STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH KARL WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
December 20, 1996

No. 172911
LC No. 93-002575

Before: White, P.J., and Gribbs and Smolenski, JJ.

PER CURIAM.

Defendant was convicted of two counts of first-degree felony murder, MCL 750.316; MSA 28.548, assault with intent to rob while armed, MCL 750.89; MSA 28.284, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two years' imprisonment for the felony-firearm conviction, five to ten years' imprisonment for the assault conviction, and life in prison without parole for the murder convictions. Defendant appeals as of right. We affirm defendant's felony murder convictions, vacate defendant's convictions for assault with intent to rob while armed and felony-firearm, and remand for the recalculation of sentence credit.

After defendant's armed accomplice robbed a man named Thamir Yaldoo, defendant drove the escape vehicle. While being pursued by the police, defendant ran a red light and collided with another vehicle, killing that vehicle's two occupants. With respect to his felony murder convictions, defendant was tried on the theory that the killings were murders that occurred while defendant aided and abetted his accomplice's armed robbery or attempted armed robbery of Yaldoo. With respect to his assault with intent to rob while armed conviction, defendant was tried on the theory that he, with the intent to rob, aided and abetted his accomplice's armed assault of Yaldoo.

Defendant first argues that the trial court erred in denying his motion for a directed verdict on the charges of felony murder. In resolving defendant's argument, we will consider the evidence presented to the time defendant moved for a directed verdict in a light most favorable to the prosecution to determine whether a rational factfinder could find that the essential elements of the charged crimes were

proven beyond a reasonable doubt. *People v Davis*, 216 Mich App 47, 52; 549 NW2d 1 (1996); *People v Allay*, 171 Mich App 602, 605; 430 NW2d 794 (1988).

Felony murder is (1) the killing of a human being; (2) with malice, i.e, the actor possessed the intent to kill, the intent to do great bodily harm, the intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, or the actor wantonly and willfully disregarded the likelihood of the natural tendency of this behavior to cause death or great bodily harm, (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, one of which is robbery. *People v Turner*, 213 Mich App 558, 566-567; 540 NW2d 728 (1995); *People v Hutner*, 209 Mich App 280, 284; 530 NW2d 174 (1995).

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 dangerous weapon. MCL 750.529; MSA 28.797; *Turner, supra* at 569. The perpetrator must specifically intend to permanently deprive the owner of the property. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). Any movement of the property, even if by the victim under the armed defendant's direction, is sufficient to sustain a conviction for armed robbery despite the fact that the defendant never acquired physical possession of the goods. *People v McQuire*, 39 Mich App 308, 314; 197 NW2d 469 (1972). An attempt is (1) an intent to do any act or to bring about certain consequences which would in law amount to a crime, and (2) an act in furtherance of that intent that goes beyond mere preparation. *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993).

The elements of aiding and abetting require the prosecutor to 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 he gave aid and encouragement. *Turner, supra* at 568. An aider and abettor's state of mind may be inferred from all the facts and circumstances. *Id*.

Robbery is a continuous offense that is not complete until the perpetrator reaches a place of temporary safety. *People v Velasquez*, 189 Mich App 14, 17; 472 NW2d 289 (1991). A murder committed while attempting to escape from a felony is felony murder only if the murder is committed as part of a continuous transaction with, or is otherwise immediately connected with, the underlying felony. *People v Gimotty*, 216 Mich App 254, 258; 549 NW2d 39 (1996). It is not necessary that the murder be contemporaneous with the enumerated felony. *People v Brannon*, 194 Mich App 121, 125; 486 NW2d 83 (1992). The felony-murder statute only requires that the defendant intended to commit the underlying felony at the time the homicide occurred. *Id*. However, the felony-murder doctrine will not apply if the intent to steal the victim's property was not formed until after the homicide. *Id*.

A jury can properly infer malice from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm. *Turner, supra* at 566. A defendant may act in

wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or serious bodily injury where he operates an automobile during a police chase at a grossly excessive speed after dark while disregarding traffic signals on a main traffic artery. *People v Vasquez*, 129 Mich App 691, 694; 341 Nw2d 873 (1983).

In this case, the evidence presented up to the time of defendant's motion for a directed verdict indicated that at approximately noon on January 14, 1993, a black male, who was not defendant, approached Thamir Yaldoo in the parking lot of Yaldoo's store from the back of the building, pulled a double-barreled shotgun from his sleeve, and said "drop it . . . . I know you just came back from the bank." Yaldoo dropped to the ground a business card, three dollars and his wallet, and explained that he had been to his bank only to obtain the balance sheet he was holding in his hand. The man turned around and walked back behind the building. Yaldoo went inside the store. A person inside the store observed a blue Chevy Lumina containing two black males exiting the parking lot and turning north on Belleville Road. Yaldoo dialed 911 and gave the police the description of this vehicle.

