STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 21, 2000
v	No. 211368 Recorder's Court
ROBERT RILEY, Defendant-Appellant.	LC No. 97-005401

Before: Cavanagh, P.J., and Holbrook, Jr. and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b). Defendant was sentenced to the mandatory term of life imprisonment without parole. We reverse.

Defendant first argues that there was insufficient evidence to support his conviction. Viewing the evidence in a light most favorable to the prosecution, we must determine whether a rational trier of fact could find the elements of the crime to have been proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

The elements of first-degree felony murder are:

> (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548. [*People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995).]

In order to convict a defendant as an aider and abettor of first-degree felony murder, the prosecution must show that the defendant had both the intent to commit the underlying felony and the same malice required to convict the principal perpetrator of the murder. *People v Flowers*, 191 Mich App 169, 178; 477 NW2d 473 (1991). The prosecution must show that the aider and abettor had the

intent to commit not only the underlying felony, but also to kill or to cause great bodily harm, or had wantonly and wilfully disregarded the likelihood of the natural tendency of this behavior to cause death or great bodily harm. *Id.* Further, if it can be shown that the aider and abettor participated in a crime with knowledge of his principal's intent to kill or to cause great bodily harm, he was acting with wanton and wilful disregard sufficient to support a finding of malice. *Id.*, citing *People v Kelly*, 423 Mich 261; 378 NW2d 365 (1985).

The underlying felony in this case was larceny in a building. MCL 750.360; MSA 28.592. Elements of the crime of larceny in a building include: (1) the actual or constructive taking of goods or property; (2) the carrying away or asportation with felonious intent the goods or personal property of another; (3) without the consent and against the will of the owner; and, (4) within the confines of a building. *People v Sykes*, 229 Mich App 254, 278; 582 NW2d 197 (1998).

Defendant admitted that he was in the apartment with David Ware and the victim, and acknowledged that he answered the door when a neighbor knocked. He admitted that he took the victim's stereo from the apartment. Defendant was seen by more than one person carrying the victim's personal items from the apartment. Defendant was also seen near the victim's car attempting to get it started and later was seen running down an alley. The evidence clearly supported a conviction for larceny in a building.

To qualify as felony murder, the homicide must be incident to the felony and associated with it as one of its hazards. Defendant claims that the larceny in this instance was a mere afterthought, and that the prosecution had to show that the killing was contemporaneous with the larceny. We disagree. It is not necessary that the murder be contemporaneous with the felony. The prosecution only had to show that defendant intended to commit the larceny at the time the homicide occurred. *People v Kelly*, 231 Mich App 627, 643; 588 NW2d 480 (1998). Nevertheless, we find that, although the evidence supported a larceny conviction, the evidence did not support a first-degree felony murder conviction.

Defendant argues that there is no direct evidence of what took place in the apartment other than defendant's statement to police and the testimony of Ware's mother, Mary McKinney. Defendant denied taking part in the killing or having any knowledge that Ware intended to kill the victim. McKinney's written statement to police and her trial testimony supported defendant's daims and demonstrated that Ware was the one who killed the victim. Defendant argues that the portion of McKinney's testimony in which she claims Ware told her that defendant helped subdue the victim was not worthy of belief because it was not included in her initial written statement, a statement which she had corrected before signing.

Defendant relies on a recent United States Supreme Court decision in support of his argument that Ware's statements to his mother concerning defendant's alleged involvement in the murder should not have been admitted. *Lilly v Virginia*, 527 US 116; 119 S Ct 1887; 144 L Ed 2d 117 (1999). This Court has held that *Lilly*, a plurality decision, is not binding precedent in Michigan. *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000). In *Beasley*, this Court held that it was bound to follow the Michigan Supreme Court's decision in *People v Poole* 444 Mich 151; 506 NW2d 505 (1993).[1] See also *People v Schutte*, ___ Mich App ___; ___ NW2d ___ (2000).

In *Poole*, three defendants were bound over on charges of first-degree felony murder and assault with intent to rob while being armed. Downer, one of the defendants, told his cousin that he had "killed somebody" in an attempted robbery in which one of the other defendants, Poole, actively participated. Downer had volunteered the confession to his cousin and relayed the information, including statements inculpating Poole, in a narrative manner. *Id.*, 154-155. The Court ruled that the Downer's statements to his cousin satisfied the requirements of MRE 804(b)(3) and the Confrontation Clause. *Id.*, 157.

The Supreme Court held that whether a statement against penal interest that also inculpates an accomplice bears sufficient indicia of reliability to provide the trier of fact a satisfactory basis for evaluating the truth of the statement, whether it has particularized guarantees of trustworthiness sufficient to satisfy Confrontation Clause concerns, must be decided on a case-by-case basis. *Id.*, 163-164. This Court must consider the circumstances surrounding the making of the statements as well as its contents. *Id.*, 164.

Factors that favor the admission of such a statement include the following: "whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates that is, to someone whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener." *Id.*, 165. Factors weighing against admissibility include the following: "whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had motive to lie or distort the truth." *Id.* The foregoing factors are not exclusive and "the totality of the circumstances must indicate that the statement is sufficiently reliable to allow its admission as substantive evidence although the defendant is unable to cross-examine the declarant." *Id.* A formidable grid work is presented to transmogrify classic hearsay into "trustworthy," "reliable" evidence.

McKinney was at Ware's apartment the day after the killing. Ware told his mother that he had been at the victim's apartment, that the victim had made unwanted sexual advances, and that Ware had twice put the victim in a "sleeper hold." At trial the mother testified that Ware told her that the victim began to struggle and that he told defendant to get a roll of duct tape that was on a table in the victim's apartment. Ware stated that defendant helped subdue the victim by taping his wrists. Ware also stated that both men thought the victim was alive and coming to when they left the apartment. McKinney approached the police and told them what her son had told her. She made a formal written statement. As noted, the written statement did not contain the hearsay testimony that inculpated defendant at trial. There was no reference to defendant helping to subdue the victim.

Defendant argues that McKinney's failure to include the inculpating portion of Ware's comments in her written statement is so significant as to remove all credibility regarding that portion of her testimony, and that that portion of her testimony should have been stricken. Defendant did not object to the testimony at trial. This Court reviews unpreserved claims of constitutional error for plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 761-764, 774; 597 NW2d

130 (1999). A "reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 774.

After reviewing all of the circumstances surrounding the portion of the statement inculpating defendant, we are convinced that it lacked sufficient indicia of reliability to provide the jury with a satisfactory basis for evaluating the truth of the statement. The admission of the statement violated defendant's Confrontation Clause rights. There was no other evidence to corroborate that portion of McKinney's testimony. McKinney's own corrected written statement did not include the inculpatory hearsay. Absent McKinney's testimony, there was insufficient evidence to convict defendant of first-degree felony murder. Defendant's conviction on that charge is therefore reversed. However, since there was sufficient evidence to support a finding of guilty on the underlying felony, we remand for entry of judgment of a conviction for larceny from a building.

In light of our ruling, we decline to address defendant's other issues raised on appeal.

Reversed in part and remanded for entry of judgment of conviction of larceny in a building and for sentencing thereon. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Michael J Kelly

[1] We note that the declarant in *Lilly* made the statement that inculpated his codefendant while under police questioning. The declarant in *Poole* made the statements to his cousin, while the declarant in *Beasley* told his girlfriend. We agree with Justice Thomas that "the Confrontation Clause 'extends to any witness who actually testifies at trial' and 'is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions.'" *Lilly*, *supra*, at 143, Thomas, J. concurring in part and concurring in the judgment. Nonetheless, we are bound to follow the decisions in *Poole* and *Beasley*.