

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 609

September Term, 2016

DION RAMON SOBOTKER

v.

STATE OF MARYLAND

Wright,
Berger,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: January 27, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

A jury in the Circuit Court for Montgomery County convicted Dion Ramon Sobotker, appellant, of first-degree murder, robbery, and conspiracy to commit robbery. Appellant was sentenced to a total term of life imprisonment, with all but 40 years suspended. In this appeal, appellant presents the following question for our review:

Did the trial court violate the Maryland Declaration of Rights by not requiring jury unanimity as to the modality of first-degree murder?

Finding no error, we affirm.

BACKGROUND

On December 5, 2014, Jonathan Harris was found, unresponsive, on the floor of his Montgomery County home. Several items belonging to him were missing from his home, including a television, a Sony PlayStation gaming console, and a wallet. Harris was later pronounced dead, the cause being asphyxia, and his death was ruled a homicide. While investigating Harris' death, the police learned that Harris' credit card had been used to purchase gas for a vehicle at a gas station. Surveillance video from the gas station depicted appellant exiting the driver's side of the vehicle around the time the card was used.

Appellant was eventually arrested, and search warrants were executed at various addresses associated with him. During the searches, police recovered several items, including Harris' PlayStation 3 and a pair of tennis shoes belonging to appellant. Forensic testing later revealed the presence of blood belonging to Harris on appellant's tennis shoes.

At trial, a friend of his, Latoya Morgan, testified that she was with him on the day Harris was found in his apartment. Morgan indicated that she and another individual, Samantha Parker, who was Harris' ex-girlfriend, drove with appellant to Harris' house to

get some of Parker's belongings. After arriving at the house, Morgan, who had fallen asleep, observed Parker coming out of the house with "a gym bag," which she put in the car's trunk. Parker then went back into the house, and appellant, who was in the driver's seat, got out of the car and followed her into the house. Approximately 15 minutes later, appellant and Parker exited the home carrying a large television. The parties eventually drove away and ended up at a Wendy's, where Parker handed appellant a wallet containing credit cards. When Morgan asked appellant where the cards came from, appellant responded that they were "the dude's credit cards."

At the close of evidence, the jury was instructed, in part, as follows:

All right. Now, we're going to get into the actual elements of the offenses, and the order of this is basically in the same order as you're going to see on the verdict sheet.

All right. Homicide. First degree premeditated murder, first degree felony murder, and second degree specific intent murder. The defendant is charged with the crime of murder. This charge includes first degree premeditated murder, first degree felony murder, and second degree murder.

All right. First, I'm going to tell you about first degree premeditated murder. First degree murder is the killing of another person with willfulness, deliberation, and premeditation.

In order to convict the defendant of first-degree murder, the State must prove, one, that the defendant caused the death of Jonathan Harris; and, two, that the killing was willful, deliberate, and premeditated

* * *

All right. Next is first degree felony murder. The defendant is charged with the crime of first degree felony murder. Felony murder does not require the State to prove that the defendant intended to kill the person who was killed.

In order to convict the defendant of first degree felony murder, the State must prove, one, that the defendant committed a robbery; two, that the defendant

or another participating in the crime killed Jonathan Harris; three, that the act resulting in the death of Jonathan Harris occurred during the commission of the robbery.

The jury ultimately returned verdicts of guilty on three counts: first-degree murder, robbery, and conspiracy to commit robbery. The jury did not specify whether it was convicting appellant of first-degree premeditated murder or first-degree felony murder.

DISCUSSION

Appellant argues that the trial court violated the Maryland Declaration of Rights, in particular, a criminal defendant's right to a unanimous verdict, "by allowing the jury to convict appellant of first degree murder without agreeing on whether he was guilty of premeditated murder or felony murder." Appellant maintains that the means by which a murder in the first degree is committed, whether by way of premeditation or during the commission of an enumerated felony, constitutes separate elements that must be proven beyond a reasonable doubt and require juror unanimity upon a finding of guilt. Appellant further maintains that this required unanimity cannot be achieved by "mixing and matching proof of various elements of premeditation and felony murder;" that is, a jury's verdict must be unanimous as to each element of first-degree murder, which, according to appellant, includes the modality of the murder. Recognizing that no Maryland court has ever made such a holding, and recognizing that both the federal courts and a majority of courts in other jurisdictions have rejected such an argument, appellant nevertheless asks that we, as a matter of first impression, adopt his position and hold that a jury's verdict on first-degree murder cannot be unanimous unless the jury specifies whether the defendant is guilty of premeditated murder or felony murder.

We decline appellant’s invitation. Maryland Courts have long held that first-degree murder is one crime committed in multiple ways, and the various modes of commission do not alter the crime or create separate crimes. As the Court of Appeals explained in *Ross v. State*, 308 Md. 337 (1987):

Where murder is established, and where it is further shown that the murder was deliberate, willful and premeditated, this murder is of the first degree. Additionally, the commission of a homicide in the perpetration or attempted perpetration of any of the felonies enumerated in [the Maryland Criminal Code] constitutes murder in the first degree, but in such cases it is not necessary to prove a specific intent to kill or to do grievous bodily harm. Accordingly, a conviction of first degree murder may be proved *either* by showing deliberation, willfulness and premeditation (premeditated murder), or by showing a homicide committed in the perpetration, or attempted perpetration, of one of the enumerated felonies (felony murder). There is but one offense – murder in the first degree – but that offense may be committed in more than one way.