At approximately noon the same day, Police Office Mark Buckberry was on patrol approximately three miles from Yaldoo's store in the area of Haggerty Road and Interstate 94. Haggerty Road, like Belleville Road, runs north and south, and is east of and parallel to Belleville Road. At that time, Buckberry received information that a blue Chevy Lumina traveling northbound on Belleville Road may have been involved in an armed robbery. Buckberry proceeded north on Haggerty Road toward Tyler Road, which runs east and west and crosses Belleville Road approximately one-eighth mile from Yaldoo's store. As Buckberry approached Tyler Road he observed a vehicle matching the description of the suspect vehicle traveling eastbound on Tyler Road at a high rate of speed through a green light at the intersection of Tyler Road and Haggerty Road. Buckberry began following the blue Lumina eastbound on Tyler Road and then northbound on Hannan Road . As Buckberry approached the blue Lumina while it was stopped for a red light behind another vehicle at the intersection of Hannan Road and Ecorse Road, the blue Lumina passed the other vehicle on the left, and then turned right (eastbound) in front of this vehicle onto Ecorse Road. Buckberry then activated his lights and sirens and pursued the blue Lumina, which was now traveling at approximately seventy miles per hour, on Ecorse Road for approximately two miles. The blue Lumina, while traveling at approximately eighty-five miles per hour, went through a red light at the intersection of Ecorse Road and Wayne Road and collided with a truck. The truck's two occupants were killed by the collision. Defendant was driving the blue Lumina. Ramone Davis was in the back seat of the blue Lumina, as was the shotgun used in the robbery. Defendant and Ramone Davis were acquainted with each other. Defendant's mother owned the blue Lumina. The last time Davis' friend, Barry Lawrence, saw Davis before Davis was injured in the crash was when Davis was getting into the blue Lumina at approximately 10:30 a.m. in mid-January.

Viewing this evidence in a light most favorable to the prosecution, a rational factfinder could have found beyond a reasonable doubt that Davis committed an armed robbery, i.e., that he assaulted Yaldoo while armed with a dangerous weapon, that property was taken from Yaldoo's person and moved under Davis' direction, and that at the time of the taking Davis specifically intended to permanently deprive Yaldoo of the property. A rational jury could have found that defendant, by

providing and driving the escape vehicle, aided and assisted Davis with the requisite intent. A rational jury could have found that defendant, by speeding away from the scene of the robbery and fleeing the police, had not yet reached a place of temporary safety and, therefore, the robbery was not complete when the victims were killed. From the evidence that defendant drove at grossly excessive speeds in violation of traffic signals during the police chase, a rational jury could have found that defendant killed the victims with malice, i.e., that defendant wantonly and willfully disregarded the likelihood of the natural tendency of his behavior to cause death or great bodily harm. Finally, a rational factfinder could have found that the murders committed during defendant's escape attempt were part of a continuous transaction with the armed robbery or attempted armed robbery. Accordingly, we conclude that the trial court did not err in denying defendant's motion for a directed verdict on the charge of felony murder.

Defendant also contends that insufficient evidence was presented on the whole record with respect to the charges of felony murder. We disagree in light of our conclusion that sufficient evidence of felony murder was presented before defendant moved for a directed verdict. Further, although defendant testified that he was forced to drive his car by a robber who "smashed" his foot on defendant's foot, thus pressing down the accelerator and causing the collision, and the jury was instructed on the defense of duress, the jury apparently disbelieved defendant's testimony. The credibility of the witnesses is for the factfinder. We find no error.[1]

Next, defendant argues that his convictions and sentences for felony murder based on the predicate offense of either armed robbery or attempted armed robbery and his conviction and sentence for assault with intent to rob while armed violate double jeopardy. See US Const, Am V; Const 1963, art 1, § 15. This Court reviews de novo questions of law, including double jeopardy issues. *People v Price*, 214 Mich App 538, 542; 543 Nw2d 49 (1995). In support of his argument, defendant relies on *People v Gibson*, 115 Mich App 622; 321 NW2d 729 (1982). In that case, the defendant, who was convicted of both felony murder and assault with intent to rob while armed, argued on appeal that his convictions violated double jeopardy. *Id*. at 626. Although this Court did not specify in its opinion the predicate felony on which the felony murder conviction was based, the facts indicate that the murder occurred during the perpetration of an armed robbery or attempted armed robbery. *Id*. at 624-625. This Court, in reliance on *People v Wilder*, 411 Mich 328; 308 NW2d 112 (1981), held that "there an be no conviction of the greater crime, felony murder, without conviction of the lesser crime, assault with intent to commit armed robbery. Therefore, the dual convictions violate double jeopardy considerations." *Gibson, supra* at 627.

