

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH MAURICE ROBINSON,

Defendant-Appellant.

UNPUBLISHED

May 28, 2009

No. 281530

Wayne Circuit Court

LC No. 07-007928-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH MAURICE ROBINSON,

Defendant-Appellant.

No. 281531

Wayne Circuit Court

LC No. 07-007927-01

Before: Murray, P.J., and Gleicher and M.J. Kelly, JJ.

PER CURIAM.

In Docket No. 281531, defendant appeals as of right his jury trial conviction for first-degree felony murder, MCL 750.316(1)(b). Defendant was sentenced to life in prison without parole. Defendant was also convicted of, but does not challenge, his convictions for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to two years in prison for the felony-firearm conviction. His second-degree murder conviction was vacated.

In Docket No. 281530, defendant was convicted, in a jury trial, of first-degree home invasion, MCL 750.110a(2), and four counts of felonious assault, MCL 750.82. Defendant was

sentenced to 7 to 20 years in prison for the home invasion conviction and one to four years in prison for each felonious assault conviction. We affirm.¹

Defendant argues on appeal that the prosecution's proofs did not establish any connection between the home invasion on Longview and the murder on Elmdale, and therefore, there was insufficient evidence to convict defendant of first-degree felony murder, and it was error for the trial court to refuse to direct a verdict on the felony-murder charge.

A challenge to the sufficiency of the evidence is reviewed de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). "[A] court must 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Nevertheless, "[t]his Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime." *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007).

A trial court must enter a directed verdict "[i]f the evidence presented by the prosecution in the light most favorable to the prosecution, up to the time the motion is made, is insufficient to justify a reasonable trier of fact to find guilt beyond a reasonable doubt" *People v Lemmon*, 456 Mich 625, 634; 576 NW2d 129 (1998). "In reviewing the denial of a motion for a directed verdict of acquittal, this Court reviews the evidence in a light most favorable to the prosecution in order to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006) (citation and quotation marks omitted). Moreover, "[i]t is not permissible for a trial court to determine the credibility of witnesses in deciding a motion for a directed verdict of acquittal, no matter how inconsistent or vague that testimony might be." *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). "Rather, questions regarding the credibility of witnesses are left to the trier of fact." *People v Peña*, 224 Mich App 650, 659; 569 NW2d 871 (1997), mod in part on other grounds 457 Mich 885 (1998).

Defendant argues that even though the home invasion on Longview and the murder on Elmdale occurred close in time and physical distance, the prosecution presented no evidence showing that defendant was trying to flee or cover up the home invasion when he committed the murder. Therefore, defendant argues, there was insufficient evidence from which a rational trier of fact could find defendant guilty beyond a reasonable doubt of first-degree felony murder, and it was error for the trial court to deny defendant's motion for a directed verdict.

"First-degree felony murder is the killing of a human being with malice 'while committing, attempting to commit, or assisting in the commission of *any* of the felonies specifically enumerated in [MCL 750.316(1)(b)],'" including first-degree home invasion. *People v Ream*, 481 Mich 223, 241; 750 NW2d 536 (2008), quoting *People v Carines*, 460 Mich

¹ Defendant only challenges his first-degree felony murder convictions on appeal.

750, 758-759; 597 NW2d 130 (1999) (emphasis in original). “It is not necessary that the murder be contemporaneous with the enumerated felony. The statute requires only that the defendant intended to commit the underlying felony at the time the homicide occurred.” *People v Kelly*, 231 Mich App 627, 643; 588 NW2d 480 (1998).

Defendant relies on *Gillis* for his argument that the home invasion and murder are unrelated. *Gillis* involved a home invasion and a homicide that occurred “several miles away from the dwelling and several minutes after [the] defendant departed from the dwelling.” *Gillis*, *supra* at 108. In *Gillis*, a homeowner confronted the defendant, who had broken into the garage and was attempting to enter into the home’s sunroom. *Id.* at 109. The defendant then fled in a white Dodge Shadow, a description of which the homeowner gave to police. *Id.* at 109-110. A state trooper spotted the vehicle on I-94 and a high-speed chase ensued. *Id.* at 110-111. The defendant’s vehicle eventually collided with another vehicle, the occupants of which were killed instantly. *Id.* at 111.

