STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VICTOR HUGO ESCOBAR,

Defendant-Appellant.

UNPUBLISHED
November 22, 1996

No. 179684
LC No. 94-0501-FC

Before: Gribbs, P.J., and Markey and T. G. Kavanagh,* JJ.

PER CURIAM.

Defendant appeals as of right his convictions by a jury of armed robbery, MCL 750.529; MSA 28.797, and felony murder, MCL 750.316; MSA 28.548. Defendant was sentenced to twenty to fifty years' imprisonment for the armed robbery conviction, and a concurrent term of life without parole for the felony murder. We affirm in part and reverse in part.

I

Defendant first argues that there was insufficient evidence that he aided and abetted the murder of the victim, that he intended to kill or inflict great bodily harm, that he had any knowledge of codefendant's plan to rob and kill, or that he in any way encouraged that behavior. We disagree.

In reviewing a sufficiency of the evidence question, this Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified 441 Mich 1201 (1992). "Inherent in the task of considering the proofs in the light most favorable to the prosecution is the necessity to avoid a weighing of the proofs or a determination whether testimony favorable to the prosecution is to be believed. All such concerns are to be resolved in favor of the prosecution." *People v Herbert*, 444 Mich 466, 474; 511 NW2d 654

---

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

(1993). In addition, when deciding this issue, this Court will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *Wolfe, supra*, 440 Mich 514.

To establish the crime of felony murder, the prosecution must present proofs from which the jury could rationally find that, while committing the underlying offense [i.e., robbery], the defendant acted with the intent to kill, with the intent to do great bodily harm, or with wanton and willful disregard of the likelihood that the natural tendency of the defendant's behavior was to cause death or great bodily harm. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

Further, one who "procures, counsels, aids, or abets" in the commission of an offense may be convicted and punished as if he directly committed the offense. MCL 767.39; MSA 28.979; *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). Aiding and abetting describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. *Id*. To support a finding that a defendant aided and abetted a crime, the prosecutor must show that:

> (1) the crime charged was committed by the defendant or some other person;
>
> (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and
>
> (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. [*Id.*]

An aider and abettor's state of mind may be inferred from all the facts and circumstances presented during trial, including such factors as a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Id*., 568-569.

In the present case, when leaving all issues of credibility to the jury, and looking only at the evidence favorable to the prosecution, we find that the record provides ample evidence, both direct and circumstantial (and the reasonable inferences arising therefrom), to sustain defendant's conviction of first-degree felony murder.

At trial, according to defendant's own testimony, defendant and codefendant (whom defendant asserts is responsible for the crime) had known one another for approximately ten or eleven years and were like "brothers." On the day in question, defendant and codefendant had been together since early that afternoon, and later left together, along with a third (but never apprehended) suspect, for the downtown area of Grand Rapids. Thereafter, defendant (later identified by his clothing) was seen on the second level of the city parking structure, "hovering over somebody" or something, moving his hands as if he were "hitting" or "beating" him. After being yelled at by a parking attendant, defendant was seen fleeing the scene with codefendant and the third suspect. One witness testified that she recalled previously seeing the three suspects run from the parking lot across the street, and noted that

she had heard shouting and laughter as the three ran through the city parking structure where the crime took place.

Immediately following their flight, the parking attendant went to the second level where he had seen defendant, and found the victim lying on his back in a pool of blood. It was later determined that the victim had sustained a 3-1/2 inch deadly knife wound to the neck, severing his carotid artery, and was robbed of his wallet, his money clip, and his watch. Within minutes of the emergency 911 call and a radio dispatch with descriptions, defendant and codefendant were apprehended. Upon conducting a search, the officers noticed that the *backside* of codefendant's jacket was splattered with blood, later identified as matching the victim's, and that defendant possessed a broken watch with the victim's name engraved on the back. Defendant's hand was cut between his forefinger and his thumb, and the insides of defendant's front pockets were bloodstained, along with two one-dollar bills found therein (later determined to be of defendant's own blood-type).

Defendant testified that he lied to the police at the time of arrest, telling them that he had just purchased the watch from a man on the street, and again, when he was interviewed by a detective, claiming that someone gave him the watch. Defendant refused to offer any further details about the watch, or explain the cut on his hand.

It was defendant's theory that it was codefendant who robbed and stabbed the victim, and that he (defendant) later arrived at the crime scene in complete surprise and fled out of fear. When considering the evidence favorable to the prosecution, we find that sufficient evidence was presented from which a rational jury could conclude that defendant's guilt, as either the principal or as the aider and abettor to the crime charged, was proved beyond a reasonable doubt.

II

Defendant next argues that the prosecutor improperly: (1) referred to him as an "idiot," and in turn stirred sympathy for the victim; (2) questioned defendant concerning his employment status, thereby creating an inference of a motive to rob; and (3) argued that the contradictions found in defense counsel's opening statement could be used to impeach defendant. In failing to object to these alleged instances of misconduct during trial, defendant did not preserve this issue. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557, cert den sub nom *People v Caruso*, 513 US __; 115 S Ct 923; 130 L Ed 2d 802 (1995). No error was committed whose potential prejudice could not have been cured by a timely objection and cautionary instruction, and further review is precluded. *People v Duncan*, 402 Mich 1, 15-16; 260 NW2d 58 (1977).

III

Last, defendant argues, and the prosecutor agrees, that the trial court erred in entering a judgment of conviction and sentence for both armed robbery and felony murder, because separate convictions and punishments for both the felony murder and the predicate offense violate defendant's right to be free from double jeopardy. We agree and vacate defendant's armed robbery conviction.

People v Passeno, 195 Mich App 91, 95; 489 NW2d 152 (1992); see also *People v Harding*, 443 Mich 693, 714, 735; 506 NW2d 482 (1993).

We affirm defendant's felony murder conviction and vacate his armed robbery conviction.

Affirmed in part, reversed in part.

/s/ Roman S. Gribbs
/s/ Jane E. Markey
/s/ Thomas Giles Kavanagh