STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 6, 2010
v	No. 289023 Wayne Circuit Court
KEITH LENARD MAXEY, Defendant-Appellant.	LC No. 08-002347-FC

Before: BANDSTRA, P.J., and BORRELLO and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b), two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, and three counts of assault with intent to rob while armed, MCL 750.89. He was sentenced to life imprisonment for the first-degree murder conviction, six to ten years' imprisonment for each assault with intent to do great bodily harm conviction, and 11 to 25 years' imprisonment for each assault with intent to rob while armed conviction, all sentences to be served concurrently. He appeals as of right. We affirm.

Defendant first argues that the evidence was insufficient to support his convictions. We disagree. When determining whether sufficient evidence exists to support a conviction, this Court must view the evidence in the light most favorable to the prosecution, drawing all reasonable inferences and making all credibility determinations in support of the jury verdict, to determine whether a rational fact-finder could conclude that the prosecutor proved every element of the crime charged beyond a reasonable doubt. *People v Sherman-Huffman*, 466 Mich 39, 40-41; 642 NW2d 339 (2002); *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). Circumstantial evidence and reasonable inferences drawn therefrom can constitute sufficient proof of the elements of an offense. *Id*., citing *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

To establish that a defendant committed the offense of first-degree felony murder, the prosecution must prove: (1) that a human being was killed, (2) that the defendant had the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm was the probable result, and (3) that the killing occurred while the defendant was committing, attempting to commit, or assisting in the commission of any of the felonies enumerated in MCL 750.316(1), including larceny, the underlying felony in this case. *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007).

"The elements of assault with intent to do great bodily harm less than murder are: '(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm *less than murder*.'" *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), quoting *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997) (emphasis added in *Brown*). In addition, "[t]he 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), quoting *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991).

Further, under MCL 767.39, a person who procures, counsels, aids, or abets the commission of a crime may be convicted and sentenced as if the person committed the offense directly. *People v Norris*, 236 Mich App 411, 419; 600 NW2d 658 (1999). "To establish that a defendant aided and abetted a crime, the prosecutor must prove 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 principal in committing the crime," *id.*, and (3) "that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense," *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006). A defendant's mere presence, even with knowledge that an offense is about to be committed, is insufficient to establish that he aided and abetted the commission of the crime. *Norris*, 236 Mich App at 419-420.

Defendant argues that he could not be convicted as a principal, and that he did not aid or abet his companions in committing the offenses, because he was merely present in the home, did not know that Bishop Allen and his friends were there at the time that he exited the bathroom, and that he wrestled with Allen only in self-defense after Allen pulled a gun on him. Viewed in a light most favorable to the prosecution, however, the evidence refutes defendant's version of events.

The evidence showed that Tyrell Adams arranged for Allen to meet him at an abandoned house for the purported purpose of purchasing marijuana from him. Immediately after Allen, Amir Taylor, Brian McClendon, and Ishmael Taylor entered the house, Allen saw defendant looking out a window of the home. Adams pulled out a gun as he was shutting the door and ordered the men to lie down. Allen then saw another man wearing a blue jacket and Cartier glasses and carrying a semi-automatic handgun walk toward him from the back of the house. After Adams had pulled out a gun and ordered everyone to the floor and the man wearing glasses had also pulled his gun out, Defendant grabbed Allen, who was holding the bag of marijuana, from behind and started wrestling with him. When the police arrived, defendant told police that Amir Taylor had tried to steal his Cartier glasses, but this statement conflicted with defendant's later statement to the police that he was merely present in the home and grabbed Allen as Allen was attempting to retrieve a gun from his pants.

Viewed in a light most favorable to the prosecution, the evidence, together with the reasonable inferences drawn therefrom, was sufficient to show that defendant and his companions intended to rob Allen and his friends of the bag of marijuana and that defendant was aware of the plan and actively participated in its execution. Further, a rational fact-finder could have concluded that the shooting death of McClendon, and the nonfatal shooting assaults of Amir and Ishmael Taylor, were a natural and probable consequence of the commission of the

intended plan to rob a group of drug dealers at gunpoint. Thus, the evidence supported defendant's convictions beyond a reasonable doubt. *Sherman-Huffman*, 466 Mich at 40-41; *Nowack*, 462 Mich at 399-400.

Defendant next argues that his convictions of assault with intent to do great bodily harm less than murder and assault with intent to rob while armed with respect to Amir and Ishmael Taylor violate his constitutional protections against double jeopardy. We again disagree. Because defendant did not raise this issue in the trial court, it is not preserved for appellate review. See *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). Accordingly, we review this issue for plain error affecting defendant's substantial rights. *Id.*

"The United States and Michigan Constitutions protect a person from being twice placed in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15." *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). The Double Jeopardy Clause of both constitutions protects against (1) a second prosecution for the same offense following either acquittal or conviction, and (2) multiple punishments for the same offense. *Smith*, 478 Mich at 299. In *Smith*, our Supreme Court held that the term "same offense" in the context of the "multiple punishments" strand of our double jeopardy jurisprudence has the same meaning as that term connotes in the "successive prosecutions" strand of our jurisprudence. *Id.* at 315-316. Thus, in the absence of clear legislative intent to impose multiple punishments, courts must apply the *Blockburger*[1] "same elements" test to determine whether multiple punishments are constitutionally permitted. *Id.* at 316. Under the "same elements" test, multiple punishments are permissible as long as each of the crimes of which a defendant is convicted contains an element that the other does not. *Id.* at 296, 316-319. But "[i]f the Legislature clearly intended to impose multiple punishments, the imposition of multiple sentences is permissible regardless of whether the offenses have the same elements[.]" *McGee*, 280 Mich App at 683.

Regarding assault with intent to do great bodily harm less than murder, MCL 750.84 provides, in relevant part:

> Any person who shall assault another with intent to do great bodily harm, less than the crime of murder, shall be guilty of a felony punishable by imprisonment in the state prison not more than 10 years, or by fine of not more than 5,000 dollars.

With respect to assault with intent to rob while armed, MCL 750.89 provides, in pertinent part:

> Any person, being armed with a dangerous weapon, or any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon, who shall assault another with intent to rob and steal shall be guilty of a felony, punishable by imprisonment in the state prison for life, or for any term of years.

[1] *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

The language of these statutes does not clearly indicate the Legislature's intent to impose multiple punishments. Thus, this Court must apply the "same elements" test to determine whether multiple punishments are constitutionally permitted. *Smith*, 478 Mich at 316.

Assault with intent to do great bodily harm less than murder requires: (1) an attempt or threat with force or violence to do corporal harm to another (2) coupled with an intent to do great bodily harm less than murder. *Brown*, 267 Mich App at 147. Assault with intent to rob while armed requires: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) that the defendant was armed. *Akins*, 259 Mich App at 554. Thus, the former offense requires an intent to do great bodily harm, an element not found in the latter, and the latter offense requires an intent to rob or steal, and element not contained in the former. Because each offense contains an element that the other does not, defendant's convictions of both offenses with respect to Amir and Ishmael Taylor do not violate his double jeopardy protections. *Smith*, 478 Mich at 296, 316-319.

We affirm.

/s/ Richard A. Bandstra
/s/ Stephen L. Borrello