STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAMON ORZA DAVIS,

Defendant-Appellant.

UNPUBLISHED
July 10, 1998

No. 187989
Recorder's Court
LC No. 94-007572 FC

Before: White, P.J., and Bandstra and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of felony murder, MCL 750.316; MSA 28.548, one count of assault with intent to rob while armed, MCL 750.89; MSA 28.284, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to the mandatory two-year term for the felony-firearm conviction, to be followed consecutively by concurrent terms of life in prison without parole and five to fifteen years' imprisonment for the murder and assault convictions, respectively. Defendant appeals as of right. We affirm in part, vacate in part and remand.

The evidence, viewed in a light most favorable to the plaintiff, established that in January, 1993, defendant approached a store owner in the store's parking lot, pulled a shotgun out of his coat sleeve, pointed it at the owner and said "drop it." The owner, believing that defendant was going to shoot, explained that he only had three dollars on him and dropped some items to the ground. Defendant turned and walked toward the back of the store without taking anything from the owner.

A blue Chevrolet Lumina with two male occupants was then observed leaving the store's parking lot, heading north on Belleville Road. Information concerning the robbery and the Lumina's description was related to and dispatched by the police. A police officer receiving this dispatch observed a blue Lumina heading east on Tyler Road approximately two miles from the store. Tyler Road crosses Belleville Road less than one-eighth mile north of the store. The officer began to follow the Lumina, which was traveling at a high rate of speed. The officer observed only the driver in the vehicle. When the officer approached the Lumina while it was stopped for a red light behind another

vehicle, the Lumina passed the other vehicle on the left and then turned in front of the other vehicle and proceeded eastbound. The officer activated his emergency lights and siren, and began pursuing the Lumina. While pursuing the Lumina, the officer observed a person "pop up from the back seat of the vehicle" and "look out the back window." While traveling at approximately eighty miles per hour and without braking, the Lumina entered an intersection on a red light and struck a truck, killing the truck's two occupants. The Lumina had been driven by its owner, Kenneth Williams. After the collision, defendant was found in the Lumina's backseat with a loaded shotgun next to him.

With respect to the truck's occupants, defendant was charged with felony murder on the theory that the deaths constituted murder occurring during "the perpetration or attempted perpetration of robbery." With respect to the store-owner, defendant was charged with assault with intent to rob while armed and felony-firearm. Defendant was convicted as charged.

We first address defendant's challenges to the sufficiency of the evidence supporting his felony-murder convictions. In reviewing the sufficiency of the 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 find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Medlyn*, 215 Mich App 338, 340; 544 NW2d 759 (1996). The elements of felony murder are (1) the killing of a human being (2) with malice (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, one of which is robbery. *People v Turner*, 213 Mich App 558, 566-567; 540 NW2d 728 (1995) (*Turner I*).

Specifically, defendant contends that the evidence was insufficient to establish that he had the requisite malice to sustain his felony-murder convictions. We disagree.

To establish that a defendant aided and abetted a crime, it must be shown that (1) either the defendant or another committed the charged crime; (2) the defendant performed acts or encouraged or assisted the principal in committing the crime, and; (3) the defendant intended to commit the crime or knew the principal intended to commit the crime at the time the defendant gave aid and encouragement. *Id*. at 568. In order to convict a defendant of felony murder, either as a principal or as an aider and abettor, it must be shown that the defendant acted with malice, i.e., that the defendant (1) possessed the intent to kill; (2) possessed the intent to inflict 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. *People v Barrera*, 451 Mich 261, 294; 547 NW2d 280 (1996). The third prong of the definition of malice has also been phrased as requiring that the defendant intended to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. *Turner I, supra*; *People v Thew*, 201 Mich App 78, 85; 506 NW2d 547 (1993).

