

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY LYNELL SMITH,

Defendant-Appellant.

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UNPUBLISHED

December 27, 2005

No. 257353

Oakland Circuit Court

LC No. 04-195521-FC

Before: Whitbeck C.J., and Talbot and Murray, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of first-degree felony murder, MCL 750.316(1)(b), two counts of armed robbery, MCL 750.529, and four counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to life imprisonment without parole for each of the murder convictions and 17½ to 50 years' imprisonment for each of the armed robbery convictions, those sentences to be served concurrently, but consecutive to four concurrent sentences of two years each for the felony-firearm convictions. He appeals as of right. We affirm defendant's felony murder convictions and two of the felony-firearm convictions, but vacate defendant's convictions and sentences for armed robbery and two convictions and sentences for felony-firearm.

Defendant's convictions arise from the January 7, 2003, robbery of a tire store in which two store employees, Stephen Putnam and Richard Cummings, were shot to death.

Defendant argues that the evidence was insufficient to establish his identity as the person responsible for these crimes. We disagree.

An appellate court's review of the sufficiency of the evidence to sustain a conviction should not turn on whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence must be viewed in a light most favorable to the prosecution. *Id.* at 515.

Defendant was connected to the tire store by Jeffrey Pickett, who testified that he observed defendant in the tire store shortly before the shootings occurred. In addition to Pickett's testimony, several witnesses testified that defendant made statements implicating himself in the

commission of the charged offense. Other evidence circumstantially connected defendant to this offense, including that he lived in close vicinity to the tire shop, that his conduct on the day of the shootings was consistent with activity suggesting that he took steps to discard a gun and clothing after the crime, and that he had access to a significant amount of money after the shootings.

Although defendant contends that many of the witnesses had motives to testify falsely against him, and that there were some discrepancies in the descriptions of a gun that two witnesses observed in defendant's possession before the shootings, the credibility of the witnesses was a matter for the jury to resolve and this Court will not resolve it anew. *Wolfe, supra* at 514-515. Viewed in a light most favorable to the prosecution, and resolving credibility disputes in favor of the jury's verdict, the evidence was sufficient to establish defendant's identity as the perpetrator beyond a reasonable doubt.

Defendant also argues that his convictions for both felony murder and armed robbery violate constitutional double jeopardy protections. We agree.

Under the state constitution, a defendant may not twice be placed in jeopardy for a single offense. Const 1963, art 1, § 15. *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995). It is well established that convictions and sentences for both felony murder and the predicate felony constitute multiple punishments for the same offense and thereby violate double jeopardy protections under the state constitution.<sup>1</sup> *Id.*; see also *People v Wilder*, 411 Mich 328, 345-347; 308 NW2d 112 (1981). The underlying felony is a necessary element of every conviction of felony murder. *Id.* at 346.

The jury convicted defendant of two counts of felony murder and two counts of armed robbery for robbing and killing the two victims in this case. We disagree with the prosecutor's contention that it is unnecessary to vacate defendant's armed robbery convictions because the predicate felony for the felony murder charges was larceny, not robbery. Because larceny is a necessarily included lesser offense of robbery, and because, factually, there was no evidence that defendant committed separate offenses of robbery and larceny, defendant's armed robbery convictions violate double jeopardy protections.

Contrary to what defendant argues, the remedy for this double jeopardy violation is not to vacate the convictions and sentences for felony murder. Rather, the appropriate remedy is to vacate the convictions and sentences for the underlying felonies. *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2001). Accordingly, we vacate defendant's two convictions and sentences for armed robbery.

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<sup>1</sup> Although we agree with Justice Corrigan's dissent in *People v Curvan*, 473 Mich 896, 903; 703 NW2d 440 (2005), that felony-murder is a distinct category of murder and not an enhanced form of armed robbery, it is not within the province of this Court to overrule precedent set forth by the Michigan Supreme Court, as we are bound to follow its decisions. See *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 554 (1993).

Because we must vacate defendant's two convictions for armed robbery, we must also vacate two of his convictions for felony-firearm. The jury convicted defendant of two counts each of felony murder and armed robbery, and then found him guilty of four counts of felony-firearm, one for each felony. Defendant could only be convicted of one count of felony-firearm for each felony committed while possessing a firearm. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003); *People v Passeno*, 195 Mich App 91, 97; 489 NW2d 152 (1992), overruled in part on other grounds in *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998). Accordingly, because defendant's only remaining felony convictions are for two counts of felony murder, we vacate two of his four felony-firearm convictions.

Affirmed in part and vacated in part.

/s/ William C. Whitbeck  
/s/ Michael J. Talbot  
/s/ Christopher M. Murray