In the trial court, the “[d]efendant moved to quash the information on the felony-murder charges, arguing that the crime of home invasion was complete when [the] defendant departed” the scene of the home invasion and escaped the homeowner who had briefly pursued him. *Id.* “The trial court denied the motion, holding that the home invasion and the accident were ‘continuous, uninterrupted by temporary safety action that was taken by this defendant.’” *Id.* The Court of Appeals, however, held that “[the] defendant had already escaped from the scene of the home invasion” and, therefore, that the . . . deaths were not ‘part of the continuous transaction of or immediately connected to the home invasion.’” *Id.* at 112.

The Supreme Court disagreed with this Court. First, the Court reasoned:

a felon has not “carried out” or “completed” the felony for felony-murder purposes until the felon has escaped. A murder committed during the attempt to escape is committed “in the perpetration of” that felony, because the felonious transaction has not yet been completed. Accordingly, “perpetration” includes not only the definitional elements of the predicate felony, but also includes those acts that are required to complete the felony — such as those that occur after the commission of the predicate felony while the felon is attempting to escape. [*Id.* at 116-117.]

The Court also discussed the common law “as it was understood when the crime of murder was codified” and similarly concluded that, under the common law, “a murder that occurs during the uninterrupted chain of events surrounding the commission of the predicate felony is committed ‘in the perpetration’ of that felony for felony-murder purposes. . . . [Therefore] the term ‘perpetration’ encompasses acts beyond the definitional elements of the predicate felony, to include those acts committed within the *res gestae* of that felony.” *Id.* at 118, 121 (citation and quotation marks omitted). The Court further noted that the *res gestae* principle had been adopted in *People v Podolski*, 332 Mich 508; 52 NW2d 201 (1952), in which an officer was shot and killed by another officer during a gun battle with the defendant, who had just committed armed robbery and was trying to escape. *Gillis*, *supra* at 121. *Gillis* explained that *Podolski* stands for the proposition that “a murder ‘committed immediately after a robbery, apparently for the purpose of preventing detection, is [felony murder].’” *Id.* at 122 n 8, citing *People v Aaron*, 409 Mich 672, 727-728; 299 NW2d 304 (1980) and quoting *Podolski*, *supra* at 518.

Though many of the cases cited by *Gillis* dealt with fleeing felons, the Court took issue with the concurrence and dissent, which wanted to define “‘perpetration’ to require that the police either be in hot pursuit following commission of the underlying felony or that they take up a chase initiated by a civilian.” *Gillis, supra* at 125 n 10. The Court observed that the dissent “fail[ed] to cite any authority for its definition, and, in fact, its definition has been rejected by a number of courts.” *Id.*

The Court next discussed the factors a jury should consider in determining “whether a murder has, in fact, taken place during the unbroken chain of events arising out of the predicate felony.” *Id.* at 126. Though not exclusive, these factors include time; place; causation; and continuity of action. *Id.* at 127, citing 2 LaFave, *Substantive Criminal Law* (2d ed), § 14.5(f), p 463. In regard to the time element, ‘even if it is clear beyond question that the crime was completed before the killing, the felony-murder rule might still apply. The most common case is that in which the killing occurs during the defendant’s flight.’” *Id.* at 128, quoting LaFave, *supra* at 464. The Court then referred to *People v Oliver*, 63 Mich App 509; 234 NW2d 679 (1975), in which “the Court of Appeals concluded that the defendant was still in immediate flight from an armed robbery when he murdered a State Police trooper 30 minutes after the commission of an armed robbery.” *Gillis, supra* at 128. The Court contrasted *Oliver* with *State v Pierce*, 23 SW3d 289 (Tenn, 2000), wherein “the Tennessee Supreme Court held that a killing that took place almost a month after the commission of the predicate felony was too remote in time to support a conviction of felony murder.” *Id.*

In terms of physical distance between the predicate felony and the scene of the murder, the Court referred to *State v Squire*, 292 NC 494; 234 SE2d 563 (1977), in which

the defendants’ vehicle was stopped for a traffic violation by a North Carolina State Police trooper 13 minutes after and ten miles away from the scene where the defendants had robbed a bank. A codefendant, under the apparent mistaken belief that the trooper was investigating the robbery, shot and killed the trooper. The North Carolina Supreme Court upheld the defendants’ felony-murder convictions . . . [because] defendants had not reached what they regarded as a place of temporary safety [*Gillis, supra* at 129, citing *Squire, supra* at 512-513.]

The Court contrasted *Squire* with *Doane v Commonwealth*, 218 Va 500; 237 SE2d 797 (1977), in which, the day after stealing a car from a location 280 miles away, “the defendant disobeyed a stop sign, striking another vehicle and killing the driver. . . . The Virginia court . . . [held] that ‘there is neither a showing of causal relationship nor a showing of nexus between the larceny . . . and the accidental killing of [the victim].’” *Gillis, supra* at 129-130, quoting *Doane, supra* at 502

The Court then discussed the third factor: whether there is a causal connection between the predicate felony and the murder. The Court cited *Allen v State*, 690 So 2d 1332 (Fla Dist Ct App, 1997), as an example of a lack of causal connection. In *Allen*, “the defendant stole a vehicle and, while driving the vehicle that evening, struck another car, killing the driver. At the time of the accident, the defendant was not being pursued by the police. The Florida court noted that, while the killing was close in time and place to the commission of the predicate felony, the prosecutor failed to show ‘that the death was causally related to the grand theft.’” *Gillis, supra* at 130, citing *Allen, supra* at 1334.

Finally, in regard to continuity of action between the predicate felony and the murder, the Court stated that perpetration “[has] consistently been construed to extend to immediate flight situations” meaning that there has been “‘no break in the chain of events,’ as to which a most important consideration is whether the fleeing felon has reached a ‘place of temporary safety.’” *Gillis, supra* at 131, quoting LaFave, *supra* at 464-465. To illustrate, the Court again discussed *Oliver* in which “the Court of Appeals rejected the defendant’s claim that he had reached a point of ‘temporary safety’ by driving unpursued at normal highway speeds, holding that there was no interruption in the chain of events between the robbery and the murder of a State Police trooper who had stopped the defendant’s vehicle for a traffic infraction.” *Id.* at 131, citing *Oliver, supra* at 523.

The Court then gave an example of an intervening act that *did* break the chain of events. In *State v Diebold*, 152 Wash 68, 72; 277 P 394 (1929), while at a café five miles away from the scene of the crime, the defendant decided to return a car he and a friend had just stolen.

On the way back . . . the defendant lost control of the vehicle, striking and killing a pedestrian. The Washington Supreme Court determined that, because the killing took place after the defendant had stopped at the café, “it cannot be held that, at the time appellant drove his car against the unfortunate victims of his carelessness, he was committing, or attempting to commit, or withdrawing from the scene of, a felony.” [*Gillis, supra* at 132, quoting *Diebold, supra* at 73-74.]

