

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARQUEL SMITH,

Defendant-Appellant.

UNPUBLISHED

September 26, 1997

No. 193575

Kent Circuit Court

LC No. 95-002578-FC

Before: Griffin, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Defendant Marquel Smith was convicted of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), and sentenced to a prison term of mandatory life. He appeals as of right. We affirm.

On August 28, 1995, defendant and a friend called for a cab from a mutual friend's house. They got into the cab, asked the cab driver to take them to a location, changed the location several times, and eventually were asked to exit the cab by the cab driver. Defendant and his friend then called for another cab from another mutual friend's house and got into this second cab when it arrived. The driver of the second cab was later found dead in his cab having been shot.

First, defendant argues that insufficient evidence was presented to sustain his conviction. We review sufficiency of the evidence claims by examining the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). The elements of first-degree felony murder are: (1) killing a person, (2) with the intent to kill, to do great bodily harm or to create a high degree of risk of death or great bodily harm with the knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of a felony. *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995). Defendant only contests the sufficiency of the evidence with respect to the underlying felony of armed robbery or attempted armed robbery.

The essential elements of armed robbery are (1) an assault, and (2) a felonious taking of property from the victim's person or presence, while (3) the defendant is armed with a weapon. *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993). The essential elements of attempt are (1) intent to commit the crime, (2) an overt act necessary to the commission of the crime, and (3) failure to consummate the crime. *People v Ng*, 156 Mich App 779, 785; 402 NW2d 500 (1986). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *Allen*, *supra* at 100.

Sufficient evidence was presented from which the jury could reasonably infer that defendant had at least attempted to commit armed robbery. Friends of defendant testified that he had been wielding a gun numerous times during the evening of the incident. They also testified that defendant made the statements that he and his friend were going "jacking" and were "about to get paid." Additionally, a witness testified that after defendant and his accomplice were informed that the cab they summoned would not arrive for twenty minutes, defendant's accomplice said "that's more money for them." The driver of the first cab testified that at 2:00 a.m. defendant asked him to drive to a series of nonexistent addresses, asked him whether he had much money that night, appeared to be in control during the cab ride, and became angry when the cab driver kept radioing his dispatcher about their whereabouts. The driver of the first cab testified that he kicked defendant and his accomplice out of his cab at 1415 Broadway, and an acquaintance of defendant who lived at 1318 Broadway testified that defendant and his friend arrived at 2:30 a.m. and used her telephone to summon another cab to 1320 Broadway. A dispatcher testified that he sent the victim to 1320 Broadway and the acquaintances living at 1318 Broadway saw defendant and his accomplice enter the cab. At 2:55 a.m., the dispatcher received a phone call from police regarding a problem in the area. Thereafter, at approximately 3:30 a.m., the accomplice from whose house defendant summoned the second cab received a telephone call from defendant asking her not tell anyone that she had seen them get into a cab that night. From these facts, a jury could reasonably infer that defendant had the intent to commit an armed robbery of a cab driver and that he made an overt act necessary to commit that crime by getting into the victim's cab while armed. This is sufficient evidence to prove the underlying felony of attempted armed robbery. Consequently, sufficient evidence was presented to sustain defendant's conviction.

Second, defendant argues that the trial court erred by admitting an out-of-court statement made by a codefendant who was tried by a separate jury and did not testify at defendant's trial. We review a trial court's decision whether to admit evidence for an abuse of discretion. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (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 made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

A mutual friend of defendant and codefendant testified that after defendant and codefendant called for the first cab, and after they were told it would be another twenty minute wait until the cab would arrive, codefendant said something to the effect that that is more money for him and defendant said that they were about to get paid. She also testified that she was not sure who spoke first, but that codefendant and defendant were talking to each other when they made these statements.

Hearsay is an oral or written assertion or nonverbal conduct of a person if it is intended by the person as an assertion, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. MRE 801(a), (c). Hearsay is not admissible except as provided by the Michigan Rules of Evidence. MRE 802.

Under MRE 803(3), a statement relating to the declarant's then existing state of mind, such as intent, plan, motive, or design, but not including a statement of memory or belief to prove a fact remembered or believed, is not excluded by the hearsay rule, even though declarant is available as a witness. MRE 803(3); *People v Fisher*, 449 Mich 441, 448-450; 537 NW2d 577 (1995). Under the felony murder statute, a defendant can be found guilty of felony murder by assisting in the commission of the underlying felony. MCL 750.316(1)(b); MSA 28.548(1)(b). Defendant's knowledge that he was assisting in an armed robbery was an issue in this case. Consequently, codefendant's statement made as an expression of his intent or plan, helps to show whether defendant knew what codefendant's intent was and then to show that defendant acted in concert with that intent. Therefore, the statement is admissible as an exception to the hearsay rule under MRE 803(3). Consequently, the trial court did not abuse its discretion in admitting the statement.

Also, a statement which is offered against a party is not hearsay if made by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of conspiracy. MRE 801(d)(2)(E). To be admissible under this rule, the existence of a conspiracy or a concert of action must be proved by a preponderance of independent evidence. *People v Vega*, 413 Mich 773, 780-782; 321 NW2d 675 (1982); *People v Loy-Rafuls*, 198 Mich App 594, 599-600; 500 NW2d 480 (1993). Defendant and codefendant had been together with others during the evening, then they alone called for a cab, got in the first cab together, ultimately exited the first cab together, then called a second cab together, got into a second cab together, and arrived at a friend's house to make a phone call together. Sufficient independent evidence was presented to prove by a preponderance of the evidence that defendant and codefendant were acting in concert. Furthermore, codefendant's statement made after the first cab had been called but before getting in the first cab was made during the course of the conspiracy and in furtherance of the conspiracy. Therefore, codefendant's statement was also admissible as nonhearsay under MRE 801(d)(2)(E). Consequently, the trial court did not abuse its discretion in admitting the statement.

Affirmed.

/s/ Richard Allen Griffin
/s/ Myron H. Wahls
/s/ Roman S. Gribbs