

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MONTRELL L. WASHINGTON,

Defendant-Appellant.

UNPUBLISHED

March 13, 1998

No. 197838

Genesee Circuit Court

LC No. 95-052514

Before: Michael J. Kelly, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Defendant Montrell Washington was convicted by a jury of felony murder, MCL 750.316; MSA 28.548, 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 sentenced to mandatory life imprisonment for first-degree felony murder, ten to twenty-five years for armed robbery, and two years for felony firearm, the latter sentence to run consecutively and prior to the others. We reverse in part, affirm in part, and remand for further proceedings.

This case arises out of the robbery and shooting death of Edward Lee Smith, in the parking lot of a party store. There were several witnesses to the crime. The prosecution presented evidence that defendant threatened Smith with a gun and demanded money, and that a struggle ensued during which defendant fired a single fatal shot to the victim. The defense theory was that Correll Bryant committed the murder while defendant unwittingly waited nearby.

Defendant argues on appeal that his convictions and sentences for both felony murder and the underlying felony constitute double jeopardy in violation of the Michigan Constitution, that the jury instructions that resulted in the impermissible double-jeopardy verdict were so confusing to the jurors as to deny defendant a fair trial, that the trial court erred in failing on its own initiative to instruct the jury on aiding and abetting, and that defendant was denied effective assistance of counsel. We find merit in defendant's argument regarding double jeopardy, but no merit in defendant's remaining arguments.

We examine defendant's constitutional double-jeopardy issue de novo as a question of law. *Bennett v Weitz*, 220 Mich App 295, 299; 559 NW2d 354 (1996). Article 1, section 15 of the

Michigan Constitution, guarantees a defendant's right not to be placed twice in jeopardy for the same offense. Double jeopardy includes subjecting a defendant to multiple punishments for a single offense. *People v Wilson*, 454 Mich 421, 427; 563 NW2d 44 (1997).

While the underlying felony in a felony-murder charge is not a lesser included offense within that charge, the predicate felony comprises an element of the felony murder charge. *People v Sanders (On Remand)*, 190 Mich App 389, 392; 476 NW2d 157 (1991). Thus, "[c]onviction of and sentences for both felony murder and the predicate felony constitute multiple punishments for the predicate offense and thereby violate double jeopardy principles under the Michigan Constitution." *People v Harding*, 443 Mich 693, 714; 506 NW2d 482 (1993); *People v Wilder*, 411 Mich 328, 347; 308 NW2d 112 (1981); *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995). We decline plaintiff's invitation to revisit Michigan's well-settled case law on this issue. Accordingly, we reverse and vacate the conviction for armed robbery, the predicate felony in this case. *Id.*

Defendant also asserts that he was denied a fair trial because his jury was confused by the trial court's instruction. We do not agree. Defendant did not object to the instruction below. This Court reviews jury instructions as a whole and not in a piecemeal fashion. Relief will be given only when necessary to avoid manifest injustice. *People v Kelly*, 423 Mich 261, 270-272; 378 NW2d 365 (1985); *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989). The instruction and verdict form here both provided the jury with the options of finding defendant guilty of second-degree murder or involuntary manslaughter, or not guilty of any offense. We find no manifest injustice in this case.

Defendant also argues that manifest injustice resulted from the trial court's failure to give, sua sponte, an instruction on aiding and abetting. This issue is without merit. There was little evidence from which a jury could infer an aiding and abetting theory and no such theory was argued. The decision not to raise the issue of aiding and abetting was a matter of trial strategy. We find no manifest injustice.

Finally, we find no merit in defendant's claim that he was convicted without effective assistance of trial counsel. A criminal defendant bears the burden of overcoming a presumption that counsel provided effective assistance. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). To establish ineffective assistance of counsel, a defendant must prove that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that counsel's erroneous performance probably affected the outcome of the proceedings. *Id.*

Here, defendant failed to show that the outcome of the proceedings in this case would have been different absent counsel's alleged errors. We find no constitutional deficiency in defense counsel's performance.

We reverse and remand this case to the trial court with instructions to vacate defendant's conviction and sentence for armed robbery. On remand the trial court shall also make a clerical correction to the judgment of sentence to reflect defendant's first-degree murder conviction and relay the correct information to the department of corrections. Although not raised by either party, we note that the judgment of sentence erroneously states that defendant was convicted of second-degree, rather

than first-degree murder. We affirm defendant's convictions and sentences for first degree felony murder and felony-firearm. We do not retain jurisdiction.

/s/ Michael J. Kelly

/s/ Harold Hood

/s/ Roman S. Gibbs