

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HERMAN PAGE,

Defendant-Appellant.

UNPUBLISHED

January 17, 2006

No. 253185

Lapeer Circuit Court

LC No. 03-007755-FH

Before: Murray, P.J. and Jansen and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b), and armed robbery, MCL 750.529. Defendant's convictions stem from the armed robbery of a gun store. A father and son working in the store were shot during the robbery, and the father ultimately died of his wounds. The trial court sentenced defendant to concurrent terms of life in prison without parole for the murder conviction and twenty-five to forty years in prison for the armed robbery conviction. We affirm in part, vacate in part, and remand.

Defendant first asserts that the prosecution failed to present sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that defendant, as an aider and abettor, had the requisite intent for felony murder. We disagree. We review challenges to the sufficiency of evidence de novo to determine whether, when the evidence is viewed in the light most favorable to the prosecutor, a rational trier of fact could have found all the elements of the charged crime proved beyond a reasonable doubt. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002).

"The 'requisite intent' for conviction of a crime as an aider and abettor 'is that necessary to be convicted of the crime as a principal.'" *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001), quoting *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985). To support a first-degree felony murder conviction as an aider and abettor, the prosecution must show 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. *People v Carines*, 460 Mich 750, 758; 597 NW2d 130 (1999). 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 and the defendant's participation in the planning or execution of the crime. *Id.* at 757-758. Evidence of a defendant's knowledge that an accomplice was armed

during the commission of an armed robbery is sufficient for an inference of malice. *People v Turner*, 213 Mich App 558, 572-573; 540 NW2d 728 (1995), overruled in part on other grounds *Mass, supra* at 627-628.

In this case, the prosecution presented evidence that defendant took part in planning the robbery and participated in the robbery by acting as a lookout. The prosecution also presented evidence that defendant saw Charles Ralston walk into the store carrying a rifle. As in *Turner*, evidence of defendant's knowledge that Ralston was armed during the commission of the robbery was sufficient to support a finding that he possessed the requisite intent for aiding and abetting first-degree felony murder.

Defendant next argues that the trial court erred when it failed to instruct the jury that an aider and abettor "must have the necessary specific intent to be guilty of a specific intent crime." We review de novo claims of instructional error. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). Because defendant did not object to the trial court's jury instructions, our review of this issue is limited to plain error affecting defendant's substantial rights. *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

Reading the instructions as a whole, *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002), we discern no plain error. Regarding aiding and abetting, the trial court instructed the jury that "Defendant must have intended the commission of the crimes alleged or must have known that the other person intended its commission at the time of giving the assistance." The trial court also instructed that "The crime of Armed Robbery requires proof of specific intent." The trial court proceeded to explain what specific intent is generally and then what the specific intent is for the crime of armed robbery. According to *People v King*, 210 Mich App 425, 431; 534 NW2d 534 (1995), "aiders and abettors can be liable for specific intent crimes if they possess the specific intent required of the principal or if they know that the principal has that intent." The trial court's instructions, even if somewhat imperfect, fairly presented the issue of intent and sufficiently protected defendant's rights. *Aldrich, supra* at 124. Accordingly, defendant has not demonstrated a plain error in the trial court's instructions.

Finally, we agree that the trial court violated defendant's constitutional right against double jeopardy when it convicted him of both first-degree felony murder and the underlying felony of armed robbery. "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).

We vacate defendant's armed robbery conviction and remand for correction of the judgment of sentence to so reflect. In all other respects, we affirm. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly