

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OLIVER WEBB, IV,

Defendant-Appellant.

UNPUBLISHED

June 12, 2001

No. 219888

Saginaw Circuit Court

LC No. 98-015741

Before: Cavanagh, P.J., and Markey and Collins, JJ.

PER CURIAM.

This case arises from the shooting death of Tommie Ford, a sixteen-year-old who was shot on Easter morning, 1998, in an isolated area in Saginaw. The prosecutor's theory of the case was that defendant murdered the victim with premeditation and deliberation because of the victim's relationship with defendant's girlfriend, and during the course of robbing the victim of a necklace. The jury found defendant guilty of first-degree murder under two alternative theories, that the killing was done with premeditation and deliberation and also during the commission of a robbery, MCL 750.316(1)(a) and (b), and of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment for the first-degree murder conviction and a consecutive two-year term for the felony-firearm conviction.¹ Defendant appeals as of right. We affirm.

Defendant first argues on appeal that the trial court abused its discretion in refusing to instruct the jury on how to consider testimony from an alleged accomplice. Defendant contends that the jury should have been cautioned that the testimony of defendant's girlfriend and cousin, Emilie Moore and Adrian Combs, respectively, may have been slanted to defendant's disadvantage in hopes of keeping themselves from being implicated in the crime.

¹ The trial court took care to structure its judgment of sentence to include one murder conviction and sentence supported by two alternative theories in accord with *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998). The court vacated the conviction for armed robbery to avoid a double-jeopardy violation. See *People v Harding*, 443 Mich 693, 714; 506 NW2d 482 (1993); *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995).

This court reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Instructions must cover each element of each offense charged, along with all material issues, defenses, and theories that have evidentiary support. *Id.* The determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

Where an accomplice testifies against a defendant, the trial court must provide a cautionary instruction concerning the credibility of such testimony if one is requested, and must do so sua sponte in the absence of a request if the issue is closely drawn. *People v McCoy*, 392 Mich 231, 240; 220 NW2d 456 (1974). In this case, the trial court ruled that no such instruction was appropriate concerning Emilie Moore or Adriane Combs, because

neither one of those two people were charged with anything. There's absolutely no testimony to indicate that any of them knew what was going to go on at . . . that place or that they participated in attempting or furthering the crime.

Defendant argues that the trial court presumed that Moore and Combs were not accomplices simply because the prosecutor chose not to charge them in the matter. However, the trial court's statement that there was "no testimony that any of them knew what was going to go on," indicates that the court did not merely rely on the fact that Moore and Combs were not charged, but concluded that the evidence did not indicate that those witnesses were accomplices. While uncontroverted evidence indicated that Combs brought the murder weapon with him when joining defendant and Moore on the morning of the crime, and that Moore took the step of removing the gun from the car at the scene of the crime, neither witness implicated the other in any kind of conspiracy, and both indicated that they were surprised when defendant started shooting and were concerned about the victim in the aftermath.

Further neither the theories of the prosecution or the defense included that either Moore or Combs was responsible or shared responsibility for the charged conduct. Indeed, the defense maintained that the shooting erupted wholly without deliberation, as the result of a confrontation between defendant and the victim. As a matter of logic, defendant's theory at trial that deliberation played no role in the matter is utterly at variance with any suggestion that there could have been any accomplices at all.

We conclude, therefore, that the trial court did not abuse its discretion in denying defendant's request to provide the jury with a cautionary instruction concerning testimony from accomplices.

Defendant next argues that the trial court abused its discretion in admitting grisly photographs depicting the victim's body in an advanced state of decomposition and the victim's skull as viewed at the autopsy. This Court reviews the trial court's decision to admit or exclude evidence for an abuse of discretion and will reverse only where there is a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

"Photographs that are merely calculated to arouse the sympathies or prejudices of the jury are properly excluded, particularly if they are not substantially necessary or instructive to

show material facts or conditions.” *People v Mills*, 450 Mich 61, 77; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995), quoting 29 Am Jur 2d, Evidence § 787, pp 860-861. However, photographs offered for a proper evidentiary purpose “are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors.” *Id.* A jury is entitled to learn the “complete story” of the matter in issue. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).

The trial court admitted the photographs on the ground that the evidence substantiated the testimony of Moore, whose credibility was key to the case. The court further found that the photographs were admissible as illustrating the attempt to conceal the body, and as indicative of the assailant’s intent. The court concluded that the photographs were more probative than prejudicial and offered to provide a limiting instruction concerning their evidentiary purposes.

Defendant relies on *People v Wallach*, 110 Mich App 37; 312 NW2d 387 (1981), vacated and remanded on other grounds, 417 Mich 937 (1983), for the proposition that photographs of murder victims are inadmissible to show premeditation and deliberation where the defense does not deny the brutality of the killings, but only the defendant’s participation in them. *Wallach* does stand for the proposition that photographs of homicide victims should not be admitted if they “indicate nothing about the assailant’s thought processes prior to the ultimate action [or] at what point during the [assault] the victims actually expired.” *Id.* at 66. However, according to higher and more recent authority, photographic evidence of injuries is admissible to prove intent to kill, and “may also be used to corroborate a witness’ testimony.” *Mills, supra* at 71, 76. Further, “[t]he mere fact that defendant did not contest the nature of the fatal wounds or the physical circumstances of the shooting does not render inadmissible evidence regarding these matters.” *People v Schmitz*, 231 Mich App 521, 534; 586 NW2d 766 (1998). Additionally, the availability of alternative means of presenting the information is not grounds for excluding photographic evidence. See *Mills, supra* at 76.

Here, the autopsy photographs showed three gunshots to the head, which corroborated the witness accounts of the shooting, and that two of the bullet holes were on the side, not the front, of the head, which militates against any suggestion that the shots were fired as a defensive gesture. The photographs of the body as found by the authorities corroborated testimony that defendant had returned to the body to move it farther from the trail, and otherwise to disturb it in ways intended to make identification more difficult. The trial court reasonably regarded this evidence as shedding light on intent, in that such actions are incompatible with those of a person who acted defensively. Further, it is not unreasonable to regard such covert activity after a murder as a possible continuation of a plan in place before the murder. See *People v Johnson*, 460 Mich 720, 733; 597 NW2d 73 (1999) (evidence that the assailant moved the body to a more secluded area may be indicative of premeditation).

Given the relatively strong probative value of the photographic evidence, the risk of unfair prejudice did not substantially outweigh its probative value. MRE 403. Accordingly, the trial court did not abuse its discretion in admitting the photographs.

Defendant next argues that the prosecutor improperly elicited hearsay testimony over objections made and sustained. Hearsay is a “statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c); *People v Bartlett*, 231 Mich App 139, 159; 585 NW2d 341 (1998).

At trial, the prosecutor elicited from a friend of Emilie Moore that the witness had met Moore at church on the morning of the crime, and that Moore was emotionally distraught at the time. When the prosecutor asked if Moore had explained her emotions, the trial court sustained defense counsel’s hearsay objection. Defendant contends, however, that the prosecutor succeeded in introducing three hearsay statements attributable to Moore through the witness—that Moore told the witness that defendant had murdered the victim, that Moore was afraid for her life as the result of the crime, and that Moore told the witness not to speak to anyone else about the matter.

Our review of the record shows that while the challenged testimony indicates that the witness found representations from Moore disturbing, the testimony included no revelation that Moore had asserted that the victim had been murdered, or that defendant was the murderer. Further, although the testimony suggests that Moore felt fear over the matter, the testimony nonetheless falls short of reporting that Moore actually asserted that she was afraid, let alone why she was afraid. Only assertions related to proving the matter asserted are subject to exclusion under hearsay rules. MRE 801(a). Finally, although the testimony does indicate that Moore told the witness not to repeat her story, that testimony thus describes a command, not an assertion. Because the report that Moore told the witness not to speak of the matter includes no assertion offered to prove the truth of the matter asserted, that evidence was not excludable as hearsay. *Id.*

Our review of the challenged testimony reveals that in neither direct nor indirect discourse did the witness restate an unsworn assertion on Moore’s part that was offered to prove the matter asserted. For these reasons, defendant’s argument that the prosecutor improperly elicited hearsay testimony over a sustained objection is without merit.

Defendant next argues that the trial court erred in denying his motion for a directed verdict. When reviewing a trial court’s decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999). Here, defendant challenges the sufficiency of the evidence only with regard to the specific intent elements of premeditated murder and armed robbery.

In order to convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the killing was premeditated and deliberate. *People v Marsack*, 231 Mich App 364, 370; 586 NW2d 234 (1998). “Premeditation and deliberation require sufficient time to allow the defendant to take a second look.” *Id.* at 370-371.

Premeditation and deliberation may be inferred from the facts and circumstances surrounding the killing, including: motive, as the result of a prior relationship between the parties, a weapon acquired and positioned in preparation

for the homicide, circumstances and events surrounding the killing, and organized conduct prior or subsequent to the killing suggesting the existence of a plan. [*People v Youngblood*, 165 Mich App 381, 387; 418 NW2d 472 (1988).]

