

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MOBILE LUNDY,

Defendant-Appellant.

UNPUBLISHED

October 9, 2001

No. 220100

Wayne Circuit Court

LC No. 98-010891

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

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree felony murder, MCL 750.316(1)(b). He was sentenced to life imprisonment without parole and appeals as of right. We reverse and remand for entry of a judgment of conviction for second-degree murder, MCL 750.317, and resentencing.

This cases arises out of the robbery and stabbing death of the victim, Reginald May, in a Detroit apartment. The prosecutor's theory of the case was a crime of opportunity. Specifically, defendant and his girlfriend, Debra Hart, were alone with the victim in an apartment, when defendant saw the victim with \$22, stabbed him to death, and took the money. Defendant's theory of the case was defense of others. Specifically, defendant alleged that he got into an altercation with the victim, who threatened Hart. The stabbing occurred when defendant was protecting Hart and himself. According to defendant's testimony at trial, the victim's money was not an issue in the killing, and Hart took the money from the victim as they left the scene.

Defendant argues that the trial court erroneously gave an instruction that was not supported by the evidence. We agree, but conclude that the erroneous instruction warrants only remand for entry of a judgment of conviction of second-degree murder, not a new trial. Unpreserved claims of instructional error are reviewed for plain error that affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999). Michigan Criminal Jury Instructions do not have the official sanction of the Supreme Court. *People v Gadomski*, 232 Mich App 24, 32 n 2; 592 NW2d 75 (1998). The use of the criminal jury instructions is not required. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). Trial judges should examine the instructions carefully prior to use to ensure their accuracy and appropriateness to the case. *Id.* Judges are expected to tailor the language of the instructions to the facts of the individual case. *People v Stephan*, 241 Mich App 482, 496; 616

NW2d 188 (2000). “It is error for the trial court to give an erroneous or misleading jury instruction on an essential element of the offense.” *Petrella, supra*.

In the present case, both Hart and defendant testified that the altercation between defendant and the victim began after Hart told defendant that the victim was bothering or winking at her when defendant was in the bathroom. While defendant’s account differed from Hart’s,¹ the altercation escalated when the victim bit defendant’s finger. None of this evidence supports an inference that larceny was the motive, or even played a role, in the stabbing of the victim. The felony-murder principle does not apply if the intent to steal from the victim is not formed until after the homicide. *People v Brannon*, 194 Mich App 121, 125; 486 NW2d 83 (1992). Stated otherwise, to qualify as felony-murder, “the homicide must be incident to the felony and associated with it as one of its hazards.” *People v Thew*, 201 Mich App 78, 87; 506 NW2d 547 (1993), quoting *People v Goddard*, 135 Mich App 128, 135-136; 352 NW2d 367 (1984), rev’d on other grounds 429 Mich 505 (1988).

During direct examination, defendant denied that he saw the victim with any money immediately prior to the killing. To support the contention that larceny was the motive for the killing, the prosecutor, on cross-examination, questioned defendant regarding a statement given to police after the murder. In the statement, defendant allegedly told police that he saw defendant with money when he exited the bathroom. The introduction of the inconsistent statement was for impeachment purposes only and could not be used as substantive evidence. *People v Jenkins*, 450 Mich 249, 260-261; 537 NW2d 828 (1995). The prosecutor, however, did not limit its use of the evidence for impeachment purposes, but rather, argued that it was substantive evidence of defendant’s motive.² The impeachment evidence, when argued substantively, affected defendant’s substantial rights in that it elevated the proofs from second-degree murder, punishable by a term of years to life, to first-degree felony murder, punishable by life without the possibility of parole. *Carines, supra*; See also *People v Hodges*, 179 Mich App 629, 632; 446 NW2d 325 (1989). However, when a conviction for a greater offense is

¹ Defendant testified that the victim charged at Hart after she struck him in the head with a bottle. Defendant testified that he intervened at that time to protect Hart. Hart denied striking the victim at any time. Defendant also testified that Hart took the victim’s money as she exited the apartment, while Hart denied taking any money from the victim and blamed defendant for any larceny.

² The prosecutor *commenced* closing argument by stating:

It was a crime of opportunity; a crime that came out of the moment in those early morning hours of September 5th of 1998 over at Mr. Craven’s apartment; a crime that was there, ripe for the taking, ripe for the picking for the defendant.

