STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 26, 2001
v	No. 215190 Wayne Circuit Court
CHARLES WILLIAM VAUGHN, Defendant-Appellant.	LC No. 98-000860

Before: Jansen, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by a jury of two counts of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b). Defendant was sentenced to two terms of natural life in prison. We affirm.

The charges in this case arose from the brutal murders of Mary Lou Drury and Dorothy Gilbert. The victims were killed in their home and their bodies were hidden in a basement storage room. The women had been beaten, their hands and feet were bound with duct tape, and duct tape also covered their nose and mouth. Unlike Mrs. Gilbert, Mrs. Drury also sustained severe head injuries that were consistent with being pistol-whipped. Both bodies had scrapes which were consistent with being dragged across the floor. A plastic garbage bag covered each woman's head, and the evidence indicated they both died of suffocation.

Defendant and codefendant Pamela Vannoy[1] had a sporadic personal relationship. Vannoy lived in the Drury home in an upstairs flat and both defendant and Vannoy worked occasionally for the Drurys. Vannoy also cared for Mrs. Gilbert, who suffered from lung congestion and required supplemental oxygen. On the day of the murders, the Drurys informed Vannoy that she had to move out because she stole money from them. Defendant and Vannoy admitted that they went to the Drury apartment shortly after Mr. Drury left. Defendant claimed that he left before Vannoy killed the women. Vannoy claimed that defendant killed the women

[1] Vannoy is not a party to this appeal, having challenged her conviction in a separate appeal, *People v Vannoy*, Docket No. 215189.

in a rage and that she could not stop him. Defendant and Vannoy were prosecuted in a joined trial with two separate juries.

On appeal, defendant challenges his murder convictions on the ground that there was insufficient evidence to prove his guilt beyond a reasonable doubt. In sufficiency of the evidence claims, we review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

In order to prove that defendant committed first-degree felony murder, the prosecution would have to introduce sufficient evidence that defendant (1) killed the victims, (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 the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specified in MCL 750.316(1)(b); MSA 28.548(1)(b). *People v Warren*, 228 Mich App 336, 346-347; 578 NW2d 697 (1998), rev'd on other grounds 462 Mich 415 (2000).

Defendant argues that he was merely present while Vannoy killed Drury and Gilbert and that the evidence was insufficient to prove that he committed the crimes or had the requisite intent to kill the victims. We disagree. The prosecution tried defendant on the alternative theories that he either committed the killings or aided and abetted Vannoy in committing the killings. Where felons act intentionally or recklessly in pursuit of a common plan, liability may be established by agency principles. *People v Flowers*, 191 Mich App 169, 178; 477 NW2d 473 (1991). To prove that defendant was guilty of aiding and abetting Vannoy in the killings, the prosecutor need only show that homicide was within the scope of the conspiracy and defendant either had the requisite intent to kill victims or participated in the felony with the knowledge of the principal's intent to kill or cause great bodily harm. *Id.*

Although defendant is correct that there was no direct evidence that he killed the victims, there was ample circumstantial evidence to prove his participation in the killings and his intent not only to rob the victims, but to kill them. Defendant admitted that he was in the victim's apartment with Vannoy at the time they were killed. The timeline of events showed that the crimes at the Drury home were completed in approximately one hour. During that hour, the evidence established that the killer or killers (1) subjected the victims to prolonged and severe beatings during which the victims struggled against their attackers, (2) searched the house to find duct tape to bind and gag the victims and plastic bags to put over the victims' heads, (3) attempted to break, then pry open a window, (4) rummaged through the house for items to steal, (5) packed Vannoy's belongings in a plastic bag, and (6) dragged the bodies to the basement. Based on all of these events taking place in the space of an hour, it was reasonable for the jury to infer that Vaughn was not merely present while Vannoy killed the victims, but actively participated in the killings.

We conclude that the prosecution presented sufficient evidence from which a reasonable trier of fact could find that Vaughn either killed the victims or aided and abetted Vannoy in committing the killings, and we will not reverse defendant's convictions on this ground.

