STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICKEY A. BILLINGSLEA,

Defendant-Appellant.

UNPUBLISHED
June 23, 1998

No. 199124
Recorder's Court
LC No. 95-011275

Before: Sawyer, P.J., and Bandstra and J. B. Sullivan*, JJ.

PER CURIAM.

Defendant was charged with first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), and first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2). After a four-day jury trial, August 19 through 22, 1996, defendant was found guilty of both offenses. The following month the trial court sentenced defendant to mandatory life imprisonment for felony murder, and ten to fifteen years for home invasion, the sentences to run concurrently. Defendant appeals as of right. We affirm the conviction and sentence for felony murder, but reverse the conviction and sentence for home invasion.

On June 9, 1995, defendant assaulted Walter Norfolk, an elderly man with a heart condition, at his home in Detroit. Defendant's confession to police was read into the record at trial:

> I had been drinking all day. I was drinking Five o'clock Gin and MD 20/20 wine, beer. I started drinking about noon. I'm an alcoholic. About dark I ran out of stuff to drink. I went down to Mr. Norfolk's house and kicked the front door in. I wanted some more money to drink. He was at the door when I kicked it in. I smacked him in the cheek area, and he fell down. I saw a shotgun in the front room, so I took that. I took some shells, too. I saw his car keys on the kitchen table, so I took them. I went out the side door and closed it and left. I got into his car and drove down on Central to see my brother.

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

It dawned on me what I had done, so I started to drive back, and the police pulled me over, and I got arrested with the shotgun in the car.

Defendant was arrested the morning after the incident with Mr. Norfolk. The arresting police officer testified that defendant struggled with the officers and had to be subdued with pepper gas. Police issued *Miranda*[1] warnings, after which defendant said nothing. It was pursuant to subsequent investigation, two days later, that defendant offered the confession above.

Meanwhile, on June 11, 1995, relatives of Mr. Norfolk became concerned upon noticing that the doors to his house were not securely closed. Norfolk's daughter and police found Norfolk inside, unconscious. Witnesses testified that Norfolk's wallet, shotgun, and car were missing, and that the household was in a disheveled state unusual for Norfolk.

Norfolk was sent to the hospital, where he remained in a comatose state until his death approximately two months later. Experts testified that a blow or blows to Norfolk's head had resulted in bleeding and blood clotting in the brain, and normally irreversible coma, but that the immediate cause of death may have been the serious bedsores Norfolk developed in the hospital as a result of his coma, age, and circulatory problems, possibly aggravated by Norfolk's previously existing heart condition.

Defendant appeals his convictions and sentences as of right.

I

Defendant seeks reversal because the trial court inadvertently instructed the jury that the predicate felony to the felony-murder charge was home invasion, where in fact the felony-murder charge, according to the information, was predicated on "robbery, and breaking and entering of a dwelling, and a larceny." Because defendant did not present this concern at trial, our consideration of it on appeal is limited to whether manifest injustice would result if relief is denied. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997).

The confusion giving rise to this issue results from a revision of the felony-murder statute, MCL 750.316(1)(b); MSA 28.548(1)(b), that took effect after the offense but before trial. The predicate felonies charged in the information reflect the wording of the felony-murder statute as of the date of the offense, but the trial court's instructions reflected the subsequent addition of home invasion, for which defendant was separately charged, to the enumeration of felonies upon which felony murder may be predicated.

This Court faced a similar controversy in *People v Horton (On Remand)*, 107 Mich App 739; 310 NW2d 34 (1981), where the defendant's felony-murder charge was predicated on rape but the jury was instructed on criminal sexual conduct, the latter reflecting recent statutory revisions. This Court ruled that reversal was not required because the instruction given, considering the evidence, concerned very similar alleged conduct and did not broaden the scope of activity for which the defendant could have been found to have committed the underlying felony. *Id.*, 742. Further, errors in jury instructions do not warrant reversal if the instructions sufficiently informed the jury of the elements necessary to

convict the defendant of the offense charged. *People v Sommerville*, 100 Mich App 470, 480; 299 NW2d 387 (1980). *Horton* and *Sommerville* thus indicate that technically imperfect jury instructions regarding the underlying felony in a felony-murder charge are not grounds for reversal where they cover all elements of the underlying felony charged, and do not broaden the scope of criminal activity that could be considered the basis for that underlying felony.

