IN THE COURT OF APPEALS OF IOWA

No. 0-706 / 09-1897
Filed February 9, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHRISTOPHER WILLIAM PULLMAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Gary D. McKendrick, Judge.

Appeal from convictions of first-degree murder and assault causing serious injury. **REVERSED IN PART; SENTENCE VACATED IN PART.**

Mark C. Smith, State Appellate Defender, and David Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, Michael Walton, County Attorney, and Julie Walton and William Ripley, Assistant County Attorneys, for appellee.

Heard by Sackett, C.J., and Vogel and Vaitheswaran, JJ. Tabor, J., takes no part.

SACKETT, C.J.

Defendant-appellant, Christopher Pullman, appeals from the judgment and sentence entered following a jury trial and verdicts of guilty of the offenses of murder in the first degree and assault causing serious injury. Pullman contends (1) there was insufficient evidence he aided and abetted in the murder, (2) the court improperly coerced him into waiving the reporting of voir dire, and (3) the court improperly submitted the felony-murder alternative to murder in the first degree. We reverse the conviction of murder in the first degree and vacate the portion of the sentence attributable to the murder conviction.

I. Background and Proceedings.

From the evidence in the record, a jury could find the following facts. On October 28, 2008, Deante Young and Sylvester Eddings were in a car when Young was shot in the face by a person or persons unknown. Eddings drove Young to the hospital. When Dennisha Lard visited Young in the hospital, Young asked Lard to retrieve something from Eddings for him and to turn it over to Pullman. Eddings drove Lard to several locations. At one, Eddings went into an apartment by himself, came back, and gave Lard a baggie of what appeared to be crack cocaine. Lard later gave the baggie to Pullman, who was supposed to take it to Young.

A day or so later Lard received a telephone call from Young, who was angry about the drugs. Young later spoke with Eddings and told him he either wanted his money or the drugs.

On November 3, between about 10:40 a.m. and 3:05 p.m., there were fourteen contacts or attempted contacts between Pullman's cell phone and Young's cell phone. During the same period, the morning of November 3 and the first half of the afternoon, Eddings made or received seventy cell phone contacts.

Around 3:15 p.m. Eddings was walking along a street in Rock Island, Illinois, with two friends when Pullman, driving Dennisha Lard's Oldsmobile Aurora, with Young in the front passenger seat, stopped nearby and spoke to Eddings. After Eddings spoke with Young, he got into the back seat of the car behind Pullman.

Eddings made or received six more cell phone calls between about 3:15 p.m. and 3:45 p.m. After that, Eddings's phone received phone-mail messages and text messages, but there were no further calls or messages from Eddings. Several of Eddings' friends tried to call him, but Eddings did not answer.

Cell phone company records showed the cell phones of Pullman, Young, and Eddings moved together for a while, operating through the same towers at or near the same times, until all of the phones reached a location north of Davenport. After that, Eddings's phone did not move, but Pullman's and Young's continued to move together through the Quad Cities until about 5:35 p.m.

Two days later, on November 5, a man found Eddings's body in his pole barn north of Davenport. The body was dressed in the same clothes Eddings had been wearing on November 3, when he got into the car with Pullman and Young. Eddings had been shot three times in the chest. There also was a bullet wound in his upper right arm. The bullets had passed through his body. The

cause of Eddings's death was multiple gunshot wounds, but the medical examiner did not identify any specific wound as the fatal one.

After hearing that Eddings had been killed, Lard repeatedly asked Young to return her car. On November 11, Young purchased a van from a car dealership in Moline. At one point, while talking to the salesman, Young excused himself for a moment, went next door to the parking lot of a motel, got into an Oldsmobile Aurora, and returned to the dealership. Two days later, police recovered Lard's Aurora from the motel parking lot. An examination of Lard's car revealed bullet holes in the back seat cushion and traces of blood that was identified as Eddings's. Two bullets were retrieved and an X-ray revealed another lodged in the seat cushion.

Police arrested Young at the apartment of Pullman's sister. When the police first arrived, Young briefly went into the bathroom. After Pullman's sister consented to a search of her apartment, the police found a semiautomatic handgun in the bathroom. Ballistics tests revealed it was the murder weapon.