In *Wilder*, our Supreme Court held that the defendant's conviction and sentence for felony murder committed during the perpetration or attempted perpetration of a robbery and his conviction and sentence for armed robbery violated the double jeopardy protection against multiple punishments for the same offense under the state constitution. *Wilder, supra* at 342-343. In so holding, the Court utilized an analysis that looked to the facts of the case to determine whether the proofs adduced at trial indicated that one offense was a necessarily or cognate lesser-included offense of the other. *Id*. at 343-344. If so, then conviction of both offenses was precluded. *Id*. at 344.

However, the factual lesser-included offense analysis enunciated in *Wilder* has been disavowed as the controlling test in double jeopardy-multiple punishment cases. *People v Harding*, 443 Mich 693, 712 (Brickley, J., with Griffin and Mallett, JJ.) 735 (Cavanagh, C.J., with Levin, J.); 506 NW2d 482 (1993); *People v Robideau*, 419 Mich 458, 485; 355 NW2d 592 (1984). Rather, under current law, legislative intent controls the determination of a double jeopardy-multiple punishment issue. *People v Rivera*, 216 Mich App 648, 650-651; 550 NW2d 593 (1996).

The purpose of the double jeopardy protection against multiple punishment for the same offense is to protect the defendant's interest in not enduring more punishment than was intended by the Legislature. *Id*. at 650. This protection is a limitation on the courts and prosecutors, not on the Legislature's power to define crimes and fix punishments. *People v Griffis*, 218 Mich App 95, 100-101; ___ NW2d ___ (1996). Accordingly, when considering a double jeopardy-multiple punishment issue, this Court's inquiry is at an end even if the crimes are the same if it is evident that the Legislature intended to authorize cumulative punishments. *Price, supra*.

The determination of legislative intent in the context of multiple punishment involves traditional considerations of the subject, language, and history of the statute. *Robideau, supra* at 487. Any sources of legislative intent may be considered. *Id*. at 488. However, in ascertaining legislative intent, two general principles apply. *Id*. at 487. First, this Court must look to whether each statute prohibits conduct violative of a social norm distinct from that protected by the other. *Id*.; *Rivera, supra* at 650-651. Second, legislative intent may be discerned from the amount of punishment authorized by the Legislature and whether the statutes are hierarchical or cumulative. *Robideau, supra*; *Rivera, supra* at 651. Where a statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes. *Robideau, supra*.. Finally, if no conclusive evidence of legislative intent can be discerned, the rule of lenity requires the conclusion that separate punishments were not intended. *Id*. at 488.

In *Harding*, the defendants were convicted of armed robbery, assault with intent to commit murder, and two counts of felony-firearm. *Harding, supra*. at 695. Following the victim's death over four years later, the defendants were convicted in a second trial of felony murder predicated on armed robbery and felony-firearm. *Id*.

Justice Brickley, writing the lead opinion, the reasoning of which was agreed to by a majority of justices,[2] thus creating binding authority,[3] held that the defendants' convictions for armed robbery, assault with intent to murder, and felony murder predicated on armed robbery violated the double jeopardy prohibition against multiple punishment, and that, therefore, the defendants were entitled to have their convictions for armed robbery and assault with intent to commit murder vacated. *Id*. at 712, 714, 720. Justice Brickley made clear that whether the convictions resulted from single or successive prosecutions, the double jeopardy-multiple punishment analysis is the same—legislative intent controls. *Id*. at 705, 712. Justice Brickley stated that the traditional lesser-included offense test, although disavowed as the controlling test, was not extinct when helpful in discerning legislative intent. *Id*. at 712. However, Justice Brickley stated that the test should not be used in the compound-predicate crime scenario where the compound and predicate crimes are tied together by the Legislature and are not

greater- and lesser-included offenses that reflect a continuum of culpability in the traditional sense. *Id*. at 713. Justice Brickley indicated that the traditional lesser-included offense test should only be used for those offenses that are tied together by logic, i.e., that lie on a single continuum of culpability serving to vindicate the same social norm. *Id*. With respect to the societal interest protected by felony murder, Justice Brickley stated as follows:

> [F]elony murder has as its objective punishment for one who commits a murder in the course of committing a felony. The societal norm could not be more clear—felony murder is second-degree murder that has been elevated to first-degree by the fact that it was committed during the commission of a felony. The felony in this case is the robbery and it was a sine qua non of the felony murder. [*Id*. at 710, n 18.]