A jury can properly infer malice from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm. *Turner I, supra*. Likewise, in order to establish malice the jury may consider the facts and circumstances involved in the perpetration of the underlying felony, although the malice necessary for a felony-murder conviction cannot be inferred from the intent to commit the underlying felony alone. *People v Aaron*, 409 Mich 672, 730; 299 NW2d 304 (1980); see also *People v Dumas*, 454 Mich 390, 398; 563 NW2d 31 (1997) (Riley, J., with Mallett, C.J.,

and Brickley, J., concurring). This Court has held that a defendant can be said to act in wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or serious bodily injury where he operates an automobile during a police chase at a grossly excessive speed after dark while disregarding traffic signals on a main traffic artery. *People v Vasquez*, 129 Mich App 691, 694; 341 NW2d 873 (1983). Intent is a question of fact to be inferred from the circumstances by the trier of fact. *Turner I, supra* at 567.

Here, defendant attempts to characterize himself as simply a passenger who was merely present in the Lumina. Defendant contends that no evidence was introduced to suggest that defendant encouraged the driver's reckless driving. However, the evidence indicated that defendant was the only perpetrator identified at the scene of the robbery. The evidence also strongly suggested that defendant was hiding in the backseat when the Lumina was initially followed by the police shortly after the robbery, presumably to escape detection. The Lumina thereafter attempted to flee from the police. Additionally, defendant was seen peering out the back window, presumably to assess how the driver's efforts to flee were progressing. Viewing this evidence and the reasonable presumptions drawn therefrom in a light most favorable to the prosecution, a rational trier of fact could have found that defendant encouraged or assisted Williams in driving the Lumina during a police chase at a grossly excessive speed in disregard of traffic signals and that, while so doing, defendant wantonly and willfully disregarded the likelihood of the natural tendency of such driving to cause death or great bodily harm. We conclude that sufficient evidence was presented from which the jury could infer that defendant possessed the requisite malice.

Next, defendant contends that the evidence was insufficient to establish that the murders occurred during the perpetration or attempted perpetration of a robbery. We disagree.

With respect to felony murder, it is not necessary that the murder be contemporaneous with the enumerated felony. *Thew, supra* at 86. A murder committed while attempting to escape from or prevent detection of a felony is felony murder if the murder is committed as part of a continuous transaction, or is otherwise immediately connected with, the underlying felony. *People v Gimotty*, 216 Mich App 254, 258; 549 NW2d 39 (1996); *Thew, supra*. Robbery is a continuous offense that is not complete until the robber reaches temporary safety. *People v Turner*, 120 Mich App 23, 28; 328 NW2d 5 (1982) (*Turner II*). Courts have usually required that the killing and the underlying felony be closely connected in point of time, place and causal relation. *Thew, supra*. "The required relationship between the homicide and the underlying felony has been summarized as being 'whether there is a sufficient causal connection between the felony and the homicide depends on whether the defendant's felony dictated his conduct which led to the homicide.'" *Id*.

Viewing the evidence in this case in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found that the murders and the underlying felony were closely connected in point of time and place. A rational trier of fact could also have found that defendant and the driver had not reached a place of temporary safety and that the murders were therefore committed as part of a continuous transaction with the underlying felony. *Gimotty, supra*. Finally, a rational trier of fact could have found that defendant's felony dictated the escape that led to the murders. *Thew, supra*. Accordingly, we conclude that a rational trier of fact could have found beyond a reasonable doubt that

the murders occurred during the perpetration or attempted perpetration of a robbery. Defendant's convictions for felony murder were supported by sufficient evidence.

We likewise conclude that the verdicts were not against the great weight of the evidence. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial on this ground. *People v DeLisle*, 202 Mich App 658, 663-664; 509 NW2d 885 (1993).

Next, defendant argues that the trial court erred in refusing to give defendant's requested instructions on involuntary manslaughter with a motor vehicle and negligent homicide. We agree. Involuntary manslaughter[1] is a cognate lesser-included offense of murder. *People v Heflin*, 434 Mich 482, 496-497; 456 NW2d 10 (1990). Negligent homicide[2] is a lesser-included offense of involuntary manslaughter. *People v Malach*, 202 Mich App 266, 277; 507 NW2d 834 (1993). Negligent homicide may also be considered a cognate lesser-included offense of felony murder because both crimes share the element of homicide. *People v Bailey*, 451 Mich 657, 668; 549 NW2d 325, amended and remanded 453 Mich 1204 (1996). In determining whether to give an instruction on a cognate offense, the evidence must be reviewed to determine if it would support a conviction of the cognate offense. *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997). The requested instruction on the cognate offense must be consistent with the evidence and defendant's theory of the case. *Id*. The instruction on a cognate offense will be required if it is requested and there the evidence would reasonably support a conviction of that charge. *Id*.