In this case, the evidence indicated that defendant was possessive of Emilie Moore generally, and jealous of the time she spent with the victim in particular. In response to Moore's revelations concerning her recent activities with the victim, defendant stated plainly that the victim had "crossed the line" and "had to die." This evidence demonstrates defendant's motive to kill the victim. Further, while testimony showed that Adriane Combs had possession of the murder weapon early on Easter morning and that Emilie Moore removed it from the car at the scene of the crime, the evidence shows that defendant on both occasions took the gun from those companions. That the gun remained in the car when the party arrived at the scene of the crime and first left the vehicle does not necessarily mean that defendant never intended to use it; the jury was free to conclude that defendant did not bring out the gun at first only as an oversight, or simply determined to wait until later in the confrontation to bring the gun into play.

The circumstances of the killing likewise support the theory of premeditation. According to trial testimony, defendant brought the victim to a location that he had earlier identified as the perfect place to kill a person, took the gun from Moore, interrogated the victim, then shot the victim. The evidence further indicates that, immediately after and in the days following the shooting, defendant moved the body to a more secluded area, and also mutilated it in ways designed to hinder identification. See *Johnson, supra* at 733. Considered in the light most favorable to the prosecution, the evidence was sufficient to establish that defendant acted with premeditation and deliberation in killing the victim.

The elements of armed robbery are (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute. MCL 750.529; *People v Turner*, 213 Mich App 558, 569; 540 NW2d 728 (1995).

The evidence in this case showed that on Easter morning, defendant asked Moore about her necklace and learned that she had given it to the victim. After the shooting, defendant demanded that Moore remove the necklace from the victim and, when she refused, removed it himself. The evidence further indicates that the necklace was not in plain view at the time; thus, the evidence that defendant took the initiative to find and retrieve it, and did so in the excitement immediately following the shooting, strongly suggests that the plan to take the necklace from the victim permeated defendant's course of conduct.

Defendant argues that Moore had given him permission to wear the necklace, and suggests that he thus did not deprive the victim of his own property, but instead simply handled Moore's property in conformity with her ownership rights. However, the evidence in fact indicated that Moore had refused to let defendant wear the necklace, and that she also refused defendant's demand to retrieve the necklace from the victim. Even if the necklace was not the property of the victim at the moment, defendant was nonetheless obliged to presume the victim's right to remain in possession of it. "[P]ossession is good title against all the world except those having a better title." *Anderson v Gouldberg*, 51 Minn 294, 296-297; 53 NW 636, 637 (1892). The evidence affords no basis for concluding that defendant either had superior title, or was acting at the time as the agent of one who did.

Defendant also argues that the victim was dead by the time he removed the necklace, and that taking property from a dead person cannot constitute armed robbery. As an initial matter, we note that according to expert testimony, the victim in this case could have lived for up to ten minutes after he was shot, and thus could well have been alive when the necklace was taken from him. However, whether the necklace was taken just before, or just after, the victim died is not dispositive.

Defendant cites no authority for the proposition that a robbery that is not completed until after the victim has been killed necessarily ceases to be a robbery. The relevant inquiry is when the intent was formed, not when the property was taken. See, e.g., *People v Brannon*, 194 Mich App 121, 125; 486 NW2d 83 (1992) (where the intent to take property from the victim was not formed until after the homicide is completed, the theft cannot establish the predicate felony for a felony-murder conviction), citing *People v Wells*, 102 Mich App 122, 133; 302 NW2d 196 (1980). We thus reject defendant's suggestion that one who assaults a victim with a dangerous weapon intending to commit robbery, and then kills the victim and takes the victim's property afterward, avoids criminal liability for armed robbery. Here, as we concluded above, there was a reasonable evidentiary basis for concluding that defendant intended to take the necklace from the victim from the start.

We conclude that the evidence presented at trial was sufficient to persuade a rationale jury, beyond a reasonable doubt, that defendant killed the victim with premeditation and deliberation, and in furtherance of the intent to rob him. Accordingly, the trial court did not err in denying defendant's motion for directed verdict.

Finally, defendant challenges the constitutionality of the automatic-waiver statute, under which the prosecutor enjoys discretion to charge a juvenile as an adult in certain cases, and thus, in cases of first-degree murder, to bring to bear the mandatory life sentence to which adults are subject. See MCL 764.1f; MCL 769.1. Defendant challenges this legislation on grounds of separation of powers, equal protection, due process, and conflict with court rules. Each of these arguments was raised in, and squarely rejected by, this Court in *People v Conat*, 238 Mich App 134, 146-153 (separation of powers), 153-157 (equal protection), 157-161 (due process), and 162-164 (to the extent the automatic-waiver statute conflicts with court rules, the legislation is substantive and not procedural, and thus overrides the court rules); 605 NW2d 49 (1999). Accordingly, defendant's argument is without merit.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey

/s/ Jeffrey G. Collins