STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DESHON A. THOMAS,

Defendant-Appellant.

UNPUBLISHED
December 7, 1999

No. 205538
Recorder's Court
LC No. 96-002991

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHANNON L. POWELL,

Defendant-Appellant.

No. 207876
Recorder's Court
LC No. 96-006226

Before: Talbot, P.J., and Neff and Saad, JJ.

PER CURIAM.

Defendants Deshon Thomas and Shannon Powell were each convicted of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), and armed robbery, MCL 750.529; MSA 28.797, following a joint trial before separate juries. Defendant Thomas was sentenced to concurrent terms of natural life imprisonment for the murder conviction and twenty-five to fifty years for the armed robbery conviction. Defendant Powell was sentenced as an adult to concurrent terms of natural life imprisonment for the murder conviction and twenty to forty years for the armed robbery conviction. Defendants appeal as of right. We affirm defendants' convictions and sentences for felony murder, but vacate their convictions and sentences for armed robbery.

Defendant Thomas first argues that the trial court erred in denying his motion to suppress his alleged statement to police. We disagree. At the evidentiary hearing, Thomas denied that he made the statement attributed to him and claimed that it was fabricated by the police. Under these circumstances, the trial court properly determined that the statement was admissible and that the question whether Thomas made the statement at all was for the jury to decide. *People v Weatherspoon*, 171 Mich App 549, 554-555; 431 NW2d 75 (1988); *People v Spivey*, 109 Mich App 36, 57; 310 NW2d 807 (1981).

The record further indicates that the trial court found that, assuming Thomas made the statement, it was made voluntarily under the totality of the circumstances and was not the product of coercion. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). As the trial court noted, there is no indication that Thomas was improperly treated by the police or that he was denied anything, other than Thomas' claim that he was not permitted to call his mother unless he signed the statement. Even assuming Thomas' claim could be considered coercive conduct, his testimony on this point conflicted with that of the police officer. The trial court attached no credibility to Thomas' claim, and we defer to the trial court's superior ability to make that assessment absent any indication that it was clearly erroneous. MCR 2.613(C); *People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1996); *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). Accordingly, we conclude that the trial court did not err in admitting the statement at trial.

Defendant Thomas next contends that there was insufficient evidence to support his felony murder conviction either as a principal or as an aider and abettor. We disagree. In reviewing the sufficiency of the evidence in a criminal case, we 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992).

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 one of the felonies enumerated in MCL 750.316; MSA 28.548. *People v Kelly*, 231 Mich App 627, 642-643; 588 NW2d 480 (1998). Larceny, one of the felonies listed in the statute, is the taking and carrying away of the property of another with felonious intent and without the owner's consent. *People v Malach*, 202 Mich App 266, 270; 507 NW2d 834 (1993). A conviction for felony murder does not require that the murder be committed contemporaneously with the felony; the defendant need only intend to commit the underlying felony at the time the homicide occurred. *Kelly*, *supra* at 643.

One who procures, counsels, aids, or abets in the commission of an offense may be convicted and punished as if he committed the offense directly. MCL 767.39; MSA 28.979; *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). A conviction for aiding and abetting requires proof that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or encouraged or assisted the principal in committing the crime, and (3) the defendant intended the commission of the crime or knew the principal intended its commission at the time he gave

aid and encouragement. *Id*. An aider and abettor's state of mind may be inferred from all the facts and circumstances. *Id.* Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Id.* at 569.

Viewed in a light most favorable to the prosecution, the evidence established that two young men approached the eighty-one year old victim in the parking lot of a food market. One witness testified that he heard someone demand "Give up the money" and saw one of the men shoot the victim. As the men ran toward an alley to make their escape, one of the men ran back to the victim and took something out of the victim's pockets. Another witness stated that she saw defendants run through the alley with a gun, and when she asked them what they were doing, defendant Powell replied, "We shot someone." An acquaintance of both defendants testified that defendants ran to his house after the incident and told him that Thomas shot the victim when he went to rob him. Other acquaintances stated that a week before the robbery, both defendants discussed committing the robbery because they needed money and that defendants had purchased a .380 caliber gun, which matched the spent shell casing found near the victim. Finally, Thomas' own statement to the police established that he and Powell went to the crime scene with the intent to rob someone. Although Thomas denies that he was involved in the incident and that defendant Powell was the shooter, these questions are appropriately left to the trier of fact and will not be resolved anew by this Court. *People v Givans*, 227 Mich App 113, 123-124; 575 NW2d 84 (1997). Further, based on the evidence presented, we find no merit to Thomas' claim that the prosecution failed to establish that he intended to commit a larceny at the time of the shooting. *Kelly*, *supra* at 643. Viewed in a light most favorable to the prosecution, we conclude that the direct and circumstantial evidence was more than sufficient to enable the jury to find beyond a reasonable doubt that Thomas committed felony murder either as a principle or as an aider and abettor. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Defendant Thomas next argues that the trial court erred in denying his attorney's request to withdraw due to a breakdown in the attorney-client relationship and where Thomas wished to proceed with newly retained counsel. We disagree. The request to withdraw was made on the day of trial, new counsel apparently had not yet been retained and was unprepared to proceed with the scheduled trial, and Thomas failed to show that he had a valid difference of opinion with his appointed attorney over trial strategy that affected his right to a fair trial. Under these circumstances, the trial court did not abuse its discretion in denying the request to withdraw. *In re Withdrawal of Attorney*, 234 Mich App 421, 431; 594 NW2d 514 (1999); *People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999).

Defendant Powell argues that the trial court erred in allowing the prosecutor to introduce evidence which implied that he fled the jurisdiction and had to be extradited back to this state. However, it is well established that evidence that a defendant fled the jurisdiction or resisted arrest is generally admissible because it may indicate consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995); *People v Cutchall*, 200 Mich App 396, 398-401; 504 NW2d 666 (1993). Because defendant failed to preserve this issue with an appropriate objection at trial, *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999), and has not demonstrated a plain error

resulting from the admission of this evidence, appellate relief is not warranted on this basis. *Carines, supra* at 763.

Defendant Powell also argues that the trial court abused its discretion in sentencing him as an adult rather than a juvenile. We disagree. This Court reviews a trial court's findings of fact supporting its determination regarding the factors enumerated in MCL 769.1(3); MSA 28.1072(3) and MCR 6.931(E)(3) for clear error, while the trial court's ultimate decision to sentence defendant as an adult is reviewed for an abuse of discretion. *People v Dilling*, 222 Mich App 44, 52; 564 NW2d 56 (1997).

Here, the record reveals that the trial court carefully considered the relevant factors set forth in MCL 769.1(3)(a)-(f); MSA 28.1072(3)(a)-(f) and MCR 6.931(E)(3)(a)-(F), and did not give any single factor undue weight. *People v Perry*, 218 Mich App 520, 542; 554 NW2d 362 (1996) aff'd 460 Mich 55 (1999). Contrary to defendant's assertion on appeal, the trial court's finding that Powell was not "amenable to treatment" in the juvenile system, MCL 761.1(3)(c)(i); MSA 28.1072(3)(c)(i), was supported by the record despite the fact that he had never received treatment in a juvenile facility. This determination was based on Powell's extensive juvenile record, the fact that Powell committed the instant offense as well as a subsequent armed robbery in North Carolina while on juvenile probation for assault with intent to rob, his failure to abide by the terms of his intensive juvenile probation, testimony that his pattern of aggressive and assaultive behavior required the maximum security setting of an adult facility, and that he could not be rehabilitated in the two years before his release from the juvenile facility. The trial court also determined that Powell would be disruptive to the rehabilitation of other juveniles if placed in a juvenile facility given his delinquent behavior and leadership status. The trial court's findings on the remaining factors were similarly supported by the evidence and were not clearly erroneous.

Nor did the trial court abuse its discretion in ultimately deciding to sentence Powell as an adult given his extensive record, the seriousness of the offense, and the recommendations from a social worker, Powell's probation officer, and a psychologist that Powell be sentenced as an adult. See *Dilling*, *supra* at 53. Accordingly, we agree that the prosecution met its burden of demonstrating by a preponderance of the evidence that the best interests of defendant and the public would be served by sentencing defendant as an adult offender. MCR 6.931(E)(2); *People v Cheeks*, 216 Mich App 470, 474; 549 NW2d 584 (1996).

Finally, both defendants argue, and the prosecution agrees, that their dual convictions for felony murder and armed robbery violate the prohibition against double jeopardy. We agree. It is well established that convictions and sentences for both felony-murder and the predicate felony violate double jeopardy protections. *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995).[1] We therefore vacate defendants' convictions and sentences for armed robbery. *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996).

Defendants' convictions of felony-murder are affirmed and their armed robbery convictions are reversed and vacated. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Henry William Saad

[1] Although defendants were convicted of felony murder based on a larceny from the victim, this Court has held that multiple convictions of armed robbery and larceny arising from the same taking violate double jeopardy. *People v Carter*, 415 Mich 558, 585; 300 NW2d 214 (1982).