Pullman was arrested and charged by trial information with murder in the first degree and willful injury. The court denied Pullman's motion to sever his trial from Young's. Voir dire was not reported. Pullman and Young were tried together—Pullman to a jury, Young to the court. The jury found Pullman guilty of murder in the first degree and assault resulting in serious injury (a lesser-included offense of willful injury). The court denied Pullman's motion for new trial and sentenced him to life in prison for the murder conviction and five years in prison on the assault conviction, the sentences to be served concurrently.

II. Merits.

Felony Murder. Pullman contends the court erred in submitting the felony murder alternative to the jury over counsel's objection. We review challenges to jury instructions for correction of errors at law. *State v. Spates*, 779 N.W.2d 770, 775 (Iowa 2010). We review to determine whether the challenged instruction accurately states the law and is supported by substantial evidence. *State v. Predka*, 555 N.W.2d 202, 204 (Iowa 1996). Error in giving a particular instruction does not warrant reversal unless the error was prejudicial. *Thavenet v. Davis*, 589 N.W.2d 233, 236 (Iowa 1999).

Jury Instruction 10 set forth the elements of murder the State had to prove.

> The State must prove all the following elements of Murder in the First Degree under Count 1 of the Trial Information:
> 1. On or about the 3rd day of November, 2008, the defendant assaulted Sylvester Eddings, and the assault must have been separate and distinct from any assault under Count 2 of the Trial Information.
> 2. Sylvester Eddings died as a result of being assaulted.
> 3. The defendant acted with malice aforethought.
> 4. The defendant:
>
> a. acted willfully, deliberately, premeditatedly and with a specific intent to kill Sylvester Eddings; or
>
> b. was participating in the offense of Willful Injury Resulting in Serious Injury or Assault Resulting in Serious Injury.

Element four allowed the jury to convict defendant of murder in the first degree either on a finding of premeditation or of participation in a felony. The verdict form does not specify which alternative the jury used as the basis for finding Pullman guilty of murder in the first degree. "[T]he validity of a verdict based on facts legally supporting one theory for conviction of a defendant does not negate the possibility of a wrongful conviction of a defendant under a theory containing

legal error." *State v. Martens*, 569 N.W.2d 482, 485 (Iowa 1997). Hence, if one of the two alternatives in element four contains legal error, reversal would be required. *Id.*; *see State v. Hogrefe*, 557 N.W.2d 871, 881 (Iowa 1996) (noting a general verdict of guilty does not allow the court to determine which theory the jury accepted). Specifically, Pullman argues the shooting cannot serve as the predicate felony for felony murder and also as the act supporting conviction of the felony of willful injury or the lesser-included offense of assault resulting in serious injury. *See State v. Heemstra*, 721 N.W.2d 549, 553 (Iowa 2006) ("[I]f the act causing willful injury is the same act that causes the victim's death, the former is merged into the murder and therefore cannot serve as the predicate felony for felony-murder purposes.").

> First-degree murder under Iowa Code section 707.2(1) requires proof that the murder was committed "willfully, deliberately, and with premeditation." In contrast, first-degree murder based on the felony-murder rule under section 707.2(2) does not require proof of any of these elements; they are presumed to exist if the State proves participation in the underlying forcible felony.
>
> The rationale of the felony-murder rule is that certain crimes are so inherently dangerous that proof of participating in these crimes may obviate the need for showing all of the elements normally required for first-degree murder.

Id. at 554 (citation omitted). After examining cases from other jurisdictions and prior Iowa cases, the supreme court continued:

> On further reflection, we adhere to the view that willful injury is a forcible felony under Iowa Code section 702.11 and, in *some circumstances*, may serve as a predicate for felony-murder purposes. For example, if the defendant assaulted the victim twice, first without killing him and second with fatal results, the former could be considered as a predicate felony, but the second could not because it would be merged with the murder.

Id. at 557 (emphasis in original). The district court, relying on the evidence Eddings had been shot three times, determined each shot was a separate assault. Therefore, one or two shots could form the basis for a willful injury conviction or assault resulting in serious injury conviction and the other shot the basis for a felony-murder conviction. Defendant argues there was only one assault—that the shots all were fired in a single burst with no pause. He further argues the medical examiner testified Eddings died of multiple gunshot wounds and could not identify any single shot as the cause of death.

The State contends the evidence supports the district court's instruction because each shot was an assault resulting in serious injury as defined in the statute. *See* Iowa Code §§ 708.1; .2(4); .4(1); 702.18(1). The medical examiner testified each shot posed a substantial risk of death to the victim. In the context of sexual abuse, the supreme court has assumed that several assaults within a short period of time could for the basis for finding a defendant had committed separate and distinct crimes. *See State v. Constable*, 505 N.W.2d 473, 477 (Iowa 1993). In the context of a felony-murder instruction, "if the defendant assaulted the victim twice, first without killing him and second with fatal results, the former could be considered as a predicate felony, but the second could not because it would be merged with the murder." *Heemstra*, 721 N.W.2d at 557. The supreme court recently restated and clarified its analysis:

> After reconsidering the issue, we held in *Heemstra* that where the act causing willful injury is the same act that caused the victim's death, the former merges with the murder and cannot serve as a predicate felony for felony-murder purposes. This is not to say, however, that willful injury could never serve as the predicate felony for felony-murder purposes. We narrowed *Heemstra's* scope by

> noting, for example, that where a defendant assaulted the victim twice, first without killing him and second with fatal results, only the second act would be merged with the murder and that the first act could be considered as a predicate felony. Thus, the merger rule announced in *Heemstra* applied only in cases involving a single felonious assault on the victim which results in the victim's death.

Goosman v. State, 764 N.W.2d 539, 541 (Iowa 2009) (citations and internal quotations omitted).

The supreme court has had two opportunities since *Goosman* to consider what actions can serve to support conviction of the predicate felony without merging with the felony murder conviction: *State v. Millbrook*, 788 N.W.2d 647 (Iowa 2010), and *State v. Tribble*, 790 N.W.2d 121 (Iowa 2010).

In *Millbrook*, the defendant claimed "the seven shots fired by him constitute one act of intimidation, as they were fired one after the other with no break in the shooting." *Millbrook*, 788 N.W.2d at 652. The defendant also opened the door of the van in which he was riding, thus enabling another passenger to shoot. *Id.* This separate act supported a conviction of aiding and abetting the other passenger's act of intimidation with a dangerous weapon, a forcible felony. *Id.* at 652-53. The court stated:

> *[I]t is unnecessary for us to determine whether the seven shots fired by Millbrook constitute one act of intimidation.* Moreover, because Millbrook's firing of his gun need not serve as the predicate felony, the State's failure to prove that Howard was hit by a shot subsequent to the first shot that arguably constituted intimidation is not fatal to the defendant's felony-murder conviction.

Id. at 654 (emphasis added).

In *Tribble*, the evidence showed at least three separate blunt-force impacts to the head and death that was caused by suffocation or strangulation. *Tribble*, 790 N.W.2d at 123. The defendant argued "an act resulting in

nonspecific asphyxia and acts resulting in blunt-force trauma are not separate and discrete acts to support felony murder, but are acts of a single assault." *Id.* at 124. He also argued "separate acts of assault could not be established to support the felony-murder alternative because the head injuries resulting from the forcible felony of willful injury were contributing factors" to the death. *Id*. "Ultimately, Tribble asserted willful injury cannot serve as a predicate felony under the felony-murder statute when the assault used to support the forcible felony of willful injury is a contributing factor in the death." *Id.* The supreme court stated:

> The facts must first support an underlying forcible felony, then separately support an act or acts resulting in the killing of another. This approach is the essence of the felony-murder doctrine. When a person engages in conduct dangerous enough to be identified by our legislature as a predicate felony for felony murder, the elements of the felony-murder statute are satisfied if the person also engages in an act causing death while participating in the dangerous conduct. The statute places no legal test for the independent-act requirement.
>
> One component of the independent-act requirement is the second act must kill another person. *See* Iowa Code § 707.2(2). In *Heemstra*, we indicated the second act must cause the death of another person. 721 N.W.2d at 557–58. Thus, while the evidence must establish the first act was an element of the predicate felony, the evidence must further establish that a separate act caused death to another. The evidence must establish both the act and that the act caused death. Without such evidence, the felony-murder doctrine does not apply.

Id. at 126. The court then applied its analysis to the facts of the case.

> In this case, substantial evidence supported a finding that an act of strangulation, choking, or drowning was a factual cause of Tracy's death by asphyxia. Substantial evidence also supported a finding of the commission of the forcible felony of willful injury causing serious injury based on a separate earlier act of blunt-force trauma to Tracy's head. The facts further supported a finding that the head trauma and asphyxia were inflicted by separate acts, with the head trauma occurring first followed by a separate act resulting

> in the asphyxia. Thus, separate, independent acts were identified by the evidence. Moreover, the evidence showed the act causing asphyxia was a factual cause of death. In fact, Tribble does not contest this evidence. Consequently, it is not important under the felony-murder analysis whether or not the separate earlier acts of blunt-force trauma were also a factual cause of death. If the acts of blunt-force trauma were also a factual cause of death, felony murder applies in this case because a separate act of asphyxia was also a factual cause. If the acts of blunt-force trauma were not a factual cause of death, felony murder likewise applies because the blunt-force trauma would satisfy the willful-injury elements of acts intended to cause serious injury and causing serious injury, followed by a separate act causing death by asphyxia.

Id. at 129.

In both *Millbrook* and *Tribble* the supreme court *could have* found multiple incidents of the same action (gunshot, blunt-force trauma) supported both the underlying felony and the felony-murder conviction, but did not expressly resolve the issue. In both cases, the supreme court pointed to two *different* acts, not merely repetitions of the same act. "We think Millbrook's aiding and abetting of White's commission of intimidation with a dangerous weapon with intent *is sufficiently independent of* Millbrook's firing of his gun into the crowd so as to support his conviction of felony murder." *Millbrook*, 788 N.W.2d at 653-54 (emphasis added). "The facts must first support an underlying forcible felony, then *separately* support an act or acts resulting in the killing of another." *Tribble*, 790 N.W.2d at 126 (emphasis added). "[W]hile the evidence must establish the first act was an element of the predicate felony, the evidence must further establish that a separate act caused death." *Id.*

In the instant case, the medical examiner testified the victim died from multiple gunshot wounds, but could not identify any shot as causing the death. The district court concluded the three shots constituted three *separate* assaults.

Following the analysis in *Millbrook* and *Tribble*, we conclude the three separate shots were not "sufficiently independent" of each other to support a conviction of felony murder, *Millbrook*, 788 N.W.2d at 654, and do not "separately support" both an underlying forcible felony and acts resulting in the killing, *Tribble*, 790 N.W.2d at 190.

The State charged defendant with murder in the first degree under the alternative theories of premeditation and felony murder. The jury was instructed on both alternatives, over defendant's objection. We have determined it was error to submit the felony-murder alternative. The jury rendered a general verdict of guilty. "When circumstances make it impossible for the court to determine whether a verdict rests on a valid legal basis or on an alternative invalid basis, we . . . assume the verdict is based on the invalid ground." *State v. Lathrop*, 781 N.W.2d 288, 297 (Iowa 2010); *see, e.g.*, *Heemstra*, 721 N.W.2d at 558-59 (reversing because general verdict did not reveal whether it rested on legally-flawed ground); *Hogrefe*, 557 N.W.2d at 881 (reversing where three theories were submitted to jury but only one was supported by substantial evidence). Because we are unable to determine from a general verdict which alternative theory of murder the jury based its decision on, we reverse defendant's conviction of murder in the first degree. We vacate the portion of his sentence attributable to the murder conviction.

Having determined we must reverse defendant's conviction of murder in the first degree, we need not address his claims concerning the sufficiency of the evidence of aiding and abetting or the lack of reporting of voir dire.

REVERSED IN PART; SENTENCE VACATED IN PART.