In determining that the defendants' convictions for felony murder and armed robbery violated double jeopardy, Justice Brickley reasoned as follows:

> Because statutory felony murder based on the predicate crime of armed robbery carries with it a greater penalty than the predicate crime, we hold that the Legislature did not intend to impose punishments for both crimes, even under the facts of this case, and thus, it is a violation of the Double Jeopardy Clauses of the United States and Michigan Constitutions to sentence the defendants for both crimes. [*Id*. at 712.]

In determining that the defendants' convictions for felony murder and assault with intent to murder violated double jeopardy, Justice Brickley reasoned as follows, *id*. at 712-714:

> In the preceding section, we discussed the structure of some of our criminal statutes, indicating that many of them have base crimes setting forth the fundamental elements for their completion, and then increase in penalty as the crime gets more complex in elements and severe in nature. For these types of crimes, the Legislature did not intend concurrent or subsequent prosecution, or multiple punishment.
>
> Similarly, in the present case, the defendants were convicted of assault with intent to commit murder and then subsequently actual murder. The Court of Appeals held that assault with intent to commit murder is a lesser included offense of felony murder. Had the death of Mr. Dudley [the victim] occurred before the first conviction, it is without doubt that upon the finding of guilt for felony murder, the assault with intent to murder would have merged into the more serious crime.23

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23. A defendant may be charged and tried for each act that constitutes a separate crime. However, when tried for an act which includes lesser offenses, if the jury finds guilt of the great, the defendant may not also be convicted separately of the lesser included offense. The prohibition against multiple punishment for the same crime cannot

be avoided by the form of the charge. [*People v Martin*, [398 Mich 303, 309; 247 NW2d 303 (1976), overruled in part by *Robideau, supra* at 485, and *People v Wakeford* 418 Mich 95, 111; 341 NW2d 68 (1983)].]

In dissent, Justice Riley found that the defendants' convictions and sentences for armed robbery and felony murder predicated on armed robbery did not violate the double jeopardy prohibition against multiple punishments. *Harding, supra* at 721. In so finding, Justice Riley reasoned that the Legislature intended to separately punish each offense where each offense was punishable by life imprisonment and the societal interests protected by each offense were distinct, i.e., felony murder targeted homicide committed with malice during the course of aggravated circumstances while armed robbery targeted the violent deprivation of property. *Id*. at 732-733.

In this case, as stated by Justice Brickley in *Harding*, the felony murder statute has as its objective punishment for a person who commits second-degree murder during the commission of a felony. *Harding, supra* at 710, n 18. The assault statutes are intended to punish crimes against persons. *People v Lugo*, 214 Mich App 699, 708; 542 NW2d 921 (1995). Where the two statutes protect different societal interests, it would appear that the Legislature intended cumulative punishment. However, this analysis, while consistent with Justice Riley's dissenting opinion in *Harding*, as well as the general principles of discerning legislative intent, was not dispositive in *Harding*. Rather, in determining whether the defendants' convictions for felony murder and armed robbery violated double jeopardy in *Harding*, Justice Brickley, noting that the armed robbery was indispensable to the felony murder, examined the statutory relationship between felony murder and armed robbery in determining the Legislature's intent. In determining whether the defendants' convictions for felony murder and assault with intent to murder violated double jeopardy, Justice Brickley examined the lesser-included offense relationship between the murder and the assault with intent to murder in determining the Legislature's intent.

Applying these principles to this case, we find that the armed robbery[4] "was a sine qua non" of the felony murder. In convicting defendant of felony murder, the jury in effect found that defendant aided and abetted the armed robbery. Under *Harding*, the jury could not also have separately convicted defendant of aiding and abetting armed robbery. However, the jury did convict defendant of aiding and abetting assault with intent to rob while armed. Assault with intent to rob while armed is a traditional lesser-included offense of armed robbery. *People v Antoine*, 194 Mich App 189, 190; 486 NW2d 92 (1992); *People v Meyers (On Remand)*, 124 Mich App 148, 160; 335 NW2d 189 (1983). Specifically, as indicated previously, the elements of armed robbery are (1) an assault; (2) a felonious taking of property from the victim's presence or person; (3) with the specific intent to permanently deprive the owner of the property; (4) while the defendant is armed with a dangerous weapon. *Turner, supra; King, supra*. Our Supreme Court has held that the focus of robbery is on the assault against the person. *Robideau, supra* at 484. Classifying robbery "as an offense against a person is particularly appropriate where the robbery is committed with the aggravating element of the perpetrator being armed. In this situation, the safety and security of the person is most severely