Although the trial court erred in telling the jury that the underlying felony was home invasion, this was harmless error. The court instructed the jury that to find defendant guilty of the predicate felony, the jury would have to find that defendant used force to gain entry into Norfolk's dwelling, that he did so intending to commit a larceny concerning property worth more than $100, and that Norfolk was lawfully present at the time. In contrast, "The elements of breaking and entering an occupied dwelling with intent to commit a felony are: (1) a breaking and entering; (2) of an occupied dwelling; and (3) with felonious intent." *People v Brownfield (After Remand)*, 216 Mich App 429, 431; 548 NW2d 248 (1996) (describing MCL 750.413; MSA 28.645). Thus, the trial court's instructions on home invasion covered the elements of breaking and entering an occupied dwelling, but with greater particularity than a generic breaking and entering charge would have required. The court predicated a finding of felonious intent specifically on larceny concerning property worth over $100, and predicated the finding that the dwelling be occupied specifically on it being the victim who was present and lawfully so. Because the instructions covered all the elements of the predicate felony charged in the information, departing from the latter only in ways that made it harder, not easier, for the jury to find that defendant had committed the predicate felony, defendant suffered no manifest injustice from the court's mistake.

Nor did the court's inadvertence have the effect of burdening defendant with ex post facto law, as is prohibited by Const 1963, art 1, § 10 and US Const, art I, § 10, cl 1. A party seeking relief from ex post facto law must establish that the law operates retrospectively, and that the law disadvantages the party. *People v Potts*, 436 Mich 295, 301; 461 NW2d 647 (1990). There is no ex post facto violation where the law in question affects procedural matters only and does not reach a party's "substantial personal rights." *Id.*, citing *Dobbert v Florida*, 432 US 282, 293; 97 S Ct 2290; 53 L Ed 2d 344 (1977). Because the conduct the jury found defendant to have engaged in clearly satisfied the felony component of a felony-murder charge at the time that defendant engaged in that conduct, and because there has been no change in the penalty for felony murder, no retroactive application of criminal law has come to bear on defendant. Defendant suffered no manifest injustice from having his felony-murder conviction predicated on conduct labeled "home invasion" instead of that same conduct labeled as one or more of the predicate felonies listed in the information and provided for in the statute as it read on June 9, 1995.

However, our analysis compels the conclusion that defendant was convicted and sentenced for both felony murder and the predicate felony. This constitutes multiple punishments for the same crime, in violation of double jeopardy principles. *People v Harding*, 443 Mich 693, 714; 506 NW2d 482 (1993); *People v Wilder*, 411 Mich 328, 347; 308 NW2d 112 (1981); *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995). Where a defendant is convicted for both felony murder and the predicate felony, the remedy on appeal is to reverse and vacate the conviction for the predicate felony. *Minor, supra*, 690, citing *Harding, supra*, 714. Although defendant did not raise this issue at

trial or on appeal, we sua sponte reverse the trial court in this one respect and remand with instructions to vacate defendant's conviction and sentence for home invasion.

II

Defendant argues that the prosecutor improperly used evidence that defendant chose to remain silent when arrested as substantive evidence of his guilt, and that the trial court should have cautioned the jury on the proper evaluation of evidence that defendant resisted arrest.

The prosecutor elicited from the arresting officer that defendant chose to remain silent after he was arrested:

> *Q*. Was there anything remarkable about the arrest?
>
> *A*. A struggle ensued. He didn't wish to be arrested, obviously. We had to struggle for awhile, and I believe my Lieutenant had to spray him with pepper gas to subdue him.
>
> *Q*. Did you read him his rights?
>
> A. Yes, Ma'am.
>
> *Q*. As a result of reading him his rights, did he say or do anything?
>
> *A*. Other than I asked him, I read him his rights and asked him if he understood; other than that, nothing.

Defendant raised no objection to this mention of defendant's post-*Miranda* silence. However, failure to object at trial to questions concerning silence in the face of accusation does not preclude this Court from reviewing an alleged infringement of the constitutional right to remain silent. *People v Finley*, 177 Mich App 215, 218; 441 NW2d 774 (1989).

At closing arguments, the prosecution stated, "I asked [the arresting officer]: Did he at any time, speaking of Mr. Billingslea, ever say anything to you, in other words, did he say I have hit somebody, please go back and check on him; but he said he didn't say anything." This prompted defendant to request a mistrial.

"[T]he grant or denial of a motion for mistrial rests in the trial court's sound discretion, and an abuse will be found only 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) (Boyle, J., with Riley and Griffin, JJ.).

At issue is defendant's right not to incriminate himself, US Const, Am V, and to due process, US Const, Am XIV. A criminal accused has the right to remain silent when arrested and faced with accusation, and the arrestee's exercise of that right may not be used as evidence against the arrestee. *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). A defendant's silence may

not be used as substantive evidence of guilt. *People v Bobo*, 390 Mich 355, 361; 212 NW2d 190 (1973).

