

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMONT A. CARD, a/k/a LAMONTE ADAM
CARD,

Defendant-Appellant.

UNPUBLISHED

February 21, 1997

No. 189319

Wayne Circuit Court

LC No. 94-002399

Before: Corrigan, C.J., and Doctoroff and R.R. Lamb,* JJ.

PER CURIAM.

Defendant, Lamont A. Card, appeals by right his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), second-degree murder, MCL 750.317; MSA 28.549, assault with intent to commit murder, MCL 750.83; MSA 28.278, armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was tried along with a codefendant, Gameliel Ware, before separate juries. Defendant was sentenced to concurrent terms of natural life for the felony murder conviction, 300 to 451 months' imprisonment for the assault with intent to murder conviction, and 180 to 271 months' imprisonment for the armed robbery conviction. These concurrent sentences were ordered to be served consecutive to a two-year term for the felony-firearm conviction. The trial court suspended defendant's sentence for the second-degree murder conviction. We affirm defendant's convictions for first-degree felony murder, assault with intent to murder and felony-firearm. We vacate defendant's convictions for second-degree murder and armed robbery.

We will first consider defendant's assertion that his convictions for both felony murder and second-degree murder for a single killing, and his convictions for felony murder and the underlying felony of armed robbery, violate the prohibition against double jeopardy. Because a significant constitutional question is presented, appellate review is appropriate even though defendant did not raise this issue below. *People v Passeno*, 195 Mich App 91, 95; 489 NW2d 152 (1992). This Court reviews double jeopardy questions de novo on appeal. *People v Torres*, 209 Mich App 651, 658;

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

531 NW2d 822 (1995), aff'd in part and rev'd in part on other grounds 452 Mich 43; 549 NW2d 540 (1996). Upon review of the issue, we conclude that defendant's convictions for second-degree murder and armed robbery must be vacated.

"[T]he federal and state constitutions prohibit placing a person in jeopardy of criminal conviction or incarceration twice for the same offense." *Passeno, supra* at 95; US Const, Am V; Const 1963, art 1, § 15. Multiple convictions and sentences for counts of first-degree felony murder and second-degree murder arising from the death of a single individual violate the constitutional guarantees against double jeopardy. *Passeno, supra* at 96. "[C]onvictions of both felony murder and second-degree murder for the killing of the same individual should result in the affirmance of the felony murder conviction and vacation of the second-degree murder conviction." *Id.* Accordingly, because defendant was convicted of both felony murder and second-degree murder for the killing of Carlos Graves, we vacate defendant's second-degree murder conviction.

Federal and state double jeopardy provisions also prohibit convictions and sentences for both felony murder and the underlying, predicate felony. *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996); *Passeno, supra*. "When a defendant is erroneously convicted of both felony murder and the underlying felony, the proper remedy is to vacate the conviction and sentence for the underlying felony." *Gimotty, supra* at 259-260. Therefore, we vacate defendant's conviction and sentence for armed robbery.

Defendant next argues that the prosecution presented insufficient evidence of an armed robbery to sustain his felony murder conviction. When reviewing a challenge based on the sufficiency of the evidence, this Court views the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995).

The elements of felony murder are: (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 knowledge that death or great bodily harm was the probable result; and (3) while committing, attempting to commit, or assisting in the commission of an enumerated felony. *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995). Defendant argues that the prosecution failed to prove the underlying felony of armed robbery because there was insufficient evidence that defendant intended to rob the victim. We disagree.

The elements of armed robbery are: (1) an assault, and (2) a felonious taking of property from the victim's person or presence, while (3) the defendant is armed with a weapon specified in the statute. *Turner, supra* at 569. "Armed robbery is a specific intent crime for which the prosecutor must establish that the defendant intended to permanently deprive the owner of property." *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). However, circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

In the present case, the evidence showed that, after the shooting, defendant and codefendant Ware pulled Carlos Graves and Marcus Williams from the car owned by Graves, dumped them in the street, and drove away. The police discovered Graves' car later that day, parked on a street directly around the block from defendant's house. Based on these facts, we conclude that there was sufficient evidence presented at trial for the jury to find, beyond a reasonable doubt, that the elements of armed robbery existed, including an intent to permanently deprive Graves of his car.

Defendant also claims that there was insufficient evidence of an intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. Malice may be inferred from the facts and circumstances of the killing, including evidence that a "defendant intentionally set in motion a force likely to cause death or great bodily harm." *People v Lewis*, 168 Mich App 255, 270; 423 NW2d 637 (1988). After a review of the record, we find that the prosecution presented sufficient evidence from which the jury could properly infer malice. Marcus Williams testified that, as the four men drove away from the party, he suddenly heard gunshots inside the car. Williams turned and observed defendant pointing a gun at Graves' head. Moreover, defendant himself admitted to shooting Graves. When asked why he and Ware opened fire on the two men, defendant responded: "We shot the guys because we were kind of scared of them. We didn't know them and didn't trust them." Viewed in a light most favorable to the prosecution, this evidence was sufficient to sustain the felony murder conviction.

Finally, we reject defendant's claim that his conviction for assault with intent to murder was not supported by sufficient evidence. The elements of assault with intent to murder are "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *Barclay, supra* at 674; *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). "The intent to kill may be proven by inference from any facts in evidence." *Barclay, supra* at 674.

Taken in a light most favorable to the prosecution, we find that sufficient evidence was presented such that a reasonable trier of fact could have found that the elements of assault with intent to murder were proven beyond a reasonable doubt. Defendant admitted shooting Carlos Graves in the head. Testimony also revealed that defendant shot Marcus Williams in the head at least once as he sat in the front passenger seat. This was sufficient evidence of an intent to kill. Moreover, even if this Court assumes *arguendo* that it was Ware who actually shot Williams, defendant's conviction was nevertheless supported by the evidence. "One who procures, counsels, aids, or abets the commission of an offense may be prosecuted, convicted, and punished as if he directly committed the offense." *People v McCray*, 210 Mich App 9, 13; 533 NW2d 359 (1995); MCL 767.39; MSA 28.979.

Affirmed in part and vacated in part.

/s/ Maura J. Corrigan
/s/ Martin M. Doctoroff
/s/ Richard R. Lamb