STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KALEN D. JOHNSON,

Defendant-Appellant.

UNPUBLISHED
June 28, 2002

No. 229169
Oakland Circuit Court
LC No. 2000-170467-FC

Before: Kelly, P.J., and Murphy and Murray, J.J.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316, conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, assault with intent to rob while armed, MCL 750.89, felon in possession of a firearm, MCL 750.224f, four counts of possession of a firearm during the commission of a felony, MCL 750.227b, and carrying a concealed weapon (CCW), MCL 750.227. He was sentenced as a second-offense habitual offender, MCL 769.10, to concurrent prison terms of life without parole for the murder conviction, twenty-five to fifty years for the conspiracy conviction, twenty-five to fifty years for the assault with intent to rob conviction, five to ten years for the felon in possession conviction, and five to ten years for the CCW conviction, to be served consecutive to four concurrent two-year terms for the felony-firearm convictions. Defendant appeals as of right. We affirm but vacate defendant's conviction and sentence for assault with intent to rob while armed and remand for correction of the judgment of sentence with regard to the felon in possession and CCW maximum sentences.

I. Motion To Quash Information

Defendant first argues that the trial court erred in denying his motion to quash the information. We disagree.

We review a circuit court's decision to deny a motion to quash de novo in order to determine whether the district court abused its discretion in ordering the bindover. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). A district court must bind a defendant over for trial when the prosecutor presents competent evidence constituting probable cause to believe that a felony was committed and that the defendant committed that felony. MCL 766.13; MCR 6.110(E); *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997). To bind a defendant over, the magistrate must find that there is evidence regarding each element of the

crime charged or evidence from which the elements may be inferred. *People v Hudson*, 241 Mich App 268, 278; 615 NW2d 784 (2000). A district court's determination that sufficient probable cause exists will not be disturbed unless the determination is wholly unjustified by the record. *Reigle, supra* at 37.

The elements of first-degree 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 knowledge that death or great bodily harm was the probable result, i.e., malice, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in the statute. *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000) (quoting *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999)). To convict a defendant of assault with intent to rob while armed, the prosecutor must establish that while armed, defendant committed an assault with force and violence, with an intent to rob or steal. *People v Federico*, 146 Mich App 776, 790; 381 NW2d 819 (1985). A conspiracy is an express or implied mutual agreement or understanding between two or more persons to commit a criminal act or to accomplish a legal act by unlawful means. Direct proof of the agreement is not required. Rather, it is sufficient that the circumstances, acts, and conduct of the parties establish an agreement. A conspiracy may be based on inferences or proven by circumstantial evidence. *People v Cotton*, 191 Mich App 377, 392-393; 478 NW2d 681 (1991).

At the preliminary examination, there was testimony that defendant, armed with a gun, along with Carl Stephens, went to the victim's house to collect money allegedly owed to Stephens. Stephens knew the victim and was aware that the victim would have money on the day of the incident. There was testimony by the individual who drove the parties to the victim's house that, while in the car, defendant and Stephens discussed beating up the victim if he did not give them any money. After arriving at the victim's house, the driver was instructed to wait outside while defendant and Stephens went into the victim's house. There was physical evidence concerning the condition of the victim's house from which it could be inferred that rooms were searched and a struggle occurred. The driver testified that when the men returned to the car approximately ten minutes later, both indicated that the victim chased them out and that defendant fired one shot with his handgun as he fled. The parties stipulated to the autopsy protocol regarding the victim's death, which showed that the victim died from a single gunshot to the back and that the manner of death was homicide. In addition, in a statement given to the police, defendant admitted that he and Stephens discussed robbing the victim before arriving at the victim's house, that he was armed with a handgun when he went to the victim's house, that he participated in the robbery, and that he shot the victim.

The testimony adduced at the preliminary hearing provided competent evidence supporting an inference that defendant committed the crimes charged. Even if there was concern over credibility issues, as defendant claims, the district court did not err in holding that the testimony established probable cause to bind defendant over for trial, and was correct to leave the factual questions raised by that testimony to the finder of fact. *People v Northey*, 231 Mich App 568, 575; 591 NW2d 227 (1998). Accordingly, we find no error in the trial court's decision to deny defendant's motion to quash the information.

II. Motion to Suppress

Next, defendant argues that the trial court erred in denying his motion to suppress his statement. Defendant asserts that the statement was not voluntary, but rather was improperly induced by police coercion and intimidation. Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law that a reviewing court considers in accord with the totality of the circumstances. *People v Cheatham*, 453 Mich 1, 27, 44; 551 NW2d 355 (1996). This Court defers to the trial court's assessment of the weight of the evidence and credibility of the witnesses, and the trial court's findings of fact will not be disturbed unless they are clearly erroneous. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

Statements of an accused made during custodial interrogation are inadmissible unless the accused has voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). The prosecutor must establish a valid waiver by a preponderance of the evidence. *People v Abraham*, 234 Mich App 640, 645; 599 NW2d 736 (1999). Whether a statement was voluntary is determined by examining police conduct, while the determination whether it was made knowingly and intelligently depends in part upon the defendant's capacity. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). In determining whether a statement was admissible, this Court considers the totality of the circumstances surrounding the making of the statement to determine whether it was freely and voluntarily rendered in light of the factors set forth in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). In *Cipriano*, our Supreme Court set forth the following nonexhaustive list of factors that a trial court should consider in determining whether a statement is voluntary:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. *Id*. at 334.

