# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRAMEL PORTER SIMPSON,

Defendant-Appellant.

UNPUBLISHED
December 18, 2003

No. 242305
Genesee Circuit Court
LC No. 02-009232-FC

Before: Talbot, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316; second-degree murder, MCL 750.317; armed robbery, MCL 750.529; two counts of assault with intent to commit murder, MCL 750.83; and carjacking, MCL 750.529a. He was sentenced to concurrent prison terms of life without parole for the first-degree murder conviction, thirty-five to seventy years for the second-degree murder conviction, and twenty to forty years each for the armed robbery, assault, and carjacking convictions. He appeals as of right. We affirm defendant's convictions for first-degree felony murder, assault with intent to commit murder, and carjacking, but vacate his convictions and sentences for second-degree murder and armed robbery.

Defendant's convictions arise from events that took place at the Thrift City Bar in Flint, Michigan, on July 19, 2001, during which defendant accompanied codefendant Antwain Johnson when Johnson fired shots killing Beatrice DuBarry, and injuring Betty Asaro and Scott Mooney, during the course of an alleged robbery or larceny at the bar. Afterward, defendant and Johnson fled the scene, forced Diane and Edward Jankowiak out of a nearby car, and took their vehicle.

I

On appeal, defendant first argues that the trial court erred in denying his motion for a directed verdict with regard to the first-degree felony murder charge. We disagree.

When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People*

*v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

In *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999), the Court observed:

> "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 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, including armed robbery]." [Quoting *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995).]
>
> The facts and circumstances of the killing may give rise to an inference of malice. *Id*. A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. *Id*. Malice may also be inferred from the use of a deadly weapon. *Id*., p 567.
>
> "In situations involving the vicarious liability of co felons, the individual liability of each felon must be shown. It is fundamentally unfair and in violation of basic principles of individual criminal culpability to hold one felon liable for an unforeseen death that did not result from actions agreed upon by the participants. In cases where the felons are acting intentionally or recklessly in pursuit of a common plan, liability may be established on agency principles. If the homicide is not within the scope of the main purpose of the conspiracy, those not participating are not criminally liable." [Quoting *Turner*, *supra* 566-567, in turn quoting *People v Flowers*, 191 Mich App 169, 178; 477 NW2d 473 (1991).]
>
> See also *People v Aaron*, 409 Mich 672, 731; 299 NW2d 304 (1980).

In *Turner*, *supra* at 567, this Court, quoting *Flowers*, *supra* at 178, noted:

> In order to convict one charged as an aider and abettor of a first-degree felony murder, the prosecutor must show that the person charged had both the intent to commit the underlying felony and the same malice that is required to be shown to convict the principal perpetrator of the murder. Therefore, the prosecutor must show that the aider and abettor had the intent to commit not only the underlying felony, but also to kill or to cause great bodily harm, or had wantonly and wilfully disregarded the likelihood of the natural tendency of this behavior to cause death or great bodily harm. Further, if it can be shown that the aider and abettor participated in a crime with knowledge of his principal's intent to kill or to cause great bodily harm, he was acting with wanton and wilful disregard sufficient to support a finding of malice. *People v Kelly*, 423 Mich 261; 378 NW2d 365 (1985).

> Intent is a question of fact to be inferred from the circumstances by the trier of fact. . . . It is likewise a factual issue whether a particular act or crime committed was fairly within the intended scope of the common criminal enterprise.

This Court in *Turner*, *supra* at 567, quoting *People v Martin*, 392 Mich 553, 561; 221 NW2d 336 (1974), overruled in part on other grounds in *People v Woods*, 416 Mich 581; 331 NW2d 707 (1982), also observed that "[m]alice is a permissible inference from the use of a deadly weapon."

In *Turner*, this Court affirmed several codefendants' convictions of felony murder arising from the robbery and death of a victim who was shot by one of the codefendants, Johnson. The evidence established that during the course of a committing a series of planned armed robberies, one of the robbers called out Johnson's first name. At that point, Johnson concluded that he had to kill the victim because "[h]e heard my name" and Johnson then shot the victim. This Court affirmed the felony murder convictions of Johnson's codefendant's, reasoning that there was sufficient evidence that each participated in the armed robbery with knowledge of Johnson's intent to kill or cause great bodily harm so as to conclude that they acted with "wanton and wilful disregard" sufficient to support a finding of malice under *Aaron*. *Turner*, *supra* at 572-575, 580-581.

Similar to *Turner*, there was sufficient evidence in this case to allow a rational trier of fact to convict defendant of felony murder for aiding and abetting codefendant Johnson in the murder of DuBarry, during the course of an enumerated felony. The information in this case charged defendant, in pertinent part, as follows:

> [D]id, while in the perpetration or attempted perpetration of a robbery, or a larceny, murder one Beatrice DuBarry and/or aid and abet Antwain Johnson in doing so.

