# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>March 29, 2002 |
| v | No. 224947<br>Wayne Circuit Court |
| ANTHONY CRAWL,<br><br>Defendant-Appellant. | Criminal Division<br>LC No. 99-004793 |

Before: Jansen, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of two counts of first-degree premeditated murder, MCL 750.316(1)(a), two counts of first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of life imprisonment for each of the four murder convictions, and twenty-five to eighty-five years' imprisonment for the armed robbery conviction, to be served consecutively to a two-year term for the felony-firearm conviction. He appeals as of right. Because defendant's convictions arise out of the deaths of two victims, we order that defendant's judgment of sentence be modified to specify that defendant's murder convictions and sentences are for two counts of first-degree murder, each supported by two theories: premeditated murder and felony-murder. The underlying conviction and sentence for armed robbery are vacated.

This case arises from a double homicide of a married couple. The prosecutor presented evidence that the victims, Samuel and Latesha Trotter, were approaching their home at night when defendant, codefendant Quentin Jones, and a third party accosted them, threatened them with guns, escorted them inside their home, demanded money from them, ransacked the house, stole property, and then killed them. The evidence included statements from both Jones and defendant to the police, in which each respectively indicated that Jones did the shooting, but that defendant had obtained a sheet to put over the victims' heads and had also turned up the radio to mask the sounds of the gun. At trial, defendant sought unsuccessfully to suppress his confession, and presented a witness who testified that she was with defendant at his home on the night in question.

Defendant first argues that the trial court erred in denying his motion to suppress his statement to the police, contending that he did not fully understand his constitutional rights and that the statement was obtained in violation of his right to counsel at the polygraph test.

With regard to the issue whether defendant was denied his right to counsel before giving his statement, the trial court found, following an evidentiary hearing, that defendant did not request counsel. Defendant testified at the hearing that he had "asked about a lawyer, but I was told that even if I was given a lawyer he wouldn't be able to enter that part of the building." However, there was no corroboration of this claim, and there is no dispute that defendant in fact received repeated and timely *Miranda* warnings, and repeatedly signed waivers. Moreover, the investigating police officer testified that defendant did not ask for a lawyer. The trial court expressly discredited defendant's assertion that he had ever asked for a lawyer, elaborating that defendant initially remained silent, then asked for a polygraph test knowing that the results would not be admissible, then chose to talk to the police when the polygraph examination did not go well for him. "Credibility is a matter for the trier of fact to ascertain. We will not resolve it anew." *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). We cannot conclude from this record that the trial court clearly erred in resolving this credibility question against defendant. Consequently, we affirm the trial court's factual finding that defendant never asked for a lawyer.

Next, we must determine whether defendant knowingly and intelligently waived his rights. The trial court's factual findings regarding a knowing and intelligent waiver of *Miranda*[1] rights will not be disturbed on appeal unless the ruling is clearly erroneous. *People v Daoud,* 462 Mich 621, 629; 614 NW2d 152 (2000), quoting *People v Cheatham,* 453 Mich 1, 30; 551 NW2d 355 (1996). The meaning of a knowing and intelligent waiver, however, is a question of law that is reviewed de novo. *Daoud, supra* at 629-630. To establish a valid waiver of *Miranda* rights, the prosecution must present evidence sufficient to show that the accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him. *Id.* at 637, quoting *Cheatham, supra* at 29.

On appeal, defendant points to his testimony at the evidentiary hearing to the effect that when he waived his rights he did not understand them as well as he did at present, which the trial court accepted. However, defendant nowhere suggests that he did not understand that he did not have to speak, that he had the right to an attorney, and that the prosecutor could use whatever he said against him. Defendant's development of a greater understanding of the ramifications of his choosing to speak after his confession is beside the point so long as defendant understood at the time of his statement that he had the right to remain silent and to have the assistance of counsel, and that anything he said could be used against him at trial. The trial court's observations that defendant was himself an intelligent adult, and its conclusion that defendant understood what he was doing when he repeatedly signed detailed waivers of his rights, are not clearly erroneous. See, e.g., *Daoud, supra* at 636 (an accused need not understand the ramifications and consequences of choosing to waive or exercise the rights that the police have properly explained in order to knowingly waive *Miranda* rights).

Accordingly, the trial court did not err in denying defendant's motion to suppress his police statement.

---

[1] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant next argues that he was denied a fair trial because the trial court allowed the prosecutor to use a recording of two 911 calls to rebut a defense witness' account of seeing the victims with two other young men on the evening in question. This Court reviews a trial court's decision regarding the appropriate remedy for failure to comply with a discovery order for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). Plaintiff on appeal argues both that the tape in question was not sufficiently probative of the question of guilt or innocence to have fallen under the disclosure requirements, and also that the failure to disclose it was an innocent oversight. Assuming, without deciding, that nondisclosure of the tape was a discovery violation, we nonetheless conclude that the trial court did not abuse its discretion in allowing the prosecutor to use it for rebuttal.

The prosecutor wished to use the 911 calls because they reflected times at night somewhat different from those reported by the defense witness who saw the victims with persons other than defendant and his companions. Although the recording did tend to confirm that an episode of violence occurred at the time and place in question, those facts were not in dispute. Instead, defendant maintained that he was elsewhere at the time and thus wrongly implicated in the crimes. Because there is no suggestion that anything in the 911 tape included any identification of defendant at the scene of the crime, and because the times reflected in those calls were times during which defendant's girlfriend said that she was with defendant at defendant's home, nothing on the 911 tape bore directly on the question of defendant's guilt or innocence. The tape bore only on the question whether what the defense witness testified that he observed was the same series of events that impelled the two callers to dial 911. This evidence was indeed "rebuttal, pure and simple," as it came about.