However, where a defendant voluntarily makes a statement, questioning regarding omissions from that statement are proper impeachment. *People v Wigfall*, 160 Mich App 765, 779; 408 NW2d 551 (1987). This exception has been extended to allow impeachment of a defendant's general protestations that the defendant cooperated with police: "[E]vidence of a defendant's silence after receiving *Miranda* warnings is excluded for the purpose of protecting certain rights of the defendant, not so that the defendant may freely and falsely create the impression that he has cooperated with the police when in fact he has not. . . . [O]nce the defendant has raised the issue of his cooperation with law enforcement authorities, he . . . opened the door to a full . . . development of that subject." *People v Vanover*, 200 Mich App 498, 503; 505 NW2d 21 (1993). Evidence of a defendant's silence is admissible if used strictly for impeachment, and not as direct evidence of the defendant's guilt. *Id.*

In the instant case, defendant did not himself testify. However, defense counsel's opening statements included representations that defendant had been both remorseful and cooperative with police in the aftermath of the crime, and defense counsel later elicited testimony from a police investigator to the effect that defendant, the day after his arrest, was both cooperative and concerned for the well-being of the victim. Further, defendant's confession to police, neither the accuracy nor the voluntariness of which is disputed on appeal, included the assertion, "It dawned on me what I had done, so I started to drive back, and the police pulled me over, and I got arrested with the shotgun in the car."

Under these facts, the prosecutor properly used defendant's silence as impeachment. A defendant whose confession includes an assertion of concern for the victim, whose counsel tells the jury that the defendant was cooperative and remorseful after being arrested, and whose counsel elicits testimony to the effect that defendant was cooperative and concerned for the victim, has opened the door to use of the defendant's post-arrest silence to rebut those assertions. Examination of the prosecutor's statements and evidence in context shows clearly that the prosecutor did not emphasize defendant's silence in the face of accusation, but rather emphasized defendant's silence when defendant was ostensibly concerned about the elderly man defendant had struck and left on the floor the day before. The trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Regarding defendant's resistance to arrest, defendant argues that the court abused its discretion by failing to take the initiative to issue the jury a standard cautionary instruction regarding how to evaluate this evidence. Such evidence is admissible as proof of defendant's state of mind when arrested, but not as substantive evidence of defendant's guilt. See *People v Kraai*, 92 Mich App 398, 409; 285 NW2d 309 (1979) (concerning evidence of flight from custody).

Had defendant requested a cautionary instruction, it would have been proper for the court to provide it. However, the court was not obliged to provide such an instruction sua sponte. The two cases defendant cites stand for the proposition that a court must provide a cautionary

instruction regarding *accomplice testimony*, if the issue is closely drawn. See *People v McCoy*, 392 Mich 231, 240; 220 NW2d 456 (1974); *People v Fredericks*, 125 Mich App 114, 122; 335 NW2d 919 (1983). No such rule applies to evidence of resisting arrest.

Because the evidence in question was relevant and admissible, because defendant did not request a cautionary instruction at trial, and because defendant establishes no rule requiring a court to issue such an instruction on its own initiative, the circuit court did not abuse its discretion by not providing a cautionary instruction sua sponte regarding evidence of resisting arrest.

III

Defendant argues that the prosecution failed to present sufficient evidence of defendant's malice to support the murder conviction. When reviewing the sufficiency of evidence in a criminal case, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the elements of the crime were proved beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

Felony murder in Michigan includes the element of malice required for second-degree murder: "the intent to kill, the intent to do great bodily harm, or the intent to create a high risk of death or great bodily harm with knowledge that death or great bodily harm will be the probable result." *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). "Malice may be inferred from the facts and circumstances of the killing." *Id.* The effect of the felony-murder statute is to raise what would otherwise be second-degree murder to first-degree murder for the purpose of punishment. *People v Harding*, 443 Mich 693, 711; 506 NW2d 482 (1993).

Defendant argued at trial that if he intended to kill he could easily have done so, being in better physical condition than the victim, and having the victim's shotgun and ammunition at his disposal. Defendant further emphasizes evidence that defendant was an alcoholic intoxicated with liquor when defendant accosted the victim, suggesting that defendant acted only to get more liquor and not to do violence. However, these arguments demonstrate only that defendant lacked the specific intent required for first-degree murder. Felony murder requires only the general intent necessary for second-degree murder, this including the intent to place the victim in great risk of death or serious bodily injury with a reckless indifference to the probability that death or serious injury will result.

In the instant case, we agree with the trial court that the evidence that defendant went to the victim's home intending to get money for more alcohol, kicked in the victim's front door with great force, struck the victim in the head with enough force to knock him down, stole the victim's car plus other property, then left the victim to his own devices until others attempted to rescue him two days later, could well lead a reasonable juror to conclude that defendant acted with a reckless indifference to the likelihood that his actions would cause death or great bodily injury to the victim.

