STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SEAN STEPHEN TAYLOR,

Defendant-Appellant.

UNPUBLISHED
February 10, 2005

No. 251148
Jackson Circuit Court
LC No. 03-000129-FC

Before: Markey, Murphy and O'Connell, JJ.

PER CURIAM.

A jury convicted defendant of felony murder, MCL 750.316, assault with intent to rob while armed, MCL 750.89, assault with intent to murder, MCL 750.83, and assault with intent to rob while unarmed, MCL 750.88. Defendant was sentenced as a second habitual offender, MCL 769.10, to life imprisonment for the felony murder conviction, along with a concurrent 25 to 50 year sentence for the assault with intent to rob while armed conviction, a concurrent 29 to 60 year sentence for the assault with intent to murder conviction and a concurrent 12- to 22½-year sentence for the assault with intent to rob while unarmed conviction. Defendant appeals by right. We affirm but vacate the assault with intent to rob while armed conviction.

I.

Defendant's convictions arise from the shooting death of Trevor Chambers during a robbery that occurred in Jackson. Joel Cropper testified that while his friend, Chambers, was using a pay phone, he observed two men who were later identified as defendant and Philip Thompson, cross the street and approach them. Cropper testified that Thompson walked up to Chambers, put a gun to his throat, and told him to empty his pockets. Cropper testified that while Thompson had the gun to Chamber's throat, defendant approached Cropper and told him "you all is in the wrong neighborhood," and told him to empty his pockets. Additionally, Detective Timothy R. Gonzalez testified about how defendant told him he had discussed with Thompson "hitting a lick" or committing a robbery. Gonzalez further stated that Cropper identified defendant and Thompson as the perpetrators of the shooting and robbery.

II.

Defendant argues that there was insufficient evidence presented by the prosecution to find defendant guilty beyond a reasonable doubt of felony murder, MCL 750.316, assault with intent to murder, MCL 750.83, and assault with intent to rob while unarmed, MCL 750.88. We disagree.

In evaluating a claim of insufficient evidence**,** this Court views the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 478 (1992), modified 441 Mich 1201 (1992). This Court will not interfere with the jury's determination regarding the weight of the evidence or the credibility of the witnesses. *Id*. at 514-515. "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant argues there was insufficient evidence presented at trial to establish that defendant had the requisite intent to be convicted of felony murder. We disagree. Our Supreme Court in *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999), quoting *People v Turner*, 213 Mich App 558, 566, 540 NW2d 728 (1995), stated:

> "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 [the statute, including armed robbery.]"

Intent may be inferred from all the facts and circumstances, *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987), and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient, *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004). Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *Id*. at 270. Moreover, if an aider and abettor participated in a crime with knowledge of the principal's intent to kill or to cause great bodily harm, the aider and abettor acted with wanton and willful disregard sufficient to support a finding of malice. *People v Riley*, 468 Mich 135, 141; 659 NW2d 611 (2003).

In *People v Feldmann*, 181 Mich App 523, 533; 449 NW2d 692 (1989), this Court held that although a defendant may not have initially intended for his co-defendant to brandish a gun and then shoot the victim of a planned robbery, there was sufficient evidence for a felony murder conviction if the "defendant became aware of the intention to kill at some point during the robbery." In *Feldmann*, the defendant knew his co-defendant possessed a gun and then tied up the victims during the robbery while the co-defendant held them at gunpoint. *Id.* His co-defendant also told the defendant that the victims would "have to go." *Id.* Based on these facts, this Court found there was sufficient evidence to convict the defendant of felony murder. *Id.*

Similarly, in *Turner, supra* at 572, the issue was whether a defendant participated in the armed robbery with knowledge of a co-defendant's intent to kill. This Court found that because the defendant knew his co-defendant was armed during the commission of the robbery, there was sufficient evidence for a rational trier of fact to find that the defendant participated in the robbery with knowledge of co-defendant's intent to cause great bodily harm. *Id.* Therefore, this Court found that viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to convict defendant of felony murder. *Id.* at 573.

In this case, although defendant told police during his interrogation that he never intended Thompson to shoot Chambers or Cropper, he also stated that he knew Thompson possessed a gun and knew that he and Thompson would be "hitting a lick", i.e., committing a robbery using the gun. Therefore, similar to *Turner* and *Feldmann,* if one views the evidence of intent in a light most favorable to the prosecution, defendant's knowledge that Thompson possessed the gun is enough for a rational trier of fact to conclude beyond a reasonable doubt that defendant possessed the requisite intent to support his felony murder conviction.

