STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DEWAYNE D. SAINE,

Defendant-Appellee.

UNPUBLISHED
October 21, 2008

No. 278882
Wayne Circuit Court
LC No. 06-003169-01

Before: Meter, P.J., and Talbot and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b), and being an accessory after the fact, MCL 750.505. The trial court originally granted defendant's post judgment motion for a new trial, agreeing with defendant that he was improperly convicted of felony murder without being separately charged with the predicate felony, in this case armed robbery. The court also sua sponte ruled that the jury's verdict was against the great weight of the evidence. In a prior appeal, this Court peremptorily vacated the trial court's order because neither defendant nor the trial court cited legal authority in support of the proposition that the prosecutor was required to charge the predicate offense for felony murder as a separate offense, and further, because it was improper for the trial court to sua sponte find that the jury's verdict was against the great weight of the evidence. *People v Saine*, unpublished order of the Court of Appeals, entered November 30, 2006 (Docket No. 274647). The trial court's order was vacated without prejudice to "defendant raising the same issue, with citation to supportive authority, in a new motion before the trial court, or in an appeal of right in this Court." *Id.* On remand, the trial court again granted defendant a new trial on the grounds that (1) defendant was improperly charged with felony murder without being separately charged with the predicate offense, and (2) the jury's verdict was against the great weight of the evidence. This Court granted the prosecutor's delayed application for leave to appeal. We reverse and remand for sentencing.

Defendant's convictions arise from the shooting death of Mohamed Makki, an alleged drug dealer, during a robbery at Makki's home in Dearborn. The prosecution's theory at trial was that defendant aided and abetted Rashad Moore, Cory Donald, and Seante Liggins in the commission of the offense. Codefendant Liggins pleaded guilty of second-degree murder pursuant to a plea agreement in which he agreed to testify against the other defendants. Defendant was tried jointly with codefendants Moore and Donald. Although codefendants Moore and Donald were each charged with felony murder and two counts of armed robbery,

defendant was not separately charged with armed robbery, but the prosecution relied on robbery as the predicate felony for the felony-murder charge against defendant.

I. Failure to Charge Defendant with Armed Robbery

The prosecutor argues that the trial court erred in granting defendant a new trial on the ground that he was improperly convicted of felony murder without being separately charged with the predicate felony of robbery.[1] We agree.

A trial court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion. A trial court abuses its discretion when its decision falls outside the principled range of outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

The elements of felony murder are (1) the killing of a human, (2) with the intent 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, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specified in the statute. *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007). In this case, the information alleged that defendant murdered the victim "in the perpetration or attempted perpetration of a robbery."[2] Armed robbery involves "(1) an assault, (2) a felonious taking of property from the victim's presence or person and (3) while the defendant is armed with a weapon." *Id*. at 319.

The trial court relied on a statement in *People v Aaron*, 409 Mich 672, 731; 299 NW2d 304 (1980), to conclude that a defendant charged with felony murder must also be charged with the predicate felony in order to be convicted of felony murder. In *Aaron*, the Court held that the requisite malice to convict a defendant of felony murder may not be inferred solely from the defendant's commission of the underlying felony. *Id*. at 731. Although the Court commented that in cases where application of the felony-murder doctrine would be unjust, a defendant "will still be subject to punishment" for the underlying felony, *id.*, the Court never addressed whether a defendant charged with felony murder *must* be separately charged with the underlying felony as a matter of law. Thus, *Aaron* is not helpful in resolving that issue. If anything, *Aaron* clarifies that the underlying felony and felony murder are separate crimes, with different intents required for each crime. See *People v Magyar*, 250 Mich App 408, 412-413; 648 NW2d 215 (2002).

[1] The prosecutor asserts that the trial court improperly exceeded the scope of this Court's remand order by considering this issue because defendant failed to cite supportive authority. Although defense counsel acknowledged that he was not able to locate authority directly on point, he argued that his position was supported by the language of the first-degree murder statute. The trial court also cited additional authority which it believed supported its conclusion that defendant was required to be separately charged with robbery. Accordingly, we conclude that this Court's remand order was not violated.