Here, defendant, who was not driving, was charged as an aider and abettor. The same evidence that supported the felony-murder charges would reasonably support a conviction of either of the lesser offenses. *Malach, supra*. The trial court should have given the requested instructions notwithstanding that there was evidence that the driver and defendant were fleeing apprehension for the underlying felony when the collision occurred. The existence of the felony does not remove the need to prove malice. *Aaron, supra* at 728-729. Rather, as indicated previously, felony murder requires proof of murder, which includes the element of malice. *People v Flowers*, 191 Mich App 169, 176-179; 477 NW2d 473 (1991). If malice is not established, felony murder is not proved. *Id*. At issue here is the third prong of malice. While the jury in this case was properly permitted to consider whether the driver's conduct, aided and abetted by defendant, satisfied the third alternative definition of malice because the natural tendency, *Flowers, supra*, or probable result, *Turner I, supra*, of the conduct was to cause death or great bodily harm, the jury, in addition, should also have been permitted to consider whether the driver's conduct, aided and abetted by defendant, was grossly negligent or negligent. See *Malach, supra*. Stated otherwise, the question of which culpable mental state was present was for the jury. *Aaron, supra*; see also *People v Datema*, 448 Mich 585, 604-609; 533 NW2d 272 (1995).

Because defendant timely requested instructions on lesser offenses supported by the evidence, the jury should have been instructed on involuntary manslaughter with a motor vehicle and negligent homicide as well as felony murder and murder. The jury should have been free to find malice if it concluded that defendant aided and abetted conduct in willful and wanton disregard of the likelihood that the natural tendency was to cause great bodily harm, but also free to find that defendant aided and abetted conduct that was grossly negligent or negligent. If the jury then found the lesser degree of culpability, there would be no felony murder, even though the driving occurred in an effort to flee

apprehension for the felony. The error in refusing the lesser-offense instructions was not harmless because the jury was given no option that would hold defendant responsible for the deaths other than the murder verdicts. "Where a trial court improperly fails to include an instruction on a lesser included offense, the remedy is to remand for entry of a conviction on the lesser included offense and for resentencing, or, if the prosecution desires, for retrial on the charge for which the defendant was convicted." *People v Cummings*, ___ Mich App ___; ___ NW2d ___ (Docket No. 199226, issued 3/31/98), slip op p 5. Accordingly, we vacate defendant's felony-murder convictions and sentences and remand for either entry of judgments of conviction of negligent homicide and resentencing or, if the prosecution wishes, for retrial on the charges of felony murder.

Next, defendant argues that the jury instructions erroneously permitted the jury to convict him of felony murder based on the predicate felony of assault with intent to rob while armed, which is not one of the felonies enumerated in the felony-murder statute. However, because we vacate defendant's felony murder convictions on other grounds, we need not address this issue. As indicated previously, the felony murder charges against defendant were premised on the theory that the deaths occurred during the perpetration or attempted perpetration of a robbery. If on remand defendant is again tried on the charges of felony murder, the jury shall be instructed in accordance with this theory.

Next, defendant argues that the trial court erred in excluding his proposed expert medical testimony concerning his amnesia that allegedly resulted from the closed-head injuries he sustained in the collision. The trial court excluded the proposed testimony on the ground that it was not relevant.

Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401, *People v VanderVliet*, 444 Mich 52, 60; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). We review a trial court's decision whether to admit evidence for an abuse of discretion. *People v Sawyer*, 222 Mich App 1, 5; 564 Mich App 62 (1997).

While the exclusion of the expert's testimony was not in itself an abuse of discretion, the prosecutor should not have been permitted to disparage defendant's claim of lack of memory after successfully urging the trial court to exclude defendant's proposed expert testimony in support of his claim. We would not, however, reverse on this ground. If the evidence is again excluded on retrial, the prosecutor's comments must be limited accordingly.