Thus, considering the facts before it, *Gillis* determined that, “The relevant question . . . is whether, viewing the evidence in a light most favorable to the prosecutor, a reasonable juror could conclude beyond a reasonable doubt that [the] defendant was still in the midst of his escape from the home invasion when he struck and killed the [victims].” *Gillis, supra* at 133. The Court concluded that the trial court did not err in denying the defendant’s motion for a directed verdict. *Id.* “Because [the] defendant at the time of the collision was attempting to escape detection after having been identified during the home invasion, a reasonable juror could conclude that he was still ‘in the perpetration of’ the home invasion.” *Id.* at 109. The Court further explained,

We are not holding that the jury may consider [the] defendant’s subjective understanding of whether he had reached a point of temporary safety. Instead, we are merely holding that the jury may consider all the objective facts surrounding [the] defendant’s flight, including reasonable inferences that may be drawn from this evidence. The question whether [the] defendant has reached a point of temporary safety is a question of fact for the jury. Here, a juror could reasonably infer from [the] defendant’s actions that he was aware that [the homeowner] had spotted him at the scene of the home invasion. The jury properly considered this inference as evidence that [the] defendant had not truly reached a point of temporary safety. [*Id.* at 134 n 15.]

The Court also applied the LaFave factors to the facts before it, focusing on the causal connection element. The Court noted that “[t]he common thread running through the cases finding a lack of causal connection is that the defendant was *not* being pursued by the police when the defendant committed the murder.” *Gillis, supra* at 135 (emphasis in original). The Court disagreed with this Court, however, which had “concluded that because [the] defendant was driving ‘in a normal manner’ at the time he was spotted by [the state trooper], he had

reached a point of ‘temporary safety.’” *Id.* at 136. The Supreme Court observed that the defendant had not stopped at any point between the scene of the home invasion and the point where he was approached by the state trooper, and concluded that “[the] defendant’s actions were not inconsistent with those of a person attempting to escape detection by the police, . . . and, in fact, [the] defendant’s act of speeding away from [the state trooper] during the attempted traffic stop suggests both a causal connection and a continuity of action between the home invasion and the murders.” *Id.*

In the case at bar, the murder victim, Javon Anderson, had no connection to anyone at the scene of the home invasion. There is sufficient evidence, however, to show that the murder happened close in time and distance to the home invasion, in an uninterrupted chain of events. Testimony suggests that defendant left the scene of the home invasion, 12223 Longview, Detroit, Michigan, at approximately 3:00 a.m., not long after one of the home’s occupants, Darlene Smith, had called the police. The witnesses and police records confirm that police arrived at Longview about ten minutes later. The witnesses also agree that defendant left the residence on foot.

The location of the homicide, 12203 Elmdale, was literally around the corner from the Longview residence; not more than a two-minute walk. Witnesses there observed defendant walk up to Anderson, threaten him and his brother (who was standing next to him), and fire his gun. Police and EMS were dispatched to the Elmdale location at approximately 3:35 a.m. As noted above, the Court in *Gillis* expressly refused to define “perpetration” as requiring hot pursuit by police. *Gillis, supra* at 125 n 10. Nevertheless, in the case at bar, there was sufficient evidence from which a rational trier of fact could find that there was a significant police presence in the area of the home invasion and murder. The jury could reasonably conclude that defendant, regardless of whether he was being actively pursued by police, was engaged in flight and had not yet reached a place of safety at the time he had committed the murder.

There was also sufficient evidence from which the jury could conclude that the two crimes were causally connected and showed a continuity of action. It is true that witnesses testified that Jermaine Williams—the man who had kissed defendant’s ex-girlfriend, Ashley Smith, at the scene of the home invasion—looked nothing like Anderson. Anderson, however, was standing outside of his apartment building arguing with his girlfriend, Latoya Turner, over allegations of cheating, when defendant happened upon them. Moreover, though not the same color, the car parked outside Anderson’s apartment building was the same model as the vehicle Williams was driving. A rational jury could infer that defendant was trying to avenge the “kiss” he had seen at the site of the home invasion. Therefore, the trial court did not err in denying defendant’s motion for a directed verdict because there was sufficient evidence to find defendant guilty beyond a reasonable doubt of first-degree felony murder.

Affirmed.

/s/ Christopher M. Murray
/s/ Michael J. Kelly