Defendant next argues there was insufficient evidence of an assault for a jury to convict him of the assault with intent to rob while unarmed. We disagree. The elements of the offense of assault with intent to rob while unarmed are: (1) an assault with force and violence, (2) an intent to rob and steal, and (3) while being unarmed. MCL 750.88; *People v Reeves,* 458 Mich 236, 242; 580 NW2d 433 (1998). Defendant correctly points out that his intended victim of the assault with intent to rob, Joel Cropper, testified that he never feared defendant. From this testimony defendant argues that it was impossible to establish he assaulted Cropper. Defendant relies on *Reeves,* which held that when assault with intent to rob while unarmed is charged, it is unnecessary to establish the perpetrator possessed the actual ability to inflict threatened harm as long as the victim reasonably apprehended an imminent battery. *Reeves, supra* at 244. "[T]he inquiry turns on what the victim perceived and whether the apprehension of imminent injury was reasonable." *Id.* Defendant asserts because he never put Cropper in fear of "imminent injury," the jury could not rationally conclude an assault occurred.

Defendant's argument fails because it does not consider that there are two kinds of assault: (1) a battery or attempted battery and (2) placing one in reasonable apprehension of a battery. *People v Nickens,* 470 Mich 622, 628; 685 NW2d 657 (2004). "[A] simple criminal assault 'is made out from either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.'" *Reeves, supra* at 240, quoting *People v Sanford,* 402 Mich 460, 479; 265 NW2d 1 (1978), adopting Perkins on Criminal Law (2d ed), p 117. A "battery" is "an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person." *Reeves, supra* at 240 n 4 (citations omitted). The *Reeves* Court only addressed and analyzed the reasonable apprehension form of assault, concluding that when a robbery victim reasonably fears a battery, the robber need not have the actual ability to perpetrate the battery. *Reeves, supra* at 244.

Here, Cropper testified that he did not fear defendant. But Cropper also testified that defendant grabbed Cropper's coat to keep Cropper from backing away, and although Cropper told defendant he had nothing, defendant stuck his hand in Cropper's pocket. Indeed, Cropper testified that defendant "grabbed my coat . . . so I wouldn't go anywhere, because I was pulling -

- because I was trying to get away from him. I pulled away so I could kind of, you know, get away from him. I didn't want him touching me." This testimony clearly proved a forceful, unconsented, offensive touching, and is sufficient for a rational jury to have concluded defendant perpetrated a "battery." "[A] battery is the successful accomplishment of an attempted-battery assault." *Nickens, supra* at 628. Consequently, sufficient existed to permit a rational jury to find all of the elements of assault with intent to commit unarmed robbery beyond a reasonable doubt.

Finally, defendant argues there was insufficient evidence to find him guilty beyond a reasonable doubt of assault with intent to commit murder under an aiding and abetting theory. Specifically, defendant argues the intent to kill element was not established because defendant never agreed or even knew the robbery would include shooting Cropper in the back. We disagree. The elements of assault with intent to commit murder are: (1) an assault; (2) with an actual intent to kill; (3) which, if successful, would make the killing murder. *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999). The intent to kill may be proven by inference from any facts in evidence, and the intent may exist without directing it at any particular victim. *Id.* at 658. We find that similar to defendant's argument on the felony murder conviction, although defendant may not have been aware that Thompson would shoot Cropper in the back, defendant became aware of Thompson's intent to shoot Cropper after the robbery commenced. Thus, defendant's knowledge that Thompson intended to shoot and kill Cropper can be inferred beyond a reasonable doubt. *Fennell, supra* at 270-271.

III.

Defendant argues that when he was excused to use the bathroom during jury voir dire, the jury saw his shackles, and as result, defendant was denied his presumption of innocence. We disagree.

Defendant's claim is reviewed for plain error affecting substantial rights because the alleged error was not preserved by a contemporaneous objection and a request for a curative instruction. *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. *Carines, supra* at 763-764.

