

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK MARTIN JACOBS,

Defendant-Appellant.

UNPUBLISHED

July 19, 1996

No. 180192

LC No. 94-049943

Before: Wahls, P.J., and Murphy and C.D. Corwin,* JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of two counts of first-degree felony murder, MCL 750.316; MSA 28.548, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two concurrent prison terms of life without parole on each first-degree felony murder conviction. A two-year sentence was imposed for felony-firearm, to be served before defendant's life sentences. We reverse defendant's first-degree felony murder convictions, and remand for entry of convictions of two counts of second-degree murder and resentencing.

Defendant first argues that the prosecution produced insufficient evidence to convict him of two counts of first-degree felony murder. We agree that, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could not find that the prosecution proved beyond a reasonable doubt the essential elements of first-degree felony murder. *People v Turner*, 213 Mich App 558, 565; 540 NW2d 728 (1995). Felony murder is (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 the knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548. *Turner, supra*, at 565. MCL 750.316; MSA 28.548 provides that "larceny of any kind" is an underlying felony murder offense.

* Circuit judge, sitting on the Court of Appeals by assignment.

The prosecution failed to establish defendant's guilt beyond a reasonable doubt of "larceny of any kind" for the purposes of felony murder. The evidence showed beyond a reasonable doubt that defendant shot his victims during a sale of fake crack cocaine. Just prior to being shot, one of the victims handed money to defendant in exchange for the fake cocaine defendant's partner had supplied. In light of this evidence, the trial court instructed the jury on the crime of larceny by trick, which requires proof of (1) a criminal taking of property by means of fraudulent contrivances rather than by trespass, (2) when the true owner has no intention of giving ownership but only intends to give up possession. *People v Styles*, 61 Mich App 532, 534; 233 NW2d 70 (1975). However, the evidence showed that defendant's victims intended to part with both title and possession of their \$3,000 for cocaine. Therefore, defendant did not engage in larceny by trick when he sold fake crack cocaine to his victims, but instead committed the crime of obtaining property by false pretenses, MCL 750.218; MSA 28.415. *People v Malach*, 202 Mich App 266, 271; 507 NW2d 834 (1993).

Because defendant's underlying crime was actually obtaining property by false pretenses, there is no "larceny of any kind" with which to support his convictions for felony murder. Accordingly, his felony murder convictions must be reversed. However, because first-degree felony murder is a second-degree murder committed during the course of one of the enumerated felonies in MCL 750.316; MSA 28.548, we remand for entry of convictions for two counts of second-degree murder, since the jury necessarily found defendant guilty of two counts of second-degree murder in reaching its first-degree felony murder verdicts. *People v Harding*, 443 Mich 693, 710 n 18; 506 NW2d 482 (1993); *People v Hughey*, 186 Mich App 585, 591; 464 NW2d 914 (1990).

Next, defendant argues that the trial court clearly erred when it decided to admit the confession he made while in police custody. We do not agree. Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *People v Garwood*, 205 Mich App 553, 555-556; 517 NW2d 843 (1994). Once an accused invokes his Fifth Amendment rights, the police must discontinue interrogation. Interrogation cannot resume in the absence of defense counsel unless the accused initiates further communication, exchanges, or conversations with the police. *Minnick v Mississippi*, 498 US 146, 152; 111 S Ct 486, 490 (1990).

Reviewing the record, we are not left with a definite and firm conviction that the trial court mistakenly admitted defendant's confession. *People v Mack*, 190 Mich App 7, 17 (1991). We are convinced that defendant's confession was made voluntarily, knowingly, and intelligently. The police scrupulously honored defendant's choice to remain silent until defendant initiated further contact by calling Detective Glenroy Walker and informing him that he wished to speak with police. Furthermore, Detective Walker took effective steps when he began defendant's jail interview to insure that defendant had really called him. Although defendant testified that he did not call Detective Walker, we defer to the trial court's credibility determination as to this issue. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1991). Lastly, defendant cites no support for his assertion that we should fashion a "telephonic contact" exception to the well-established Fifth Amendment doctrine that police may interrogate further when a defendant who has exercised his Fifth Amendment rights subsequently

initiates additional police contact. This Court will not search for authority to sustain defendant's argument. *People v Hoffman*, 205 Mich App 1, 17; 518 NW2d 790 (1994).

Next, defendant complains that the trial court incorrectly instructed the jury on aiding and abetting in relation to his charges of first-degree felony murder, thus violating his right to a fair trial. Defendant failed to object to the instructions in the trial court. Therefore, this issue has not been preserved for review by this Court. *People v Watkins*, 209 Mich App 1, 4; 530 NW2d 111 (1995). Accordingly, we will not reverse unless failure to address this issue will result in manifest injustice. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). We find that no manifest injustice will result in this case. Upon reviewing the record, we find that the trial court did not instruct the jury on aiding and abetting first-degree felony murder, due probably to the failure of either party to request such an instruction. Moreover, the instructions that were given fairly presented to the jury the issues to be tried and sufficiently protected defendant's rights. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995).

Affirmed in part, reversed in part and remanded for entry of convictions of second-degree murder and resentencing. We do not retain jurisdiction.

/s/ Myron H. Wahls
/s/ William B. Murphy
/s/ Charles D. Corwin