STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LASHAWN REYNOLDS,

Defendant-Appellant.

UNPUBLISHED
March 26, 1999

No. 205528
Recorder's Court
LC No. 96-002485

Before: Doctoroff, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree murder, MCL 750.317; MSA 28.549. The trial court sentenced defendant to twenty to thirty years' imprisonment. We affirm.

Defendant first argues that the trial court erred by failing to grant his motion for a mistrial on the ground that the prosecutor elicited testimony from a police officer that defendant failed to show up for a polygraph test and would not submit to taking the test. We disagree. This Court reviews a trial court's grant or denial of a motion for a mistrial for an abuse of discretion. *People v Lugo,* 214 Mich App 699, 704; 542 NW2d 921 (1995). A motion for a mistrial should be granted "only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *Id*.

References to polygraph examinations do not always constitute reversible error because a reference may be "the result of a nonrespons[ive] answer, or otherwise brief, inadvertent and isolated." *People v Rocha*, 110 Mich App 1, 8-9; 312 NW2d 657 (1981); *People v Kiczenski*, 118 Mich App 341, 346-347; 324 NW2d 614 (1982). The following factors should be considered to determine if reference to a polygraph examination constitutes reversible error:

> (1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. [*Rocha, supra,* 110 Mich App 9.]

In this case, the prosecutor asked Officer Shadwell, "How about December 21st, you go to the Manor house?" The officer responded:

> [Defendant] was scheduled for a polygraph that morning, he didn't show up on the 21st, he didn't show up. We called the Manor house. I spoke with [defendant's girlfriend]. She said he was not going to take a polygraph. I asked if it's alright (sic) if we came by [to] look around the house to make sure, we told her that we were looking for the murder scene, she said come on over. It's no problem, good.

Defendant waited two days before moving for a mistrial on the basis of Officer Shadwell's reference to the polygraph examination. When defendant moved for a mistrial he did not request that, in the alternative, a cautionary instruction be given to the jury. Furthermore, the reference to the polygraph test was unsolicited and unrepeated. The reference was not an attempt to bolster a witness's credibility. Finally, defendant did not take a polygraph test, and therefore no polygraph results were admitted. Accordingly, the trial court did not abuse its discretion when it denied defendant's motion for a mistrial. *Lugo, supra*.

Defendant next argues that the trial court erred in denying his motion for a directed verdict with respect to the first-degree felony murder charge because the predicate felony was not established. Defendant further argues that the error was prejudicial even though the jury found defendant guilty of second-degree murder because of the possibility that the jury reached a compromise verdict. We disagree. When reviewing a denial of a motion for a directed verdict, this Court must consider the evidence presented by the prosecution up to the time the motion was made in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994). Circumstantial evidence and reasonable inferences therefrom may be sufficient to prove the elements of a crime. *Id.*

To establish the crime of felony murder, the prosecution must present proofs from which the jury could rationally find that, while committing the underlying offense, the defendant acted with the intent to kill, with the intent to do great bodily harm, or with wanton and wilful disregard of the likelihood that the natural tendency of the defendant's behavior was to cause death or great bodily harm. *McKenzie, supra*, 206 Mich App 428. The underlying felony in this case was larceny.

> In order to prove a larceny, the prosecutor must show the following: (1) an actual or constructive taking of goods or property, (2) an asportation of the same, (3) with an intent to permanently deprive the owner, (4) of property that does not belong to the defendant, (5) against the will and without the consent of the owner. [*People v Edwards*, 171 Mich App 613, 617; 431 NW2d 83 (1988).]

Given that the victim was hit in the head with a hammer a minimum of thirteen times, we conclude that a rational trier of fact could determine that the malice element was established beyond a reasonable doubt. *People v Hughey*, 186 Mich App 585, 592; 464 NW2d 914 (1990). As for establishing the intent to commit the larceny, two witnesses testified that on the night before the victim

died he was carrying approximately two thousand dollars and was going to see defendant to collect money that defendant owed him. No money was found on the victim's body. Furthermore, two days before the murder, defendant had paid a minimal deposit on furniture for which, immediately after the victim's death, he paid cash in full and also made cash purchases at another store. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that all of the elements of larceny were proven beyond a reasonable doubt. Therefore, the trial court properly submitted the issue of felony murder to the jury.

Finally, defendant argues that the trial court erred by admitting into evidence testimony from two witnesses regarding the victim's statements to them on the night he died, that he was going to see defendant to collect money that defendant owed him and that defendant was taking him to several places. We disagree. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Lugo, supra*, 214 Mich App 709. An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997).

Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted. MRE 801(c). The hearsay exception provided by MRE 803(3) allows the admission of a victim's declarations of state of mind or emotion to prove state of mind when state of mind itself is an issue. *People v Furman*, 158 Mich App 302, 315; 404 NW2d 246 (1987). In Michigan, a homicide victim's declarations of where he intended to go and with whom are admissible. *Id.* at 316. Here, the testimony from the two witnesses regarding the victim's statements that he was going to see defendant to collect money that defendant owed him was admissible under MRE 803(3) to show where the victim intended to go and with whom. *Furman, supra*, 158 Mich App 315-316. One of these witnesses further testified that the victim told her, at one point during a telephone conversation, that defendant *had* taken him to several different places. This testimony was outside the scope of MRE 803(3), which excludes such "a statement of memory . . . to prove the fact remembered." However, this testimony was admissible under MRE 803(1) as a present sense impression describing the event of defendant taking the victim to several different places immediately thereafter. *People v Cross*, 202 Mich App 138, 142; 508 NW2d 144 (1993). Therefore, the trial court did not abuse its discretion by admitting the testimony at issue into evidence.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Michael R. Smolenski
/s/ William C. Whitbeck