STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CALVIN R. BILLINGSLEA,

Defendant-Appellant.

UNPUBLISHED
August 1, 1997

No. 169239
Oakland Circuit Court
LC No. 93-127218-FC

Before: Corrigan, C.J., and Michael J. Kelly and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), first-degree retail fraud, MCL 750.356c(1)(b); MSA 28.588(3)(1)(b), and conspiracy to commit first-degree retail fraud, MCL 750.157a; MSA 28.354(1). The trial court sentenced defendant to concurrent terms of life imprisonment for the first-degree felony murder conviction and one to two years' imprisonment for the first-degree retail fraud and the conspiracy to commit first-degree retail fraud convictions. We vacate defendant's conviction and sentence for first-degree retail fraud and affirm in all other respects.

I

Defendant first argues on appeal that the trial court abused its discretion by admitting testimony from an inmate at the county jail regarding statements made to the inmate about the incident in question. Defendant failed to preserve this issue for review by making a timely objection and stating the basis for his objection. MRE 103(a)(1). Appellate review of an unpreserved evidentiary issue is waived except to prevent manifest injustice. *People v Turner*, 213 Mich App 558, 583; 540 NW2d 728 (1995).

Here, we conclude that our failure to review this unpreserved evidentiary issue will not result in manifest injustice because defendant's argument is wholly without merit. The record does not support defendant's claim that the inmate witness testified to any statement, other than ones made by defendant.

II

Next, defendant argues that his first-degree felony murder conviction should be reversed because the trial court abused its discretion by admitting into evidence an irrelevant and prejudicial photograph of the victim.

This Court reviews the trial court's decision to admit evidence for an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling that was made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

MRE 402 provides that "[a]ll relevant evidence is admissible." "Relevant evidence" is defined as that "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." MRE 401; *People v Mills*, 450 Mich 61, 66-67; 537 NW2d 909, modified 450 Mich 1212 (1995). Here, the admission of the victim's photograph was, at a minimum, relevant for purposes of establishing the element that a human being was killed. *People v Brannon*, 194 Mich App 121, 124-125; 486 NW2d 83 (1992).

Next, we must determine whether the photograph should have been excluded due to its prejudicial effect. MRE 403; *Mills, supra* at 74-75. Although we recognize the potential for sympathy that may occur when a photograph of a very young victim is placed into evidence, we cannot say that that factor alone constitutes prejudice warranting reversal. From our review of the record, we do not find that the prejudicial effect of the exhibit substantially outweighed its probative value. And even if it did, we are persuaded that the other substantial evidence of defendant's guilt made any error in this case harmless.

III

Next, defendant argues that his constitutional guarantee against double jeopardy was violated when he was convicted and sentenced for both first-degree felony murder and the underlying predicate felony of first-degree retail fraud. We agree that defendant cannot be convicted for both felony murder and the underlying felony. *People v Passeno*, 195 Mich App 91, 96; 489 NW2d 152 (1992). When a defendant is erroneously convicted of both felony murder and the underlying, or predicate, felony, the remedy is to vacate the conviction and sentence for the underlying felony. *Id.* at 96-97. Because defendant was convicted and sentenced for both first-degree felony murder and the underlying predicate felony of first-degree retail fraud, we vacate defendant's first-degree retail fraud conviction and the one- to two-year prison sentence imposed for this offense. *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996).

Defendant fails to argue or cite any authority in support of his claim that his conviction and sentence for conspiracy to commit first-degree retail fraud also constitutes a double jeopardy violation.

Therefore, we deem the argument to be abandoned. *People v Hanna*, ___ Mich App ___; ___ NW2d ___ (Docket No. 183094, issued 05/16/97).

IV

Next, defendant argues that the trial court erred in refusing to grant his motion for directed verdict at the close of the prosecution's proofs. In reviewing a trial court's decision regarding a motion for a directed verdict, this Court views the evidence presented up to the time the motion was made in the light most favorable to the prosecution to determine if a rational factfinder could find the essential elements of the crime proved beyond a reasonable doubt. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996).

First, defendant argues that the trial court should have entered a directed verdict in his favor because the offense of first-degree felony murder may not be predicated on the underlying felony of first-degree retail fraud. However, this Court recently rejected this argument in the appeal of defendant's coperpetrator. *Gimotty*, *supra* at 258.