Defendant argues that had the defense known about the 911 tape in the first place, it might have declined to call the witness. Defendant further suggests that, had the tape been known to the defense from the beginning, this case might have been resolved without going to trial.

Because the witness unambiguously stated that the two men he saw with the victims on the night of April 15, 1999, included neither defendant nor Jones, that testimony was obviously useful to the defense. The impeachment evidence in the form of the 911 tape did not call into question the witness' ability to distinguish physical appearances, but called into question only his sense of what time it was, or whether what he saw was part of the series of events leading to the double homicide. Thus, even with the rebuttal evidence becoming known, defense counsel affirmatively asked that the witness' testimony, originally introduced on behalf of Jones, be considered also for defendant's case.

We find disingenuous any suggestion that a plea agreement might have been struck had the existence of the 911 tape been known to defense counsel all along. It is difficult to imagine the prosecutor feeling any need to bargain where strong evidence implicated all participants under a first-degree felony-murder theory. Because any conviction of first-degree murder brings a sentence of life without parole, defendant, if not offered a chance to plead in avoidance of first-degree murder, would have had no incentive to bargain in the matter.

Defendant next argues that the murder convictions should be reversed because the trial court made no findings under the premeditated-murder theory and failed to articulate findings with sufficient specificity concerning the intent element for felony murder.

Although in its concluding remarks after stating its findings and conclusions the trial court failed to mention premeditated murder, the trial court's other statements of record, considered along with the judgment of sentence, clearly indicate that the trial court found defendant guilty as an aider and abettor of that crime. Within its findings and conclusions, the trial court addressed the element of premeditated murder according to which the actor must have had the opportunity to reconsider his or her course of action but then continued with the crime nonetheless. See *People v Marsack*, 231 Mich App 364, 370-371; 586 NW2d 234 (1998) ("Premeditation and deliberation require sufficient time to allow the defendant to take a second look."). The trial court stated that defendant "could have said, wait a minute, we came over here to rob them, we didn't come over here to do anything else. He could have abandoned the crime, he could have left or he could have refused to participate, but he did not do that. Instead, what he did was participate knowingly, deliberately aided and abetted in the crime . . . ." Further, the judgment of sentence reflects the trial court's verdict of guilty of two counts of premeditated murder. This record clearly establishes that the trial court found defendant guilty of that crime upon due consideration of its elements.

Nor do we find the trial court's statements concerning the intent element for felony murder lacking. An aider and abettor guilty as a principal in felony murder must have acted with "the intent to kill, the intent to cause great bodily harm or [must have] wantonly and willfully disregarded the likelihood of the natural tendency of his behavior to cause death or great bodily harm." *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985), citing *People v Aaron*, 409 Mich 672, 733; 299 NW2d 304 (1980). In this case, the trial court acknowledged that felony murder could follow from a finding that the defendant intended to kill or created a great risk of death or great bodily harm, and announced that defendant satisfied that element, but did not specify which of these alternatives it found to have existed. Defendant's argument on appeal that this was error invalidating the verdict is not persuasive. Obviously, the least of these states of mind—that the defendant acted with a reckless disregard for the likelihood that his or her course of behavior was likely to put the victim at risk of at least great bodily harm—is included within the others: specific intent to kill or to do great bodily harm. Thus, if the evidence is sufficient to satisfy the recklessness finding, the intent element for felony murder is necessarily satisfied whether or not the factfinder arrived at the verdict on that basis or on the basis of one of the specific-intent alternatives. In this case, the trial court articulated findings indicating that it concluded that defendant in fact aided and abetted in the crime with the specific intent that the victims would be killed, as discussed above. Thus, the trial court had little reason to elaborate when considering the intent element for felony murder, and left no ambiguity in the record in this particular. Having summarized what the intent element for felony murder required, and having concluded that defendant satisfied that element by reference to facts that would in fact satisfy any of the bases for that element of felony murder, the trial court's findings and conclusions in this regard were not deficient. MCR 6.403.

Lastly, defendant argues that his conviction of, and sentence for, both armed robbery and felony murder predicated on the armed robbery constitute a violation of his rights against double jeopardy. Plaintiff concedes this point and asks this Court to vacate the armed-robbery conviction and sentence. We agree, and order that the armed robbery conviction and sentence be vacated. *People v Harding*, 443 Mich 693, 714; 506 NW2d 482 (1993) (opinion by Brickley, J.); *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995).

We further take this opportunity to correct another double-jeopardy problem. The judgment of sentence indicates convictions and life sentences on two counts of premeditated murder and two counts of felony murder, thus reflecting a total of four convictions and sentences where only two murders were committed. Separate convictions and sentences for both premeditated murder and felony murder, both of which were charged in connection with a single instance of criminal conduct, violate double-jeopardy principles. *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744 (1998). Accordingly, we order that the judgment of sentence be modified to specify that defendant's murder convictions are for two counts of first-degree murder, each supported by two theories: premeditated murder and felony murder. *Id.* at 220-221.

Affirmed in part, vacated in part, and remanded for an amended judgment of sentence consistent with this opinion. Jurisdiction is not retained.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Richard Allen Griffin