Next, defendant contends that the trial court abused its discretion in refusing to instruct the jury on attempted armed robbery. To the extent that defendant contends that the trial court erred in failing to instruct the jury concerning one of the essential elements of felony murder, i.e., the predicate felony of attempted robbery,[3] we need not address this issue because we have vacated these convictions on other grounds. We again simply note that, as indicated previously, the predicate felony underlying defendant's felony murder charges was robbery or attempted robbery. If on remand defendant is again tried on the charges of felony murder, the jury shall be instructed accordingly. However, to the extent that the trial court refused to instruct the jury on attempted armed robbery as a lesser included offense of assault with intent to rob while armed, we will consider this issue.

In reviewing the propriety of a requested lesser included offense instruction, the first determination that must be made is whether the requested instruction is a necessarily included lesser offense or a cognate lesser included offense. *Lemons, supra* at 234. In *People v Bryan*, 92 Mich App 208, 225; 284 NW2d 765 (1979), this Court, relying on a plurality opinion in *People v Patskan*, 387 Mich 701; 199 NW2d 458 (1972), held that attempted armed robbery is a necessarily lesser included offense of assault with intent to rob while armed. In so holding, the *Bryan* Court appears to have relied on a factual analysis of the offenses:

> In every case where an assault with intent to rob while armed takes place, an attempted armed robbery will also take place. Both require that defendant be armed. Further, the assault necessary for the former offense will always provide the force and violence and overt act necessary for the attempted armed robbery.

In *People v Adams*, 416 Mich 53; 330 NW2d 634 (1982), our Supreme Court considered the specific issue whether the offense of attempt is a necessarily included lesser offense or a cognate lesser included offense of the substantive crime. In that case, the defendant was originally charged with armed robbery and convicted of three unarmed robberies and one larceny from the person. *Id*. at 55. This Court reversed the defendant's convictions because the trial court had refused the defendant's requested instructions on attempted armed robbery and attempted unarmed robbery. *Id*. at 56.

Our Supreme Court reversed this Court and reinstated the defendant's convictions. *Id*. The Court held that the crime of attempt was a cognate lesser included offense of the substantive crime and that, under the facts of the case, the trial court had not erred in refusing the defendant's requested instructions on attempt. *Id*. at 57, 59-60. In so holding, this Court appears to have rejected the factual analysis relied on in *Bryan*:

> In *People v Lovett*, 396 Mich 101; 238 NW2d 44 (1976), the defendant was charged with armed robbery. This Court reversed the defendant's conviction of larceny from the person because the judge had refused to instruct, as requested by the defendant's lawyer, on the lesser included offense of attempted armed robbery. We said that attempted armed robbery is "necessarily included."
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> While a completed offense may necessarily include as a factual matter conduct that, taken alone, would constitute an attempt to commit the offense, we are now of the opinion that because the elements of an attempt are not duplicated in the completed offense the judge is not required to instruct the jury on attempt without regard to the evidence or the defense presented or argued.
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> Neither an attempt to commit an offense nor all its elements[4] are elements of the completed offense. In instructing the jury on armed robbery, the judge identifies eight or nine elements,[5] none of which is an attempt to commit the offense. If the elements of armed robbery were successively peeled away, singly or in various combinations, the

offense of attempt to commit armed robbery, or any necessarily included offense of armed robbery, would not emerge.

* * *

In providing for instructions on cognate offenses where the evidence or lack of evidence warrants, this Court drew a distinction between necessarily included and cognate offenses so that an instruction on a cognate offense would not be required in every case. It would be inconsistent with that approach to require an instruction on the cognate offense of attempt in every case because factually the charged offense cannot be committed without committing the cognate offense of attempt, and would transform attempt, which is not, because its elements are not elements of the charged offense, into a necessarily included offense although it is not elementally a necessarily included offense. We decline to so erase the distinction between necessarily included and cognate offenses which serves to create some balance in the number of lesser-offense instructions required.

We add that a judge has the discretion, without request, to instruct on attempt and is obliged to instruct on attempt when the defense is that there was only an attempt and there is evidence that the completed offense may not have been committed or the defense is that the jury should not credit evidence tending to show that it was completed.

