STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM HOSS, JR.,

Defendant-Appellant.

UNPUBLISHED
October 31, 1997

No. 195661
Tuscola Circuit Court
LC No. 95-006721-FC

Before: Griffin, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, second-degree home invasion, MCL 750.110a(3); MSA 28.305(a)(3), larceny in a building, MCL 750.360; MSA 28.592, and unlawfully driving away an automobile, MCL 750.413; MSA 28.645. Defendant was sentenced, as a third felony offender, to forty to sixty years' imprisonment for second-degree murder, fifteen to thirty years' imprisonment for second-degree home invasion, three to eight years' imprisonment for larceny in a building, and three to ten years' imprisonment for unlawfully driving away an automobile. Defendant now appeals as of right. We affirm.

Defendant broke into a home before the homeowner arrived and spotted his car in the driveway. Defendant ran out of the house and the homeowner drove away to call the police. Defendant drove away from the home at a speed slightly higher than the legal limit when, approximately two minutes away from the home, he ran through a stop sign without braking and without making any major move to avoid hitting a pickup truck on the through street. He hit the pickup truck at approximately 58 mph, killing the driver. Defendant then drove away in the car of a good Samaritan who had stopped to help him. Defendant again drove through stop signs while getting away from the good Samaritan, who was chasing defendant in a car driven by another person who had come onto the scene. Defendant was finally arrested at a motel where he held the police at bay for a period of time. Certain property, including jewelry, was seized at that time. The homeowner later identified a ring and necklace as belonging to her.

Defendant was originally charged with felony murder and now argues that the trial court erred in denying his motion for directed verdict and allowing that charge to go to the jury. We disagree. A killing committed while attempting to escape from or prevent detection of a felony, is felony murder only if it is committed as part of a continuous transaction with, or is otherwise immediately connected with, the underlying felony. *People v Gimotty*, 216 Mich App 254, 258; 549 NW2d 39 (1996); *People v Smith*, 55 Mich App 184, 189; 222 NW2d 172 (1974). An escape ceases to be a continuous part of the original felony when the defendant reaches a point of at least temporary safety. *People v Gore*, 30 Mich App 490, 495; 186 NW2d 872 (1971). Defendant argues that he had reached a place of temporary safety when he was traveling the speed limit on Ormes Road. We disagree.

Viewed in a light most favorable to the prosecution, there was sufficient evidence to find that defendant was still in the process of escaping because the collision occurred only two miles from the home and on a route that took only two minutes to cover. In further support of a finding that defendant was still escaping, we look to the fact that defendant did not alter his slightly excessive speed as he went through the stop sign even though there was a visible stop ahead sign approximately two tenths of a mile before the stop sign that defendant ignored. In addition, although there was some slight movement of defendant's vehicle at the time of impact, there was no evidence of any real attempt by defendant to avoid the accident or to apply the brakes.

Defendant also argues that there was insufficient evidence of the underlying crime of larceny to support the felony murder charge. We disagree. Defendant was identified as being in the house and the homeowner noticed missing property soon after he left. This is sufficient to allow the charge to go to the jury. *People v Greenwood*, 209 Mich App 470, 471-472; 531 NW2d 771 (1995).

Although charged with felony murder, defendant was convicted of second-degree murder. He now claims that there was insufficient evidence of the requisite mens rea to support a conviction of that offense. Viewed in a light most favorable to the prosecution, there was sufficient evidence presented to support the conviction. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). Defendant's reckless driving through the stop sign without ever putting on his brakes while escaping from a felony presents sufficient evidence of a willful and wanton disregard of the likelihood that he would cause death or great bodily harm. *People v Miller*, 198 Mich App 494, 496-498; 499 NW2d 373 (1993); *People v Vasquez*, 129 Mich App 691; 341 NW2d 873 (1983). Although defendant argues that his brakes were not working and he did attempt to avoid the other vehicle, the evidence does not support that argument.

Defendant next argues that the trial court erred in failing to give his requested instruction on negligent homicide and the degrees of negligence. We need not examine this issue because any error was harmless. The jury was instructed on felony murder, second-degree murder, involuntary manslaughter and gross negligence. The jury neglected the lesser included offense of involuntary manslaughter. Where the jury has been instructed on a lesser offense and returns a verdict on a higher offense, any error in refusing to give another lesser included offense instruction is harmless error. *People v Beach*, 429 Mich 450, 491-493; 418 NW2d 861 (1988); *People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990).

Defendant argues that the trial court abused its discretion in refusing to admit certain accident reports into evidence. We disagree. The reports at issue were reports made pursuant to

MCL 257.622; MSA 9.2322. As a result, they are inadmissible pursuant to MRE 803(8) and MCL 257.624(1); MSA 9.2324(1). *Moncrief v Detroit*, 398 Mich 181, 191; 247 NW2d 783 (1976).

Defendant further argues that the trial court abused its discretion when it denied his motion for change of venue based on pretrial publicity. Defendant failed to meet his burden of proof on this issue. *People v Passeno*, 195 Mich App 91, 98; 489 NW2d 152 (1992). The newspaper articles presented to this Court do not demonstrate publicity that is extensive or inflammatory nor do they demonstrate a strong community feeling against defendant. In addition, a review of the record reveals that none of the jurors who had seen the media coverage and who actually sat on the jury had prejudged this case.

Defendant also argues that the trial court erred in refusing to dismiss two jurors for cause. However, defendant has failed to satisfy the four-part test for reversal set forth in *People v Lee*, 212 Mich App 228, 248-249; 537 NW2d 233 (1995). In particular, defendant failed to demonstrate a desire to excuse another subsequently summoned juror and failed to show that the subsequently summoned juror was objectionable. Although defendant lists many jurors and facts about them, he makes no specific arguments about any of them that would make them objectionable. In addition, having reviewed the record, this Court is not persuaded that defendant met his burden of showing bias or prejudice with regard to the two jurors. *People v Roupe*, 150 Mich App 469, 474; 389 NW2d 449 (1986).

Defendant argues that the trial court abused its discretion when it refused to allow two witnesses to answer questions regarding defendant's mental condition. With regard to the question posed to the physician assistant, it was a general question about the behavioral consequences of hypoglycemia and did not go specifically to defendant's mental state. Therefore, when the trial court sustained the prosecutor's objection, it did not prevent defendant from inquiring about his mental condition. A review of the record reveals that that witness did testify as to defendant's mental state and his depression at other times in her testimony. Inasmuch as defendant does not argue that the question objected to was properly within the physician assistant's expertise, we do not find that the trial court abused its discretion in refusing to admit her answer. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992).

However, the trial court did abuse its discretion in refusing to allow defendant's foster mother to answer whether she thought defendant was suffering from severe depression. Lay witnesses may be competent to testify regarding sanity. *People v Murphy*, 416 Mich 453, 465; 331 NW2d 152 (1982). The facts and circumstances with regard to the foster mother's knowledge at the time of the incident in question are sufficient to support her testimony as to defendant's sanity. *People v Ritsema*, 105 Mich App 602, 608; 307 NW2d 380 (1981). However, this error does not require reversal because it is harmless beyond a reasonable doubt. *People v Jordon*, 187 Mich App 582, 593; 468 NW2d 294 (1991). Defendant complains about the failure to allow this witness to answer one question, but the record demonstrates that this witness gave considerable evidence of defendant's mental state through numerous other questions. Reversal is not required on this basis.

Defendant contends that the trial court abused its discretion in admitting a pair of bloody jeans into evidence. This issue does not require review because the jeans were never admitted into evidence at trial.

Defendant argues that his sentence for second-degree murder is disproportionate. We disagree. Considering defendant's extensive criminal history together with the facts of this case, the sentence does not violate the principle of proportionality. *People v Hansford (After Remand)*, 454 Mich 320; ___NW2d___ (1997); *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990) .

Finally, defendant argues that he was denied the right to be sentenced by the judge who presided over his trial and contends that he has the right to be sentenced by the judge who tried him if that judge is reasonably available. *People v Humble*, 146 Mich App 198, 200; 379 NW2d 422 (1985). Here, although the record is silent, the prosecutor contends (and defendant does not dispute) that the trial judge was unavailable because he had suffered a heart attack. We do not agree that resentencing is necessary.

Resentencing is only appropriate when the previously imposed sentence is invalid. *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997); *People v Whalen*, 412 Mich 166, 169; 312 NW2d 638 (1981). A sentence is invalid if it is beyond statutory limits. *Id.* It may also be invalid if the sentencing court relies on constitutionally impermissible considerations, improperly assumes a defendant's guilt on a charge which has not yet come to trial, fails to exercise it's discretion because it is laboring under a misconception of law, or conforms the sentence to a local sentencing policy rather than imposing an individualized sentence. *Id.* at 169-170; *Mitchell*, at 176. A sentence may be set aside if it is based on inaccurate information. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). A sentence may also be set aside if it fails to comply with essential procedural requirements such as failure to utilize a reasonably updated presentence report, or to provide the defendant and his counsel with the opportunity to address the court before sentence is imposed. *Whalen*, supra at 169-170.

In this case there is no evidence or allegation that defendant's sentence is invalid. We note that *Humble*, supra, unlike the case before us, involved a guilty plea rather than a jury trial. Defendant here was convicted by a jury, and was properly sentenced on the basis of valid information. There is no genuine dispute that the trial judge was not reasonably available at defendant's sentencing, and we decline to remand for resentencing.

Affirmed.

/s/ Richard Allen Griffin
/s/ Myron H. Wahls
/s/ Roman S. Gribbs