

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID D. DANIELS,

Defendant-Appellant.

UNPUBLISHED

July 20, 2004

No. 247558

Oakland Circuit Court

LC No. 01-180760 FC

Before: Zahra, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felony murder, MCL 750.316, assault with intent to murder, MCL 750.83, two counts of armed robbery, MCL 750.529, conspiracy to commit armed robbery MCL 750.157a; MCL 750.529, felonious assault, MCL 750.82, and seven counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced, as an habitual offender, fourth offense, MCL 769.12, to life in prison without parole for the felony murder conviction, twenty to thirty years in prison for the assault with intent to murder, conspiracy to commit armed robbery and both armed robbery convictions, ten to fifteen years in prison for the felonious assault conviction, and two years' imprisonment for each of the seven convictions of felony-firearm. We vacate defendant's conviction and sentence on one count of armed robbery and one count of felony-firearm, and affirm in all other respects.

This case arises out of the armed robbery of an alleged drug house by defendant and codefendant, Terrill Boyles, which resulted in the shooting death of Kevin Stephens. Defendant argues that there was insufficient evidence to convict him of felony murder and of assault with intent to murder. We disagree.

We review a challenge to the sufficiency of the evidence de novo and in a light most favorable to the prosecution to determine whether any rational factfinder could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002); *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). 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 [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies enumerated in [the statute, including armed robbery]. *People v Carines*, 460 Mich 750, 759; 597

NW2d 130 (1999), citations omitted. A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm or from the fact that the defendant used a deadly weapon. *Id.*

The elements of assault with intent to murder are: (1) an assault; (2) with an intent to kill; (3) which if successful, would make the killing murder. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Intent to kill may be proven by inference from any facts in evidence. *Id.* A conviction on an aiding and abetting theory requires proof that: (1) the underlying crime was committed by either defendant or some other person; (2) the defendant performed acts or gave encouragement that aided and assisted the commission of the crime; and, (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement. *People v Smielewski*, 235 Mich App 196, 207; 596 NW2d 636 (1999). Such intent can be inferred from circumstantial evidence. *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992). “Aiding and abetting” describes all forms of assistance, including all words and deeds that may support, encourage, or incite the commission of crime. *Id.*

Ample evidence was adduced at trial to support defendant’s felony murder conviction under an aiding and abetting theory. A witness to the shootings testified that defendant and codefendant came to Stephens’ house together, and once inside, they both pulled guns, demanded “the stuff,” and threatened to kill everyone if they did not get what they wanted. An occupant of the house testified that defendant shot Stephens in the leg, and, after more threats on Stephens’ life, codefendant shot Stephens in the back of the head, killing him. The fact that defendant threatened the life of the occupants of the house and used a weapon to shoot Stephens in the leg shows his intent to kill or inflict great bodily harm. By virtue of codefendant’s instruction to defendant to kill everyone, defendant had knowledge of codefendant’s intent to kill, if necessary, to get what he was after. Defendant gave aid and encouragement by shooting Stephens in the leg, presumably to get him to tell where “the stuff” was located, by ransacking Stephen’s bedroom and carrying away goods, and by helping to corral the occupants of the house. The fact that defendant was not present in the room when codefendant shot and killed Stephens does not negate the fact that defendant gave aid and encouragement to codefendant during the entire joint endeavor.

There was also sufficient evidence to support defendant’s conviction of assault with intent to murder Kenneth Hayes. There was testimony at trial that, after shooting Stephens, codefendant pointed the gun at Hayes, who was lying on the bed, and pulled the trigger. This testimony established that codefendant assaulted Hayes with the intent to murder him. As stated above, defendant’s participation in the armed robbery of the occupants of Stephens’ house in the face of codefendant’s threats to kill everybody, defendant’s threats to kill the occupants, his use of a weapon during the robbery and his shooting of Stephens in the leg was sufficient for a jury to infer that defendant had knowledge that codefendant intended to kill on the occupants of the house, including Hayes, and that defendant aided and abetted codefendant in this crime.

