STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY CLIFFTON RILEY, a/k/a JERRY CLIFTON RILEY,

Defendant-Appellant.

UNPUBLISHED
December 15, 2000

No. 219815
Washtenaw Circuit Court
LC No. 98-009944-FC

Before: O'Connell, P.J., and Zahra and B. B. MacKenzie,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), two counts of felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1), armed robbery, MCL 750.529; MSA 28.797, four counts of assault with intent to rob while armed, MCL 750.89; MSA 28.284, and one count each of assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to serve a mandatory two year prison term for the felony-firearm conviction, to be followed by concurrent life terms for each of the eleven remaining convictions. Defendant appeals as of right. We affirm in part, vacate in part, and remand for modification of the judgment of sentence.

This case arises from the armed robbery of a Pittsfield Township moving and storage business in March 1997, during which two employees, Neal Green and Duane Holder, were shot and killed, and the owner of the business, David Pepper, was shot and suffered a traumatic brain injury that left him paralyzed.

On appeal, defendant first argues that the trial court abused its discretion by allowing Pepper's neuropsychologist, Dr. Karen Price, to testify on rebuttal that following the shootings she had seen defendant loitering in the hallways of St. Joseph Mercy Hospital where Pepper had been a patient. In so arguing, defendant asserts that, because this testimony was not responsive to evidence introduced by the defense, but rather to denials elicited by the prosecutor during cross-examination of defendant, this testimony was not proper rebuttal and, therefore, should not

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

have been permitted by the court. Although we agree that admission of the challenged evidence was error, we find it to be harmless.

The test of whether rebuttal evidence was properly admitted is "whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant." *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). As explained by this Court in *People v Leo*, 188 Mich App 417, 422; 470 NW2d 423 (1991):

> Rebuttal testimony may be used to contradict, repel, explain, or disprove evidence presented by the other party in an attempt to weaken and impeach it. The test for error regarding rebuttal evidence is whether it is justified by the evidence it is offered to rebut. A prosecutor cannot elicit a denial during the cross-examination of a defense witness and use such denial to inject a new issue into the case. Cross-examination cannot be used to revive a right to introduce evidence that could have been, but was not, introduced in the prosecutor's case in chief. [Citations omitted.]

Here, we find that nothing in defendant's direct testimony supported admission of the challenged testimony on rebuttal; rather, his denials with respect to having been at any of the area hospitals during the summer of 1997 came during the prosecutor's cross-examination and were, thus, not the proper subject of rebuttal. Nonetheless, we find the erroneous admission of Dr. Price's rebuttal testimony to be harmless. Although, the prosecutor inappropriately argued during closing argument that the rebuttal testimony supported an inference that defendant had gone to the hospital hoping to "eliminate" the witness he had left behind, this preserved nonconstitutional error requires reversal only if it is shown that, in the context of the untainted evidence, "it is more probable than not that a different outcome would have resulted without the error." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). After a review of the untainted evidence admitted at trial, we find that no such probability exists.

Defendant next argues that his convictions of two counts each of first-degree premeditated murder and felony-murder, stemming from the deaths of Duane Holder and Neal Green, violate his right against double jeopardy. The prosecution concedes this error. The proper treatment of such dual convictions is to draft a judgment of sentence which reflects that the defendant has received a single conviction and sentence for each count of first-degree murder, supported by two theories: premeditated murder and felony-murder. *People v Bigelow*, 229 Mich App 218, 221-222; 581 NW2d 744 (1998). Accordingly, we remand to the trial court which shall modify defendant's judgment of sentence consistent with the requirements of *Bigelow*.

Defendant further argues, and the prosecution agrees, that defendant's convictions and sentences for both felony-murder and the predicate felony violate double jeopardy principles. Defendant was charged with two counts of felony-murder involving the deaths of Neal Green and Duane Holder with the predicate offenses being assault with intent to rob while armed. The offense of assault with intent to rob while armed constitutes a proper predicate robbery offense for felony-murder. MCL 750.316(1)(b); MSA 28.548(1)(b). See *People v Gibson*, 115 Mich App 622; 321 NW2d 749 (1982); *People v Ross*, 242 Mich App 241; ___ NW2d ___ (2000) (holding that the offense of assault with intent to commit unarmed robbery constitutes a predicate

robbery offense for felony-murder). However, convictions and sentences for both felony-murder and assault with intent to rob while armed violate the constitutional prohibition against double jeopardy. *Gibson, supra* at 626-627. Accordingly, we vacate defendant's two convictions and sentences for assault with intent to rob while armed involving victims Duane Holder and Neal Green and remand for modification of the judgment of sentence.[1]

Affirmed in part and vacated in part. We remand to the trial court for amendment of the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Brian K. Zahra
/s/ Barbara B. MacKenzie

[1] We note that, when instructing the jury regarding the offenses of felony-murder, the trial court misspoke in stating that the predicate offense for felony-murder was armed robbery. We decline to attach any significance to this error given that neither party objected to the instruction and, in any event, the error was harmless. The jury foreman, in reading the jury's verdict, expressly stated that the jury had found defendant guilty of armed robbery involving David Pepper and assault with intent to rob while armed involving Neal Green and Duane Holder.