Robbery and larceny are both felonies enumerated in MCL 750.316. The jury determined that defendant was guilty of felony murder based on the predicate felony of armed robbery. The elements of armed robbery are: "(1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute." *Turner*, *supra* at 569.

Relying on *People v Randolph*, 466 Mich 532, 536; 648 NW2d 164 (2002), defendant argues that the evidence failed to establish a robbery. In *Randolph*, our Supreme Court held "that the force used to accomplish the taking underlying a charge of unarmed robbery must be contemporaneous with the taking." In light of the Supreme Court's decision in *Randolph*, we agree that it is questionable whether a robbery was established in this case, given that the evidence showed that codefendant Johnson took Asaro's money from the table as he was walking past it, that Johnson and defendant exited the bar, and that it was not until after Johnson reentered the bar that he began his assaultive conduct. Under these circumstances, it appears the evidence failed to show that the larcenous taking and the assault were sufficiently contemporaneous to establish a robbery under *Randolph*.

Nonetheless, we conclude that our resolution of this issue is not necessary to the disposition of this case. To the extent the evidence failed to establish a robbery, the remedy

would be to vacate defendant's armed robbery conviction. Conversely, even if we were to find that the evidence could properly be viewed as establishing a robbery, it would still be necessary to vacate that conviction where it served as the predicate felony for defendant's felony murder conviction. US Const, Am V; Const 1963, art 1, § 15; *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996); see also *People v Garcia (After Remand)*, 203 Mich App 420, 425; 513 NW2d 425 (1994), aff'd 448 Mich 442; 531 NW2d 683 (1995). In this regard, we also conclude that any deficiency in the evidence with regard to the armed robbery conviction does not affect defendant's conviction of first-degree felony murder. Defendant was charged with felony murder based on separate theories of larceny and armed robbery, and the jury was instructed on both theories. By determining that defendant was guilty of felony murder based on an armed robbery, the jury necessarily determined his guilt of felony murder based on the commission of a larceny. *Randolph, supra* at 553.

Although defendant concedes that the evidence clearly showed that codefendant Johnson committed a larceny, he argues that the evidence was insufficient to show that he aided and abetted Johnson in committing a larceny. We disagree.

The elements of larceny are: (1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the subject matter must be the goods or personal property of another, (5) the taking must be without the consent and against the will of the owner. *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999).

Although defendant contends that he did not assist codefendant Johnson in committing the larcenous act, i.e., taking the ten-dollar bill from the table, the evidence showed that defendant had previously discussed with Johnson how to open the cash register when they were seated at the bar together. Additionally, during a discussion in which Johnson said that he was going to "house the till," defendant informed Johnson that he was going to "house everything else in there." This evidence supports an inference that defendant and Johnson were acting in pursuit of a common plan when Johnson took the ten-dollar bill from the table. Additionally, when Johnson pulled out his gun and pointed it in Wilson's face, defendant said to Johnson, "If you were going to do that, you might as well house the whole bitch," i.e., steal everything. Thus, the evidence was sufficient to establish defendant's guilt under an aiding and abetting theory.

Furthermore, there was sufficient evidence of malice to support defendant's conviction of felony murder under an aiding and abetting theory. As in *Turner*, defendant knew that Johnson was armed with a gun when they entered the bar. Additionally, while defendant and Johnson were seated at the bar, they discussed how to open the cash register and commit a robbery. When Johnson told defendant that he was going to "house the till," defendant replied that if "he housed the till, he was gonna house everything else." Defendant's knowledge that Johnson was armed during the planned commission of a robbery was additional evidence that enabled a rational trier of fact to find that he acted with the "wanton and wilful disregard" necessary to support a finding of malice. See *Turner, supra* at 572.

II

Defendant also challenges the sufficiency of the evidence in support of his convictions for assault with intent to commit murder. "The elements of assault with intent to commit murder

are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995).

Defendant argues that the evidence was insufficient to show that he assisted codefendant Johnson in shooting Asaro and Mooney while possessing the requisite intent to kill. We disagree.

To support a finding that a defendant aided and abetted a crime, the prosecutor must show that: (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement which assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *Turner*, *supra* at 568. An aider and abettor's state of mind may be inferred from all the facts and circumstances. *Id.*

Here, the evidence showed that defendant was aware that codefendant Johnson was armed with a gun and that the two had discussed committing a robbery. This supports an inference that defendant and codefendant Johnson were acting in pursuit of a common plan. Additionally, although it was Johnson who shot at Asaro and Mooney, a witness testified that defendant was right behind Johnson when Johnson reentered the bar and that defendant held the door open for Johnson. One of the victims, Mooney, similarly testified that defendant was inside the bar behind Johnson when Johnson fired the shots. Viewed most favorably to the prosecution, the evidence was sufficient to enable a rational jury to find that defendant assisted Johnson with knowledge of Johnson's intent to kill, thereby supporting defendant's convictions for assault with intent to commit murder under an aiding and abetting theory.