Second, defendant argues that the trial court erred in refusing to grant his motion for directed verdict because the prosecution failed to produce evidence as to the intent element of first-degree felony murder. We firmly disagree. The elements of felony murder are (1) the killing of a human being (2) with the intent to 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, as pertinent to the instant case, "larceny of any kind." MCL 750.316(1)(b); MSA 28.548(1)(b); *Brannon*, *supra*. Where, as here, a defendant is charged as an aider and abettor of a first-degree felony murder, the prosecutor must show beyond a reasonable doubt that the person charged had both the intent to commit the underlying felony and the same malice that is required to be shown to convict the principal perpetrator of the murder. *People v Flowers*, 191 Mich App 169, 178; 477 NW2d 473 (1991). Therefore, the prosecutor must show that the aider and abettor had the intent to commit not only the underlying felony, but also to kill or to cause great bodily harm, or had wantonly and wilfully disregarded the likelihood of the natural tendency of this behavior to cause death or great bodily harm. *Id.*

We have reviewed the evidence presented by the prosecution and conclude that the trial court did not err in refusing to grant defendant's motion for a directed verdict. The prosecution's evidence clearly established that defendant and his coperpetrator made a concerted effort to escape apprehension after defendant shoplifted clothing from a store, totally disregarding the risk of injury to others. Far from a passive participant in the getaway, defendant took an active role in disposing of the stolen merchandise, directing the coperpetrator's wantonly dangerous driving, and further attempting to escape after the fatal crash. Defendant's actions clearly evidence that he possessed the requisite intent for a felony murder conviction.

Third, defendant argues that the police pursuit of defendant and his coperpetrator somehow "deprived defendant's actions of the requisite proximate cause" necessary for first-degree felony

murder by superseding defendant's own criminal negligence. This argument is without merit. Defendant disregards the fact that his own actions caused the police chase in the first place. Defendant intended to escape the police, and was convicted on the basis of this intent, not his "criminally negligent" actions.

Fourth, defendant argues that the trial court should have granted his motion for directed verdict because the evidence demonstrated that he had reached a place of at least temporary safety in his escape from the scene of the crime before the police chase ensued. This same argument was raised and decided in the appeal of defendant's coperpetrator. *Gimotty, supra* at 258-259. For the same reasons stated in that opinion, we also find no merit to this argument.

V

Next, defendant argues that the trial court erroneously instructed the jury on the elements of first-degree felony murder and failed to instruct the jury, as mandated, as to the elements of necessarily included offenses. Defendant did not object to the trial court's jury instructions and, therefore, he failed to preserve this issue for our review. *People v VanDorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). However, we may still grant relief to avoid manifest injustice. *Id.* at 545. When read as a whole, we find that the trial court's instructions on the elements of first-degree felony murder fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). Consequently, no manifest injustice will result from our failure to review the claimed error. Moreover, any error resulting from the trial court's failure to instruct the jury on negligent homicide and accidental homicide was harmless. See *People v Mosko*, 441 Mich 496, 502; 495 NW2d 534 (1992); *People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990).

VI

Next, defendant argues that the trial court erred in imposing a term of restitution that was longer than the maximum term of restitution authorized by statute. At sentencing, the trial court ordered defendant to make restitution of "any monies that you earn throughout your prison term" to a fund to be created in memory of the victim. On appeal, defendant argues that the term of this order of restitution exceeded that which is allowable under MCL 769.1a(12); MSA 1073(12).

Because the language of the applicable statute is clear and unambiguous, we may only look at its plain meaning to resolve defendant's argument. *People v Nantelle*, 215 Mich App 77, 80; 544 NW2d 667 (1996). MCL 769.1a(12); MSA 28.1073(12) provides:

> (12) If not otherwise provided by the court under this subsection, restitution shall be made immediately. However, the court may require that the defendant make restitution under this section within a specified period or in specified installments. The end of the period or the last installment shall not be later than the following:
>
> (a) The end of the period of probation, if probation is ordered.

(b) Two years after the end of imprisonment or discharge from parole, whichever occurs later, if the court does not order probation but imposes a term of imprisonment.

(c) Three years after the date of sentencing in any other case.

Here, the trial court's order of restitution for a specified period, the term of his life prison sentence, is consistent with the language of the statute. The order ends when defendant's term of imprisonment concludes, which is allowable under the plain language of § 12(b). We find no error.

VII

Lastly, defendant argues that the trial court abused its discretion by admitting evidence of his prior theft convictions for purposes of impeachment, because they were too similar to the charged crimes of first-degree retail fraud and conspiracy to commit first-degree retail fraud.

We need not decide whether the trial court abused its discretion by admitting evidence of defendant's prior theft convictions, because the error, if any, of admitting this evidence was patently harmless. See *People v Coleman*, 210 Mich App 1, 6-7; 532 NW2d 885 (1995). The salesperson at the store where the theft occurred identified defendant and defendant admitted in his testimony that he committed first-degree retail fraud and conspiracy to commit first-degree retail fraud. In light of the strength of the properly admitted evidence and defendant's own admission to the crimes of first-degree retail fraud and conspiracy to commit first-degree retail fraud, any error stemming from the trial court's admission of defendant's prior theft convictions was harmless.

Defendant's conviction and sentence for first-degree retail fraud are vacated. We affirm in all other respects.

/s/ Maura D. Corrigan
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra