

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JENNIFER M. PRUITT,

Defendant-Appellant.

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UNPUBLISHED

August 13, 1996

No. 170648

LC No. 93-124150

Before: Young, P.J., and Corrigan and M.J. Callahan,\* JJ.

PER CURIAM.

Defendant appeals by right her jury trial convictions of felony murder-armed robbery and felony murder-larceny, MCL 750.316; MSA 28.548, second-degree murder, MCL 750.317; MSA 28.549, and armed robbery, MCL 750.529; MSA 28.797, arising from the murder of Elmer Heichel. Defendant was charged with aiding and abetting the offenses.<sup>1</sup> The court sentenced defendant to terms of life imprisonment for the second-degree murder conviction, the felony murder convictions, and the armed robbery conviction. We affirm in part and reverse in part.

On August 29, 1992, in the early morning hours, defendant informed codefendant Donnell Miracle<sup>2</sup> that Elmer Heichel, an elderly neighbor, had “a lot of money.” Codefendant told defendant that she was going to obtain money from the victim and would hurt him if necessary. Defendant and codefendant put socks on their hands, climbed out the window, and entered the victim’s unlocked home. Defendant was present when Miracle stabbed the victim 27 times. Both women later returned to the scene to clean up their fingerprints. Defendant and codefendant took the victim’s wallet containing \$93.00, a carton of cigarettes, a watch, a camera, a lighter and rings from the victim’s home.

Defendant first argues that the prosecutor improperly charged her with three counts of murder arising from one death. Because ample evidence supported the prosecutor’s decision to charge defendant with each count of first-degree premeditated murder, felony murder-armed robbery, and felony murder-larceny, the prosecution did not abuse its discretion in charging defendant. *People v Oxendine*, 201 Mich App 372, 377; 506 NW2d 885 (1993).

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

Defendant further argues that her convictions for second-degree murder, felony murder-larceny, felony murder-armed robbery and armed robbery and life sentences for each of these convictions violated her right against double jeopardy. US Const, Am V; Const 1963, art 1, § 15. We agree. We affirm defendant's felony murder-armed robbery conviction, but vacate her convictions for felony murder-larceny, second-degree murder, and armed robbery because they offend the constitutional guarantees against double jeopardy. *People v Passeno*, 195 Mich App 91, 95-96; 489 NW2d 152 (1992). *Passeno* held that "because felony murder requires proof of an element not required for a conviction of second-degree murder," the appropriate remedy is to affirm the felony murder conviction and vacate the second-degree murder conviction. *Id.* at 96. *Passeno* further mandated that when a defendant is wrongly convicted of both felony murder and the underlying felony, the remedy is to vacate the underlying felony. *Id.* at 96-97.

Next, defendant contends that the trial court improperly instructed the jury. We disagree. Because defendant failed to object to the trial court's instructions, we review this claim for manifest injustice. *People v Ferguson*, 208 Mich App 508, 510; 528 NW2d 825 (1995). First, contrary to defendant's assertion, the trial court did not err in omitting CJI2d 3.9, which is given only if intent is disputed or the jury expresses confusion regarding the necessary intent. *People v Beaudin*, 417 Mich 570; 339 NW2d 461 (1983). Defendant, who was charged as an aider and abettor, did not dispute her codefendant's intent. The court gave CJI2d 18.1, the standard instruction for armed robbery. The trial court did not err in this respect. Additionally, having reviewed the instructions on felony murder-larceny in context, we conclude that the instruction on this charge was entirely proper. *People v Moldenhauer*, 210 Mich App 158; 533 NW2d 9 (1995). Regarding defendant's contention that the unobjected to aiding and abetting instruction was improper, the record reflects overwhelming evidence of the intent necessary for aiding and abetting. We cannot identify any injustice in the instructions.

Defendant further contends that counsel was ineffective in failing to object to the prosecutor's decision to overcharge her and the trial court's alleged instructional errors. Because defendant failed to move for a new trial or an evidentiary hearing on this issue, review is limited to errors apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that counsel's representation prejudiced the defendant so as to deprive her of a fair trial. *Id.* In determining whether the error was prejudicial, the defendant must overcome the presumption that, under the circumstances, the challenged action could be sound trial strategy. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995). A defendant must show that, but for the error, the result of the proceedings would have been different. *Id.*

Contrary to defendant's assertions, she was not denied effective assistance of counsel because counsel failed to object to the prosecutor's alleged overcharging. The evidence reasonably supported each charge filed against defendant. *People v Wells*, 102 Mich App 122, 132; 302 NW2d 196 (1980). Because counsel's failure to object to the charges did not affect the outcome of the case, defendant was not denied the effective assistance of counsel. *LaVearn, supra*. Defendant's additional contention that she was denied the effective assistance of counsel because counsel failed to object to the

trial court's jury instructions is also without merit. An objection would not have affected the outcome of this case. *Id.*

Defendant further maintains that the prosecutor's actions constituted misconduct. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). Prosecutorial misconduct claims are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate the remarks in context. *Id.* at 82. Defendant complains about comments that defendant and her codefendant were "two butchers who committed these acts." The prosecutor further stated that "both of these defendants here are exactly what we charged them with. They're cold-blooded, calculating, butchering murderers." During closing argument, the prosecutor referred to the offense as a "butchering" and described the decedent as having been "butchered" and "filleted." Defendant objected only to the first remark, and the trial court sustained the objection. Although the prosecutor certainly used colorful language, the remarks were not so improper as to require reversal. Testimony showed that Donnell Miracle stabbed the victim 27 times, and that one of the knives she used was a butcher knife. A prosecutor need not argue in the blandest possible terms. *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989). These remarks were supported by evidence adduced. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Moreover, any potential prejudice could have been cured by an appropriate instruction. *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993).

Next, defendant claims that the trial court erred in finding that she should be sentenced as an adult. Appellate review of the trial court's decision to sentence a minor as a juvenile or as an adult is bifurcated. *Passeno, supra* at 103. We review the trial court's findings on the factors enumerated in MCL 769.1(3); MSA 28.1072(3), under the "clearly erroneous" standard of MCR 2.613(C). *Id.* Next, the ultimate decision to sentence the minor as a juvenile or adult and the sentence itself should be reviewed for an abuse of discretion, using the same standard applied in reviewing adult sentencing decisions. *Id.* at 103-104. Reversal is required if the sentence imposed violated the principle of proportionality. *Id.*

The trial court made specific findings of fact regarding its decision to sentence defendant as an adult. The court noted that defendant had "established a very dysfunctional lifestyle" and also noted the "heinousness" of the crime. The court also acknowledged that expert testimony did not assure it that defendant could be rehabilitated. The court's findings and conclusions of law were premised on the criteria contained in MCL 769.1(3); MSA 28.1072(3). The decision to sentence defendant as an adult is not clearly erroneous. Nor did the trial court abuse its discretion in imposing sentence. *People v Gregory Brown*, 205 Mich App 503; 517 NW2d 806 (1994). In light of the nature of the case and defendant's background, the sentence was not at all disproportionate to the offense and the offender.

Finally, defendant contends that she is entitled to resentencing because the sentence of mandatory life violates the constitutional prohibitions against cruel and unusual punishment. Because felony murder is punishable by a mandatory life sentence, however, the sentence is not cruel and unusual. *People v Harding*, 443 Mich 693, 711; 506 NW2d 482 (1993).

Defendant's conviction and sentence for felony murder armed-robbery are affirmed, but her convictions and sentences for felony murder-larceny, second-degree murder and armed robbery are vacated.

/s/ Robert P. Young, Jr.

/s/ Maura D. Corrigan

/s/ Michael J. Callahan

<sup>1</sup> "Aiding and Abetting" describes all forms of assistance rendered to the perpetration of a crime, and includes all words or deeds that might support, encourage, or incite the commission of a crime. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).

<sup>2</sup> Defendant and codefendant Donnell Miracle were jointly tried before separate juries. Miracle was convicted of first-degree premeditated murder, MCL 750.316; MSA 28.548, two counts of felony murder, MCL 750.316; MSA 28.548, and armed robbery, MCL 750.529; MSA 28.797. This Court affirmed her conviction in *People v Donnell Miracle*, unpublished opinion per curiam of the Court of Appeals, issued January 16, 1996 (Docket No. 170647).