Here, the record does not support defendant's contention that his statement was not voluntary. The interview was videotaped, and the videotape was admitted into evidence at the evidentiary hearing. Defendant, himself, did not testify at the hearing. One of the officers who took defendant's statement testified at the hearing that defendant was not threatened or abused. The trial court believed the officer's testimony and there was no contrary evidence presented. Likewise, there was no evidence indicating that defendant was ill, intoxicated, or deprived of sleep, food, or drink. On the contrary, pursuant to defendant's request, the officers provided defendant some ice water. Additionally, the officers advised defendant of his *Miranda* rights before they proceeded with the questioning, defendant indicated that he understood those rights, and then signed the written waiver. The officers' entire interview with defendant lasted one hour

and forty minutes. The record shows that defendant was twenty-two years old, had a tenth grade education, had no learning disabilities, and had not been diagnosed with any psychological problems. Although defendant became distraught and began to cry as he admitted his involvement in the crimes, there is no indication that he was so distraught such that he was not operating of his own free will. Further, having been arrested on at least two previous occasions, there was ample evidence that defendant had prior contact with the police. On one occasion, defendant refused to make a statement and on the other occasion, defendant waived his rights and made a statement. In addition, defendant was in jail at the time of the interview as a result of a conviction in an unrelated case.

Viewing the totality of the circumstances, the record does not leave us with a firm and definite conviction that a mistake was made. Thus, the trial court did not clearly err in denying defendant's motion to suppress his statement given to the police.

III. Sufficiency of Evidence

Next, defendant argues that the evidence was insufficient to support each of his convictions because there was no evidence of malice and because a particular witness was not credible. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to prove the elements of a crime. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

In this case, viewing the evidence in a light most favorable to the prosecution, sufficient evidence was presented from which a jury could infer the elements of the charged offenses. At trial, there was evidence that defendant, armed with a handgun, went to the victim's house with Stephens for the purpose of taking money from the victim, and that they planned to beat up the victim if he did not give them any money. When they arrived at the victim's house, defendant and Stephens entered together and returned ten to fifteen minutes later. There was evidence, including defendant's own trial testimony, that he broke into a basement bedroom and searched for money while Stephens held the victim in the kitchen. Additional evidence further established that, as defendant fled the victim's house, he fired a single gunshot which resulted in the victim's death. Contrary to defendant's assertion, there was sufficient evidence of malice, which may be inferred from all the facts and circumstances of the killing, *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993), including the use of a deadly weapon. *Carines*, *supra* at 759. In addition, although defendant argues that the evidence was insufficient because a prosecution witness lacked credibility, this Court will not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *Wolfe, supra* at 515.

Accordingly, we find that the evidence, viewed in a light most favorable to the prosecution, was sufficient for a rational trier of fact to conclude that the elements of felony

murder, conspiracy to commit armed robbery, and assault with intent to rob while armed were all proved beyond a reasonable doubt.

IV. Double Jeopardy

Defendant argues that his convictions of both first-degree felony murder, based on the underlying felony of attempted armed robbery, and assault with intent to rob while armed, violate his right to be free from double jeopardy because attempted armed robbery is a lesser included offense of assault with intent to rob while armed. US Const, Am V; Const 1963, art 1, § 15. We agree. See *People v Harding*, 443 Mich 693, 705, 714; 506 NW2d 482 (1993); *People v Wilson*, 242 Mich App 350, 360; 619 NW2d 413 (2000); *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996). Therefore, we vacate defendant's conviction and sentence for assault with intent to rob while armed.

V. Invalid Sentence

Defendant's final claim is that his maximum sentences of ten years' imprisonment for his convictions for felon in possession and CCW are invalid. We agree and the prosecution acknowledges that the trial court must correct this error. The statutory maximum sentence for a conviction of both felon in possession and CCW is five years. MCL 750.224f(3); MCL 750.227(3). Defendant was sentenced as a second-offense habitual offender in accord with MCL 769.10. Under MCL 769.10(1)(a), the maximum sentence for defendant's felon in possession and CCW convictions could be 1-1/2 times the maximum term prescribed. Accordingly, the authorized maximum sentence for each conviction is 7-1/2 years. Therefore, we remand to correct the judgment of sentence consistent with this opinion. *People v Avant*, 235 Mich App 499, 521; 597 NW2d 864 (1999). MCR 6.435(A).

Affirmed in part, vacated in part, and remanded for the limited purpose of correcting the judgment of sentence. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ Christopher M. Murray