STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY J. WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
April 13, 1999

No. 204297
Oakland Circuit Court
LC No. 96-149943 FC

Before: MacKenzie, P.J., and Gribbs and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder (larceny), MCL 750.316; MSA 28.548. The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to life without parole. Defendant appeals as of right. We affirm.

First, defendant argues that the trial court erred in denying his motion for a directed verdict because the prosecutor failed to prove that he acted with wanton and wilful disregard of the likelihood that the natural tendency of his behavior was to cause death or great bodily harm, the third form of malice necessary to sustain a felony-murder conviction. We disagree.

In reviewing a trial court's ruling on a directed verdict, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Vincent*, 455 Mich 110, 121; 565 NW2d 629 (1997); *People v Warren*, 228 Mich App 336, 345; 578 NW2d 692 (1998). The malice element of felony murder may be established by showing that the defendant intended to kill, intended to do great bodily harm, or acted with a wanton and wilful disregard of the likelihood of the natural tendency of his act to cause death or great bodily harm. *People v Dumas*, 454 Mich 390, 396-397; 563 NW2d 31 (1997). Malice may be inferred from the facts and circumstances of the killing, including evidence that the defendant set in motion a force likely to cause death or great bodily harm. *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995).

In the present case, the evidence established that while the 79-year-old victim was standing on the passenger side of her car, defendant entered his car which was parked next to the victim. He then

reached through the window of his still-open car door, grabbed the victim's purse and put the car in reverse. As defendant was backing up, the victim, who was still holding on to the purse, fell to the ground. Defendant continued backing up, eventually wrestled the purse from the victim, and drove away. In the process, defendant drove over the victim crushing her right leg and hip. The victim told the emergency room physician that the perpetrator "backed his car over her right leg and hip and then drove back forward over her right leg and hip." Three weeks after the incident, the victim died after her right leg had been amputated in an attempt to save her life. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could conclude that defendant acted in wanton and wilful disregard of the likelihood that the natural tendency of his act was likely to cause death or great bodily harm. The trial court did not err in denying defendant's motion for a directed verdict.

Next, defendant asserts that the trial court abused its discretion in admitting a police officer's hearsay testimony regarding the victim's account of the incident. Defendant contends that the statements cannot be deemed excited utterances because they were made in response to direct questioning by the officer and were, therefore, not spontaneous or unreflecting. We review a trial court's decision whether to admit evidence for an abuse of discretion. *People v Hoffman*, 225 Mich App 103, 104; 570 NW2d 146 (1997).

MRE 803(2), the excited utterance exception to the hearsay rule, allows the admission of statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." MRE 803(2). To be admissible under this exception, two primary requirements must be met: (1) there must be a startling event, and (2) the resulting statement must be made while under the excitement caused by that event. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998); *People v Hackney*, 183 Mich App 516, 524; 455 NW2d 358 (1990).

In the present case, there can be little doubt that being run over by a vehicle is a startling event and that the victim was under the stress of that event when she told the police officer what had occurred. Defendant's contention that the statement was unreliable because it was made in response to police questioning is without merit. We find no abuse of discretion.

Defendant also contends that the trial court abused its discretion in admitting the statements the victim made to the emergency room physician as statements made for purposes of medical diagnosis or treatment. MRE 803(4) allows the admission of statements made for the purposes of medical treatment or medical diagnosis in connection with treatment. In order to be admitted under this exception the statement (1) must be made for purposes of medical treatment or diagnosis in connection with treatment, and (2) must describe medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source of the injury insofar as reasonably necessary to diagnosis and treatment. MRE 803(4); *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992); *People v Crump*, 216 Mich App 210, 212; 549 NW2d 36 (1996).

First, defendant contends that the victim's statements, in particular, the statement that the car ran over her more than once, were improperly admitted because they were not necessary for diagnosis or treatment. We disagree.

At trial, the emergency room physician testified that the pre-examination was necessary for diagnosis and treatment in order to ascertain the cause of the injury, the amount of force involved in the accident, and the severity of the injury. He explained that at the onset, he had to determine if the victim's status had declined and to evaluate and prioritize what treatment was needed. Information about the number of times the vehicle ran over the victim's leg was reasonably necessary for diagnosis or treatment as it assisted the physician in determining the severity of the injury and the extent to which the leg was crushed. Moreover, the remaining statements that the victim had been struck with the car door and had fallen before she was run over were also necessary for treatment. The physician testified that the information contained in the challenged statement assisted him in determining the victim's treatment and especially alerted him to assess whether the victim lacked blood supply to the leg.

Second, defendant argues that the victim's statements were unreliable because: the victim never told bystanders, the police officer, or other medical personnel that she had been run over more than once; the victim "may" have been experiencing the side effects of pain medication before she made the statement; and the victim's statement was the doctor's summary of what the victim said and not the victim's own words.

After a thorough review, we find that defendant has failed to overcome the presumption of truthfulness. *Crump, supra* at 212. There is no indication that the statements were unreliable, and the effect of possible medications is sheer speculation. It is logical that the victim explained her injury in more detail to her physician than she did to others, and the physician testified that his report reflected what the victim told him.

Defendant also contends that the admission of the challenged hearsay statements violated his constitutional right to confrontation. However, the contested statements fell within two firmly rooted exceptions to the hearsay rule. Therefore, defendant's right to confrontation was not violated. *People v Poole*, 444 Mich 151, 163; 506 NW2d 505 (1993), citing *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980); *People v Richardson*, 204 Mich App 71, 74; 514 NW2d 503 (1994).

Finally, defendant argues that he was denied his right to a fair trial when the prosecutor questioned him about his post-arrest, post-*Miranda* warnings[1] silence. Defendant failed to object below and this issue is not preserved for review. See *People v Sutton (After Remand)*, 436 Mich 575, 596; 464 NW2d 276 (1990). In any event, in light of the overwhelming evidence of

defendant's guilt and the testimony of several witnesses who identified defendant as the perpetrator, we are convinced that the alleged error did not change the outcome of the trial.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Roman S. Gribbs
/s/ Kurtis T. Wilder

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