

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUSTIN ADRIAN WATKINS,

Defendant-Appellant.

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UNPUBLISHED

October 14, 2003

No. 241422

Oakland Circuit Court

LC No. 01-180607-FC

Before: Kelly, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder,<sup>1</sup> MCL 750.316(b), assault with intent to rob while armed, MCL 750.89, two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and carrying a concealed weapon, MCL 750.227. Defendant was sentenced to life imprisonment for the felony murder conviction, twenty to forty years' imprisonment for the assault with intent to rob while armed conviction, two years for each of the felony-firearm convictions, and two to five years' imprisonment for the carrying a concealed weapons conviction. We affirm.

I. Facts

This case arose out of the attempted robbery and fatal shooting of eighteen-year old Lennel Caffey over a pair of sunglasses. Caffey, accompanied by his friend, Carlin Small, were approaching a party store when defendant exited a car and ordered Caffey to take off his Cartier sunglasses. Small testified that defendant tried to knock the glasses from Caffey's face. Defendant was only two feet away from Caffey. When Caffey raised his hand to remove the glasses, defendant pulled a gun from his waistband and shot Caffey in the chest. Caffey fell to the ground and defendant fired a second shot into Caffey's leg. Defendant fired a third shot at Caffey, but it missed him. Defendant ran back to his car and drove away with his friend Darrell Murphy.

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<sup>1</sup> The underlying felony in this case was larceny or attempted larceny. In pertinent part, MCL 750.316(1)(b) (felony murder), provides that a defendant is guilty of first degree murder if the killing is "committed in the perpetration of, or attempt to perpetrate, . . . larceny of any kind."

Murphy testified that defendant said that he was “going to get them” when he saw Caffey and Small outside the party store. Murphy testified that Caffey attempted to grab defendant before the shooting. When Murphy later asked defendant why he had shot Caffey, defendant replied that “[h]e wasn’t about to be tussling with anybody.” Caffey was pronounced dead upon arrival at the hospital.

## II. Analysis

### A. Jury Instructions

Defendant argues that the trial court erred in failing to instruct the jury as to (1) the defense of another and (2) imperfect self-defense. Defendant also argues that the trial court improperly instructed the jury that it could infer defendant’s state of mind from his use of a dangerous weapon.

These claims of instructional error are waived. *People v Carter*, 462 Mich 206, 214-219; 612 NW2d 144 (2000). Defendant affirmatively waived any errors when he specifically indicated to the trial court at the time the prosecution rested its case that the parties were in agreement with the jury instructions and, after the jury was instructed, when he stated that he had no objections to the instructions as given. *Id.*, *People v Lowery*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 240001, issued August 21, 2003) slip op p 3; *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001). Because any objections were waived, there are no errors to review. *Ortiz, supra*. Further, we decline defendant’s invitation to extend the doctrine of imperfect self-defense to first-degree murder. See *People v Landrum*, 434 Mich 482, 507-509; 456 NW2d 10 (1990). But see *People v Posey*, 459 Mich 960; 590 NW2d 577 (1999) (“[o]ur resolution of this matter should not be construed as a ruling that ‘imperfect self-defense’ is recognized as a theory which would reduce murder to manslaughter.”)

### B. Sufficiency of the Evidence

Defendant next argues that there was insufficient evidence to support his conviction for first-degree felony-murder. Defendant did not need to take any special steps to preserve this issue for appeal. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). The test for determining whether sufficient evidence was presented to support a criminal conviction is whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable trier of fact in finding that the essential elements of an offense were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

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 [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316. It is not necessary that the murder be contemporaneous with the enumerated felony. The statute requires only that the defendant intended to commit the underlying felony at the time the

homicide occurred. [*People v Kelly*, 231 Mich App 627, 642-643; 588 NW2d 480 (1998) (citations omitted).]

The second element of felony murder, malice, may be inferred from the facts and circumstances of the killing. “A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm.” *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000), quoting *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999).

Defendant challenges the second element and argues that the fact he possessed a dangerous weapon when he committed the offense does not provide a reasonable basis to establish malice. Specifically, defendant asserts that there was no evidence to show that “he knew the death was likely to occur in the manner in which it did.” We disagree. Defendant’s malice, or intent to create a high risk of death or great bodily harm with knowledge that death or great bodily harm will be a probable result, could be inferred by the fact that defendant pulled out a gun and shot the decedent in the chest at a very close range and then fired two more shots at the victim while he was laying on the ground.

Defendant’s next argument on appeal is unclear. We cannot discern from defendant’s brief on appeal whether his cursory argument challenges the sufficiency of the evidence with respect to the third element of felony murder or the sufficiency of the evidence as it relates to his conviction for assault with intent to rob while armed. The two cases upon which defendant relies discuss only armed robbery, MCL 750.529, of which defendant was neither charged nor convicted. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority. *Kelly*, *supra* at 640-641. Because defendant does not argue the merits of this claim it is considered abandoned. *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992).

#### C. Defendant’s Right to Testify

Defendant next argues that he was denied a fair trial because he was denied the right to testify on his own behalf and there was no waiver of that right made on the record. Defendant also argues that no defense witnesses testified. Defendant’s arguments lack merit. There is no requirement in Michigan that there be an on-the-record waiver of a defendant’s right to testify. *People v Harris*, 190 Mich App 652, 661; 476 NW2d 767 (1991). Contrary to defendant’s claim, the record establishes that defendant called a witness to testify on his behalf.

#### D. Double Jeopardy

Defendant claims that his conviction and sentence for assault with intent to rob while armed must be vacated as violative of double jeopardy. A claim of double jeopardy involves a question of law to be reviewed de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). The issue of double jeopardy presents an important constitutional question that is considered on appeal regardless of whether the defendant raised the issue at the trial court level. *People v Colon*, 250 Mich App 59, 63; 644 NW2d 790 (2002). 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).

Defendant correctly argues that he cannot be convicted of both first-degree felony murder and the predicate felony. *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996). However, defendant's entire argument is grounded on the erroneous proposition that the predicate felony was assault with intent to rob while armed. That was not the predicate felony in this case. The felony information and the jury verdict indicate that the predicate felony was larceny or attempted larceny. Defendant does not claim on appeal that larceny and assault with intent to rob while armed are the same offenses. Defendant presents nothing whatsoever to support his claim that the assault with intent to rob while armed conviction should be vacated. Therefore, this claim is deemed abandoned. *Kent, supra*.

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ Mark J. Cavanagh  
/s/ Michael J. Talbot