STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL WILLIAM GUNDRUM,

Defendant-Appellant.

UNPUBLISHED
November 18, 1997

No. 199772
Branch Circuit
LC No. 96-036094

Before: White, P.J, and Cavanagh and Reilly, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by a jury of first-degree (felony) murder, MCL 750.316; MSA 28.548, and first-degree home invasion, MCL 750.110a(2); MSA 8.305(a)(2). Defendant was sentenced to concurrent terms of life in prison without parole for felony murder, and twelve to twenty years' imprisonment for first-degree home invasion. We affirm.

I

Defendant first argues that there was insufficient evidence to sustain his conviction of felony murder. Defendant contends that it was not sufficiently proven that the underlying felony was contemporaneous with the killing, and that the felony did not dictate the conduct which led to the killing. We disagree.

Where the underlying felony of a felony murder charge is part of a continuous transaction or is otherwise immediately connected with the killing, it is immaterial whether the underlying felony occurs before or after the killing. *People v Hunter*, 209 Mich App 280, 284; 530 NW2d 174 (1995). However, the homicide must be incident to the felony and associated with it as one of its hazards. *People v Thew*, 201 Mich App 78, 87; 506 NW2d 547 (1993). Whether there is a sufficient causal connection between the felony and the homicide depends on whether the defendant's felony dictated his conduct which led to the homicide. *Id.* at 86.

The underlying felony relied on in this case was larceny. The trial testimony showed that the victim suffered incapacitating injuries from being struck several times with a blunt object, and that she

was left to freeze to death. While in jail awaiting trial, defendant told a fellow inmate that he had struck the victim on the head with a rock, got in her car with her purse, took the money out of her wallet, and left her. Defendant also told police that he took the purse, and that as he left the scene, he went through it and then tossed it out the car window. The victim's wallet and purse were found alongside a nearby road with no money in them. Further, defendant took the victim's car, drove it for several days, and then abandoned it in a parking lot and threw away the keys. Defendant concedes that the evidence was sufficient for the jury to find that he killed the victim, but argues that the evidence is insufficient to show that the larceny was committed contemporaneously with the killing.

As noted above, it is not necessary that the murder be contemporaneous with the underlying felony, but that the defendant intended to commit the underlying felony at the time the homicide occurred. *People v Brannon*, 194 Mich App 121, 125; 486 NW2d 83 (1992); see *Hunter*, *supra*, 284. Hence, it is not the timing of the larcenous act but, rather, the timing of the larcenous intent that is crucial. *Id.*, 126. The question when a defendant's larcenous intent was formed is for the jury to decide. *Id.*

Viewing the evidence in the light most favorable to the prosecution, *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), we conclude that the evidence was sufficient for the jury to find that the killing and the larceny "were so closely connected in point of time, place, and causal relation that the homicide was incident to the felony and associated with it as one of it hazards." *Brannon, supra*, 126. There was sufficient evidence to support the inference that defendant's intent to take the victim's purse, wallet, money, and car was formed either before or contemporaneous with the attack resulting in the victim's death, and, thus, the felony dictated the conduct which resulted in the beating and abandonment of the victim.

II

Next, defendant argues that his convictions should be reversed because remarks made by the prosecutor, in his opening statement and closing argument, were designed to inflame the jury by appealing to its passions and evoking sympathy for the victim, and because the prosecutor argued that defendant's failure to go to the police and his escape from jail were indicative of guilt. We disagree.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Here, defendant did not object at trial to the prosecutor's remarks. Review of allegedly improper prosecutorial remarks is foreclosed if defense counsel fails to object, unless the prejudicial effect of the comments was so great that it could not have been cured by an appropriate instruction, or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989).

Defendant first contends that remarks made by the prosecutor during his opening statement regarding the victim's physical infirmities were an improper appeal to sympathy. We have reviewed the

remarks and conclude that any possible prejudicial effect could have been cured by a timely requested instruction.

Defendant also argues that the prosecutor improperly asserted that defendant's failure to inform police of the incident sooner and his escape from jail were acts indicative of guilt. It is improper to impeach a defendant with his silence maintained during his contact with police officers. *People v Collier,* 426 Mich 23, 31; 393 NW2d 346 (1986). However, a closing argument that questions silence occurring before police contact, and where it would have been natural for a defendant to come forward and make a report, is not improper. *Id.,* 31-34. We conclude that the prosecutor could legitimately comment on defendant's failure to immediately report his story that the victim's hair accidentally caught fire when he lit her cigarette, and she ran and fell, hitting her head on some rocks. *Id.,* 35. Further, defendant failed to object to the prosecutor's suggestion of an inference of guilt based on defendant's failure to report the "accident," *id.*, 35-36 n 3, and a timely cautionary instruction would have cured any prejudicial effect.

Furthermore, evidence of flight is admissible. *People v Coleman,* 210 Mich App 1, 4; 532 NW2d 885 (1995). This Court, in *Coleman,* stated:

> Such evidence is probative because it may indicate consciousness of guilt .... The term "flight" has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody. [*Id.*]

The prosecutor's remarks regarding defendant's escape from jail, therefore, were not improper. No miscarriage of justice occurred as a result of the prosecutor's comments. Accordingly, defendant's argument that prosecutorial misconduct deprived him of a fair trial is without merit.

III

Defendant next argues that because his attorney failed to object to the introduction of inadmissible evidence and the prosecutor's improper remarks, and failed to move for a change of venue, defendant was deprived of effective assistance of counsel. We disagree.

Defendant did not move for a new trial or evidentiary hearing on an ineffective assistance of counsel claim, and this is a prerequisite for appellate review unless the already-existing record contains sufficient detail to support defendant's position. *People v Sharbnow,* 174 Mich App 94, 106; 435 NW2d 772 (1989). See *People v Ginther,* 390 Mich 436, 443-444; 212 NW2d 922 (1973).

To establish ineffective assistance, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant as to deprive him of a fair trial. *People v Pickens,* 446 Mich 298, 303; 521 NW2d 797 (1994). Here, the prosecutor's alleged misconduct was not such that the result of defendant's trial would have been different. Therefore, defendant's ineffective assistance of counsel claim regarding the prosecutor's remarks is without merit.

Defendant also argues that he was deprived of effective assistance of counsel because his attorney failed to move for a change of venue. Defendant asserts that because this case was highly publicized, prospective jurors exposed to pretrial media coverage could not be fair and impartial when inflamed with a strong community feeling against defendant, and the overall atmosphere of the trial created a probability of prejudice. We cannot agree.

During jury selection, it came to light that most of the prospective jurors had learned of the case in advance, either in the media or from other sources. The court repeatedly asked potential jurors whether they could decide the case based only on the evidence presented at trial, and those who stated that they could not do so were excused. The court further asked generally whether there were other reasons why any prospective juror could not be fair and impartial. Four prospective jurors knew defense counsel but indicated that they could be fair and impartial. One prospective juror knew defendant, and was excused. Also, attorneys for both sides were given the opportunity to question potential jurors.

Where potential jurors can swear that they will put aside preexisting knowledge and opinions about the case, neither will be a ground for reversing a denial of a motion for a change of venue. *People v DeLisle,* 202 Mich App 658, 662; 509 NW2d 885 (1993). Also, in *People v Harvey,* 167 Mich App 734, 741; 423 NW2d 335 (1988), this Court stated:

> A change of venue is not necessary even though jurors have been exposed to adverse publicity and hold preconceived notions of guilt or innocence if they can lay aside their impressions or opinions and render a verdict based on the evidence presented in court.

Accordingly, we find that what transpired here was a "thorough and conscientious voir dire designed to elicit enough information" to properly assess any jury bias created by pretrial publicity. *People v Tyburski,* 445 Mich 606, 623; 518 NW2d 441 (1994). Where bias was detected, the trial court acted accordingly. Denial of a motion for a change of venue would have been proper, and counsel is not required to argue a meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). We conclude, defendant was not deprived of effective assistance of counsel for his attorney's failure to move for a change of venue.

IV

Next, defendant argues that although the trial court correctly retroactively suppressed a state trooper's testimony regarding statements made by defendant, the court erred in denying a mistrial, and the instruction to the jury to disregard the trooper's testimony was insufficient to cure its prejudicial effect. We disagree.

Defense counsel argued that defendant's statement to the state trooper was in violation of his right to counsel. The trial court suppressed the trooper's testimony but denied defendant's motion for a mistrial, and instructed the jury to disregard the testimony. A decision on a motion for mistrial rests in the trial court's sound discretion, and an abuse of discretion will only be found where denial of the motion deprived the defendant of a fair and impartial trial. *People v Manning,* 434 Mich 1, 7; 450

NW2d 534 (1990). Defendant specifically argues that the trial court erred by not granting his motion because the jury had already heard the inadmissible testimony, and the court's instruction to disregard it was insufficient.

However, we find that in light of all the evidence, the verdict in this case would not have been different had the challenged statements not been heard by the jury. See *People v Jacques*, 215 Mich App 699, 702; 547 NW2d 349 (1996). There was other evidence apart from the suppressed testimony that corroborated defendant's statements. The trooper's testimony, therefore, was harmless due to its cumulative nature. See *People v Meeboer*, 181 Mich App 365, 373; 449 NW2d 124 (1989).

Further, the court's instruction to the jury was as follows:

> One of the things that I would indicate to you at this time is that the Court has ordered that the testimony of Trooper Ouwinga would be suppressed and you would not give it any consideration, whatsoever, regarding either of the two counts against the Defendant.

The court also gave the following jury instruction:

> At times during the trial, I have excluded evidence that was offered or stricken testimony that was not - - that was heard. Do not consider those things in deciding the case. Make your decision only on the evidence that I let in and nothing else.

These instructions were sufficient to preserve defendant's right to a fair trial. The trial court did not abuse its discretion in denying defendant's motion for a mistrial.

V

Defendant argues next that the cumulative effect of trial errors deprived him of a fair trial. We disagree.

The cumulative effect of a number of minor errors may require reversal. *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987). The test to determine whether reversal is required is not whether there are some irregularities, but whether the defendant has had a fair trial. *Id.* We find no merit in defendant's claim because the cumulative effect of any errors here did not deprive defendant of a fair trial nor result in manifest injustice.

Affirmed.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly