STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES MARTRICE BROWN,

Defendant-Appellant.

UNPUBLISHED
August 23, 1996

No. 173108
LC No. 93001069 FC

Before: Marilyn Kelly, P.J., and Neff and J. Stempien,* JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree felony murder, attempted robbery being the underlying felony, MCL 750.316; MSA 28.548. He was convicted, also, of conspiracy to commit armed robbery and two counts of possessing a firearm during the commission of a felony, MCL 750.157a; MSA 28.354(1), MCL 750.227b; MSA 28.424(2). We affirm in part and reverse in part.

Christopher Ricketts was sitting in his vehicle parked on Hawley Street in Kalamazoo when defendant and Edward Neilly, both armed with handguns, approached the vehicle. Defendant stood behind the vehicle as Neilly approached the driver's side window. Ricketts began to drive away, and shots were fired at the vehicle. As a result, Ricketts was hit by gunshot and killed.

I

First, defendant claims that the prosecutor presented insufficient evidence to withstand his motion for a directed verdict and to support his convictions. Specifically, defendant challenges the evidence of his intent to commit felony-murder and conspiracy.

We review a trial court's disposition of a directed verdict motion by considering all of the evidence presented by the prosecution in a light most favorable to the prosecution. We determine if a

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

rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). When reviewing a claim of insufficient evidence following a bench trial, we view all the evidence in a light most favorable to the prosecution. We ascertain whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hunter*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

A person who commits murder in the perpetration of or attempt to perpetrate a robbery is guilty of first-degree murder. MCL 750.316; MSA 28.548. To establish this crime, the prosecutor must prove the defendant possessed a two-fold intent. First, there must be evidence that the defendant had an intent to rob. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). The intent must have been to permanently deprive the owner of his property. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). Second, the prosecutor must produce evidence that, while committing the attempted robbery, the defendant acted with (1) the intent to kill, (2) the intent to do great bodily harm, or (3) with a wanton or willful disregard of the likelihood that the natural tendency of the behavior was to cause death or great bodily harm. *People v Aaron*, 409 Mich 672, 733; 299 NW2d 304 (1980); *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

In this case, there was evidence that someone in a group of individuals which included defendant, standing near Ricketts' vehicle, suggested taking Ricketts' stereo equipment by force. Defendant stated that he would do it. There was also evidence that, in order to facilitate the robbery, defendant and Neilly held handguns as they approached Ricketts' vehicle and that, when Ricketts attempted to drive away, both defendant and Neilly fired at Ricketts' vehicle.

When the above evidence is viewed in a light most favorable to the prosecution, a rational trier of fact could conclude beyond a reasonable doubt that defendant intended to rob Ricketts. Also, during the attempt to rob Ricketts, defendant acted with a willful or wanton disregard of the natural tendency of his behavior to cause death or great bodily harm by firing a handgun at an occupied, moving vehicle. Therefore, the trial court did not err by denying the motion for a directed verdict, and the prosecution presented sufficient evidence to support defendant's felony-murder conviction.

To be guilty of conspiracy, a person must conspire with one or more persons to commit an offense prohibited by law. MCL 750.157a; MSA 28.534(1). Conspiracy requires the intent to combine with others and the intent to accomplish an illegal objective. *People v Cotton*, 191 Mich App 377, 392-393; 478 NW2d 681 (1991).

In this case, as previously stated, there was evidence that defendant intended to rob Ricketts, that someone in the group suggested taking Ricketts' stereo equipment, and that defendant said he would do it. There was also evidence that defendant and Neilly both approached Ricketts' vehicle and that, when Ricketts attempted to flee, both defendant and Neilly fired shots at the vehicle. When this evidence, presented by the prosecution, is considered in a light most favorable to the prosecution, a rational trier of fact could conclude beyond a reasonable doubt that defendant intended to rob Ricketts, and that defendant intended to combine with Neilly to accomplish the robbery. Therefore, the trial court

did not err when it denied defendant's motion for directed verdict, and the prosecution presented sufficient evidence to support the conspiracy conviction.

