STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM HALL CURTIS,

Defendant-Appellant.

UNPUBLISHED
October 16, 1998

No. 210633
Washtenaw Circuit Court
LC No. 91-26449 FC

Before: Saad, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

A jury convicted defendant of first-degree felony murder, MCL 750.316; MSA 28.548, armed robbery, MCL 750.529; MSA 28.797, conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The jury acquitted defendant of first-degree premeditated murder and conspiracy to commit first-degree premeditated murder. The verdict form included second-degree murder as a lesser included offense of the first-degree premeditated murder charge, but not the felony-murder charge. This Court reversed defendant's felony murder conviction and remanded the case for retrial on that count on the combined effect of two errors: (1) the prosecutor improperly stated to the jury that any killing in the course of a robbery constitutes felony murder (see *People v Aaron*, 409 Mich 672, 727-728; 299 NW2d 304 (1980)); and (2) the verdict form did not include second-degree murder as a lesser included offense of felony murder. *People v Curtis*, unpublished opinion per curiam of the Court of Appeals, decided November 17, 1995 (Docket No. 156154).

After being recharged for felony murder, defendant moved to quash, arguing that a second trial would put him twice in jeopardy. The trial court denied his motion, and defendant filed an interlocutory appeal with this Court. We denied leave to appeal, then defendant requested leave to appeal to our Supreme Court. The Supreme Court denied his request, but remanded to this Court for consideration as on leave granted. We affirm.

Defendant's argument can be summarized as follows: The acquittal on charges of both premeditated and second-degree murder dictates the conclusion that the jury also found him not guilty

of felony murder. Therefore, the jury must have convicted him of felony murder only because the prosecutor misrepresented the crime's elements during his closing argument, and the verdict form failed to include second-degree murder as a lesser included offense of felony murder. Felony-murder "is merely a degree-raising device for certain types of second-degree murders." *People v Jones*, 209 Mich App 212, 215; 530 NW2d 128 (1995); *Aaron, supra*. Because defendant was acquitted of the lesser included charge of second-degree murder, he cannot be retried on the greater charge of felony murder. To retry him for felony murder would be to litigate an already determined issue of ultimate fact, thereby subjecting defendant to double jeopardy.

We disagree with defendant's flawed argument. Defendant argues that collateral estoppel precludes a second trial. However, the verdict from the first trial leaves open the question of whether the jury found all the elements of felony murder. Defendant assumes that the jury ignored the trial court's instructions on the intent required for felony murder. Nothing in the record, however, logically mandates this assumption.

Defendant further argues that the felony murder conviction is logically inconsistent with the acquittal of second-degree murder. This conclusion simply does not follow from the record. The jurors marked the line next to "Not Guilty" under Count I, which included first-degree premeditated murder and, as an alternative, second-degree murder. They then marked the line next to "Guilty" under Count II, which only listed first-degree felony murder. We cannot assume from these facts that the jury meant to acquit defendant of murder altogether, especially in light of the trial court's instructions on felony murder.

Defendant is mistaken insofar as he claims that the jury must have bootstrapped the felony murder conviction onto the armed robbery conviction. Another plausible explanation is that the prosecution did not prove, to the jurors' satisfaction, that defendant planned for his wife to be killed. However, they may have found that defendant did help plan the robbery of his home, that he gave his gun and a knife to his co-conspirator, and that these actions satisfied the intent element of felony murder, even though there was no premeditation. Therefore, the jury would find defendant guilty of felony murder, but not premeditated murder. Furthermore, they would not find him guilty of second-degree murder as a lesser included offense of first-degree murder because they already found him guilty of felony-murder.

This is just one plausible explanation for the verdict. It demonstrates that the verdict form does not require the conclusion that the jurors found defendant not guilty of any murder. Rather, they found him guilty of first-degree felony murder, in full accord with the trial court's instructions. Defendant relies heavily on the United States Supreme Court's decision in *Ashe v Swenson*, 397 US 436; 90 S Ct 110; 25 L Ed 2d 469 (1969). However, he disregards the statement in *Ashe* that the reviewing court should "examine the record . . . and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* (quoting *Sealfon v United States*, 332 US 575, 579; 68 S Ct 237; 92 L Ed 180 (1947). Here, the jury's verdict might well have been based on the trial court's instructions rather than on the prosecutor's misstatements of law. Accordingly, retrial on the felony murder charge is not barred by collateral estoppel.