Defendant also disputes the sufficiency of the evidence that defendant's actions actually caused Mr. Norfolk's death, arguing that the head injury could have been caused by a subsequent fall relating to Norfolk's difficulty walking, or from his drinking, or both. However, defendant confessed to striking

Norfolk with enough force to knock him down, and the record contains no evidence of any other cause of Norfolk's injury. "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). It is sufficient if the prosecution proves its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defense may produce. It is not necessary for the prosecution to disprove every reasonable theory of innocence. *People v Johnson*, 137 Mich App 295, 303; 357 NW2d 675 (1984).

IV

Defendant argues that the trial court abused its discretion in limiting defendant's presentation of evidence that Norfolk actually died as the result of negligent hospital care instead of from his head injury, and in refusing a jury instruction on negligent medical care. However, there was no evidentiary basis for development of this theory at trial. There is no evidence in the record that the victim's hospital care was negligent, let alone grossly negligent. Witnesses attested to Norfolk's receiving adequate care in the hospital, and none suggested otherwise. Defendant made no offers of proof regarding evidence of improper hospital care. Again, circumstantial evidence may prove a fact without the prosecution's having to disprove every, or any, innocent hypothetical alternative. *Id*.

If there were evidence that Norfolk's medical treatment was so grossly negligent as to constitute the sole, intervening cause of his death, this would operate to shield defendant from criminal responsibility for the death. However, any lesser showing of hospital negligence would constitute, at most, a mere contributory cause of death, leaving defendant fully liable for his conduct that contributed to causing Norfolk's death. *People v Bailey*, 451 Mich 657, 678-679; 549 NW2d 325 (1996).

The defense sought to elicit expert testimony to the effect that usually if a head injury caused death, it did so quickly, but such testimony would not have been germane to the issue of defendant's culpability in causing Norfolk's death. There was no dispute that the head injury caused Norfolk to become hospitalized, and there was also no dispute that it was complications from the injury, including bedsores as a consequence of the hospitalization, plus infirmities that the victim had in the first place, that caused his death. Even defendant's own expert unequivocally stated, "The manner of death in this case was homicide. . . . Bedsore infection would be one of the complications of in [sic] the realm of the causation of death."

In the absence of evidence that the hospital was negligent, the trial court was required neither to entertain testimony suggesting that the head injury may not have been the exclusive cause of death, nor to instruct the jury on the subject of negligent medical care.

V

Finally, defendant argues that the trial court denied him a fair trial by taking over the questioning of witnesses, raising objections to defense testimony on its own initiative, and denigrating and belittling defense counsel in front of the jury.

This Court reviews a trial court's general conduct of a trial for an abuse of discretion. See *People v Cole*, 349 Mich 175, 200; 84 NW2d 711 (1957); *People v Wigfall*, 160 Mich App 765, 773; 408 NW2d 551 (1987). We find no such abuse in the instant case.

A court must not take over the role of prosecutor, or unjustifiably arouse suspicion in the mind of the jury regarding a witness' credibility. *People v Sterling*, 154 Mich App 223, 229; 397 NW2d 182 (1986). Further, a court should treat counsel with "the consideration due an officer of the court. Belittling observations aimed at defense counsel are necessarily injurious to the one he represents." *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989). However, a trial court has the duty and the authority to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." MRE 611(a). A trial court may question witnesses in order to clarify testimony or elicit additional relevant information. MRE 615(b). The court may on its own motion reject irrelevant evidence. *Lynch v Sign of the Beefeater, Inc*, 90 Mich App 358, 362; 282 NW2d 321 (1979), rev'd on other grounds 407 Mich 866 (1979) (citing *Detroit v Porath*, 271 Mich 42; 760 NW 114 [1935]). Examining the transcript of the proceedings below, we find that the trial court's actions about which defendant complains generally fall under its prerogative to clarify testimony and limit the presentation of evidence to relevant matters. We further hold that, although the trial court may have seemed impatient at times, the trial court did not belittle and denigrate defense counsel.

The trial transcript reveals the trial judge to be both authoritative and driven to make efficient use of judicial resources, but not disrespectful of counsel or prejudicial toward defendant. Further, the court did not bias the jury by singling out defense counsel for stern treatment, several times showing an impatience with the prosecuting attorney similar to that about which defendant complains. The court may have been brusque at times—with both parties—but its conduct of the trial did not prejudice defendant or otherwise rise to the level of an abuse of discretion. Although ideally a judge "would always discreetly and circumspectly subordinate his opinions and emotions so as to display courtesy and impartiality to counsel and litigants . . . it does not follow that every deviation from the ideal requires a new trial." *People v McIntosh*, 62 Mich App 422, 438-439; 234 NW2d 157 (1975), rev'd in part on other grounds 400 Mich 1 (1977). In the instant case, we hold that the trial judge conducted a fair trial for defendant.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Joseph B. Sullivan

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).