STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 15, 2008
v	No. 277363 Wayne Circuit Court
JASON OWENS TREADWELL, Defendant-Appellant.	LC No. 06-008315-01

Before: Owens, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

After a jury trial, defendant Jason Owens Treadwell was convicted of the first-degree murder of Detroit Police Officer Charles Phipps, MCL 750.316(1)(a), the felony murder of Phipps, MCL 750.316(1)(b), assault with intent to rob Officer Phipps while armed, MCL 750.89, carjacking of John Feazell, MCL 750.529a(1), two counts of armed robbery for the robberies of Feazell and Marie Leinonen, MCL 750.529, assault with intent to murder Leinonen, MCL 750.83, felon in possession of a firearm, MCL 750.224f(3), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1).[1] These offenses

[1] Defendant was also charged with two counts of assault with intent to rob while armed, regarding the assaults of Myra Andrews and Roland Wellborn, and one count of armed robbery for the robbery of Dewayne Smith. However, the trial court granted defendant's motion for directed verdict with regard to the charges of assault with intent to rob while armed against Andrews and Wellborn. The trial court failed to ask the jury on the record for its verdict regarding the armed robbery of Smith, so the trial court dismissed this count.

Brion McConnell, Elgie Grays and David Currie, Jr., were also charged in relation to this crime spree. McConnell pleaded guilty to second-degree murder, armed robbery of Feazell and Leinonen, and felony-firearm. Grays and Currie were tried separately from defendant. Grays was convicted of one count of assault with intent to commit murder, one count of carjacking, three counts of armed robbery, one count of second-degree murder, one count of felony murder, one count of felon in possession of a firearm, and one count of felony-firearm. Currie was convicted of one count of assault with intent to commit murder, one count of carjacking, three counts of armed robbery, one count of felon in possession of a firearm, and one count of felony-firearm. In a separate opinion, we affirmed Grays' and Currie's convictions. *People v Grays*, unpublished opinion per curiam of the Court of Appeals, issued July __, 2008 (Docket Nos. 277866 & 278072).

occurred during a crime spree targeting various motorists between 3:00 a.m. and 3:35 a.m. on April 28, 2006, on the west side of Detroit. The trial court sentenced defendant to life imprisonment without parole for each murder conviction, 285 months to 50 years' imprisonment for each assault with intent to rob while armed, carjacking, armed robbery and assault with intent to commit murder conviction, two to five years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm, but remand for correction of the judgment of sentence.

I. Sufficiency of the Evidence

First, defendant argues that the prosecution failed to present legally sufficient evidence to support his convictions. We review sufficiency of the evidence claims de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We "view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (internal quotations omitted). Circumstantial evidence and reasonable inferences arising from that evidence may be satisfactory proof of the elements of a crime. *People v Lee*, 243 Mich App 163, 167–168; 622 NW2d 71 (2000).

A. First-Degree Murder

Defendant contends that the prosecution failed to present legally sufficient evidence to support his first-degree premeditated murder conviction. We disagree. "The elements of first-degree murder are that the defendant killed the victim and that the killing was . . . 'willful, deliberate, and premeditated . . . .'" *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). First-degree murder may be established if the defendant had the specific intent to kill. *People v Graham*, 219 Mich App 707, 710–711; 558 NW2d 2 (1996). To show premeditation and deliberation, "'[s]ome time span between [the] initial homicidal intent and ultimate action is necessary . . . .'" *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003), quoting *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979) (internal citations omitted). "The interval between the initial thought and ultimate action should be long enough to afford a reasonable person time to take a 'second look.'" *Id.*

Defendant was convicted of first-degree murder under an aiding and abetting theory. "[T]o convict a defendant of aiding and abetting a crime, a prosecutor must establish that '(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that 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 that [the defendant] gave aid and encouragement.'" *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999).

A reasonable jury could have found that defendant aided in Phipps' murder. Defendant admitted that he, McConnell, Grays, and Currie carried guns on the night of the shooting. They participated in robberies and attempted robberies within an hour and a few blocks away from Joy Road, where Phipps was found dead. Admittedly, no witnesses observed Phipps' shooting and defendant's gun was not recovered or connected to the bullets that killed Phipps. Regardless, even if defendant was not the shooter, there was evidence that his acts encouraged and assisted

the shooting. Defendant told Investigator Barbara Simon that Grays was the first person to shoot at Phipps' minivan. However, when Phipps began to run away, defendant encouraged and assisted Grays by also shooting at Phipps. Defendant's knowledge of Grays's intent can be inferred from the assistance he provided Grays. Therefore, there was sufficient evidence to convict defendant of first-degree premeditated murder under an aider and abettor theory.

B. Felony Murder

Defendant contends that the prosecution failed to present legally sufficient evidence to support his felony murder conviction. We disagree.

> The elements of first-degree 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 specifically enumerated in [MCL 750.316(1)(b), here larceny.]'" [*People v Bobby Smith*, 478 Mich 292, 318–319; 733 NW2d 351 (2007), quoting *Carines*, *supra* at 758–759 (citation omitted).]

Phipps died from multiple gunshot wounds. The existence of defendant's intent to commit murder can be inferred from his intentional discharge of his firearm at Phipps when he began to run away.

Finally, Phipps was killed during an attempted larceny, satisfying the third element of felony murder. MCL 750.316(1)(b). The elements of larceny are

> (1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the subject matter must be the goods or personal property of another, (5) the taking must be without the consent and against the will of the owner. [*People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999), quoting *People v Anderson*, 7 Mich App 513, 516; 152 NW2d 40 (1967).]

"[A]n 'attempt' consists of (1) an attempt to commit an offense prohibited by law, and (2) any act towards the commission of the intended offense." *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001).

The circumstances surrounding the shooting suggest that defendant, McConnell, Grays and Currie attempted to take property from Phipps. Defendant admitted that they robbed one person and attempted to rob others that night. Specifically, while driving a gray Honda CRV, they pretended to be the police and stole jewelry, wallets and one vehicle from motorists. In the midst of these robberies, they encountered Phipps in his minivan. A reasonable juror could infer that defendant and the others in the Honda CRV used a similar tactic with Phipps.[2] Because

[2] Defendant told police investigators that he was unsure if anything was taken from Phipps.

there was sufficient evidence to prove that defendant attempted to commit larceny against Phipps, the predicate offense has been established and a reasonable jury could have found defendant guilty of felony murder.

C. Assault with Intent to Rob while Armed

Defendant contends that the prosecution failed to present legally sufficient evidence to convict him of assault with intent to rob Phipps while armed. We disagree. "'The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed.'" *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003), citing *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). Defendant admitted that he was armed with a .38 caliber gun. Defendant, McConnell, Grays and Currie shot at Phipps. Additionally, their intent to steal from Phipps may be inferred from their intent to rob all motorists stopped during their crime spree. Therefore, there was sufficient evidence to convict defendant of assault with intent to rob while armed.

D. Carjacking

Defendant contends that the prosecution failed to present legally sufficient evidence to convict him of carjacking. We disagree. To convict a defendant of carjacking, the prosecution must prove that the defendant, by force or violence, by threat of force or violence, or by putting in fear, took a motor vehicle in the presence of the lawful possessor of it. *People v Davis*, 468 Mich 77, 80 n 2; 658 NW2d 800 (2003). In this case, Feazell testified that defendant and several other men pointed their guns at him, forced him from his vehicle, stole his gold chain and cellular phone, hit him in the head and stole his vehicle. Even if defendant did not drive Feazell's vehicle away, defendant's knowledge of the driver's intent to do so can be inferred from his assistance in forcing Feazell from the vehicle. Consequently, the prosecution presented sufficient evidence to convict defendant of carjacking.

E. Armed Robbery

Defendant contends that the prosecution failed to present legally sufficient evidence to convict him of the armed robbery of Feazell and Leinonen. We disagree. The elements of armed robbery are '"(1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute.'" *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004), citing *Carines*, *supra* at 757. Both Feazell and Leinonen identified defendant as one of the men in the Honda CRV who approached them armed with guns. After the men stole Feazell's gold chain and cellular telephone, defendant threatened to shoot Feazell and hit him in the head with his gun. Darryl Fulks saw defendant with a gold chain after the robbery. Leinonen testified that defendant hit her in the head with a gun and stole her purse. The men also shot at Leinonen's vehicle as she escaped. Defendant's statement to Investigator Simon that "Only one person got robbed . . . . We attempted to rob other people, but they got away," sufficiently demonstrates defendant's intent to permanently deprive Feazell and Leinonen of their property. Therefore, sufficient evidence existed to convict defendant of these armed robberies.

F. Assault with Intent to Murder

Defendant contends that the prosecution failed to present legally sufficient evidence to convict him of assault with intent to murder Leinonen. We disagree. The elements of assault with intent to murder are "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Brown*, 267 Mich App 141, 147–148; 703 NW2d 230 (2005) (internal quotations omitted). Leinonen testified that she initially attempted to escape from the men in the CRV. However, when she backed away, one of the men shot at her vehicle. After she was robbed, Leinonen ducked and drove away while the men shot at her vehicle and broke her windows. Officer David Pauch explained that evidence from more than one gun was recovered at the scene of this robbery. Although it is unclear who shot at Leinonen's vehicle, defendant's acts encouraged and assisted the shooting. Defendant stole Leinonen's purse and hit her after the initial shooting. Therefore, a reasonable juror could infer that defendant was aware of the shooter's intent to shoot at Leinonen if she attempted to escape. Thus, there was sufficient evidence to convict defendant of assault with intent to murder Leinonen as an aider and abettor.

G. Felon in Possession of a Firearm/Felony-Firearm

Finally, defendant contends that the prosecution failed to present legally sufficient evidence to convict him of either weapons offense. We disagree. Defendant bases his claim on his assertion that the prosecution presented insufficient evidence to convict him of the murder, carjacking, and assault charges. Because we concluded that the prosecution presented sufficient evidence to support these convictions, we conclude that defendant's assertions that the prosecution presented insufficient evidence to establish his weapons convictions lack merit.

II. Ineffective Assistance of Counsel

Next, defendant argues that his attorney was ineffective because he failed to move to sever these offenses, which involved separate victims and circumstances. We disagree. Our review of a claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). "A judge must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel." *Id.* We review the trial court's factual findings for clear error and its constitutional determinations de novo. *Id.* at 484–485.

Effective assistance is strongly presumed and the reviewing court should not evaluate an attorney's decision with the benefit of hindsight. *Id.* at 485; *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To demonstrate ineffective assistance, a defendant must show (1) that his attorney's performance fell below an objective standard of reasonableness, and (2) that this performance so prejudiced him that he was deprived of a fair trial. *Grant, supra* at 485–486. Prejudice exists if a defendant shows a reasonable probability that the outcome would have been different but for his attorney's errors. *Id.* at 486.

A criminal defendant is entitled to separate trials on unrelated offenses pursuant to MCR 6.120(B). *People v Daughenbaugh*, 193 Mich App 506, 509; 484 NW2d 690 (1992), mod 441 Mich 867 (1992). "Joinder is appropriate if the offenses are related." MCR 6.120(B)(1). "Offenses are related if they are based on the same conduct or transaction, a series of connected acts, or a series of acts constituting parts of a single scheme or plan. *Id.* This Court has noted,

> "'[S]ame conduct' refers to multiple offenses 'as where a defendant causes more than one death by reckless operation of a vehicle.' 'A series of acts connected together' refers to multiple offenses committed 'to aid in accomplishing another, as with burglary and larceny or kidnapping and robbery.' 'A series of acts . . . constituting parts of a single scheme or plan' refers to a situation 'where a cashier made a series of false entries and reports to the commissioner of banking, all of which were designed to conceal his thefts of money from the bank.'" [*Daughenbaugh, supra* at 509–510, quoting *People v Tobey*, 401 Mich 141, 151–152; 257 NW2d 537 (1977).]

Joinder is also appropriate for offenses within a close time-space sequence, such as offenses occurring within an hour and a half and having arisen from substantially the same transaction. *Id.* at 510.

In this case, the offenses against Feazell, Smith, Leinonen, Phipps, Andrews, and Wellborn occurred between 3:00 a.m. and 3:35 a.m. on April 28, 2006. Furthermore, the offenses each occurred within several blocks on the west side of Detroit. In each offense, the assailants drove a vehicle resembling a gray Honda CRV and targeted motorists. Feazell, Smith, and Leinonen testified that their assailants pretended to be police officers, carried guns and hit them in the head. The motorists also described the assailants' physiques similarly. Finally, defendant admitted that he robbed one person and attempted to rob others during those early-morning hours. Therefore, because these offenses occurred within a close time-space sequence, they arose out of substantially similar transactions, and because joinder was in the interest of judicial economy, the offenses were properly joined. Consequently, a motion to sever would have been futile, and therefore defense counsel's failure to make such a motion was not ineffective. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003) ("[C]ounsel does not render infective assistance by failing to raise futile objections.").

III. Double Jeopardy

Finally, defendant argues that the trial court denied him the constitutional protection against double jeopardy when it failed to vacate one of his first-degree murder convictions at sentencing. Although defendant was convicted of felony murder based on the predicate offense of larceny of Phipps, he also argues that assault with intent to rob Phipps while armed was actually the predicate offense of felony murder and thus this conviction should also have been vacated at sentencing to protect against double jeopardy. We agree.

"No person shall be subject for the same offense to be twice put in jeopardy." *Bobby Smith*, *supra* at 298, citing Const 1963, art 1, § 15. The purpose of the double jeopardy protection against multiple punishments for the same offense is to protect the defendant's interest in not enduring more punishment than was intended by the Legislature. *People v Calloway*, 469 Mich 448, 451; 671 NW2d 733 (2003).

This Court has held that dual convictions for both first-degree premeditated murder and first-degree felony murder arising from the death of a single victim violate double jeopardy. *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744 (1998). To protect a defendant's rights, we must "modify defendant's judgment of conviction and sentence to specify that defendant's conviction is for one count and one sentence of first-degree murder supported by two theories: premeditated murder and felony murder." *Id.* Therefore, because the judgment of sentence orders defendant to serve life imprisonment for his first-degree premeditated murder and felony murder convictions, we remand to the trial court for a correction of the judgment of sentence reflecting one conviction and one sentence of first-degree murder supported by two theories.

Next, "convictions of and sentences for both felony murder and the predicate offense violate[] [a defendant's] right against double jeopardy . . . ." *Id.* at 221–222. In addition, convictions for two criminal offenses are precluded where one offense is a necessarily included lesser offense of the other. See *Bobby Smith*, *supra* at 316. Attempted larceny, the predicate offense of defendant's felony-murder conviction, is a necessarily included lesser offense of assault with intent to rob while armed. Therefore, attempted larceny was subsumed into the charge of assault with intent to rob while armed.[3] We vacate defendant's assault with intent to rob while armed conviction to protect defendant against double jeopardy and remand to the trial court for a corresponding correction of the judgment of sentence.

We affirm defendant's convictions, but we remand for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Alton T. Davis

[3] We note that this case can be distinguished from *Smith*, *supra* at 317 n 15, where the larceny offense was not subsumed into the greater offense of armed robbery because sufficient evidence existed in that case for the jury to find beyond a reasonable doubt that the defendant separately committed armed robbery and larceny by taking separate property from separate victims. In contrast, evidence in this case of larceny and assault with intent to rob while armed is derived from the same offense against Phipps.