

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MIGUEL HARRIS,

Defendant-Appellant.

UNPUBLISHED

December 21, 2004

No. 246882

Wayne Circuit Court

LC No. 02-005328-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRELL JERROD PHILLIPS,

Defendant-Appellant.

No. 246922

Wayne Circuit Court

LC No. 02-005789-01

Before: Cavanagh, P.J. and Kelly and H. Hood*, JJ.

PER CURIAM.

In Docket No. 246882, defendant Miguel Harris appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, assault with intent to rob while armed, MCL 750.89, felon in possession of a firearm, MCL 750.224(f), and possession of a firearm during commission of a felony (felony-firearm), MCL 750.227(b). The trial court sentenced him, as a fourth habitual offender, MCL 769.12, to twenty to thirty years' imprisonment for both the murder conviction and the assault conviction, two to five years' imprisonment for the felon in possession of a firearm conviction, and two consecutive years' imprisonment for the felony-firearm conviction. We affirm.

In Docket No. 246922, defendant Jerrod Phillips appeals as of right his jury trial convictions of felony murder, MCL 750.316(b), armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224(f), and felony-firearm, MCL 750.227(b). The trial court sentenced him, as a fourth habitual offender, MCL 769.12, to life imprisonment without parole

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

for the murder conviction and an ordinary life term for the armed robbery conviction, three to five years' imprisonment for the felon in possession of a firearm conviction, and two consecutive years' imprisonment for the felony-firearm conviction. We affirm in part and vacate in part, and remand for correction of Phillips' judgment of sentence.

I. Docket No. 246882

A. Admission of Defendant's Custodial Statement

Harris first argues that that his otherwise voluntary statement should have been excluded because it was made pursuant to an unlawful arrest. Because this issue was not preserved, reversal is warranted only if plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A police officer may arrest an individual without a warrant if a felony has been committed and the officer has probable cause to believe the individual committed the felony. MCL 764.15(c); *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998). In reviewing a challenge to probable cause, this Court must determine whether the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected individual had committed the felony. *Id.* at 631.

Harris' argument that his arrest was unlawful rests mainly on the testimony of one officer who testified that when Harris gave his first statement, he was not yet under arrest and there was insufficient evidence for an arrest warrant. This officer also testified that even after he obtained Harris' first statement, he still did not believe there was sufficient evidence for an arrest warrant. But the officer's subjective characterization of the circumstances surrounding Harris' arrest is not determinative. In *People v Cipriano*, 431 Mich 315, 342-343; 429 NW2d 781 (1988), our Supreme Court held:

An arresting officer's subjective characterization of the circumstances surrounding an arrest does not determine its legality. Rather, probable cause to justify an arrest has always been examined under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved.

We first assume, despite the officer's subjective belief, that defendant was in fact arrested before he made the statement at issue. Reviewing the facts available to the arresting officers at the moment of the arrest, we conclude that they would justify a fair-minded person of average intelligence in believing that Harris had murdered, or participated in the murder of, the victim. Therefore, the trial court did not err in admitting defendant's statement, which was made pursuant to a lawful arrest. Nor was defense counsel ineffective for failing to file a meritless motion to suppress this properly admitted statement. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 646 (2000); *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

B. Stipulation to Defendant's Prior Conviction

Harris next argues that the trial court violated his constitutional right to due process when it admitted evidence of his prior felony convictions. This unpreserved issue is reviewed for plain error affecting Harris' substantial rights. *Jones, supra* at 355.

The parties stipulated that defendant had been convicted of a felony making him ineligible to possess a firearm. Because this was a stipulated fact, there is no evidentiary ruling for us to review. When a defendant concedes the fact of his prior convictions, only the admission of evidence *beyond* such a stipulation may constitute prejudicial error. *People v Mayfield*, 221 Mich App 656, 661; 562 NW2d 272 (1997). In this case, however, no evidence was admitted that went beyond the stipulation. Therefore, there was no error in this regard.

Harris also asserts that defense counsel was ineffective for stipulating to defendant's prior conviction. But this stipulation was sound trial strategy. By entering into the stipulation, defense counsel limited the evidence the prosecution could present to the jury. *Id.* at 661. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

C. Prosecutorial Misconduct

Finally, Harris argues that the prosecutor committed misconduct when the prosecutor misstated the law concerning felony murder in his opening statement. We review a claim of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Although we agree that the prosecutor misstated the law, we conclude that Harris is not entitled to reversal. The prosecutor improperly indicated that the jury only needed to find that Harris intended to commit a robbery, during the course of which a killing occurred in order to be found guilty of first-degree felony murder. *People v Aaron*, 409 Mich 672, 728-730; 299 NW2d 304 (1980). This error, however, did not deny Harris a fair or impartial trial. The brief statement was made early in the trial, before any evidence had been presented and before the trial court had instructed the jury on the law. After the parties rested, the trial court correctly instructed the jury on felony murder. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

II. Docket No. 246922

A. Armed Robbery

Phillips argues that his right against double jeopardy was violated when he was convicted and sentenced for both felony murder and the predicate offense of armed robbery. We agree. "When a defendant is erroneously convicted of both felony murder and the underlying felony, the proper remedy is to vacate the conviction and sentence for the underlying felony." *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996). Accordingly, we vacate Phillips' armed robbery conviction and sentence and remand for correction of his judgment of sentence.

B. Felony Murder

1. Corpus Delicti

Phillips next argues that the trial court violated the corpus delicti rule when it admitted Phillips' inculpatory custodial statement, in which he admitted that he committed the armed robbery. We disagree.

The corpus delicti rule bars the prosecution from using a defendant's confession in any criminal case unless it presents direct or circumstantial evidence that the specific injury or loss occurred and that some criminal agency was the source or the cause of the injury. *People v Ish*, 252 Mich App 115, 116-117; 652 NW2d 257 (2002). In regard to felony murder, the corpus delicti rule is satisfied by showing that a death has occurred, and that the death resulted from a criminal agency. *People v Hughey*, 186 Mich App 585, 589; 464 NW2d 914 (1990). Independent proof of the underlying felony is not required. *Id.* at 589-590. Before introducing Phillips' custodial statement, the prosecution introduced evidence that the victim had died, and that his death was the result of a criminal agency, i.e. that he had been shot in the back. Accordingly, the corpus delicti rule was satisfied. Defense counsel was not ineffective for failing to bring a meritless motion in this regard. *Snider, supra* at 425.

2. Sufficiency of the Evidence

Phillips also argues that the prosecution introduced insufficient evidence to support his felony murder conviction; specifically, Phillips challenges the sufficiency of the evidence as to the underlying offense of armed robbery.

In reviewing a challenge to the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified 441 Mich 1201 (1992). Circumstantial evidence is sufficient proof of the elements of an offense. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The prosecution presented sufficient evidence to support Phillips' armed robbery conviction. Phillips admitted that he and Harris had gone to the victim's apartment intending to commit an armed robbery, that Harris had a revolver, and that they took jewelry, shoes, and a digital scale from the apartment. In addition, Jessie Collins testified that at least at one time while Phillips was at the apartment building on the night the victim was shot, Phillips had possession of a revolver. Further, Phillips' girlfriend at the time of the murder, Serrena Wallace, testified that she overheard Phillips and Harris planning to rob the victim's apartment, and stated that Phillips himself had informed her that he was intending to assist Harris in robbing the apartment. Although Wallace also testified that Phillips told her that he was not at the apartment building at the time the victim was shot, and that she had not seen Phillips carrying any stolen property that night, we view the evidence in the light most favorable to the prosecution and conclude that the prosecution introduced sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Phillips committed armed robbery.

C. Ineffective Assistance of Counsel

Phillips also argues that he was denied the effective assistance of counsel when defense counsel (1) failed to move to suppress his statement on the ground that it was fruit of an unlawful arrest and (2) conceded Phillips' guilt as to the armed robbery charge in his opening statement and closing argument.

Phillips first asserts that he was denied the effective assistance of counsel because defense counsel failed to move to exclude his custodial statement on the ground that it was the inadmissible fruit of an illegal arrest. Phillips argues that his removal from prison in Jackson, where he was serving time on an unrelated offense, and his transfer to the police department in Detroit for questioning in this case, was an illegal "reverse writ." But the writ of habeas corpus was obtained not as a means of seeking judicial approval to hold Phillips for questioning in the absence of probable cause, but rather, as a means of obtaining Phillips' physical presence in Detroit for questioning. Cf. *People v Casey*, 411 Mich 179, 180; 305 NW2d 247 (1981).

Moreover, the police had probable cause to arrest Phillips at the time of his detention under the writ. The arresting officer testified that at the time he prepared the writ to bring Phillips to Detroit for questioning, he had already begun preparing an arrest warrant. When Phillips was brought to Detroit, the police had statements from Collins indicating that Phillips was at the victim's apartment building on the day of the murder, from Wallace indicating that Phillips had gone to the apartment building on the night the victim was murdered intending to rob the victim's apartment, and from Harris indicating that Phillips had been directly involved in the events giving rise to this suit and that Phillips had been the one to shoot the victim. In light of this evidence, we conclude that the facts available to the officers at the moment of Phillips' detention would justify a fair-minded person of average intelligence in believing that Phillips had committed, or been an accomplice to, the victim's murder. *Kelly*, *supra* at 631.

Phillips also argues that defense counsel was ineffective for conceding Phillips' guilt with regard to the armed robbery charge. We disagree. Given Phillips' statement, defense counsel could reasonably have concluded that the defense would seem incredible to the jury if it did not concede Phillips' guilt of armed robbery. We will not second guess this trial strategy. *Toma*, *supra* at 302-303.

Affirmed as to defendant Harris. Affirmed in part and vacated in part as to defendant Phillips, and remanded for correction of Phillips' judgment of sentence. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ Harold Hood