STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY BRADLEY,

Defendant-Appellant.

UNPUBLISHED
February 3, 2004

No. 240746
Wayne Circuit Court
LC No. 00-008732-01

Before: Smolenski, P.J., and Saad and Kelly, JJ.

PER CURIAM.

A jury convicted defendant of first-degree felony murder, MCL 750.316, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to life imprisonment for the felony murder conviction, and a consecutive two-year prison term for the felony-firearm conviction. Defendant appeals, and we affirm.

I. Facts

On July 12, 2000, shortly after midnight, defendant Bradley, along with codefendant Derico J. Thompson, stole marijuana from the thirty-year-old victim, who was shot and killed during the robbery. The victim's body was found on a porch near his home in Westland. The defendants were friends and co-workers. The defense maintained that, although a robbery and shooting occurred, defendant was merely present.

II. Sufficiency of the Evidence of Felony Murder

Defendant argues that there was insufficient evidence to establish the malice element for felony murder. We disagree.

We view 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 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 can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of first-degree felony murder are (1) the killing of a human being, (2) with malice, i.e., 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, and (3) while committing, attempting to commit, or assisting in the commission of any of the felonies enumerated in MCL 750.316(1)(b), which in this case is armed robbery. *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000).

At trial, the prosecutor advanced alternative theories that defendant was guilty either as a principal or as an aider and abettor. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39. To support a finding that a defendant aided and abetted, "the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that 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." *People v Izarraras-Placante*, 246 Mich App 490, 496-497; 633 NW2d 18 (2001) (citation omitted).

"Aiding and abetting" describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991). "The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime." *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). Further, an aider and abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Carines*, *supra* at 758.

Viewed in a light most favorable to the prosecution, the evidence is sufficient for a rational trier of fact to conclude that defendant committed the crime of felony murder. Although a jury may not infer malice solely from the fact that defendant intended to commit the underlying robbery, *People v Aaron*, 409 Mich 672, 730; 299 NW2d 304 (1980), a jury may infer malice, as here, from the facts and circumstances surrounding the crime. For instance, a jury "may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death." *Carines*, *supra* at 759. "Malice may also be inferred from the use of a deadly weapon." *Id.* A defendant need not personally use the weapon for the jury to infer malice. *Id.* at 760.

Here, the evidence shows that defendant was an active participant in the planning and execution of the robbery, and supplied the handgun used during the crime. Specifically, the evidence showed that defendant and the victim were friends, that defendant was aware that the victim possessed marijuana, and that, shortly before the incident, defendant asked a mutual friend of both defendant and the victim about robbing the victim. Defendant used his girlfriend's car to drive himself and codefendant Thompson to commit the crime. After the incident, defendant told his girlfriend that he and codefendant Thompson had robbed the victim of marijuana, and marijuana was observed in his girlfriend's car, which defendant unexpectedly had painted blue on the day after the incident. Defendant also commented to his girlfriend that he

hoped the victim died, and that codefendant Thompson was having trouble moving the marijuana. Based on this evidence, the jury could reasonably infer that defendant was the source of information about the victim having marijuana, was the architect of the scheme to rob the victim, and was involved in executing the robbery.

Furthermore, the evidence supported a reasonable inference that defendant supplied the gun used during the robbery. The victim was shot with a nine-millimeter handgun. There was evidence that, when discussing robbing the victim with a mutual friend of both defendant and the victim, defendant was armed with a nine-millimeter handgun. Also, the owner of the house where defendant stayed with this girlfriend saw a nine-millimeter handgun in their room shortly before the shooting. Moreover, when talking to the police after the incident, defendant admitted that he owned a nine-millimeter handgun, but refused to disclose its location. Defendant also declared to the police that they would never find the murder weapon.

In sum, by engaging in the robbery and providing the weapon used to commit the crime, defendant set in motion a force likely to cause death or great bodily harm, which was sufficient to establish the requisite malice. *Carines*, *supra* at 759-760. Therefore, viewed in a light most favorable to the prosecution, the evidence was sufficient to sustain defendant's conviction of felony murder.

III. Motion for Mistrial

Defendant also argues that the trial court abused its discretion by denying his motion for a mistrial following the terrorist attacks of September 11, 2001. He contends, without any support, that the tragic events, which occurred during his trial, prevented the jurors from properly concentrating on the evidence and caused them to hastily return a verdict.

Defendant is not entitled to relief on this basis because he has failed to establish that he was prejudiced, i.e., that he was denied a fair and impartial trial. Defendant has failed to set forth any evidence that the events of September 11 affected the jury's verdict. Defendant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997). We reject this basis for defendant's appeal.

IV. Double Jeopardy

Defendant also says, erroneously, that the trial court abused its discretion by finding that manifest necessity existed to declare a mistrial and, therefore, he argues that his second trial and subsequent convictions violated the Double Jeopardy Clauses of the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 15.

Because defendant failed to raise this double jeopardy claim below, this Court reviews this unpreserved constitutional claim for plain error, i.e., clear or obvious error, affecting defendant's substantial rights, i.e., affecting the outcome of the proceedings. *Carines*, *supra* at 763-764.

On May 16, 2001, at 10:11 a.m., the jury began deliberations in defendant's first trial. They were excused for lunch at 1:10 p.m., and resumed deliberations at 2:10 p.m. At 4:10 p.m.,

the jurors were dismissed for the day. On May 17, at 9:03 a.m., the jury resumed deliberations. At 10:39 a.m., the jury sent a note indicating that they were "hung." Over defense counsel's objection, the court read the "deadlocked jury" instruction, CJI2d 3.12, and ordered the jury to continue deliberations. After the jury was excused, defense counsel expressed concern that the trial court was forcing the jurors to continue to deliberate, which may coerce them into reaching a verdict. The jury deliberated from 10:45 a.m. until 12:33 p.m., at which time they were excused for lunch. The jury resumed at 1:45 p.m., and, at 3:36 p.m., again sent out a note indicating that they "can't reach a verdict." The court noted that the message represented the second time the jury had indicated that it was deadlocked and, if upon inquiry, the jurors indicated that further deliberations would be helpful, it would possibly let them continue. At 3:40 a.m., the following exchange occurred:

> [*Trial court*]: At about 3:36 you sent out this note. It says: "We can't reach a verdict."
>
> To the foreperson, has there been any change since you sent out this similar note earlier today?
>
> [*Foreperson*]: Yes, but it's still split. We can't reach a unanimous verdict.
>
> [*Trial court*]: Is it still split the same way it was before, is what I'm asking you.
>
> [*Foreperson*]: From the first note that we sent you?
>
> [*Trial court*]: Yes.
>
> [*Foreperson*]: No.
>
> [*Trial court*]: Okay. Now, *is it possible that further deliberations would assist you in arriving at a verdict?*
>
> [*Foreperson*]: *No*.
>
> [*Trial court*]: All right. Manifest necessity, I'm going to have to declare a mistrial. We'll rise and have out jurors step in the jury room. [Emphasis added.]

The double jeopardy provisions of the United States and Michigan Constitutions protect citizens from multiple prosecutions for the same offense. *People v Lett*, 466 Mich 206, 213; 644 NW2d 743 (2002); *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). Because jeopardy attaches when a jury is selected and sworn, double jeopardy protects a defendant's interest in avoiding multiple prosecutions even when no prior determination of guilt or innocence has been made. *Lett*, *supra* at 215. "However, the general rule permitting the prosecution only one opportunity to obtain a conviction must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Id*. (internal quotation omitted). If a trial is concluded prematurely, "a retrial for that offense is prohibited unless the defendant

consented to the interruption or a mistrial was declared because of a manifest necessity." *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997).

In *Lett*, *supra*, our Supreme Court addressed a case factually similar to this case. The Court stated the applicable standard of review as follows:

> A constitutional double jeopardy challenge presents a question of law that we review de novo. Necessarily intertwined with the constitutional issue in this case is the threshold issue whether the trial court properly declared a mistrial. The trial judge's decision to declare a mistrial when he considers the jury deadlocked is accorded great deference by a reviewing court. "*At most* . . . the inquiry . . . turns upon determination whether the trial judge was entitled to conclude that the jury in fact was unable to reach a verdict." [*Lett, supra* at 212-213 (citations omitted; emphasis supplied).]

In discussing the "the concept of manifest necessity," the Court stated:

> The constitutional concept of manifest necessity does not require that a mistrial be "*necessary*" in the strictest sense of the word. Rather, what is required is a "high degree" of necessity. Furthermore, differing levels of appellate scrutiny are applied to the trial court's decision to declare a mistrial, depending on the nature of the circumstances leading to the mistrial declaration . . . At the other end of the spectrum is the mistrial premised on jury deadlock, "long considered the classic basis for a proper mistrial." [*Id.* at 218-219 (citations omitted; emphasis supplied).]

The Court further explained:

> Consistent with the special respect accorded to the court's declaration of a mistrial on the basis of jury deadlock, this Court has never required an examination of alternatives before a trial judge declares a mistrial on the basis of jury deadlock; nor have we ever required that the judge conduct a "manifest necessity" hearing or make findings on the record. In fact, we long ago stated that, "[a]t most, . . . the inquiry in [such a case] turns upon determination *whether the trial judge was entitled to conclude that the jury in fact was unable to reach a verdict.*" Moreover . . . where the basis for a mistrial order is adequately disclosed by the record, the ruling will be upheld. [*Id*. at 221-222 (citations omitted; emphasis supplied in original).]

The Court in *Lett* concluded that the record provided sufficient justification for the mistrial declaration, and that the trial court did not abuse its discretion by dismissing the jury, given the following facts:

> The jury had deliberated for at least four hours following a relatively short, and far from complex, trial. The jury had sent out several notes over the course of its deliberations, including one that appears to indicate that its discussions may have been particularly heated. Most important here is the fact that the jury foreperson expressly stated that the jury was not going to reach a

> verdict. We conclude that, in the absence of an objection by either party, the declaration of a mistrial in this case constituted a proper exercise of judicial discretion. [*Id.* at 223 (footnote omitted).]

Consistent with our Supreme Court's holding and rationale in *Lett*, we conclude that the trial court did not abuse its discretion by declaring a mistrial on the basis of manifest necessity, i.e., a deadlocked jury. Here, the jury was discharged approximately ten hours after it began deliberations. There were two communications from the jury that said they were unable to reach a verdict. The first note was sent after approximately six hours of deliberations. After the first note, the court gave the deadlocked jury instruction, CJI2d 3.12, and asked the jurors to further deliberate. Subsequently, after an additional four hours of deliberations, the jury again said they could not reach a verdict. Indeed, the foreperson advised the trial judge that the jury was not going to reach a verdict, and that further deliberations would be fruitless. As our Supreme Court observed in *Lett*, *supra* at 223 n 17, "This Court long ago indicated that 'the court is justified in accepting [the jury's] statement that [it] cannot agree as proper evidence in determining the question.'" (Citation omitted.) Additionally, the trial court was surely aware that there was a risk that a jury forced to continue to deliberate after twice reporting that it was deadlocked may compromise too easily, which might well have worked to defendant's detriment rather than his benefit.

Accordingly, the trial court did not abuse its discretion in finding that manifest necessity required a mistrial. Therefore, defendant's retrial, following the declaration of a mistrial, did not violate the double jeopardy protections against successive prosecutions.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kirsten Frank Kelly