

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS RAYVON GILMER,

Defendant-Appellant.

UNPUBLISHED

May 25, 2006

No. 259824

Wayne Circuit Court

LC No. 04-005434-01

Before: Cavanagh, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions on two counts of felony murder in the course of a home invasion, MCL 750.316(1)(b),¹ three counts of assault with intent to murder, MCL 750.83, armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110(a)(2), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the course of a felony, MCL 750.227b. We affirm, but remand for amendment of the judgment of sentence.

Defendant first challenges the sufficiency of the evidence supporting his murder conviction, contending that the prosecution's evidence did not establish malice. After review de novo, considering the evidence in the light most favorable to the prosecutor to determine whether the essential elements were proved beyond a reasonable doubt, we disagree. See *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

Felony murder consists of second-degree murder in combination with one of the felonies enumerated in MCL 750.316. *People v Bulls*, 262 Mich App 618, 624; 687 NW2d 159 (2004). The prosecution proceeded against defendant on an aiding and abetting theory. Accordingly, this Court must determine whether the prosecution presented sufficient evidence to prove that defendant:

- (1) performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to

¹ Defendant was also charged with and convicted of two counts of first-degree premeditated murder, MCL 750.316(1)(a). The trial court vacated these convictions in an attempt to avoid violating defendant's protection against double jeopardy.

create a 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 the predicate felony. [*Id.*, citing *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003).]

The underlying felony in this case is home invasion, MCL 750.110(a)(2). A jury may infer malice from evidence that defendant “intentionally set in motion a force likely to cause death or great bodily harm,” from the nature and type of wounds inflicted, and the use of a deadly weapon. *Bulls, supra* at 626-627. Malice may not be inferred merely from the intent to commit the underlying felony. *People v Kelly*, 423 Mich 261, 273; 378 NW2d 365 (1985).

The record in this case demonstrates that defendant intended to go beyond merely forcing his way into the home. Multiple witnesses testified regarding the violent reaction of defendant and his codefendant when they were told that there were no drugs in the house. Everyone in the house was shot and either killed or seriously injured. Testimony included that defendant and his codefendant fired simultaneously in the direction of the two slain victims, that defendant shot two of the other victims at point blank range, and was also seen trying to unjam his fired weapon. Viewed in the light most favorable to the prosecution, this evidence, if believed by the jurors, was sufficient to support a rational conclusion that defendant acted with the requisite malice.

Defendant next argues that prosecutorial misconduct denied him a fair trial and that his counsel was ineffective for not objecting to the prosecutor’s allegedly improper remarks. He argues that the remarks impermissibly vouched for witnesses, placed the prestige of the prosecutor’s office behind those witnesses, and appealed to the sympathy of the jurors. We find no merit in defendant’s arguments.

Because defendant did not object below, appellate review is for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). When reviewing a claim of prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate a prosecutor’s remarks in context. *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). Further, the propriety of a prosecutor’s remarks will depend upon the particular facts of each case. *Id.* In addition, a prosecutor’s comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id.*

When read in context, it is clear that the prosecutor’s comments were not meant to personally vouch for any witness, to place the prestige of the office of the prosecutor behind any witness, or to appeal to the jurors’ sympathy. The prosecutor did not, based on extrajudicial information that the prosecutor possessed, attempt to boost the credibility of the witnesses. Instead, the prosecutor only implored the jury to weigh the credibility of the witnesses based on their testimony. Even if any of the comments were improper, a timely instruction from the court would have remedied any error. If a curative instruction could have alleviated any prejudicial effect of prosecutorial misconduct, the appellate court will not find error requiring reversal. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). The court, in fact,

gave the jury proper instructions about how to consider evidence and make credibility determinations. Absent a contrary showing, jurors are presumed to follow their instructions. *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000). Moreover, given the evidence against defendant, a few isolated remarks in closing by the prosecutor did not affect the outcome of the case. In sum, defendant has failed to demonstrate plain error.

Defendant's claim of ineffective assistance of counsel is also unpersuasive. Because the remarks to which defendant now objects were proper, any objection by his counsel at trial would have been overruled. His counsel was not ineffective for failing to make futile motions upon which the trial court would have ruled adversely. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Finally, defendant challenges his sentence on double jeopardy grounds. Generally, double jeopardy challenges present questions of law that are reviewed de novo. *People v Lett*, 466 Mich 206, 212; 644 NW2d 743 (2002). However, because this double jeopardy issue was not raised before the trial court, defendant must establish a plain error affecting his substantial rights in order to prevail. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004).

We find that the court did commit plain error in its judgment of sentence. Upon conviction of first-degree premeditated murder and first-degree felony murder, the proper remedy is to modify the conviction to specify that it is a single count of first-degree murder supported by two theories. *People v Williams*, 265 Mich App 68, 72; 692 NW2d 722 (2005); *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998). The court therefore erred when it vacated the convictions for premeditated murder. The court also erred when it imposed a separate sentence for the underlying felony of home invasion. The factual scenario is thus akin to that of *Williams* and *Bigelow*, which both held that to avoid double jeopardy the sentence for the underlying felony must be vacated. *Williams, supra* at 73; *Bigelow, supra* at 221-222. We therefore remand with instructions for the court below to amend the judgment of sentence to include a single count of first-degree murder for each victim supported by theories of premeditation and felony murder, and to vacate the sentence for the underlying felony of home invasion.

The remaining convictions do not offend principles of double jeopardy. Specifically, defendant's convictions for armed robbery and assault with intent to murder were for crimes that were directed toward the surviving victims. They were thus not underlying felonies already taken into account in his murder conviction. Defendant's argument to the contrary is neither persuasive nor supported by law.

Affirmed, but remanded for amendment of the judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto