STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 21, 2001
V	No. 219074 Genesee Circuit Court
TRENT MAURICE CARR, Defendant-Appellant.	LC No. 98-003315-FC

Before: K. F. Kelly, P.J. and Hood and Zahra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316(1)(a), armed robbery, MCL 750.529, kidnapping, MCL 750.349, carjacking, MCL 750.529a(1), and possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b. He was sentenced to concurrent terms of life imprisonment without the possibility of parole for the first-degree premeditated murder conviction, fifteen to thirty years' imprisonment for the armed robbery conviction, and twenty-five to fifty years' imprisonment for the kidnapping conviction, to be served consecutively to a term of two years' imprisonment for the felony-firearm conviction and a term of twenty-five to fifty years' imprisonment for the carjacking conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court erred by denying his motion for a separate trial from codefendant Reginald White. We disagree. The decision to sever or join defendants is within the discretion of the trial court. *People v Hana*, 447 Mich 325, 331, 346; 524 NW2d 682 (1994), citing MCL 768.5 and MCR 6.121(D).

A defendant does not have an absolute right to a separate trial, and strong policy favors joint trials in the interest of judicial economy. *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). Severance is mandated under MCR 6.121(C) only when a defendant demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. *Hana*, *supra*. Severance is required where the defenses are mutually exclusive or irreconcilable, not merely where they are inconsistent. *Id*. at 349. In addition, severance is mandated only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that "clearly, affirmatively, and fully

demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Id.* at 346. The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, precludes reversal of a joinder decision. *Id*. at 346-347.

Here, defendant and White's joint trial involved numerous witnesses and substantially identical evidence. To hold two trials on these substantially identical cases would have been unnecessarily duplicative and excessive. As such, the interests of justice, judicial economy and orderly administration clearly called for a joint trial. Further, each defendant had a separate jury and each jury was excused when appropriate in order to avoid prejudice because of potentially antagonistic defenses. We have approved the use of dual juries to avoid problems in joint trials of defendants with antagonistic defenses. *People v Greenberg*, 176 Mich App 296, 304; 439 NW2d 336 (1989); *People v Brooks*, 92 Mich App 393, 396-397; 285 NW2d 307 (1979).

Moreover, defendant failed to submit an affidavit or make an offer of proof that persuasively demonstrated that his substantial rights were prejudiced. In fact, defendant failed to sufficiently explain, in the trial court or on appeal, what evidence caused him to suffer the type of prejudice that necessitates severance. "Incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice." *Hana, supra* at 349 (citation omitted). Finally, the trial court instructed defendant's jury separately, and instructed the jurors concerning reasonable doubt and the determination of guilt or innocence on an individual basis. Defendant is not entitled to a new trial on the basis of the trial court's refusal to sever his trial from codefendant White's.

II

Next, defendant claims that the trial court erred in denying his motion to suppress because his statement was not voluntary, but induced by police threats and appeals to sympathy. Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law that a court evaluates under the totality of the circumstances. *People v Cheatham*, 453 Mich 1, 27, 44; 551 NW2d 355 (1996). Deference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses, and the trial court's findings of fact will not be disturbed unless they are clearly erroneous. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

Statements of an accused made during custodial interrogation are inadmissible unless the accused has voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966). The prosecutor must establish a valid waiver by a preponderance of the evidence. *People v Abraham*, 234 Mich App 640, 645; 599 NW2d 736 (1999). Whether a statement was voluntary is determined by examining police conduct, while the determination whether it was made knowingly and intelligently depends in part upon the defendant's capacity. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). In determining whether a statement was admissible, this Court considers the totality of the circumstances surrounding the making of the statement to determine whether it was freely and voluntarily made in light of the factors set forth in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).

