

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY M. BOLDEN,

Defendant-Appellant.

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UNPUBLISHED

November 23, 2004

No. 249501

Macomb Circuit Court

LC No. 03-000288-FC

Before: Borrello, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder (felony murder), MCL 750.316, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), 250.227b. Defendant was sentenced to life in prison without the possibility of parole for the felony murder conviction, 375 months to 75 years in prison for the armed robbery conviction, and two years in prison for the felony-firearm conviction. We affirm in part, vacate in part, and remand.

I

Defendant first argues on appeal that his motion to suppress the nine-millimeter gun used in the robbery should have been granted because the prosecution failed to establish that exigent circumstances existed justifying the warrantless entry into the home where defendant was staying. We disagree.

A trial court's findings of fact at a suppression hearing are given deference by this Court and will not be overturned unless clearly erroneous. *People v Hall*, 249 Mich App 262, 267; 643 NW2d 253 (2002), rem'd 467 Mich 888 (2002), on rem 256 Mich App 674 (2003). For questions of law, this Court reviews the trial court's ruling under the de novo standard. *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000).

The right against unreasonable searches and seizures is guaranteed by both the United States and Michigan Constitutions. US Const, Am IV; Const 1963, art 1, § 11; *Snider, supra* at 406. The lawfulness of a search or seizure depends on its reasonableness. *Id.* In general, a warrantless search or seizure is unreasonable unless there exist both probable cause and circumstances establishing an exception to the warrant requirement. *Id.* at 407. When a defendant moves to suppress evidence as illegally obtained, it is the prosecutor's burden to show

that the search and seizure were justified by a recognized exception to the warrant requirement. *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003).

A number of factors may be considered to determine whether the people have established exigent circumstances to justify a warrantless search. *People v Oliver*, 417 Mich 366, 384; 338 NW2d 167 (1983). These factors include (1) whether the crime was serious or involved violence; (2) whether the defendant is reasonably believed to be armed; (3) whether the defendant is reasonably believed to be in the premises; (4) whether there is a clear showing of probable cause; (5) whether it is likely that the defendant will escape if not apprehended; (6) whether the entry is forcible or peaceful; and (7) whether the entry is made during the day or night. *Id.* (Citing *Dorman v United States*, 140 US App DC 313, 320-321; 435 F 2d 385 (1970)). Other relevant factors include the need to prevent the destruction of evidence, the need to ensure the safety of the officers involved, the need to ensure the safety of other citizens, and the ability to secure a warrant. *Id.* The factors are not all-inclusive and each case should be judged on its own facts. *Id.* A warrantless entry may be legal where there is a compelling need for official action and no time to secure a warrant. *Snider, supra* at 408.

There is no serious challenge to defendant's standing to challenge the search. Neither is there any substantive claim that police did not have probable cause to arrest defendant and the evidence all supports a finding of probable cause to arrest<sup>1</sup>.

The issue we must decide is whether exigent circumstances justified the warrantless entry. Numerous factors support the existence of exigency in this case. First, there was strong evidence to support the belief that defendant committed armed robbery and first-degree felony murder, the most severe and violent crime possible. Second, police had a reasonable belief that defendant was armed based on information provided by his mother, the ammunition found in defendant's Detroit home, and his previous crime of armed robbery. Third, police had very reliable evidence that defendant was inside the home which they had under surveillance. Fourth, as discussed above, police had strong probable cause to believe that defendant committed the robbery. Fifth, the safety of five young children, as well as three other adults present in the home was at risk by defendant's continued presence in the home. One of the adults likely present was a man on parole for second-degree murder. Police also knew that defendant's family was aware that they were looking for him and that defendant was able to receive

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<sup>1</sup> Probable cause to arrest exists if police reasonably believe, based on trustworthy information, that an offense has occurred and that defendant committed it. MCL 764.15; *People v McLeod*, 254 Mich App 222, 227-228; 656 NW2d 844 (2002). Prior to entering the home, police knew that a black male, wearing the softball jacket recovered in the alley, robbed the victims' store and shot and killed victim Haitham Bahri with a nine-millimeter gun in the process of the robbery. Police had knowledge that the fingerprint of defendant, a black male, had been identified as the one police found on the duct tape used to tie up the victims of the robbery, nine millimeter shells were found at his mother's Detroit home, defendant had previously committed armed robbery with a similar modus operandi, and he had been linked to the softball jacket recovered in the alley by the store. Further, police had already obtained a warrant for the Detroit home. Based on this information, the police had probable cause to arrest defendant at the time they entered the home where defendant was arrested.

messages from his pager. Fearing that defendant would be made aware of his imminent apprehension, coupled with the reasonable likelihood that defendant possessed a gun and was likely in the presence of a parole violator, police opted for a warrantless entry.

We find these factors to clearly support a finding of exigent circumstances and a compelling need for official action and conclude that the prosecution met its burden of establishing the exception. *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003). Concerns for the safety of the children inside the house compelled the trial court to find against defendant. We agree, and also find that other factors support the trial court's finding, as set forth above. The evidence supporting probable cause that defendant committed the robbery was compelling. We hold that sufficient exigent circumstances existed such that police were justified in entering the house prior to receiving a warrant. See *Snider*, *supra* at 408.

Further, we note that police initially located the gun during a protective sweep of the living room in preparation for gathering residents of the house in that room, for the safety of police and the occupants. Protective sweeps are permitted in connection with an in-home arrest if police reasonably believe that the area in question harbors an individual who poses a danger to them or to others and the search is quick and limited, and conducted for the sole purpose of ensuring the safety of police officers and other persons. *People v Beuschlein*, 245 Mich App 744, 757; 630 NW2d 921 (2001). Police testified that they did the sweep of the living room as a safety precaution because they had planned on holding the occupants of the house in that room. During the sweep, they found defendant's nine-millimeter gun under the couch and they did not remove the gun until they received the search warrant. Thus, because the police made a legal entry into the house, the subsequent protective sweep that turned up the nine-millimeter gun used in the robbery was also proper. *Id.* at 757-758.

## II

Defendant next argues on appeal that the trial court erred when it denied his request to instruct the jury on second-degree murder. We disagree. Claims of instructional error are reviewed de novo. *Hall*, *supra* at 269.

Defendant argues that he was entitled to a jury instruction on second-degree murder because second-degree murder is a necessarily included lesser offense of first-degree murder and a rational view of the evidence supports the instruction. While we agree that second-degree murder is a necessarily included lesser offense of first-degree murder, *People v Cornell*, 466 Mich 335, 358 n 13; 646 NW2d 127 (2002), we find that the evidence did not support a second-degree murder instruction.

The elements of first-degree, 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 the felonies set forth in the felony murder statute. MCL 750.316; *People v Maynor*, 256 Mich App 238, 243; 662 NW2d 468 (2003). Robbery is one of the felonies enumerated in MCL 750.316. The elements of armed robbery are: (1) an assault, and (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a specified weapon. MCL 750.529; *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004). The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. MCL 750.317; *People v Goecke*, 457 Mich 442, 463-464;

579 NW2d 868 (1998). Felony murder is essentially second-degree murder elevated by an enumerated felony, such as armed robbery. *Maynor, supra* at 243-244.

The fact that a robbery occurred was never in dispute. The crime was captured on video. The robber entered the store, pointed a gun at the robbery victim, Hala Bahri, and forced her to give him money from the store. In the course of the robbery, the robber shot and killed Haitham. The only rational conclusion to draw from the evidence is that the robber killed Haitham. No juror could rationally find defendant guilty of killing Haitham, but not of robbing Hala. Defendant was either the robber, guilty of armed robbery and first-degree felony murder, or he was not guilty of murder at all. Because there is no evidentiary dispute regarding whether a robbery occurred, the element that differentiates the lesser second-degree murder offense from the greater first-degree felony murder offense, as required by *Cornell, supra* at 365, the trial court did not err in failing to give the jury a second-degree murder instruction. *Id.* at 355.

### III

Defendant's final argument on appeal is that his conviction and sentence for armed robbery should be vacated because it violates his right against double jeopardy. We agree. This Court reviews a question of double jeopardy de novo on appeal. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

In Michigan, conviction of both felony murder and the underlying felony violates double jeopardy, and the conviction and sentence for the underlying felony must be vacated. *People v Harding*, 443 Mich 693, 712; 506 NW2d 482 (1993) (Brickley, J); *People v Adams*, 245 Mich App 226, 242; 627 NW2d 623 (2001). In *Harding, supra* at 712, the Supreme Court held that it was a violation of the United States and Michigan Constitutional prohibitions against double jeopardy to punish defendant for both felony murder and the predicate felony, armed robbery. The Court determined that the Legislature did not intend to impose multiple punishments for both crimes because statutory felony murder based on the predicate crime of armed robbery carries with it a greater penalty (mandatory life in prison, MCL 750.316) than the predicate crime of armed robbery (any term of years to life in prison, MCL 750.529). *Id.* at 711-712.<sup>2</sup> In this case, although there are two victims, there is only one felony charge: armed robbery of Hala.<sup>3</sup> Therefore, defendant's conviction and sentence for armed robbery violates the double jeopardy prohibition against multiple punishments. *Harding, supra*. Defendant's conviction and

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<sup>2</sup> The facts of this case, however, indicate that two victims were involved. In *Hall, supra* at 273, this Court reiterated the rule that "double jeopardy does not apply to crimes committed against different victims, even if the crimes occurred during the same criminal transaction." However, a review of the felony information reveals that, although there were two victims, defendant was charged with only one count of armed robbery, for the robbery of Hala, and one count of felony murder, for the shooting death of Haitham. This differentiates the facts of the current case from those in *Hall*.

<sup>3</sup> We note that had defendant been charged with armed robbery of both Hala and Haitham, the result would be different.

sentence for armed robbery, as the predicate felony for the felony murder conviction, are therefore vacated. *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2001).

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

/s/ Stephen L. Borrello  
/s/ William B. Murphy  
/s/ Janet T. Neff