

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE ABRAHAM,

Defendant-Appellant.

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UNPUBLISHED

May 12, 2000

No. 215819

Saginaw Circuit Court

LC No. 98-015852-FC

Before: Fitzgerald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), assault with intent to murder, MCL 750.83; MSA 28.278, use of a firearm in the commission of a felony, MCL 750.227b; MSA 28.424(2), and unlawful driving away of a motor vehicle, MCL 750.413; MSA 28.645. The trial court sentenced defendant to life without parole for the first-degree felony murder conviction, life for the assault with intent to murder conviction, twenty-four months for the felony-firearm conviction, and thirty-six to sixty months for the unlawful driving away of a motor vehicle conviction. Defendant appeals by right and we affirm.

Defendant first argues that there was insufficient evidence that he shot Jermaine Gates to steal his car. We disagree. “In reviewing a sufficiency of the evidence question, this Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the crime were proved beyond a reasonable doubt.” *People v Warren*, 228 Mich App 336, 343; 578 NW2d 692 (1998), lv gtd 460 Mich 851 (1999).

“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 the knowledge that death or great bodily harm was a probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies listed in MCL 750.316; MSA 28.548.” *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995). Defendant’s felony murder charge is predicated on the underlying felony of larceny or robbery. The elements of armed robbery are assault, felonious taking of property from the victim’s person or presence, and the defendant must be armed

with a dangerous weapon as described in the statute. MCL 750.529; MSA 28.797; *People v Johnson*, 206 Mich App 122, 123; 520 NW2d 672 (1994).

Defendant argues there was no evidence that any property was taken from the presence or control of Jermaine Gates, so insufficient evidence was presented of the killing occurring while committing the underlying felony, robbery. We disagree. An object is in the “presence or possession” of a person for purposes of a robbery analysis when it is so within the person’s reach, inspection, observation or control that the person could, if not overcome by violence or fear of violence, retain possession of it. *People v Raper*, 222 Mich App 475, 482; 563 NW2d 709 (1997); *People v Beebe*, 70 Mich App 154, 159; 245 NW2d 547 (1976). For example, in *Raper*, *supra* at 482, this Court applied the interpretation of the “presence” requirement of the crime of robbery to the crime of carjacking, MCL 750.529a; MSA 28.797(a). In *Raper*, this Court found that the presence requirement was satisfied where the defendant confessed to shooting the victim to obtain an automobile in the victim’s possession and where the defendant took the keys from the lifeless body of the victim. *Id.* at 483. Here, Jermaine Gates’ rights of possession of the car were clearly greater than those of defendant; Jermaine was the owner of the car. Although not on his person, the car keys were in the house where Jermaine was living, and he did not give defendant permission to use the car. Thus, the evidence presented at trial was sufficient for the jury to find that defendant took the car from the victim’s person or presence.

Defendant also contends that no evidence was presented that defendant shot Jermaine Gates in order to commit the underlying felony of stealing the car. We disagree. 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 statute only requires that the defendant intended to commit the underlying felony at the time the homicide occurred.” *Id.* Intent may be proven by the facts and circumstances that surround the case. *People v Rotar*, 137 Mich App 540, 549; 357 NW2d 885 (1984). Here, there was evidence that defendant had told a friend that he was angry at Jermaine, that Jermaine made him sick, and that he could kill Jermaine and use his car. Defendant also drove away in Jermaine’s car after the shooting and took it to the friend’s house. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find the elements of felony murder were proven beyond a reasonable doubt.

Next, defendant argues that the trial court erred in denying defendant’s motion for directed verdict based on the charge of assault with intent to commit murder because insufficient evidence was presented that defendant intended to murder Peter Gates when he shot him. Again, we disagree. We review the trial court’s ruling de novo, viewing the evidence presented by the prosecution in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the elements of the crime charged were proved beyond a reasonable doubt. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). “The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, and (3) which, if successful, would make the killing murder.” *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). Circumstantial evidence and reasonable inferences that arise from the evidence may constitute satisfactory proof of the elements of the offense. *People v Lawton*, 196 Mich App 341, 350; 492 NW2d 810 (1992). “The use of a

lethal weapon will support an inference of an intent to kill.” *People v Ray*, 56 Mich App 610, 615; 224 NW2d 735 (1974). Here, defendant used a gun, a lethal weapon, to shoot at his former foster father, Peter Gates. Evidence shows that defendant shot at Peter Gates three times and struck him twice in the shoulder. Viewing the evidence in a light most favorable to the prosecutor, a rational trier of fact could find that defendant shot Peter Gates with the intent to kill him. Consequently, sufficient evidence was presented to justify the jury’s verdict of assault with intent to murder.

Next, defendant argues that he was denied his right to the effective assistance of counsel where his trial attorney failed to introduce into evidence a letter from defendant to Mrs. Gates. We disagree. Because defendant did not have a *Ginther*<sup>1</sup> hearing, this Court’s review is limited to errors appearing on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). This Court presumes the effective assistance of counsel, and the defendant bears a heavy burden to prove otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To determine whether ineffective assistance of counsel occurred, this Court must determine (1) whether counsel’s performance was objectively unreasonable, and (2) whether the defendant was prejudiced by counsel’s defective performance. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997); *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant must overcome the presumption that counsel’s action was trial strategy, and must also establish a reasonable probability that, but for counsel’s errors, the result would have been different. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *Rockey, supra* at 76. This Court should not substitute its judgment for that of defense counsel regarding matters of trial strategy, nor should it assess the competence of defense counsel with the benefit of hindsight. *Id.* at 77. Because defendant’s counsel’s decision not to introduce the letter could have reasonably been one of trial strategy and because defendant has not established that he was prejudiced by counsel’s decision, we conclude that defendant did not receive ineffective assistance of counsel.

Finally, defendant contends that if this Court vacates defendant’s felony murder conviction, then defendant should be resentenced for the assault with intent to commit murder conviction because the length of the sentence may have been influenced by the length of the other counts. However, we need not address this issue because sufficient evidence was presented to sustain defendant’s murder conviction.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Janet T. Neff

/s/ Michael R. Smolenski

<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).