[2] The information also listed larceny as a predicate offense, but that theory was abandoned at trial.

Decisions regarding whether to bring a charge and what charges to bring lie within the sound discretion of the prosecutor. *People v Venticinque,* 459 Mich 90, 100; 586 NW2d 732 (1998). When a court assumes the right to determine under which of two statutes a defendant will be prosecuted, the court intrudes on the power of the executive branch and violates the separation of powers clause, Const 1963, art 3, § 2. *People v Jones,* 252 Mich App 1, 6; 650 NW2d 717 (2002); see also *People v Morrow,* 214 Mich App 158, 160; 542 NW2d 324 (1995), and *Genesee Prosecutor v Genesee Circuit Judge,* 386 Mich 672, 683-684; 194 NW2d 693 (1972). Unless the prosecutor's actions are unconstitutional, illegal, or ultra vires, the prosecutor's decision on how to proceed is exempt from judicial review. *Jones, supra* at 6-7.

Thus, we conclude that it was within the prosecutor's charging discretion whether to separately charge defendant with armed robbery. Neither the trial court nor defendant has identified any principled basis upon which to conclude that the prosecutor's failure to separately charge defendant with the underlying felony can be considered unconstitutional, illegal, or ultra vires. We note that at the time this case was tried, double jeopardy prevented a defendant from being convicted of both felony murder and the underlying felony. See *People v Wilder,* 411 Mich 328, 342; 308 NW2d 112 (1981). This rule was recently changed. In *People v Ream,* 481 Mich 223, 225-226; 750 NW2d 536 (2008), the Supreme Court overruled *Wilder* and held that dual convictions for both felony murder and the underlying felony do not violate double jeopardy protections. The decision in *Ream* reinforces that felony murder and the underlying felony are separate offenses for purposes of the prosecutor's charging discretion.

The trial court was concerned that allowing the prosecution to charge a defendant with felony murder, without separately charging the defendant with the underlying felony, may cause a jury to convict a defendant of felony murder even if it believes that he is guilty only of the underlying offense if it is not given the alternative of convicting the defendant for only the underlying offense. This concern is not justified, however, if the jury is properly instructed as it was in this case. To be guilty of felony murder, the jury must find that the charged killing occurred during the commission or attempted commission of an enumerated felony, and further find that the defendant possessed the requisite malice, which may not be inferred solely from the defendant's commission of the predicate felony. *Smith, supra*; *Aaron, supra*. Thus, if a properly instructed jury determines that the elements of the predicate felony were proven, but determine that the malice element was not proven, it would be required to acquit the defendant of felony murder. Simply put, the absence of a separate charge for the predicate offense, in this case armed robbery, should have no effect on the jury's deliberations with respect to the felony-murder charge.

Furthermore, the prosecution complied with due process protections by charging defendant with felony murder and specifying in the information the underlying felony on which it was relying for that charge, that being robbery. Defendant therefore received notice that the prosecution would have to prove a robbery as an element of felony murder. *People v McGee,* 258 Mich App 683, 699-700; 672 NW2d 191 (2003); *People v Higuera,* 244 Mich App 429, 443-444; 625 NW2d 444 (2001).

In sum, we conclude that although the prosecution was required to prove a predicate offense, in this case robbery, as an element of felony murder, it was not required as a matter of law to separately charge defendant with the predicate offense in order to convict him of felony murder.

Defendant also argues that the trial court should have sua sponte instructed the jury on armed robbery as a necessarily included lesser offense of felony murder. A trial court has no duty to instruct the jury sua sponte regarding lesser included offenses, *People v Henry*, 395 Mich 367, 374; 236 NW2d 489 (1975), although it may do so, *People v Bearss*, 463 Mich 623, 628-629; 625 NW2d 10 (2001). See also MCL 768.29 ("[t]he failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused"). Accordingly, even if the predicate felony may be considered a necessarily included lesser offense, the court is only required to instruct on it upon request. *People v Reese*, 242 Mich App 626, 629; 619 NW2d 708 (2000), aff'd 466 Mich 440 (2002). Defendant did not request a separate instruction on armed robbery. Accordingly, a lesser offense instruction was not required.[3]

For these reasons, the trial court erred in granting defendant a new trial on the ground that the prosecutor did not separately charge defendant with the predicate offense of robbery.