Defendant next argues that his conviction of felony-firearm and his acquittal of the companion charge of assault with intent to murder Jerean Tidwell, resulted in an impermissible inconsistent verdict. Again we disagree. A jury may render an inconsistent verdict, which acquits a defendant of the predicate felony and yet convicts a defendant of felony-firearm. *People v Lewis*, 415 Mich 443, 449-453; 330 NW2d 16 (1982); *People v Vaughn*, 409 Mich 463,

466; 295 NW2d 354 (1980). The only requirement is that there be proof that defendant committed the underlying felony. *People v Burgess*, 419 Mich 305, 310; 353 NW2d 444 (1984).

There was sufficient evidence that defendant aided and abetted codefendant in the assault with the intent to murder Jerean Tidwell. Hayes testified that, after shooting Stephens in the head, codefendant shot at the back of Tidwell's head. Another victim of the armed robbery testified that she saw codefendant point a gun at Tidwell's head and fire. Tidwell testified that a gunshot grazed the back left side of his head. The emergency room doctor corroborated this testimony by stating that he treated Tidwell for a small laceration on the back of his skull, which could have been the result of a gunshot. This testimony was sufficient to establish that codefendant assaulted Hayes with the intent to murder him. As stated *supra*, codefendant's threats to kill everybody, defendant's threats to kill the occupants, defendant's use of a weapon during the robbery, and his shooting and injuring of Stephens was ample evidence from which a jury could infer that defendant aided and abetted codefendant with knowledge of his intent to kill. Because the prosecutor presented evidence that defendant committed an assault with the intent to murder Tidwell under an aiding and abetting theory, defendant's conviction of felony-firearm may stand regardless of the fact that he was not convicted of the underlying felony.

Defendant also contends that his convictions and sentences for felony murder, the predicate felony of armed robbery, and its accompanying felony-firearm charge violate the proscriptions against double jeopardy. We agree. It is well settled that a defendant's convictions and sentences for both felony murder and the underlying, or predicate, felony violate a defendant's protection against double jeopardy under the federal and state constitutions. *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2001); *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998). The appropriate remedy is to vacate the conviction and sentence for the underlying felony. *Id.* If the substantive crime underlying a felony-firearm conviction must be vacated, the accompanying felony-firearm conviction must also be vacated. *People v Harding*, 443 Mich 693, 716; 506 NW2d 482 (1993).

In this case, while the information indicated and the trial court instructed the jury that the predicate felony for the felony murder conviction was larceny, defendant was never charged with larceny. The prosecutor, however, argued below and acknowledges on appeal that armed robbery was the predicate felony. Because defendant was convicted of both felony murder and the predicate felony of armed robbery, defendant's right against double jeopardy was violated, and we vacate defendant's conviction and sentence for armed robbery, as well as the accompanying felony-firearm conviction. *Harding, supra*, 443 Mich at 716.

The prosecution asks that this Court reexamine the issue of whether convictions and sentences for both felony murder and the underlying felony violate the proscriptions against double jeopardy. The prosecution argues that the Legislature intended to "allow cumulative punishment for armed robbery and felony murder." However, in *Harding, supra*, 443 Mich at 712, our Supreme Court unequivocally stated that the Legislature did not intend to impose punishments for both the offenses of felony murder and the predicate felony of armed robbery, and that sentencing a defendant for both crimes violates the double jeopardy clauses of the federal and state constitutions. The prosecution's argument is without merit.

Defendant's judgment of sentence indicates that each of his sentences is to be served consecutively. Defendant was on parole at the time he committed the instant offenses.

Defendant argues on appeal that his sentences for the multiple counts of felony-firearm should be served concurrently, consecutive to his sentence for the parole violation, and that the sentences for the remaining felony convictions should be concurrent with each other and consecutive to the two-year-term for felony-firearm. We agree. *People v Chavies*, 234 Mich App 274, 280-281; 593 NW2d 655 (1999); *People v Sawyer*, 410 Mich 531, 534-535; 302 NW2d 534 (1981).

Defendant's conviction for one count of armed robbery and one count of felony-firearm are vacated. In all other respects, defendant's convictions are affirmed. We remand for clerical correction of defendant's judgment of sentence. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder