STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARICE BARNES,

Defendant-Appellant.

UNPUBLISHED
August 20, 1996

No. 173919
LC No. 93-009939

Before: Neff, P.J., and Jansen and G. C. Steeh, III,* JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of first degree, felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), assault with intent to rob while armed, MCL 750.89; MSA 28.284, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). In addition to the mandatory consecutive two-year prison term for the felony-firearm conviction, defendant was sentenced to concurrent terms of natural life for the murder conviction, and ten to twenty-five years on the assault conviction. We affirm defendant's convictions.

I

Defendant first argues that the trial court erred in instructing the jury that it could use the assault with intent to rob while armed charge to fulfill the robbery requirement in the felony murder statute. The essence of defendant's argument is that because the crime of assault with intent to rob while armed is not specifically set forth in the statute, the trial court erred in allowing the jury to use that crime as a predicate for his felony murder conviction. We disagree.

The felony murder statute, MCL 750.316; MSA 28.548, provides in pertinent part:

> (1) A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:

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

* * *

(b) Murder committed in the perpetration of, or attempt to perpetrate . . . robbery . . . .

Defendant primarily relies on *People v Sanford*, 402 Mich 460; 265 NW2d 1 (1978), and *People v Chandler*, 201 Mich App 611; 506 NW2d 882 (1993) in support of his argument. However, we find both of these cases inapplicable to the issue at bar. Because the Courts were dealing with the distinction between assault with intent to rob while *unarmed*, MCL 750.88; MSA 28.283, and *unarmed* robbery, MCL 750.530; MSA 28.798. The Supreme Court in *Sanford, supra* at 472-474, determined nothing more than that those two crimes were different. This Court in *Chandler, supra* at 614-616, merely determined that even though evidence of unarmed robbery existed, absent evidence of an assault, the defendant's conviction for assault with intent to rob while unarmed must fail.

This case, however, presents the issue whether assault with intent to rob while armed may be considered "robbery" as that term is used in MCL 750.316(1)(b); MSA 28.548(1)(b). We conclude that it may.

In *People v Patskan*, 387 Mich 701, 713-714; 199 NW2d 458 (1972), our Supreme Court determined that attempted armed robbery is a lesser included offense of assault with the intent to rob while armed. Thus, in *People v Bryan*, 92 Mich App 208, 225; 284 NW2d 765 (1979), this Court stated that as a result of armed robbery's lesser included offense status, "[i]n every case where an assault with intent to rob while armed takes place, an attempted armed robbery will also take place."

Accordingly, because an attempted armed robbery must necessarily exist in order to obtain a conviction for assault with intent to commit armed robbery, we conclude that the trial court did not err when it instructed the jury that it could use the latter crime to support a felony murder conviction.[1]

II

We next examine defendant's argument that the trial court erred in allowing James Floyd to testify to the statement made by one of the victims of the crime, Renard Bell. We find no error.

We conclude that the statement made by Bell, only moments after the shooting in which he was shot and the passenger in his car killed, constitutes an excited utterance, and thus was not precluded by the hearsay rule. MRE 803(2). Because we have concluded that the statement was permissible under this exception, we need not determine whether it falls within any other exception to the hearsay rule.

III

Last, we conclude that the trial court's instructions on the prosecutor's burden of proof does not require reversal. Although it is true that trial courts should refrain from giving the "moral certainty" definition, it is likewise true that giving it does not automatically require reversal. See *Victor v*

Nebraska, 511 US 1; 114 S Ct 1239; 127 L Ed 2d 583 (1994); *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

Here, on our thorough examination of the trial court's instructions regarding reasonable doubt, we conclude that even though the instructions were not perfect, no error requiring reversal exists because the instructions fairly represented the legal issue involved, i.e., the prosecutor's burden of proof. See *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995).

Affirmed.

/s/ Janet T. Neff
/s/ Kathleen Jansen
/s/ George C. Steeh, III

[1] Because of this conclusion, we need not address defendant's further argument that the trial court erred in allowing evidence of car-jacking to fulfill the larceny requirement in the felony-murder statute.