II. Great Weight of the Evidence

The prosecutor also argues that the trial court erred in granting defendant a new trial on the ground that the jury's verdict was against the great weight of the evidence. We agree.

A verdict is against the great weight of the evidence when "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). "[U]nless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id*. at 645-646 (internal citation and quotation omitted). "Absent exceptional circumstances, issues of witness credibility are for the trier of fact. The hurdle that a judge must clear in order to overrule a jury and grant a new trial is unquestionably among the highest in our law." *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008) (citations and quotation omitted).

The prosecutor argued that defendant was guilty of felony murder under an aiding and abetting theory. To find that a defendant aided and abetted in a crime, the prosecution must show that "(1) the crime charged was committed by the defendant or another person, (2) the defendant performed acts or gave encouragement that assisted in the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal

[3] Defendant also asserts that defense counsel was ineffective for not requesting an instruction on armed robbery as a lesser offense. However, decisions regarding what instructions to request are left to counsel's discretion as a matter of trial strategy, and this Court will not second-guess such decisions. *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003); *People v Henry*, 239 Mich App 140, 148; 607 NW2d 767 (1999). Defendant does not explain why counsel's failure to request the instruction should be considered objectively unreasonable.

intended its commission at the time he gave aid and encouragement." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); see also *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006). "An aider and abettor's state of mind may be inferred from all of the facts and circumstances [of the crime]. Factors that can be considered include a close association between the principal and the defendant, the defendant's participation in the planning and execution of the crime, and evidence of flight after the crime. *Carines, supra* at 757-758. "Mere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to show that a person is an aider and abettor." *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992).

For aiding and abetting felony murder, the defendant need not participate in the actual killing to be guilty. However, he must have the requisite intent of malice for felony murder. *Carines, supra* at 769-771. "[I]f an aider and abettor participates in a crime with knowledge of the principal's intent to kill or to cause great bodily harm, the aider and abettor is acting with 'wanton and willful disregard' sufficient to support a finding of malice." *People v Riley* (*After Remand*), 468 Mich 135, 141; 659 NW2d 611 (2003). One who aids and abets a felony murder must have the requisite malice, but need not have the same malice as the principal. *Robinson, supra* at 14. Malice, for purposes of proving felony murder, can be inferred from the use of a deadly weapon. *People v Bulls*, 262 Mich App 618, 627; 687 NW2d 159 (2004).

The prosecution presented evidence that defendant was present with other codefendants when the crime was planned in a parking lot. The evidence also showed that defendant met with the codefendants at a vacant house shortly before the robbery. Seante Liggins's testimony allowed the jury to infer that defendant provided codefendant Donald with the gun that was used in the crime while the group was at the vacant house just before the robbery. Although defendant was not present during the robbery, the evidence showed that he remained in contact with the codefendants by telephone, that he made telephone calls to the person who ordered the robbery hours before the meeting at which the robbery was arranged, approximately an hour before the robbery, and again shortly after codefendant Donald was dropped off at the hospital after the robbery. Additionally, defendant remained in the area during the robbery and was available to drive codefendant Donald to the hospital shortly after Donald was shot during the robbery.

Liggins was the prosecution's principal witness and much of the prosecution's case depended on the credibility of Liggins's testimony. The trial court never explained why Liggins's testimony should not or could not have been believed by the jury. In sum, the case did not present such exceptional circumstances that the trial court was justified in overruling the jury's verdict based on the weight of the evidence. Thus, the trial court erred in granting defendant a new trial on this ground.

Reversed and remanded for sentencing. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Christopher M. Murray