A defendant in shackles presents an image in conflict with the presumption of innocence. Accordingly, the shackling of an accused at trial is disfavored. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). To obtain the reversal of a conviction on the basis that he was in restraints in the presence of the jury, a defendant must establish that he was prejudiced by the exposure. *People v Moore*, 164 Mich App 378, 384-385; 417 NW2d 508 (1987), modified on other grounds 433 Mich 851 (1989). The situation here is analogous to that in *People v Herndon*, 98 Mich App 668, 673; NW2d (1980). There, this Court stated:

> Although evidence in the record indicates that defendant may have been in the presence of the jury while in handcuffs, there is no evidence that would indicate that any member of the jury ever saw handcuffs on defendant. Further, defense counsel did not request an evidentiary hearing to inquire as to whether members of the jury saw shackles on defendant and, if they did, whether they were thereby

> prejudiced. See, *People v Panko*, [34 Mich App 297; 191 NW2d 75 (1971)] . . . . In the absence of such an evidentiary record we are unable to hold that defendant was denied his right to a fair and impartial jury.

Similarly, in this case, defendant presented no evidence that a juror who actually deliberated defendant's case saw him in shackles. Moreover, the record indicates that the trial court repeatedly instructed the jury panel not to draw any negative inferences from the fact that defendant was in custody and on trial. The trial court also asked the prospective jurors if anyone thought that defendant was more likely to be guilty of an offense because he was on trial. None of the prospective jurors responded affirmatively to the trial court's questioning. Accordingly, defendant has not established prejudice and is not entitled to relief.

IV.

Defendant argues that the trial court erroneously refused to instruct the jury with the elements of second-degree murder because, according to *People v Jenkins*, 395 Mich 440, 442; 236 NW2d 503 (1975), in every trial for first-degree murder, the trial court is required to instruct the jury on the lesser included offense of second-degree murder. We disagree.

We review de novo claims of instructional error. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002), remanded 467 Mich 888; 653 NW2d 406 (2002), on remand 256 Mich App 674; 671 NW2d 545 (2003). The determination whether an offense is a lesser included offense is a question of law subject to de novo review. *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003).

Our Supreme Court in *People v Cornell*, 466 Mich 335, 358, n 13; 646 NW2d 127 (2002), overruled *Jenkins'* requirement that a jury be instructed on second-degree murder in every case when it is instructed on first-degree murder. Under *Cornell*, "an inferior-offense instruction is appropriate only if the lesser offense is necessarily included in the greater offense, meaning, all the elements of the lesser offense are included in the greater offense, and a rational view of the evidence would support such an instruction." *Mendoza*, *supra* at 533, citing *Cornell*, *supra* at 357. Accordingly, "an instruction on second-degree murder, as a necessarily included lesser included offense of first-degree murder . . . will be proper if . . . [an] element differentiating the two offenses is disputed and the evidence would support a conviction of second-degree murder." *Id*. at 357 n 13.

Therefore, because the element differentiating second-degree murder from first-degree felony murder is that the latter is committed in the perpetration or attempted perpetration of an enumerated felony, MCL 750.316(1)(b), the ultimate question here is whether a factual dispute existed at trial over defendant having committed a felony. At trial, defendant never disputed having committed a robbery, or in his words, "hitting a lick." Defendant did not dispute at trial that he told police he planned to commit a robbery. Defendant only argued at trial that he never intended anyone to be hurt or killed during the robbery. Therefore, under *Cornell*, the trial court did not commit error by failing to provide the second-degree murder instruction because there was no dispute on the element differentiating the two crimes: the underlying felony.

V.

Defendant argues that the Fifth Amendment Double Jeopardy Clause prohibits his convictions for both first-degree felony murder and the underlying felony of assault with intent to rob while armed. We agree. A double jeopardy claim presents a question of law, which is reviewed de novo on appeal. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

Convictions and sentences for both felony murder and the predicate felony violate the multiple punishments prohibition of the Double Jeopardy Clause. *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995). In this case, defendant was convicted of both felony murder and the underlying felony. The proper remedy is to vacate the conviction and sentence for the underlying felony. *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996). Therefore, we vacate defendant's assault with intent to rob while armed conviction and sentence.

VI.

Last, defendant argues that his felony murder conviction must be reversed because assault with intent to rob while armed is not one of the enumerated felonies in the felony murder statute. This Court recently rejected this identical argument in *People v Akins*, 259 Mich App 545, 553; 675 NW2d 863 (2003). We are required to follow *Akins* and must reject defendant's argument. MCR 7.215(J)(1).

We affirm defendant's convictions and sentences except that for assault with intent to rob while armed, which we vacate.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Peter D. O'Connell