Defendant also argues that the trial court erred by improperly instructing the jury on reasonable doubt. Because defendant consented to the instructions as given, he failed to properly preserve this issue for appeal. *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987). Further, where a defendant's counsel expressly accepts a trial court's jury instruction, he effectively waives appellate review of any error based on that accepted instruction. *People v Carter*, 462 Mich 206, 218-219; 612 NW2d 144 (2000). However, this case is distinguishable from *Carter* because the issue here involves a fundamental constitutional right which cannot be waived by the action of counsel. *Id*. at 218. In addition, this Court may review a constitutional issue for the first time on appeal despite the defendant's failure to preserve the alleged error if the issue could be decisive of the outcome. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994).

Defendant claims that the reasonable doubt instruction given by the trial court was flawed because it shifted the burden of proof from the prosecution to defendant and because it required the jury to have a reason to doubt defendant's guilt. We review de novo an error in jury instructions. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). The instructions must be read as a whole to determine whether the trial court made an error requiring reversal. *People v Kelly*, 423 Mich 261, 270-271; 378 NW2d 365 (1985); *People v Cain*, 238 Mich App 95, 127; 605 NW2d 28 (1999). Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id*.

A reasonable doubt instruction, when read in its entirety, must leave no doubt in the mind of the reviewing court that the jury understood that the prosecution had the burden of proof and what constituted reasonable doubt. *Hubbard*, *supra* at 487. If the jury is not properly instructed on reasonable doubt, the defendant is denied his Fifth and Sixth Amendment rights to be convicted by the jury only if the prosecution proves guilt beyond a reasonable doubt. *Sullivan v Louisiana*, 508 US 275, 278-281; 124 L Ed 2d 182; 113 S Ct 2078 (1993). An erroneous instruction on reasonable doubt is a structural error that is not subject to harmless error analysis. *Sullivan*, *supra* at 280-281; *People v Anderson (After Remand)*, 446 Mich 392, 405; 521 NW2d 528 (1994).

In this case, the trial court gave a lengthy and somewhat rambling reasonable doubt instruction. During the course of its instruction, the court referred to reasonable doubt as "the kind of doubt that makes you hesitate before making any normal, reasonable or rational decision" and "the kind of doubt for which you can assign a reason for having." The court also told the jury that "[i]f you have a doubt, you must have a reason for having the doubt. That's why it is called reasonable doubt." These statements are problematic because instructions which require the jurors to have a reason to doubt defendant's guilt shift the burden of proof. *People v Jackson*, 167 Mich App 388, 391; 421 NW2d 697 (1988).

Had the trial court only utilized the above-stated instructions on reasonable doubt, we would be forced to conclude that reversal is required. *Id*. However, the court also provided accurate definitions, describing reasonable doubt at "reason and common sense," and "fair, honest, and reasonable doubt." These instructions closely track the definition contained in the standard jury instructions, CJI2d 3.2(3), which this Court has approved as an appropriate

instruction on reasonable doubt. *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999). In addition, the trial court properly contrasted reasonable doubt with what does not constitute reasonable doubt, such as "proof beyond a shadow of a doubt," "a fictitious, or flimsy, or vain, or imaginary doubt," "a hunch or a feeling," or a possibility of innocence." Further, the court unequivocally stated at least three times that the prosecution has the burden of proof beyond a reasonable doubt.

It is apparent in this case that the trial court provided the jury with a less than perfect definition of reasonable doubt. However, when the instruction is read in its entirety, it is equally apparent that the court gave sufficient correct information on the burden of proof and the definition of reasonable doubt such that the jurors understood the meaning of reasonable doubt and the prosecution's burden. *Hubbard*, *supra* at 487. We do not believe that the imperfections in the reasonable doubt instruction in this case were sufficient to warrant reversal of defendant's conviction.

Affirmed.

/s/ Kathleen Jansen
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell