

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

July 5, 1996

Plaintiff-Appellee,

v

No. 171604

LC No. 93-000559

DEMETRIUS DONNER BRASHER, a/k/a
DEMETRIUS LEE BRASHER,

Defendant-Appellant.

Before: Corrigan, P.J., and MacKenzie and P.J. Clulo*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felony murder, MCL 750.316; MSA 28.548, assault with intent to commit murder, MCL 750.83; MSA 28.278, and two counts of armed robbery, MCL 750.529; MSA 28.797. He was subsequently sentenced to life imprisonment for the murder conviction and thirty to sixty years' imprisonment for the remaining convictions. Defendant appeals as of right. We affirm in part and vacate in part.

Defendant contends that there was insufficient evidence to support his felony murder conviction on an aiding and abetting theory. Specifically, he contends that the evidence was insufficient to support a finding (1) that he performed acts or gave encouragement that aided and assisted the commission of the crime, or (2) that he had the requisite intent for either felony murder or aiding and abetting. We disagree.

When reviewing a challenge to the sufficiency of the evidence, this Court views the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Intent may be inferred by all the facts and circumstances, *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987); *People v Daniels*, 163 Mich App 703, 706; 415 NW2d 282 (1987), and because of the difficulty of proving an

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

actor's state of mind, minimal circumstantial evidence is sufficient. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

In this case, the evidence, viewed in a light most favorable to the prosecution, established that defendant and Dehomey Hence approached victims Lorenzo Robinson and Lewis McGruter as the latter two were about to enter a car. Defendant grabbed Robinson and removed money from his pockets. At the same time, Hence ordered McGruter to the ground, took his wallet and keys, and shot him in the head. Hence then approached Robinson, who fell when defendant released him, and shot him in the back. In a statement to the police, defendant admitted that he grabbed Robinson so that he could not interfere with Hence's robbery of McGruter, admitted taking money from Robinson, admitted that he knew before the incident that Hence had a gun, and admitted that he and Hence planned to split the proceeds of the robbery.

Based on this evidence, a rational trier of fact could conclude that defendant performed acts that aided and abetted in McGruter's murder. Aiding and abetting includes all forms of assistance rendered to the perpetrator of a crime. *People v Usher*, 196 Mich App 228, 233; 492 NW2d 786 (1992). Defendant knew Hence was armed and admitted that he held Robinson so that Robinson would not get in Hence's way as he dealt with McGruter. This conduct assisted the commission of the murder by preventing interference with that act. Sufficient evidence was also presented to support a finding that defendant intended to kill, intended to do great bodily harm, or wantonly and willfully disregarded the likelihood of the natural tendency of his behavior to cause death or great bodily harm. *People v Flowers*, 191 Mich App 169, 178; 477 NW2d 473 (1991). As stated in *People v Hart*, 161 Mich App 630, 636; 411 NW2d 803 (1987):

The very essence of armed robbery is the procurement of another's property through threat of death or bodily injury. The jury could infer that, by creating the inherently dangerous situation, defendant was aware that there was a likelihood [co-defendant] would harm the victim if she resisted the robbery attempt.

Consistent with this analysis, defendant's active and knowing participation in an armed robbery – a crime that has a natural tendency to cause death or serious bodily injury if the victim resists – supports a finding that he acted with the necessary intent to support his felony murder conviction.

Defendant also contends that there was insufficient evidence to support his assault with intent to murder conviction. Again, we disagree. Viewed in a light most favorable to the prosecution, *Wolfe, supra*, Robinson's testimony established that defendant held Robinson while Hence shot McGruter; defendant then stood over Robinson until Hence also shot him. This was sufficient to support a finding that defendant aided or assisted Hence's act of shooting Robinson. Additionally, taken in a light most favorable to the prosecution, a reasonable juror could infer that defendant, by holding onto and standing over Robinson, intended to give Hence the opportunity to shoot him. The jury was not required to accept defendant's claim that he was unaware of Hence's intentions and did not wish to kill either

victim; credibility is a matter for the trier of fact to decide. *People v Jackson*, 178 Mich App 62, 65; 443 NW2d 423 (1989).

Defendant next argues that the trial court abused its discretion by refusing to grant the jury's request for additional instructions on the intent required for a conviction of aiding and abetting felony murder. We decline to reverse on this basis. The instructions as given adequately explained the law. Moreover, the jurors were reinstructed, and after those instructions, they did not request additional instructions. In the absence of any evidence that the jury remained confused after hearing the instructions a second time, we find no abuse of discretion.

Defendant also claims that his convictions and sentences for both felony murder and the predicate felony of armed robbery violate his rights against double jeopardy. Const 1963, art 1, § 15; US Const, Am V. As the prosecution concedes, defendant is correct. *People v Passeno*, 195 Mich App 91, 96; 489 NW2d 152 (1992); *People v Minor*, 213 Mich App 682, 689-690; 541 NW2d 576 (1995). 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. *Passeno*, *supra*, p 97; *People v Gimotty*, 216 Mich App 254, 259-260; ___ NW2d ___ (1996). We therefore vacate defendant's conviction and sentence for the armed robbery of McGruter.

Finally, defendant claims that he should be resentenced on his conviction for the armed robbery of Robinson. The claim is without merit. The court's decision to consult an SIR completed for the offense of assault with intent to commit murder when imposing the robbery sentence was proper. See Michigan Sentencing Guidelines, Second Edition, p 1. Because reversal of defendant's assault conviction is not warranted, those guidelines calculations remain valid, and defendant is not entitled to resentencing.

Affirmed in part and vacated in part.

/s/ Maura D. Corrigan
/s/ Barbara B. MacKenzie
/s/ Paul J. Clulo