Furthermore, as Justice Riley noted in *People v Garcia*, 448 Mich 442, 459; 531 NW2d 683 (1995) (opinion by Riley, J.) (emphasis supplied):

> *Ashe and Turner* involve situations in which an appellate court was able to review the instructions and *unequivocally* determine that the jury had rendered a decision that precluded a subsequent trial.

This is not such a case. The jury's verdict does not unequivocally determine that defendant did not commit or aid in felony murder. Therefore, the verdict does not preclude a second trial. Defendant cannot use an acquittal of first-degree premeditated murder to collaterally estop plaintiff from pursuing a new trial on the reversed conviction. The only issue definitively determined by the jury is that there was no premeditation.

In sum, defendant was found guilty of felony murder. That verdict was reversed on defendant's appeal because this Court found that the prosecutor repeatedly misstated the elements of felony murder, and the jury verdict form did not include second-degree murder as a lesser included offense of felony murder. However, retrial on a reversed verdict does not constitute double jeopardy, unless it was reversed for insufficient evidence. *People v Torres*, 452 Mich 43, 63; 549 NW2d 540 (1996). In this case, we reversed for procedural errors, not insufficient evidence. In addition, we cannot unequivocally determine that the jury acquitted defendant of second-degree murder. Therefore, the doctrine of collateral estoppel does not preclude a second trial.

Although the parties do not explicitly address it, an underlying issue in this scenario is whether the trial court may instruct the jury on second-degree murder as a lesser included offense of felony murder. This would allow the jury to convict defendant of second-degree murder after the first trial's jury selected "not guilty" on the section of the verdict form for first degree premeditated murder, with second-degree murder as a lesser included offense. This would not violate the right against double jeopardy. The inconsistency between the acquittal and the felony-murder conviction does not negate the validity of the implied second-degree murder conviction for double jeopardy purposes. We permit juries to reach inconsistent verdicts, including verdicts which incongruently convict a defendant of a compound offense and acquit the defendant of the compound offense's predicate offense. The United States Supreme Court stated in *United States v Powell*, 469 US 57, 65; 105 S Ct 471; 83 L Ed 2d 461 (1984):

> The rule that the defendant may not upset such a verdict embodies a prudent acknowledgment of a number of factors. First, . . . inconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense.

See also *People v Goss (After Remand)*, 446 Mich 587, 599; 521 NW2d 312 (1994) (opinion by Levin, J), "[t]he jury's decision regarding the predicate offense does not preclude it from reaching a

different conclusion in the context of the compound offense." Therefore, the jury's guilty verdict on felony-murder (along with its implied second-degree murder conviction) is valid (aside from the procedural error necessitating retrial), and retrial does not offend double jeopardy principles.

The case *Hoffer v Morrow*, 797 F2d 348 (CA 7, 1986), while not on all fours, is instructive. There, a jury returned the "muddled" verdict finding the defendant guilty of murder, voluntary manslaughter, and involuntary manslaughter, all for a single homicide. *Id.* at 349. The Illinois Supreme Court remanded for a new trial on all three counts. *People v Hoffer*, 106 Ill2d 186; 478 NE2d 335 (1985). The defendant argued in a habeas proceeding that retrial for murder and manslaughter violated his right against double jeopardy, because the involuntary manslaughter conviction was an implicit finding that his conduct was unintentional. 797 F2d 351. The Court rejected this argument, stating that it was "arbitrary to deem the jury to have authoritatively found lack of intent by convicting Hoffer of involuntary manslaughter yet ignore the contrary finding implied by the jury's having convicted him of murder and manslaughter". *Id.* at 352. See also *Kennedy v Washington*, 986 F2d 1129 (CA 7, 1993). Analogously, it would be arbitrary in the instant case to ignore the felony-murder conviction and infer that the jury cleared defendant of second-degree murder.

Furthermore, we have already determined that the protection against double jeopardy does not preclude retrial on the felony murder charge, because the premeditated murder acquittal has no collateral estoppel effect in this case. It would be absurd to now say that the trial court is precluded from instructing the jury on second-degree murder, when felony-murder is merely second-degree murder in the context of an underlying felony. Furthermore, Michigan law requires the trial court sua sponte to instruct the jury on second-degree murder as a lesser included offense "in every trial for first-degree murder, including felony murder". *People v Jenkins*, 395 Mich 440, 442; 236 NW2d 503 (1975). We therefore instruct the trial court on remand to give the second-degree instructions.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra