

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

RAHIM JONES,

Defendant-Appellant.

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UNPUBLISHED

June 22, 2004

No. 244278

Wayne Circuit Court

LC No. 01-010882

Before: Neff, P.J., and Wilder and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), two counts assault with intent to rob while armed, MCL 750.89, and felony-firearm, MCL 750.227b. Defendant was sentenced to life in prison for the first-degree felony murder conviction, fifteen to thirty years in prison for each assault with intent to rob while armed conviction, and two years, with 214 days credit for time served, for the felony-firearm conviction. We affirm defendant's convictions for felony murder, felony-firearm, and one count assault with intent to rob while armed, but vacate the other conviction and sentence for assault with intent to rob while armed.

Defendant first contends that the prosecution presented insufficient evidence to convict him of felony-murder. We disagree. To determine if sufficient evidence existed for a conviction in a criminal proceeding, this Court must view the evidence in a light most favorable to the prosecution and decide if a reasonable juror could find guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

The jury convicted defendant of first-degree felony murder under an aiding and abetting theory. In order to prove felony murder under an aiding and abetting theory, the prosecution must demonstrate that defendant:

(1) performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of the predicate felony. [*People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003).]

Defendant does not challenge the first and third elements, but merely challenges the second intent/malice element. The Supreme Court stated:

In order to satisfy the malice standard required under *People v Aaron*, 409 Mich 672; 299 NW2d 304 (1980), the prosecution must show that the aider and abettor either intended to kill, intended to cause great bodily harm, or wantonly and willfully disregarded the likelihood that the natural tendency of his behavior was to cause death or great bodily harm. [*Riley, supra* at 140-141.]

The prosecution presented sufficient evidence for a reasonable juror to find that defendant willfully disregarded the likelihood that the natural tendency of his behavior was to cause death or great bodily harm.

Defendant admitted that he agreed with his co-felons to rob the murder victim and his friend. He admitted that he planned to share in the spoils of the robbery. Further, defendant actually gave one of his co-felons the murder weapon. This Court has stated that a defendant's knowledge that a co-felon is armed during the commission of a robbery is sufficient for a rational trier of fact to find that the defendant, as an aider and abettor, participated in the crime with knowledge of the co-felon's intent to cause great bodily harm. *People v Turner*, 213 Mich App 558, 573; 540 NW2d 728 (1995), overruled in part on other grounds *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001). Given that defendant not only knew his co-felon was armed, but actually provided his co-felon with the murder weapon, sufficient evidence existed for the jury to find that defendant willfully disregarded the likelihood that the natural tendency of his behavior was to cause death or great bodily harm. *Riley, supra* at 140-141; *Turner, supra* at 573.

Defendant next claims that his convictions and sentences for felony murder and assault with intent to rob while armed constitute double jeopardy. We agree in part. This Court exercises de novo review over a double jeopardy issue. *People v Colon*, 250 Mich App 59, 62; 644 NW2d 790 (2002).

The facts of this case indicate the predicate felony was attempted armed robbery. The Michigan Supreme Court ruled that attempted armed robbery is a lesser-included offense of assault with intent to rob while armed. *People v Patskan*, 387 Mich 701, 714; 199 NW2d 458 (1972). The double jeopardy clause prohibits multiple punishments for the same offense. *People v Squires*, 240 Mich App 454, 456; 613 NW2d 361 (2000). But this Court has stated: "there is no violation of double jeopardy protections if one crime is complete before the other takes place, even if the offenses share common elements or one constitutes a lesser offense of the other." *Colon, supra* at 63, quoting *People v Lugo* at 699, 708.

In this case, there is no separation between the assault with intent to rob and the attempted robbery. There was no gap in the events. Under *Colon*, the attempted robbery and assault constitute the same offense. Thus, the assault with intent to rob while armed is the predicate felony in this case. Conviction for both felony murder and its predicate felony

constitutes double jeopardy. *People v Bigelow*, 229 Mich App 218, 221-222; 581 NW2d 744 (1998). The proper remedy for such a violation is to vacate the conviction and sentence for the underlying felony. *Id.* at 222. Therefore, we vacate one of defendant's convictions and sentences for assault with intent to rob while armed.

Defendant claims that this Court should vacate both of his assault with intent to rob while armed convictions due to the double jeopardy issue. We disagree. Only one of the assault with intent to rob while armed charges was based on the assault on the murder victim. The other was based on the assault of the murder victim's friend. Thus, only the assault with intent to rob while armed based on the assault on the murder victim violates the double jeopardy clause because the felony murder only involved the murder victim. Therefore, we vacate only one assault with intent to rob while armed conviction and sentence.

Defendant next contends that the prosecution committed misconduct in her closing argument by appealing to the jury's sympathy for the murder victim. We agree, but find that trial court's careful instructions cured any potential existing error. Defendant did not object to any of the alleged prosecutorial misconduct, therefore, our review is for plain error affecting defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

During her argument, the prosecutor spoke at length regarding the murder victim's cold grave and the fact that the victim was no more than a morgue number. "Appeals to the jury to sympathize with the victim constitute improper argument." *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). However, a trial court can cure an improper appeal for sympathy with a proper jury instruction. *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). In addition, a trial court's instruction to the jury that it should decide the case only on the evidence and that the lawyer's arguments are not evidence cures any prosecutorial misconduct in closing arguments. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). The trial court gave appropriate instructions to cure the misconduct here, including its instruction that the jury should not let sympathy or emotions influence its decision. While we admonish and do not condone the prosecutor's behavior, the careful and proper instructions by the trial court cured any error stemming from the prosecutor's statements. *Mayhew, supra* at 123; *Green, supra* at 693.

Defendant raises an ineffective assistance of counsel claim in connection with the prosecutorial misconduct claim, but did not include this claim in his statement of questions presented. Therefore, it is not properly presented before this Court, and we will not review it. MCR 7.212(C)(5); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

Finally, defendant claims that the lower court's jury instructions regarding aiding and abetting felony-firearm was insufficient. After giving its jury instruction, the trial court specifically asked the parties if they had any objections to these instructions. Defendant, through counsel, stated that he had no objections. "By expressly approving the instructions, defendant has waived this issue on appeal." *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). The waiver extinguishes any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Affirmed in part, and remanded for the purpose of correcting the judgment of sentence to vacate one of defendant's convictions for assault with intent to rob while armed, as well as the accompanying sentence. We do not retain jurisdiction.

/s/ Janet T. Neff  
/s/ Kurtis T. Wilder  
/s/ Kirsten Frank Kelly