threatened, and the larcenous taking is of secondary importance." *People v Hendricks*, 446 Mich 435, 450; 521 NW2d 546 (1994). Likewise, the offense of assault with intent to rob while armed is intended to punish crimes against persons and requires an assault[5] with the intent to rob and steal while armed with a dangerous weapon. MCL 750.89; MSA 28.284; *Lugo, supra*. "Offenses lie on the same continuum, and are therefore greater and lesser included offenses, when 'the elements shared by the two offenses coincide in the harm to the societal interest to be protected.'" *Harding, supra* at 713 (Brickley, J.) (quoting Justice Ryan's concurring opinion in *Wilder, supra* at 360-361).

We conclude that the Legislature did not intend to impose cumulative punishment for a conviction of felony murder and a conviction for a lesser-included offense of the predicate felony on which the felony murder conviction is based where both the predicate felony and the lesser-included offense protect the same societal interest. We conclude that, like *Harding,* the offense of assault with intent to rob while armed merged into the more serious crime of felony murder predicated on armed robbery. Accordingly, we conclude that defendant's convictions and sentences violated the double jeopardy prohibition against multiple punishment. We affirm defendant's felony murder convictions and vacate defendant's assault with intent to rob while armed conviction. *Harding, supra* at 716. Defendant is entitled to receive sentence credit toward his felony murder punishments for the time served for the assault with intent to rob while armed conviction. *Harding, supra* at 720. Therefore, we remand for correction of the judgment of sentence to reflect such credit. Because defendant's felony-firearm conviction accompanied defendant's assault with intent to rob while armed conviction, we likewise must vacate defendant's felony-firearm conviction. *Harding, supra* at 716-717.

Affirmed in part, vacated in part, and remanded.

/s/ Roman S. Gribbs
/s/ Michael R. Smolenski

[1] Defendant also contends that insufficient evidence was presented to sustain his convictions for assault with intent to rob while armed and felony-firearm. However, we decline to address these issues in light of our conclusion, *infra*, that these convictions must be vacated on the ground of double jeopardy.

[2] *Harding, supra* at 705-717 (Brickley, J., with Griffin and Mallett, JJ., concurring), 735 (Cavanagh, C.J., with Levin, concurring).

[3] *Burns v Olde Discount Corp*, 212 Mich App 576, 582; 538 NW2d 686 (1995).

[4] Where the proofs establish that an armed robbery occurred and we have no way to determine whether the jury found that defendant aided and abetted armed robbery or attempted armed robbery, we assume that the jury found that defendant aided and abetted armed robbery.

[5] We note that in *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991), this Court stated that the elements of assault with intent to rob while armed are "(1) an assault *with force and violence*; (2) and intent to rob or steal; and (3) the defendant's being armed." We believe this is error because the assault with intent to rob while armed statute requires only an assault, not an assault with

force and violence. See MCL 750.89; MSA 28.284. Our conclusion in this regard is bolstered by the fact that in *Cotton*, this Court, in specifying the elements of assault with intent to rob while armed, relied on a line of cases that can be traced to *People v Sanford*, 402 Mich 460, 474, n 1; 265 Nw2d 1 (1978), in which our Supreme Court enunciated the elements of assault with intent to rob while *un*armed. See *People v Federico*, 146 Mich App 776, 790; 381 NW2d 819 (1985); *People v Bryan*, 92 Mich App 208, 225; 284 NW2d 765 (1979); see also *People v Smith*, 152 Mich App 756, 761; 394 NW2d 94 (1986). The assault with intent to rob while unarmed statute does require an assault with force and violence. See MCL 750.88; MSA 28.283. However, although *Cotton* was issued after November 1, 1990, we need not decide in this case whether the enunciation in *Cotton* of the elements of assault with intent to rob while armed established a rule of law we must follow, see Administrative Order No. 1996-4 and *People v Cooke*, 194 Mich App 534, 537-538; 487 NW2d 497 (1992), because we are concerned in this case with the social norm each statute seeks to protect, not the precise manner in which either statute protects that norm. See *Robideau*, *supra* at 487.