III

Next, defendant argues that the trial court erred by denying his motion for a directed verdict with regard to the charge of first-degree premeditated murder. We disagree.

To convict a defendant of first-degree premeditated murder, the prosecution must show that the defendant intentionally killed the decedent and that the killing was premeditated and deliberate. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *Id*. The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. *Jolly*, *supra* at 466. Among the factors that may be considered in order to establish premeditation and deliberation are: (1) the previous relationship between the decedent and the defendant, (2) the defendant's actions before and after the crime, and (3) the circumstances surrounding the killing itself, including the weapon used and the location of the wounds. *People v Coddington*, 188 Mich App 584, 600; 470 NW2d 478 (1991).

The evidence in this case indicated that defendant was aware that codefendant Johnson was armed with a gun and that the two discussed committing a robbery together. There was also evidence that defendant encouraged and assisted Johnson when Johnson pulled out his gun upon initially leaving the bar and told him, "If you were going to do that, you might as well house the whole bitch." Additionally, there was evidence that defendant accompanied Johnson when Johnson reentered the bar and began shooting, and assisted Johnson by holding the door open for him, following which the two fled the scene together and carjacked an automobile from another

couple to aid their escape. This evidence, viewed most favorably to the prosecution, is sufficient to support an inference that defendant aided and abetted codefendant Johnson with knowledge of a premeditated intent to kill. Thus, the trial court did not err in denying defendant's motion for a directed verdict with regard to the charge of first-degree premeditated murder.

Furthermore, even if the evidence did not support the charge of first-degree premeditated murder, any error in submitting that charge to the jury was harmless where the jury acquitted defendant of that offense and found him guilty only of second-degree murder. *People v Graves*, 458 Mich 480, 482-483; 581 NW2d 229 (1998).

IV

We agree with defendant that the trial court erroneously instructed the jury that the use of force in retaining property previously taken, or in attempting to escape, is sufficient to provide the element of force or coercion necessary to the offense of robbery. This transactional approach to robbery was rejected by our Supreme Court in *Randolph*, *supra*. Nonetheless, because we are vacating defendant's armed robbery conviction on independent grounds (see part I, *supra*), this issue does not warrant further relief. Furthermore, as also discussed in part I, because defendant's felony murder conviction may be sustained on the basis that a larceny was committed during the commission of a murder, the court's instructional error is harmless as it concerns the felony murder conviction. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

V

Defendant also argues that the trial court erroneously admitted Marilyn Wilson's statement to the police, wherein she reported that codefendant Johnson had stated, "We're going to rob the place." The statement was admitted as a past recollection recorded under MRE 803(5). We review a trial court's decision to admit evidence for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

In *People v Daniels*, 192 Mich App 658, 667-668; 482 NW2d 176 (1992), this Court discussed the foundational requirements for admitting a statement under MRE 803(5):

> The following foundational requirements must be met before a memorandum or writing may be admitted into evidence under the recorded recollection exception to the hearsay rule:
>
> "Documents admitted pursuant to this rule must meet three requisites: (1) The document must pertain to matters about which the declarant once had knowledge; (2) The declarant must now have an insufficient recollection as to such matters; (3) The document must be shown to have been made by the declarant or, if made by one other than the declarant, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge when the matters were fresh in his memory." [Quoting *People v J D Williams*, 117 Mich App 505, 508-509; 324 NW2d 70 (1982), rev'd and remanded on other grounds 412 Mich 711; 316 NW2d 717 (1982).]

In the instant case, the prosecution satisfied the foundational requirements to admit Wilson's statement under MRE 803(5). First, Wilson gave a statement to the police while the events were fresh in her memory. Second, Wilson could not remember the specific statement that the prosecution wished to introduce at trial. Third, Wilson testified that the police officer wrote her statement down and that she reviewed his notes at the time, confirming their accuracy. Thus, the trial court did not abuse its discretion when it allowed Wilson's statement to the police as a past recollection recorded under MRE 803(5).

VI

Finally, because we are affirming defendant's felony murder conviction, we agree that it is necessary to vacate his conviction and sentence for second-degree murder, inasmuch as both convictions stem from the death of a single victim. US Const, Am V; Const 1963, art 1, § 15; *People v John Clark*, 243 Mich App 424, 429-430; 622 NW2d 344 (2000).

We affirm defendant's convictions for first-degree felony murder, two counts of assault with intent to commit murder, and carjacking, but vacate his convictions and sentences for second-degree murder and armed robbery.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Karen M. Fort Hood