

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN L. GRANDION,

Defendant-Appellant.

UNPUBLISHED

June 2, 1998

No. 196879

Oakland Circuit Court

LC No. 95-142363 FC

Before: Doctoroff, P.J., and Reilly and G. S. Allen*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1), and armed robbery, MCL 750.529; MSA 28.797. He was sentenced to life imprisonment without parole on the first-degree felony murder conviction, twenty to forty years' imprisonment on the conspiracy conviction and twenty to forty years' imprisonment on the armed robbery conviction. Defendant appeals as of right. We affirm his first-degree felony murder and conspiracy convictions and vacate his conviction and sentence for armed robbery.

First, defendant argues that his convictions and sentences for both felony murder and the underlying felony of armed robbery violate constitutional prohibitions against double jeopardy. We agree. Punishing a defendant for both felony murder and the underlying felony violates double jeopardy principles. *People v Bigelow*, ___ Mich App ___; ___ NW2d ___ (Docket No. 188900, issued 4/10/98), slip op at 2, citing *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996). The remedy for the double jeopardy violation is vacation of the conviction and sentence for the underlying felony. Accordingly, we vacate defendant's conviction and sentence for armed robbery conditioned on the ultimate affirmation of defendant's conviction for felony murder..

Next, defendant argues that the trial court erred in failing to instruct the jury on accessory after the fact. We disagree. In *People v Perry*, 218 Mich App 520, 530-536; 554 NW2d 362 (1996), lv gtd ___ Mich ___ (Docket No. 107621 issued 5/11/98), this Court held that accessory after the fact

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

was not a cognate lesser offense of murder. Although defendant argues that the dissent in that case is the better-reasoned analysis, we are bound by and agree with the majority's analysis.

Next, defendant argues that the trial court improperly instructed the jury concerning the intent necessary for aiding and abetting felony murder. He contends that the instructions conveyed to the jury that the intent element for aiding and abetting felony murder was satisfied by showing that defendant aided and abetted the robbery.¹ Because defendant failed to object to the instructions on this basis, we review only to determine whether manifest injustice has occurred. *People v Kelly*, 423 Mich 261, 277; 378 NW2d 365 (1991).

The trial court instructed the jury that to convict defendant of first-degree felony murder, the prosecutor must prove that defendant intended to kill, intended to do great bodily harm to the victim or knowingly created a very high risk of death or great bodily harm, knowing that death or such harm would be the likely result of his action. Concerning aiding and abetting felony murder, the court instructed the jury that the prosecutor had to show that the crime was committed, that defendant did something to assist in the commission of the crime and that when defendant gave his assistance, he intended to help another commit the crime. We believe that these instructions adequately conveyed the intent required for aiding and abetting felony murder, and therefore find no manifest injustice has occurred.

Finally, defendant argues there was insufficient evidence of malice to support his conviction for first-degree felony murder. We disagree.

According to defendant's statements, he, Achille Logan, Benson Martin and Jerene Tidwell planned to do a carjacking. Defendant knew Logan "always" carried his .22 caliber revolver, and he knew that Logan had it when they planned the carjacking. Defendant drove his car from Pontiac to Southfield. The group saw a "fresh" green Chevy Blazer at a gas station. They waited for the victim to finish pumping gas and followed him to his next stop. As soon as he stopped, defendant stopped his car directly behind the Blazer. Logan left defendant's car and got into the passenger side of the Blazer. Defendant heard a gun shot. When defendant was asked by a police sergeant if defendant was surprised or shocked when he heard the shot, he replied that he was not.

Defendant's knowledge that Logan was armed during the time of the carjacking is sufficient for a rational trier of fact to find that defendant, as an aider and abettor, participated in the crime with knowledge of Logan's intent to cause great bodily harm. *People v Turner*, 213 Mich App 558, 572; 540 NW2d 728 (1995). Defendant's lack of surprise when the gun was fired further indicates that defendant was aware of Logan's intent. Because defendant was aware of Logan's intent to at least cause great bodily harm, a rational trier of fact could find that defendant was acting with "wanton and willful disregard" sufficient to support a finding of malice under *People v Aaron*, 409 Mich 672; 299 NW2d 304 (1980). *Turner, supra* at 572-573. Therefore, we conclude that there was sufficient evidence of malice to support the felony murder conviction.

We affirm defendant's convictions for first-degree felony murder and conspiracy to commit armed robbery. We vacate defendant's conviction and sentence for armed robbery conditioned on the ultimate affirmation of defendant's conviction for felony murder..

Affirmed in part and vacated in part.

/s/ Martin M. Doctoroff

/s/ Maureen Pulte Reilly

/s/ Glen S. Allen, Jr.

¹ This was not the grounds on which defendant objected at trial. Instead, he argued that the court should have included CJI2d 8.3 concerning the scope of common unlawful enterprise in its instructions pertaining to felony murder. That instruction was properly rejected by the trial court. See *People v Kelly*, 423 Mich 261, 277-280, 285-286; 378 NW2d 365 (1991).