Here, the record does not support defendant's contention that his statement was not voluntary. The officer who took defendant's statement testified at the evidentiary hearing that defendant was not threatened. The trial court believed the officer's testimony, and there was no evidence indicating the contrary. Defendant did not testify at the hearing, but indicated in his statement that he was not threatened. There was likewise no evidence that defendant was abused, or deprived of sleep, food, or drink. Although defendant was cuffed to a chair for over an hour before his interview, there was no evidence that the particular restraint caused physical abuse. Further, defendant was advised of his *Miranda* rights before he was questioned, and indicated that he understood those rights. The interview was conducted in the interviewing officer's office and was not prolonged. The officer's entire contact with defendant, including the time for the interview and reviewing defendant's statement, lasted approximately one and a half hours. With regard to defendant's personal circumstances, the record shows that he was nineteen, had a twelfth grade education, and that, although he became emotional and cried at times, he was not extremely distraught such that he was not operating of his own free will. Viewing the totality of the circumstances, the record does not leave us with a firm and definite conviction that a mistake has been made. Thus, the trial court did not clearly err in denying defendant's motion to suppress his statement given to the police.

III

Defendant also argues that the trial court abused its discretion in admitting photographic evidence of the victim. We review a trial court's decision to admit photographic evidence for an abuse of discretion. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995); *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998). 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 Beckley*, 434 Mich 691, 711; 456 NW2d 391 (1990); *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

Photographs that are calculated solely to arouse the sympathies and prejudices of the jury may not be admitted. *Howard*, *supra* at 549. The question is whether photographs are relevant under MRE 401 and, if so, whether their probative value is substantially outweighed by the danger of unfair prejudice under MRE 403. *Mills*, *supra* at 66. Here, the photographs were relevant to show the method in which the victim was murdered, disposed of, and transported, as well as being instructive in depicting the location, nature and extent of the victim's injuries. *People v Williams*, 422 Mich 381, 392; 373 NW2d 567 (1985); *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). The fact that defendant did not dispute that the victim was shot does not render the photographs inadmissible. See *People v Schmitz*, 231 Mich App 521, 534; 586 NW2d 766 (1998). Moreover, relevant photographs are not rendered unfairly prejudicial simply because they are gruesome, vivid or shocking. *Mills*, *supra* at 76. The trial court did not abuse its discretion in admitting the photographic evidence.

IV

Next, defendant argues that the evidence was insufficient to support his convictions of carjacking, kidnapping, armed robbery and first-degree murder. When reviewing the sufficiency of the evidence in a criminal case, we view the evidence in a light most favorable to the

prosecution to determine whether a rational trier of fact could have found that the essential elements of the crimes were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Vronko*, 228 Mich App 649, 654; 579 NW2d 138 (1998). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *Wolfe*, *supra* at 524-526.

With regard to the carjacking conviction, defendant claims that there was no evidence of a taking by force, and that the intent to take the car was not formed until after the victim was presumed dead. To prove carjacking, the prosecution must prove that the defendant took a motor vehicle from another person; that the defendant did so in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle; and that the defendant did so either by force or violence, by threat of force or violence, or by putting another in fear. MCL 750.529a; *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

Here, the testimony, if believed, was sufficient for a rational trier of fact to find the necessary elements, including a taking by force or violence, were proved beyond a reasonable doubt. There was evidence that defendant shot the victim, struck him several times, placed him into the trunk of a car, and closed the compartment, which supports a findings of force or violence. There is no requirement that the force or violence be done with the intent of taking the motor vehicle. See *People v Davenport*, 230 Mich App 577, 578-579; 583 NW2d 919 (1998). Further, after defendant and White forced the victim into the trunk of his car, they drove the victim's car from Flint to Detroit. While en route to Detroit, they stopped, opened the trunk, assaulted the victim further, left him in the trunk, and continued to their destination. Viewed in a light most favorable to the prosecution, sufficient evidence was presented to allow a rational trier of fact to conclude that the essential elements of carjacking were proved beyond a reasonable doubt.

With regard to the kidnapping conviction, defendant contends that there was insufficient evidence to prove that the movement of the victim was not merely incidental to the underlying crime of murder because he "thought they were getting rid of a dead body." A person can be convicted of kidnapping if it is proved beyond a reasonable doubt that the person wilfully, maliciously, and without lawful authority forcibly or secretly confined or imprisoned any other person within this state against the other person's will. MCL 750.349. To establish the necessary element of asportation, there must be some movement of the victim taken in furtherance of the kidnapping that is not merely incidental to the commission of another underlying lesser or coequal crime, *unless* the underlying crime involves murder, extortion, or taking a hostage. *People v Wesley*, 421 Mich 375, 388; 365 NW2d 692 (1984); *Green*, *supra* at 697. An asportation of the victim incidental to an underlying crime of murder is sufficient asportation for a kidnapping conviction. *Wesley*, *supra*. Thus, defendant's claim is unpersuasive.

