cojocar was armed is incredible in light of the evidence.

IV

Both defendants Hughes and Jones argue that the trial court erred by failing to re-instruct the jury regarding mere presence and aiding and abetting. We disagree. When a jury has asked for supplemental instruction, the trial court need only give those instructions specifically requested. *People v Darwall*, 82 Mich App 652, 663; 267 NW2d 472 (1978). The mere presence instruction was part of the aiding and abetting instructions, which the jury specifically had not requested. Therefore, the trial court did not err by failing to reread these instructions.

V

Defendant Hughes argues that the trial court abused its discretion by sentencing him to forty to sixty years' imprisonment. We agree. The guidelines recommended a minimum sentence between three and eight years. Although the crime was serious in nature, Hughes had no prior criminal record, and Hughes' actions do not indicate that he was a hardened, predatory criminal. While some departure from the guidelines may have been justified, the degree of departure was excessive and resulted in a sentence that was disproportionately severe in light of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

VI

Defendant Hughes argues that there was insufficient evidence to convict him as an aider and abettor of assault with intent to rob while armed. We disagree. When reviewing a claim of insufficient evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the crime were proved beyond a reasonable doubt. *People v McCoy*, 223 Mich App 500, 501; 566 NW2d 667 (1997).

Viewing the evidence in a light most favorable to the prosecutor, a rational jury could find beyond a reasonable doubt that Hughes possessed the required intent to aid and abet an assault with intent to rob while armed and that Hughes engaged in acts which supported, encouraged, or incited Cojocar's commission of the assault upon the victim. *Cotton, supra* at 391; *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991); *In re McDaniel*, 186 Mich App 696, 697; 465 NW2d 51 (1991). Therefore, the evidence was sufficient to support defendant's conviction.

VII

Defendants Hughes and Jones argue that the trial court's instructions regarding aiding and abetting allowed the jury to convict them based upon intent alone. Jury instructions must be reviewed as a whole rather than extracted piecemeal to establish error. *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991). Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* Review of the instructions as a whole indicates that the trial court properly instructed the jury that the prosecution must prove that the defendants did something to aid, assist, or encourage in the commission of the crime. Accordingly, we find no error.

VIII

Defendant Cojocar argues that the trial court erred by failing to instruct the jury regarding the defense of accident. We disagree. To prove felony murder the prosecutor did not have to prove an intent to kill or injure, nor did the prosecutor argue that Cojocar intended to kill or injure the victim. Instead the prosecutor emphasized that he did not have to prove an intent to kill or injure and argued that defendant intentionally committed acts which created a very high risk of death or great bodily harm with the knowledge that death or great bodily harm was the probable result of his actions. Under the circumstances of this case, accident was not a viable defense against the felony-murder charge. *People v Hess*, 214 Mich App 33; 543 NW2d 332 (1995). Therefore, the trial court did not err in failing to instruct the jury on the defense of accident.

IX

Defendant Cojocar argues that the trial court erred when instructing the jury regarding robbery and intent. No manifest injustice occurred, so appellate review of the challenged instructions is waived by defendant's failure to object to these instructions at trial. *People v Johnson*, 187 Mich App 621, 628; 468 NW2d 307 (1991).

X

Defendant Cojocar argues that his trial counsel's performance denied him effective assistance of counsel. In particular, defendant argues that counsel was ineffective in failing to move to redact Branscum's statement to police or to request a contemporaneous limiting instruction, and by failing to impeach Branscum with evidence of a prior breaking and entering conviction. We disagree.

To establish ineffective assistance of counsel, a defendant must show that his trial counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To find prejudice, this Court must conclude that there is a reasonable probability that, absent the errors, the outcome of the proceeding would have been different. *Id.* at 314.

Defendant Cojocar has not shown that his counsel made errors so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment, nor has he shown any resulting

prejudice to the defense. The evidence against Cojocar was overwhelming. The weapon used to shoot the victim belonged to Cojocar, and evidence indicated that he planned the robbery. Cojocar's second statement to police established that he approached the victims door with a pizza box and a loaded gun, and the gun accidentally discharged when the victim opened the door. This assertion is contradicted by testimony that the screen door was locked and by physical evidence indicating that the bullet passed through the close door. Moreover, even if Cojocar's statement is believed, the evidence still shows that he intended to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm is the probable result when he pointed a loaded weapon at the victim. This was sufficient to prove the intent element of felony murder. *People v Flowers,* 191 Mich App 169, 177; 477 NW2d 473 (1991). Therefore, defendant has not proven that he was denied the effective assistance of counsel.

XI

Defendant Cojocar argues that the trial court erred by denying his motions for separate trial, separate jury, or a mistrial. We find that the trial court did not abuse its discretion by denying these motions. Review of the trial record shows that Cojocar's and codefendant Branscum's defenses were not mutually exclusive or irreconcilable as defined under *Hana, supra*. Therefore, separate trials or juries were not required.

XII

Defendant Cojocar correctly argues that he cannot be convicted of both first-degree felony murder and the predicate felony. *People v Gimotty,* 216 Mich App 254, 259; 549 NW2d 39 (1996). We therefore vacate his conviction and sentence for assault with intent to rob while armed, conditioned on the ultimate affirmation of his felony murder conviction. See *People v Garcia (After Remand),* 203 Mich App 420, 425; 513 NW2d 425 (1994), aff'd 448 Mich 442; 531 NW2d 683 (1995).

XIII

Defendant Jones also argues that his sentence violates the principle of proportionality set forth in *Milbourn*. We disagree. The evidence before the sentencing judge showed that Jones had little respect for law or human life. Jones was on probation at the time he committed this crime, and continued to associate with Cojocar despite a probation order directing otherwise. Unlike the other defendants, Jones admitted to police that Cojocar had expressed an intent to shoot someone prior to driving to the victim's home. This evidence showed that Jones was willing to encourage or promote a killing as part of a robbery plan. In light of these circumstances, his forty-year minimum sentence is not disproportionately severe.

XIV

Defendant Jones also argues that there was insufficient evidence to convict him as an aider and abettor of assault with intent to rob while armed. We disagree. Viewing the evidence in a light most favorable to the prosecutor, a rational jury could find beyond a reasonable doubt that Jones possessed

the required intent to aid and abet an assault with intent to rob while armed and that he engaged in acts which supported, encouraged, or incited Cojocar's commission of the assault upon the victim. *Jolly, supra*; *Hampton, supra*; *Cotton, supra*; *Rockwell, supra*; *McDaniel, supra.*

XV

Jones argues that the prosecutor violated constitutional guarantees against double jeopardy by charging him with both first-degree felony murder and armed robbery. We disagree. As previously noted, constitutional guarantees against double jeopardy prohibit convicting a criminal defendant of both felony murder and the predicate felony. *Passeno, supra* at 96. Defendant Jones was convicted of only the predicate felony. This does not violate constitutional guarantees against double jeopardy.

XVI

Defendant Jones argues that he should not have been bound over for trial on the felony murder charge because there was insufficient evidence to show that he intended to commit a robbery. We disagree. Review of the evidence shows that Jones either intended to commit a robbery or knew that defendant Cojocar intended to commit an armed robbery. *Hill, supra*; *Turner, supra*.

We affirm defendant Jones' conviction and sentence in docket No. 196142. We affirm defendant Hughes' conviction but vacate his sentence and remand for resentencing in docket No. 191776. We affirm defendant Cojocar's convictions for first-degree felony murder and felony-firearm, but vacate his conviction and sentence for assault with intent to rob while armed in docket No. 193961. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Barbara B. MacKenzie
/s/ Martin M. Doctoroff