

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 172911

LC No. 93-002575

KENNETH KARL WILLIAMS,

Defendant-Appellant.

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

WHITE, J. (concurring in part and dissenting in part).

I agree in the abstract with the majority's analysis of the double jeopardy issue. I do not, however, agree with the application of that analysis to the instant case. I would affirm the assault with intent to rob while armed conviction, as well as the felony-murder convictions, and would vacate the felony-firearm conviction as contrary to *People v Johnson*, 411 Mich 50; 303 NW2d 442 (1981), rather than as violative of the Double Jeopardy Clause.

I agree that the Legislature did not intend to impose punishments for both armed robbery and felony murder where the defendant robs and murders the victim. I also agree that the double jeopardy violation is not eliminated by charging the defendant with felony murder based on armed robbery and recasting the predicate felony as assault with intent to rob while armed. My disagreement in the instant case stems from the fact that multiple victims were involved.

Defendant was convicted of murdering the truck's occupants while committing, attempting to commit, or assisting in the commission of the armed robbery of Yaldoo, and was convicted of the armed assault with intent to rob Yaldoo. He was not convicted of committing both a felony-murder and a robbery or assault of Yaldoo, and was not convicted of committing both a felony-murder and a robbery or assault of the truck's occupants. While he was convicted of an armed assault on Yaldoo, and that same assault was used as the predicate for the felony-murder convictions (framed as an armed robbery), I conclude that this is not contrary to the Legislature's intent and does not violate the Double Jeopardy Clause.

A single predicate felony can support multiple convictions of felony murder where multiple persons are murdered. This is the case even where the murder victims were not victims of the predicate felony. Thus, if two pedestrians were to enter an alley upon hearing screams, encounter a rape in progress, and be shot by the perpetrator as he attempts to escape, the perpetrator would properly be charged with two counts of felony murder for murder committed in the perpetration of, or attempt to perpetrate, criminal sexual conduct. The inquiry analogous to the inquiry in the instant case is whether the elevation of the charge from second-degree to felony murder based on the rape precludes a conviction for criminal sexual conduct as well as felony murder. I conclude that the Legislature, in providing for the increased penalty for murder when committed in conjunction with an enumerated felony, did not intend to foreclose separate punishment for the predicate felony when that felony was perpetrated on a different victim.

I acknowledge that were it not for the rape, the felony-murder charge could not be maintained, and were it not for the assault on Yaldoo, the felony-murder charge relating to the truck's occupants could not be maintained. Nevertheless, the question is one of legislative intent, and I conclude that where multiple victims are involved, the harms are so clearly distinct that the Legislature did not intend that the elevation of a murder charge relating to one victim preclude prosecution and punishment for the predicate felony committed against a different victim. I would therefore affirm the assault with intent to rob while armed conviction.

I concur in the majority's discussion regarding the sufficiency of the evidence and the denial of the motion for directed verdict.

I also concur in the vacation of the felony-firearm conviction, although on a different ground. I would vacate that conviction as contrary to *People v Johnson, supra*. While there was ample evidence that defendant knowingly aided and abetted the armed assault, more is required for a felony-firearm conviction. There was insufficient evidence that defendant "procured, counseled, aided, or abetted and so assisted in obtaining the proscribed possession, or in retaining such possession otherwise obtained." *Id.* at 54. *People v Morneweck*, 115 Mich App 156, 158; 320 NW2d 327 (1982).

/s/ Helene N. White