

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL F. JONES,

Defendant-Appellant.

UNPUBLISHED

September 18, 1998

No. 201647

Recorder's Court

LC No. 96-004081

Before: Cavanagh, P.J., and Murphy and White, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317; MSA 28.549, first-degree felony-murder, MCL 750.316; MSA 28.548, assault with intent to rob while armed, MCL 750.89; MSA 28.284, 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). Defendant, a sixteen-year-old juvenile at the time of the offenses, was sentenced as an adult to concurrent prison terms of twenty-five to fifty years for the second-degree murder conviction, mandatory life for the felony-murder conviction, and fifteen to thirty years for the armed robbery conviction, all to be served consecutive to a two-year term for the felony-firearm conviction. The court vacated defendant's sentence for the assault with intent to rob while armed conviction. Defendant appeals as of right. We affirm in part, vacate in part, and remand for further proceedings.

I

Defendant raises three claims of instructional error. First, defendant argues that the trial court erred in failing to give the jury an instruction on specific intent for the robbery offenses and the lesser included offenses. Because defendant failed to request a specific intent instruction, appellate review of this issue is waived unless failure to consider the issue will result in a miscarriage of justice. *People v Messenger*, 221 Mich App 171, 177; 561 NW2d 463 (1997). No error results from an omitted instruction if the charge as a whole covers the substance of the omitted instruction. See *id.* at 177-178. Because the instructions on each offense included an

instruction as to the intent element, the failure to separately instruct the jury as to the specific intent of each of the challenged offenses does not constitute error requiring reversal. Accordingly, we conclude that a miscarriage of justice will not result from our failure to consider this issue further.

Next, defendant argues that the trial court erred in failing to give an instruction defining “firearm” for purposes of the felony-firearm charge. Again, defendant failed to preserve this issue by requesting an instruction at trial and, therefore, review of this issue is appropriate only to avoid a miscarriage of justice. See *id.* at 177. We find no miscarriage of justice because the evidence does not support defendant’s assertion that the assailant was armed with the BB gun recovered at the scene, rather than an assault weapon. A trial court is not required to give a requested instruction where the theory is not supported by the evidence. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995).

Defendant also argues that the trial court improperly instructed the jury that it could find him guilty of felony-murder based on the underlying felony of assault with intent to rob while armed when the information listed only armed robbery as the predicate felony. Because defendant failed to object to the trial court’s instructions, review of this issue is precluded absent manifest injustice. *People v Welch*, 226 Mich App 461, 463; 574 NW2d 682 (1997). We find no manifest injustice because the jury found defendant guilty of both underlying felonies.

II

Next, defendant argues that the trial court’s factual findings at the dispositional hearing were clearly erroneous and that its decision to sentence him as an adult constituted an abuse of discretion. In an appeal from a decision to sentence a juvenile as an adult, this Court reviews the trial court’s findings of fact for clear error, while the ultimate decision to sentence a juvenile as an adult is reviewed for an abuse of discretion. *People v Dilling*, 222 Mich App 44, 52; 564 NW2d 56 (1997). The prosecution bears the burden of establishing by a preponderance of the evidence that the best interests of the juvenile and the public will be served through sentencing the defendant as an adult. MCR 6.931(E)(2); *People v Perry*, 218 Mich App 520, 542; 554 NW2d 362 (1996). The sentencing court must make specific and detailed factual findings on each of the statutory criteria. MCL 769.1(5); MSA 28.1072(5);¹ MCR 6.931(E)(4); *Perry, supra*. No single statutory criterion may be given preeminence over the others. *Id.*

The trial court discounted the reports submitted by representatives from the Family Independence Agency and the Department of Corrections because both witnesses assumed that the shooting of Steven Krass was accidental. Moreover, neither witness had been aware that defendant had been involved in a carjacking immediately before the shooting, and both witnesses indicated that knowledge of the carjacking might have affected their respective recommendations. The trial court’s findings that defendant participated in the carjacking and possessed the intent to kill Krass are not clearly erroneous. We find no abuse of discretion in the trial court’s ultimate decision to sentence defendant as an adult.

III

Finally, defendant raises two double jeopardy issues. First defendant asserts that his convictions of both second-degree murder and felony-murder violate the prohibition against double jeopardy. We agree. See *People v Passeno*, 195 Mich App 91, 95-96; 489 NW2d 152 (1992), overruled in part on other grounds in *People v Bigelow*, 229 Mich App 218; ___ NW2d ___ (1998). Thus, we remand this matter to allow the trial court to vacate defendant's second-degree murder conviction and sentence.

Defendant also contends that the trial court must vacate his convictions of armed robbery and assault with intent to commit armed robbery. The prosecution agrees. We therefore remand to allow the trial court to vacate the armed robbery and assault with intent to rob convictions and the armed robbery sentence.²

Affirmed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ William B. Murphy

/s/ Helene N. White

¹ This section is currently located at MCL 769.1(6); MSA 28.1072(6).

² The trial court vacated defendant's sentence for assault with intent to commit armed robbery but not the conviction itself.