With regard to the armed robbery conviction, defendant argues that the evidence was insufficient because "[t]he $200 that was taken was money the deceased owed the Defendants." To prove armed robbery, the prosecutor must prove an assault, a felonious taking of property from the victim's presence or person, while the defendant is armed with a dangerous weapon described in the statute. MCL 750.529. Armed robbery is a specific intent crime, and the

prosecutor must establish that the defendant intended to permanently deprive the owner of property. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995).

Here, there was evidence that, while the victim was alive in the trunk, defendant reached into his pocket, took $200, and later gave the money to White. This evidence, if believed, established that defendant took the victim's property without his consent and carried it away. See *People v Malach*, 202 Mich App 266, 270; 507 NW2d 834 (1993). Further, defendant's act of giving the money to White shows an intent to permanently deprive the victim of his property. Accordingly, viewed in a light most favorable to the prosecution, sufficient evidence was presented to allow a rational trier of fact to conclude that the essential elements of armed robbery were proved beyond a reasonable doubt.

With regard to the first-degree murder conviction, defendant argues that the evidence did not establish premeditation and deliberation. First-degree premeditated murder requires proof that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *Id*. Premeditation and deliberation may be established by evidence of "(1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *Id*.

Here, evidence was presented at trial that defendant and White stated to a witness their intent to rob the victim when he arrived to pay his wife's drug debt. The witness actually heard defendant say that he was going to shoot the victim. After defendant shot the victim, he was observed punching the victim. Thereafter, he and White placed the victim in the trunk of a car and attempted to dispose of the body. Viewed in a light most favorable to the prosecution, sufficient evidence was presented to allow a rational trier of fact to conclude that the elements of premeditation and deliberation were proved beyond a reasonable doubt.

V

Next, defendant argues that the trial court erred in sentencing him for first-degree premeditated murder and first-degree felony murder for the death of a single victim. Because defendant did not raise this issue in the trial court, he must demonstrate a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Kulpinski*, 243 Mich App 8, 11-12; 620 NW2d 537 (2000).

The double jeopardy guarantees in the federal and state constitutions protect a defendant from multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Torres*, 452 Mich 43, 64; 549 NW2d 540 (1996). Where dual convictions of first-degree premeditated murder and first-degree felony murder arise out of the death of a single victim, the dual convictions violate double jeopardy. *People v Bigelow*, 229 Mich App 218, 220-222; 581 NW2d 744 (1998). In this case, however, the trial court did not sentence defendant to imprisonment for both first-degree premeditated murder and first-degree felony murder. Rather, the Judgment of Sentence provides that defendant was found guilty of first-degree premeditated murder, and lists felony murder as an alternative to the first-degree murder conviction and sentence. As such, the Judgment of Sentence reflects a single sentence for a crime that was

supported by two separate theories. Defendant has not demonstrated a plain error that affected his substantial rights

VI

Defendant's final claim is that the trial court erred when it denied his motion to quash the information on the charge of first-degree murder. We review a circuit court's decision to deny a motion to quash de novo to determine if the district court abused its discretion in ordering the bindover. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). A district court must bind a defendant over for trial when the prosecutor presents competent evidence constituting probable cause to believe that a felony was committed and that the defendant committed that felony. MCL 766.13; MCR 6.110(E); *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997). A district court's determination that sufficient probable cause exists will not be disturbed unless the determination is wholly unjustified by the record. *People v Justice (After Remand)*, 454 Mich 334, 343-344; 562 NW2d 652 (1997).

Here, defendant was charged with open murder. The prosecution was not required to designate a degree of murder. *People v Johnson*, 427 Mich 98, 107-108; 398 NW2d 219 (1986). It is established that the prosecution is not required to present evidence of premeditation and deliberation during the preliminary examination to support a bindover on a charge of open murder. *People v Coddington*, 188 Mich App 584, 593-594; 470 NW2d 478 (1991). As such, this claim is unpersuasive.

We affirm.

/s/ Kirsten Frank Kelly
/s/ Harold Hood
/s/ Brian K. Zahra