

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UNPUBLISHED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.

GLEICHER, J. (*dissenting*).

I respectfully dissent. In my view, insufficient evidence supported that defendant was “in the perpetration of” the home invasion when he killed the victim, Javon Anderson.

During defendant’s invasion of the home shared by Ashley and Darlene Smith, he brandished a gun and threatened to shoot Darlene’s boyfriend, Cornelius Jones. Jones managed to persuade defendant to lower the gun to his waist. Defendant then asked Jones for a ride home. When Jones explained that his car was not drivable, defendant left the Smiths’ home, carrying bags containing his belongings. Jones described the events surrounding defendant’s departure as follows:

Came out with a book bag, and a Target bag. He threw it across his shoulder and then he was leaving the house. My auntie Michelle was walking up. Then he asked her, like, can I get a ride home. And she was like I got to get home to my man. My man waiting on me. And he was like all right, all right. And then he walked back in the house for a minute and then walked back out and

threw his cell phone down on the ground and just—like just walked toward Rosebury and made a left on Rosebury. And then, like I ain't see him after that.

According to Jones, “He was just walking calmly. He just walked away.” The other eyewitnesses agreed that defendant simply walked away from the scene of the home invasion.

Approximately 20 minutes later and less than two blocks distant, defendant shot and killed the victim. Deshawn Anderson, the victim's brother, witnessed the murder. Anderson explained that while he stood with the victim in the doorway of the victim's apartment building, he “saw a guy walking down the street,” proceeding down Elmdale toward Rosebury. Anderson described that the man altered his path of travel by crossing Elmdale and walking toward the apartment located near the corner of Elmdale and Rosebury, moving in an “L-shaped” direction. Anderson's testimony continued as follows:

Q. And what happens then?

A. He had a gun in our face. He ran up on us with the gun in our face.

Q. He runs up to where, please?

A. That side door—

* * *

—of the apartment.

Q. In that L shaped pattern you just told us about?

A. Yes.

Q. Okay. At what point, can you tell, that he has a weapon?

A. When he was standing right in front of us and pulled it out.

Defendant pointed the gun at them, asked “what the fuck ya'll niggas doing,” threatened to shoot if they moved, and then shot the victim.

At the close of the prosecution's proofs, defendant moved for a directed verdict regarding felony murder. The trial court denied defendant's motion, reasoning that because the period of time was so short and the distance “just around the corner,” a rational trier of fact could find that defendant had not completed the home invasion when he shot the victim. In affirming defendant's felony murder conviction, the majority concludes that sufficient evidence demonstrates “that the murder happened close in time and distance to the home invasion, in an uninterrupted chain of events.” *Ante* at 9. However, no record evidence logically supports a causal connection between these two crimes.

In *People v Gillis*, 474 Mich 105; 712 NW2d 419 (2006), our Supreme Court comprehensively analyzed the felony murder statute, MCL 750.316(1)(b), which provides in pertinent part:

A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:

* * *

Murder committed in the perpetration of, or attempt to perpetrate ... home invasion in the first or second degree

The Supreme Court majority devoted most of its opinion to an examination of the statutory phrase “in the perpetration of, or attempt to perpetrate” an enumerated felony. *Id.* at 115-137. In *Gillis*, our Supreme Court confirmed that the “res gestae principle” of felony murder, first adopted in *People v Podolski*, 332 Mich 508; 52 NW2d 201 (1952), remains viable. *Id.* at 121-122. That principle “holds that a murder committed during the unbroken chain of events surrounding the predicate felony is committed ‘in the perpetration of’ that felony[.]” *Id.* at 121.

The Supreme Court in *Gillis*, *supra* at 119-120, offered several detailed descriptions of this approach to felony murder, including Professor Francis Wharton’s opinion that, “in order for a murder to have been committed in the perpetration of a felony,”

it must have been done in pursuance of the unlawful act, and not collateral to it. The killing must have had an intimate relation and close connection with the felony, and not be separate, distinct, and independent from it; and when the act constituting the felony is in itself dangerous to life, the killing must be naturally consequent to the felony. . . . It is not enough that it occurred soon or presently after the felony was attempted or committed; there must have been such a legal relationship between the two that it could be said that the killing occurred by reason of, or as part of, the felony, or that it occurred before the felony was at an end, and was concurrent with it, or at least part of it in an actual and material sense. . . . [Id., quoting Wharton, Law of Homicide (3d ed), § 126 pp 184-186 (emphasis added).]

The Supreme Court in *Gillis*, *supra* at 127-135, also derived detail for its description of the res gestae principle from Professor Wayne LaFave, who has explained that a homicide “must have some causal connection with the felony in order to qualify for felony murder; more than a mere coincidence of time and place is necessary.” LaFave & Scott, Criminal Law, § 71, p 557. The LaFave test summarizes, “In short, whether there is a sufficient causal connection between the felony and the homicide depends on whether the defendant’s felony dictated his conduct, which led to the homicide.” *Id.*¹

¹ The LaFave text employs the following pertinent example of a scenario not constituting a felony murder:

A robber who, in flight from the scene, shoots a policeman who threatens to capture him may easily be found to have caused a death in the commission of the robbery; but if, during his flight, he should happen to spot his enemy and shoot him, this death, though equal to the policeman’s death in point of time and

(continued...)

In both *Gillis* and this case, a home invasion supplied the predicate for the defendants' felony murder convictions. However, in *Gillis* the defendant "abruptly fled" from the scene and remained "in flight" from the home when a state police trooper began chasing him. *Id.* at 134. The Supreme Court held that the defendant's subsequent collision with another vehicle, resulting in the occupants' deaths, satisfied the "causal connection" and "continuity of action" factors identified by Professor LaFave. *Id.* at 135. The Court observed 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." *Id.* (emphasis in original).

Here, no evidence tends to support that defendant was being pursued by the police when he shot the victim. The police had arrived at the Smiths' home no more than 10 minutes before defendant shot the victim. Defendant's conduct in asking Cornelius and Cornelius's aunt for a ride home, and altering his direction of travel to accost the Andersons, demonstrates that defendant did not perceive that the police would pursue him. That defendant apparently went out of his way to accost the Andersons constitutes conduct entirely inconsistent with conscious flight from an earlier crime. Furthermore, no evidence reasonably suggests that defendant murdered the victim to prevent or impair defendant's identification as the perpetrator of the home invasion. No evidence supports that the witnesses present at the shooting possessed any previous knowledge of defendant, or an awareness that he had just committed a home invasion.

The majority speculates that defendant may have shot the victim "to avenge the 'kiss' he had seen at the site of the home invasion." *Ante* at 10. This insight may have psychological merit, but avenging a kiss by shooting an uninvolved person at an entirely different location does not qualify as part of the *res gestae* of defendant's invasion of the Smiths' home. Rather, the apparently senseless nature of the victim's murder evidences that no causal connection exists between the home invasion and the victim's death. After completing the home invasion and departing without apparent concern of pursuit, defendant committed a distinct and independent homicide. Because these crimes simply do not form an unbroken chain of connected events, as required to establish a felony murder, *Gillis, supra* at 125, I would reverse defendant's felony murder conviction.

/s/ Elizabeth L. Gleicher

(...continued)

place, would lack the causal connection which existed in the policeman's case.
[*Id.*]

In my view, this scenario approximates the facts of the instant case.