People v Lovett is overruled to the extent that it is inconsistent with this decision. [*Adams, supra* at 56-61.]

In applying *Adams* to this case, we note that the elements of assault with intent to rob while armed are (1) an assault with force and violence; (2) an intent to rob or steal, and (3) the defendant being armed. *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). As indicated previously,[6] the elements of attempt are (1) an intent to do an act or to bring about certain consequences that would in law amount to a crime, and (2) an act in furtherance of that intent that goes beyond mere preparation. *Adams, supra* at 53, n 5; see also *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993). Although assault with intent to rob while armed may include as a factual matter conduct that, taken alone, would constitute an attempted armed robbery, the legal elements of attempt are not duplicated in the completed offense of assault with intent to rob while armed. Cf. *Adams, supra* at 56, 58-59. Thus, we conclude that attempted armed robbery is a cognate lesser included offense of assault with intent to rob while armed. *Id*.

With respect to the offense committed on the store owner in this case, defendant did not contend that only an aborted taking occurred. Rather, defendant conceded that an armed perpetrator assaulted the store owner with the intent to rob or steal, but argued that the crucial issue was the identity of the perpetrator. Alternatively, defendant was willing to concede that he, while armed, assaulted the store owner with the intent to rob or steal, but argued that he did not aid and abet the killing of two people. In addition, there was no evidence indicating that the completed offense of assault with intent to

rob while armed may not have been committed. Thus, because an instruction on attempted armed robbery with respect to the store owner was inconsistent with the evidence and defendant's theories of the case, we conclude that the trial court did not err in refusing to so instruct the jury. *Id*. at 60; see also *Lemons, supra* at 254.

Finally, defendant argues that the prosecutor improperly impeached defendant by using a report that had been prepared for defendant's prior competency proceeding. However, defendant did not object to the use of this report below on the ground he now asserts on appeal. An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996).

In summary, we affirm defendant's assault and felony-firearm convictions and sentences. We vacate defendant's felony murder convictions and sentences and remand for either entry of judgments of conviction of negligent homicide and resentencing or, if the prosecution wishes, for retrial on the charges of felony murder.

Affirmed in part, vacated in part and remanded. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Michael R. Smolenski

[1] In order to prove involuntary manslaughter with a motor vehicle, the prosecution must show (1) that the defendant was operating a motor vehicle; (2) that the defendant operated the vehicle in a grossly negligent manner; (3) that the defendant's gross negligence was a substantial cause of an accident resulting in injuries to the victim, and; (4) that the victim's injuries were the cause of the victim's death. CJI2d 16.12; see also *People v McCoy*, 223 Mich App 500; 566 NW2d 667 (1997).

[2] In order to prove negligent homicide, the prosecution must show that (1) the defendant was operating a motor vehicle; (2) that the defendant was operating the vehicle in a negligent manner (or at an unreasonable rate of speed); (3) that the defendant's negligence was the cause of an accident resulting in injuries to the victim, and; (4) that the victim's injuries were the cause of the victim's death. CJI2d 16.14.

[3] See *People v Sanders (On Remand)*, 190 Mich App 389, 392; 476 NW2d 157 (1991).

[4] In a footnote, the Court defined the elements of the offense of attempt as "'(1) an *intent to do an act* or to bring about certain consequences which would in law *amount to a crime*; and (2) an act in furtherance of that intent which, as it is most commonly put, goes beyond mere preparation.'" *Id*. at 58, n 5 (quoting LaFave & Scott, Criminal Law, § 59, p 423).

[5] In a footnote, the Court identified the eight elements of robbery as consisting "'of all six elements of larceny--a (1) trespassory (2) taking and (3) carrying away of the (4) personal property (5) of another (6) with intent to steal it—plus two additional requirements: (7) that the property be taken from the person or presence of the other and (8) that the taking be accomplished by means of force or putting in

fear.'" *Id*. at 59 , n 6 (quoting LaFave, *supra* at § 94, p 692). The Court noted that the ninth element was "being armed." *Id*.

[6] See note 4, *supra*.