He comes out of the bathroom, and Mr. May is sitting at the table. He’s got money. He’s got some cash in his hand; and it all comes together, as Ms. Hart says, that Mr. May winked at her. Here’s the money. It all comes together. And it was at that point that the defendant sits next to Mr. May. And although Ms. Hart doesn’t see the knife come out, there are blood spots on the table right there.

reversed on grounds that affect only the greater offense, we may remand for entry of judgment of a necessarily included lesser offense. *People v Bearss*, 463 Mich 623, 631; 625 NW2d 10 (2001). “First-degree murder necessarily includes the lesser offense of second-degree murder.” *People v Binder (On Remand)*, 215 Mich App 30, 33; 544 NW2d 714 (1996), modified on other grounds 453 Mich 915 (1996). Accordingly, we remand for entry of a judgment of conviction of second-degree murder and resentencing.

Defendant next argues two additional claims of instructional error, the failure to give the self-defense and voluntary manslaughter instructions, that denied his right to a fair trial. We disagree. The claim of error regarding the self-defense instruction is not preserved for appellate review, and defendant cannot demonstrate a plain error affecting substantial rights. *Carines, supra*. The trial court denied the request for a self-defense instruction because the testimony supported a defense of others instruction, and defense counsel did not object to this decision. As a result of the ultimate jury conviction in this case, the failure to instruct regarding voluntary manslaughter was harmless. *People v Sullivan*, 231 Mich App 510, 520; 586 NW2d 578 (1998).

Defendant next argues that he was denied a fair trial when the trial court erroneously excluded statements by Hart. We disagree. Defendant failed to make an offer of proof regarding the substance of the excluded testimony, MRE 103(a)(2). Consequently, we cannot determine whether the testimony was offered for the truth of the matter asserted, MRE 801(c), and we are unable to conclude that the exclusion of the testimony affected defendant’s substantial rights. MRE 103(a); *People v Hampton*, 237 Mich App 143, 154; 603 NW2d 270 (1999).

Defendant next argues he was denied a fair trial when the trial judge learned that the jury fabricated their own theory of the case in order to convict. There is no merit to this claim of error.

Defendant next argues that he was denied due process when the trial court rejected defendant’s guilty plea to second-degree murder. We disagree. The trial court has the discretion to reject a guilty plea. *People v Grove*, 455 Mich 439, 444; 566 NW2d 547 (1997). We cannot conclude that the trial court abused its discretion when the factual basis for the plea given by defendant indicated that it was a justifiable homicide. *Id.*

Defendant next argues that the trial court erred in failing to distinguish the crime of larceny from a person from the crime of larceny from a building in the instructions. We disagree. Defendant did not request an instruction regarding larceny from a person and did not ask the trial court to distinguish the crimes at any time. Furthermore, defendant cannot demonstrate plain error affecting substantial rights, particularly when the jury acquitted defendant of the crime of larceny from a building. *Carines, supra*.

Defendant next argues that he was denied a fair trial when a missing witness was located, but not presented to the jury. We disagree. Review of the record reveals that defense counsel failed to request that the trial court re-open proofs upon the production of Officer Terrill Shaw. Furthermore, the statement received by Officer Shaw was hearsay and would not have been admissible at trial. In fact, review of the record reveals that defendant was given the benefit of an adverse witness instruction, and the jury was not recalled after it was learned that he would not have provided testimony that was unfavorable to the prosecution. Accordingly, defendant’s claim of error is without merit. *Carines, supra*.

Defendant next argues that the trial court erred in allowing the prosecutor to impeach him with a statement that was involuntary. We cannot conclude that a plain error affecting substantial rights occurred. *Carines, supra*. Initially, a *Walker*³ hearing was requested by defense counsel. The prosecutor advised the trial court that defendant's statement to police would not be admitted during the case in chief. However, the prosecutor requested that the statement would be admissible for impeachment purposes if defendant chose to testify at trial. The trial court agreed, and defense counsel did not object at any time to the failure to hold the hearing or to the use of the statement for impeachment purposes. "Involuntary confessions may not be used for any purpose at trial, either for substantive evidence or for impeachment purposes." *People v Tyson*, 423 Mich 357, 377; 377 NW2d 738 (1985). However, in the present case, we have no factual basis to conclude that defendant's statement was involuntary. Accordingly, the claim of error does not warrant relief.⁴ *Carines, supra*.

Lastly, defendant argues a new trial is warranted based on ineffective assistance of counsel. We disagree. To establish a claim of ineffective assistance of counsel, the defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness and was so prejudicial that the defendant was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The defendant must overcome the presumption that the challenged action was trial strategy and also establish a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant has failed to meet this burden.

We vacate defendant's conviction for first-degree felony murder and remand for entry of a judgment of conviction for second-degree murder and resentencing. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Harold Hood

³ *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

⁴ We note also that impeachment with the statement appeared to be a surprise to defense counsel. It appears that trial counsel advised defendant that he should not testify at trial. When defendant's waiver of his right to testify was placed on the record, defendant told the trial court that he "really would like to." Based on that statement to the trial court, defendant testified at trial, seemingly against the advice of counsel.