

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ABRAHAM DRIVER, JR.,

Defendant-Appellant.

UNPUBLISHED

March 7, 1997

No. 189336

Detroit Recorder's Court

LC No. 94-011830

Before: Gribbs, P.J., and Holbrook, Jr., and J. L. Martlew, * JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316; MSA 28.548, assault with intent to rob while armed, MCL 750.89; MSA 28.284, and felony-firearm, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent terms of life imprisonment, and to a two year consecutive term for felony-firearm. We affirm in part and reverse in part.

First, defendant contends that his convictions for both felony murder and assault with intent to rob while armed are violative of double jeopardy. We agree. The principle of double jeopardy protects against more than one punishment for the same offense arising out of a single prosecution. *People v Harding*, 443 Mich 693, 705; 506 NW2d 482 (1993). Accordingly, we vacate defendant's conviction and sentence for assault with intent to rob while armed.

Defendant also argues that the trial court abused its discretion by admitting evidence of defendant's prior bad acts. We find this issue to be meritless. In any event, in light of the other evidence presented at trial, we conclude that any error would have been harmless. MCR 2.613(A).

There is no merit to defendant's claim that he was denied a fair trial because of prosecutorial misconduct. The prosecutor was permitted to impeach the witnesses' credibility. Although the prosecutor should have laid a foundation for her cross-examination of defendant's alibi witness, any error was harmless.

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

There is no merit to defendant's claim of judicial misconduct. The trial court's caution to defense counsel was too ambiguous to be prejudicial and, in any event, the trial court later instructed the jury that its rulings and comments were not evidence. Even assuming the trial court erred in asking whether defendant would testify before ruling on the motion to suppress evidence of defendant's prior convictions, any error was harmless.

Defendant argues that his life sentence for assault with intent to rob while armed violates the principle of proportionality. In light of our decision to vacate defendant's assault conviction and sentence, this issue is now moot.

Defendant's conviction and sentence for assault with intent to rob while armed are reversed. Defendant's remaining convictions and sentences are affirmed.

Affirmed in part; reversed in part. We do not retain jurisdiction.

/s/ Roman S. Gibbs

/s/ Donald E. Holbrook, Jr.

/s/ Jeffrey L. Martlew