Defendant also argues that the trial court's findings of fact were insufficient, and that the court erred by failing to consider lesser included offenses. However, a trial court's findings must show merely that it was aware of the relevant issues and correctly applied the law. *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995). A review of the record in this case indicates that the court's findings meet this standard. Also, the findings do indicate that the court did consider lesser included offenses. In any event, because this was a bench trial and the proofs clearly established the charged offense, it would not have been error for the judge to fail to consider lesser included offenses. *People v Winans*, 187 Mich App 294, 298; 466 NW2d 731 (1991).

II

Next, defendant claims that the trial court improperly found him guilty of two offenses for the same conduct. He argues that, in order to be convicted of felony-murder, with attempted robbery being the underlying felony, and conspiracy to commit robbery, there must be separate and distinct evidence used to prove each offense. He asserts that, because the trial court considered the same evidence as proof of conspiracy as well as proof of the initial steps of attempted robbery, he cannot be convicted of both offenses. His claim is one of double jeopardy.

Two offenses can have common elements and still be separate for double jeopardy purposes if it is clear that the Legislature intended to create separate offenses. *People v McKinley*, 168 Mich App 496, 502-504; 425 NW2d 460 (1988). It is a settled principle of black letter law that conspiracy is a crime separate and distinct from the substantive crime that is its object. *People v Carter*, 415 Mich 558, 569; 330 NW2d 314 (1982). Therefore, even though robbery and conspiracy to commit robbery have common elements, they are different for double jeopardy purposes. Defendant is not being punished twice for the same conduct. The conspiracy statute punishes the planning of the offenses and focuses on the dangers resulting from group action. The felony-murder statute punishes defendant for the consequences that occurred during the actual commission of the robbery. *Carter*, *supra*, 415 Mich 586.

Defendant is mistaken in his assertion that the evidence used to convict him of both counts must also be separate and distinct. Because an additional fact is required to support a conviction for the underlying offense, using the same evidence as a starting point for finding defendant guilty of conspiracy and attempted robbery does not violate double jeopardy. *Carter*, *supra* at 587. In this case, the additional fact is that a murder was committed in defendant's actual attempt to perpetrate the underlying offense of robbery. The use of the same evidence to support defendant's conspiracy and felony-murder conviction was not improper, and the convictions do not violate double jeopardy.

III

Next, defendant argues that the prosecutor's comment on rebuttal that he would "throw up" if he heard one more allegation by the defense that this incident was a joke amounted to misconduct.

However, defense counsel made no objection to the remark at trial and, because this was a bench trial and a failure to review this issue would not result in a miscarriage of justice, we find that the issue was waived. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988).

IV

Last, defendant claims that it was error for the trial court to convict him of possession of a firearm during the commission of armed robbery. He claims that the armed robbery had merged into the felony-murder, and he was also convicted of possessing a firearm during the commission of the felony-murder offense. We agree.

Armed robbery is a lesser included offense of first-degree felony-murder, and conviction of both offenses violates double jeopardy. *People v Wilder*, 411 Mich 328, 343-348; 308 NW2d 112 (1981). Some jurisdictions refer to this principle as the merger doctrine: where the lesser included offense "merges" into the greater offense. Although Michigan does not denominate it as such, it applies the same basic concept. *Wilder*, *supra*, at 344-345 n 9. The armed robbery was a lesser included offense of defendant's first-degree felony-murder conviction, and defendant was convicted of having a firearm in his possession during the commission of the felony-murder offense. Therefore, defendant may not also be convicted of possession of a firearm in the commission of the lesser included offense of armed robbery.

Defendant's conviction for possessing a firearm during the commission of an armed robbery is reversed and the sentence for that offense is vacated. Defendant's other convictions and sentences are affirmed.

/s/ Marilyn Kelly
/s/ Janet T. Neff
/s/ Jeanne Stempien