Id. at 341-42 (emphasis in original).

Likewise, Section 2-201 of the Maryland Criminal Code states that “[a] murder is in the first degree if it is: (1) a deliberate, premeditated, and willful killing;...**or** (4) committed in the perpetration of or an attempt to perpetrate...robbery under § 3-402 or § 3-403 of this article[.]” *Id.* (emphasis added). The statute also states that “[a] person who commits a murder in the first degree is guilty of a felony and on conviction shall be sentenced to: (i) imprisonment for life without the possibility of parole; or (ii) imprisonment for life.” Md. Code, Criminal Law § 2-201(b)(1). Clearly, the Legislature intended first-degree murder to be treated as one crime, and to be punished as one crime, regardless of modality. Moreover, the statute’s legislative history makes clear that the Legislature, in codifying murder into first and second degrees, did not intend to create

separate crimes but rather intended to maintain the common-law tradition of treating murder as a single offense. *Gladden v. State*, 273 Md. 383, 389 (1974).

In fact, the Court of Appeals has expressly rejected the very premise appellant proposes, albeit under different circumstances. In *Twigg v. State*, 447 Md. 1 (2016), the Court held that a jury need not be unanimous as to the mode of commission of child sexual abuse, for which the governing statute provided multiple modes of commission, because “abuse of a child is the gravamen of the offense of child sexual abuse, not the particular sexual act involving molestation or exploitation itself.”¹ *Id.* at 17-18. In other words, “[s]o long as the jurors were unanimous that [the defendant] committed child sexual abuse...it is of no consequence that they may not have agreed on which of the underlying sexual offenses supplied the ‘element’ of sexual molestation or exploitation that supported the child abuse conviction.” *Id.* at 18; *See also Crispino v. State*, 417 Md. 31, 49-50 (2010) (jury unanimity regarding mode of commission of sexual abuse not necessary).

Likewise, in *Rice v. State*, 311 Md. 116 (1987), the Court of Appeals held that a jury need not be unanimous with regard to the mode of commission of a crime, unless it constituted an element of the offense. After a jury trial, the defendant in *Rice* was convicted of theft under Maryland’s consolidated theft statute. *Id.* at 119-22. On appeal, Rice argued that the trial judge erred in failing to instruct the jury “that it could convict the defendant

¹ At the time of the offense, child sexual abuse was codified as “any act or acts involving sexual molestation or exploitation, including but not limited to incest, rape, or sexual offense in any degree, sodomy or unnatural or perverted sexual practices on a child by any parent, adoptive parent or other person who has the permanent or temporary care or custody or responsibility for supervision of a minor child.” *Twigg*, 447 Md. at 7 n. 5.

of theft only if all twelve jurors agreed unanimously that the defendant had committed all the elements of larceny...or all the elements of possession of stolen property....” *Id.* The Court explained that jury unanimity as to the theft’s mode of commission, was not required because “[n]othing in the language of the theft statute or its legislative history suggests that [the statute] encompasses multiple crimes for jury instruction purposes.” *Id.* at 124. The Court also determined that jury unanimity was not constitutionally required because the two “crimes,” namely theft by larceny and theft by possession of stolen goods, were not “autonomous offenses but rather one crime defined in two ways.” *Id.* 136. The Court concluded that “[w]hatever variance there may be between the elements of [larceny and possession of stolen goods], it is clear that violation of either leads to the same result. In either case the defendant has appropriated the property of another person without that person’s consent.” *Id.*

We think the Court’s reasoning in the above cases is sound and directly on point in the present case. Here, the jury was instructed on alternate means by which appellant could have committed first-degree murder. That some of the jurors may have convicted appellant of premeditated murder while the remaining jurors convicted him of felony-murder is a distinction without a difference; in the end, all twelve jurors convicted appellant of first-degree murder. Thus, under both the Maryland Criminal Code and the Maryland constitution, appellant’s conviction of first-degree murder was sound.

Appellant maintains that the above cases are distinguishable from the instant case because in those cases the modes of commission were merely the acts supporting the

conviction and not distinct elements of the crime. To the contrary, appellant maintains, the *mens rea* of premeditated murder, which is the intent to kill, and the *mens rea* of felony-murder, which is the intent to commit the underlying felony, are so different as to create separate and distinct elements that must be proven beyond a reasonable doubt.

While valiant, Appellant’s argument is unconvincing. Murder, at its most basic, is a killing with malice aforethought. *Selby v. State*, 361 Md. 319, 331 (2000). In the case of premeditated murder, “malice aforethought” is proven by showing that the killing was willful, deliberate, and premeditated. *State v. Frye*, 283 Md. 709, 712 (1978). In the case of felony-murder, “malice aforethought” is proven by showing the specific intent to commit the underlying felony prior to the killing. *State v. Allen*, 387 Md. 389, 402 (2005). Thus, even though the “intent” in premeditated murder is to kill and the “intent” in felony-murder is to commit the underlying felony, within the context of first-degree murder, the “element” at issue is malice. Accordingly, even if the jury was split on how appellant formed the requisite malice, the jury was unanimous in finding that such malice existed, and, as a result, the jury’s verdict on first-degree murder was equally unanimous.

**JUDGMENT OF THE CIRCUIT
COURT FOR MONTGOMERY
COUNTY AFFIRMED. COSTS TO
BE PAID BY APPELLANT.**