

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES EDWARD KING,

Defendant-Appellant.

UNPUBLISHED

November 23, 2004

No. 250331

Washtenaw Circuit Court

LC No. 01-001808-FC

Before: Donofrio, P.J., and Markey and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for second-degree murder, MCL 750.317, felony murder, MCL 750.316(1)(a), assault with the intent to cause great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. We vacate the second-degree murder conviction and affirm the remaining convictions.

Defendant asserts that there was insufficient evidence presented at trial for a jury to find beyond a reasonable doubt that he was guilty of felony murder and violation of the felony-firearm statute. We disagree.

When reviewing a claim that evidence in a criminal case is insufficient, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime were proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). This standard is deferential and requires that this Court “draw all reasonable inferences and make credibility choices in support of the jury verdict.” *Id.* at 400. “Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *Id.*, quoting *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Defendant first contends that there was insufficient evidence that he committed the robbery that was the predicate offense for the felony murder conviction. The elements of robbery are: (1) a felonious taking of property from a victim’s presence or person, (2) accomplished by an earlier or contemporaneous threat or application of force or violence. *People v Randolph*, 466 Mich 532, 537-539; 648 NW2d 164 (2002); *Carines*, *supra* at 757. A defendant may also be guilty of robbery by aiding or abetting another in the commission of the

robbery. *Id.*; MCL 767.39. The concept of aiding and abetting includes “‘any type of assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite the commission of that crime’” *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004), quoting *People v Palmer*, 392 Mich 370, 378; 220 NW2d 393 (1974).

The testimony at trial, viewed in a light favorable to the prosecution, showed the following. Defendant was attempting to collect rent from Howard Williams and Kenneth Cooksey. Defendant admitted in statements to the police that he had planned for two days before November 9, 2001, to murder Williams and Cooksey with the aid of his longtime friend Antjuan Walden. Defendant admitted that he went to the victims’ residence on November 9, and after entering the apartment, defendant left with Cooksey. While Cooksey and defendant were gone, Walden executed Williams by a single gunshot to the back of his head while he slept. When defendant and Cooksey returned, Cooksey entered the apartment first while defendant followed him from behind. Walden then crossed in front of Cooksey and defendant, and came to stand by the door to their immediate right. After Walden was in place, defendant pulled a knife and cut Cooksey’s throat and proceeded to stab him while demanding money. During this attack, Walden shot Cooksey twice in the legs. Defendant then took Cooksey’s car keys and left with Walden who had a bag containing marijuana, a wallet and a Playstation video game system, all taken from the apartment occupied by Cooksey and Williams. Defendant then drove Cooksey’s car to a nearby Kmart where he and Walden unloaded a set of tire rims from the back of Cooksey’s car into defendant’s car. Defendant was apprehended later that same day.

A reasonable jury could find that these facts establish beyond a reasonable doubt that defendant either committed robbery or that he aided and abetted a robbery of Cooksey. Defendant’s primary argument is that there is no evidence that he took items of value from the victims’ residence. First, a reasonable jury could choose to disbelieve defendant’s testimony that he took Cooksey’s car keys for the sole purpose of regaining his apartment key and find instead that he assaulted Cooksey for the purpose of taking his keys and thereby gaining access to the tire rims which he admitted taking. Furthermore, from the close relationship of defendant with Walden, combined with their flight from the scene with stolen property (the bag with one victim’s wallet, a bag of marijuana and the Playstation), was sufficient evidence for a jury to find beyond a reasonable doubt that defendant assisted a robbery. *Carines, supra* at 758. Therefore a reasonable jury could infer from these facts that defendant was guilty beyond a reasonable doubt of aiding and abetting the robbery committed by Walden.

Defendant next claims that there was insufficient evidence that he aided and abetted the use of a firearm in the commission of a felony. In *Moore*, our Supreme Court clarified the standards applicable to the aiding and abetting of a violation of the felony-firearm statute. The Court stated that “[a]ll that is required to prove aiding and abetting felony-firearm is that the defendant aided and abetted another in carrying or having in his possession a firearm while that other commits or attempts to commit a felony.” *Id.* at 68. Here, defendant admitted to knowing that Walden carried a firearm and that he had the firearm with him when he first invited him to stay with him. This knowledge along with the statements regarding the planning of the attack, evidence that Walden used the gun to shoot Cooksey while defendant was stabbing him, and evidence of gunshot residue on defendant’s hand, permitted a reasonable jury to infer beyond a reasonable doubt that defendant either used a firearm during the commission of a felony or aided and abetted Walden’s use of the firearm in the commission of a felony. *Id.* at 70-71.

In a supplemental brief, defendant argues that he was denied due process because the prosecutor knowingly presented false testimony. Defendant's argument is patently absurd. Defendant asserts the prosecutor should have known his confession to the police that he had planned with Walden for two days before the offense to kill both Cooksey and Williams was false. But defendant admitted during cross-examination that he made this statement to the police, which was taped-record and played for the jury. Defendant contends the statement was the product of "coercive overzealous police tactics," but offers no reason to find the trial court erred in finding, after a pretrial suppression hearing that, "there was no evidence of coercion, or duress, and he had a continuing opportunity to exercise his right to counsel and terminate the interviews." The heart of defendant's argument is that he initially denied planning to kill the victims, as did Walden, and therefore his confession must be false. But whether defendant's statement was true was a question for the jury to decide. Defendant was accorded due process.

Defendant next argues that his dual convictions and sentences for the murder of Williams violates the Double Jeopardy Clauses of the United States and Michigan Constitutions. We agree.

Both the United States Constitution and the Michigan Constitution prohibit multiple punishments of a defendant for the same offense. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). The prohibition extends to both multiple prosecutions for the same offense after an acquittal or conviction and multiple punishments for the same offense. *Id.* Multiple murder convictions and sentences that arise out of the death of a single victim violate double jeopardy. *People v Adams*, 245 Mich App 226, 241-242; 627 NW2d 623 (2001). Because defendant was convicted and sentenced for second-degree murder and felony murder arising out of the death of a single victim, there has been a clear violation of the double jeopardy protections afforded by the United States and Michigan Constitutions. The general remedy for a double jeopardy violation arising out of multiple murder convictions is to "affirm the greater conviction." *Herron, supra* at 609. Accordingly, we vacate defendant's conviction and sentence for second-degree murder. We affirm the remainder of defendant's convictions and sentences.

We affirm in part and vacate in part.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Karen M. Fort Hood