STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 17, 2002
v	No. 229099 Wayne Circuit Court
TITUS BANKS, Defendant-Appellant.	LC No. 99-008712

Before: Bandstra, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, unlawfully driving away an automobile (UDAA), MCL 750.413, and possession of a firearm during the commission of a felony, 750.227b.[1] In addition to the mandatory two-year term for his felony-firearm conviction, defendant was sentenced to concurrent terms of 25 to 45 years' imprisonment for the second-degree murder conviction and 2 to 5 years' imprisonment for the UDAA conviction. Defendant appeals as of right. We affirm.

This case arises from the shooting death of Darrell Brown, who was shot by defendant following an altercation prompted by Brown having backed into a vehicle owned by defendant's companion, Ilamani Hampton. Testimony offered at trial indicated that although Brown attempted to apologize for the accident several times, Hampton refused to accept Brown's apologies and struck him in the face with a beer bottle. During the ensuing fight between Brown and Hampton, defendant approached and fired several gunshots. Brown, who was struck in the back as he attempted to flee the barrage, was killed.

I

On appeal, defendant first argues that the trial court erred when it refused to instruct the jury on the cognate lesser offense of voluntary manslaughter. We disagree.

A trial court, if requested, must instruct the jury on a cognate lesser offense only if the evidence adduced at trial would support a conviction of the lesser offense. *People v Pouncey*,

[1] The jury acquitted defendant of the original charge of first-degree felony murder. MCL 750.316(1)(b).

437 Mich 382, 387; 471 NW2d 346 (1991). This Court reviews the record adduced at trial de novo to determine whether the evidence was sufficient to convict the defendant of the cognate lesser included offense. See, e.g., *People v Cheeks*, 216 Mich App 470, 479-480; 549 NW2d 584 (1996). After such review, we conclude that the evidence at trial was insufficient to support the requested instruction on voluntary manslaughter.

A homicide may be mitigated from murder to voluntary manslaughter if the circumstances surrounding the killing demonstrate that (1) malice was negated by adequate and reasonable provocation, (2) the killing was done in the heat of passion, and (3) there was not a lapse of time during which a reasonable person could control his passions. *Pouncey*, *supra* at 388. With respect to the these elements, there was nothing in the evidence offered at trial to suggest that defendant was adequately and reasonably provoked or that he was in a "highly inflamed state of mind" at the time of the shooting. *Id*. at 390. Defendant was not himself involved in either the physical or verbal altercation initiated by Hampton, nor was it his vehicle that had been involved in the accident. Further, there was no evidence that Hampton requested or even needed defendant's assistance to fend off Brown, and yet defendant pulled out a gun, began firing, and then continued to fire even as Brown and his companions ran away. On the basis of this evidence, we find no error in the trial court's refusal to instruct the jury on voluntary manslaughter.[2]

II

Defendant next argues that the trial court erred when it refused to instruct the jury on the defense of others, arguing that he acted to protect Hampton. Again, we disagree.

Although jury instructions must not exclude material defenses and theories that are supported by the evidence, *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998), an instruction on the use of deadly force in defense of others is warranted only if the evidence shows that the defendant honestly and reasonably believed that the protectee was in danger of being killed or seriously injured at the time the defendant acted. CJI2d 7.21; see also *People v Wright*, 25 Mich App 499, 503; 181 NW2d 649 (1970). Here, however, there is no evidence that Hampton was in danger of death or great bodily harm. Contrary to defendant's assertions, Hampton was not surrounded by Brown and his companions. Although Brown's niece was initially involved in a scuffle with Hampton while Brown and his nephew were still in the car, it was not until after the niece had been thrown to the ground that Brown was able to get out of the car and confront Hampton himself. Moreover, although Brown's nephew also left the car at that time, there is no evidence that he was ever involved in the fight.

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[2] In reaching this conclusion we recognize defendant's assertion that "imperfect self-defense" can mitigate murder to voluntary manslaughter. See *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993). However, defendant never advanced a theory of imperfect self-defense at trial, nor did he request the voluntary manslaughter instruction on the basis that imperfect self-defense mitigated his crime to manslaughter. Defendant may not, therefore, prevail in his argument that a voluntary manslaughter instruction was warranted on this theory. See *People v Posey*, 459 Mich 960; 590 NW2d 577 (1999).

In any event, in order to properly assert a claim of self-defense or the defense of others, a defendant must be shown to have used only the amount of force reasonably required to defend himself or another, and cannot be the initial aggressor. *Kemp*, *supra* at 322-323. Here, it was not disputed at trial that Hampton initiated the fight by throwing a beer bottle at Brown and subsequently hitting him. Defendant's statement to Hampton requesting that he simply "let it go" indicates that defendant knew that Hampton was the aggressor. Moreover, it is clear from the evidence that defendant did not need to fire the gun in order to protect Hampton. There was no evidence that anyone other than defendant possessed a weapon that night. Further, Brown and his companions began to flee as soon as defendant produced the gun. Thus, even if Hampton was previously in danger of death or great bodily harm, this was no longer the case at the time defendant began firing. Indeed, Brown was shot in the back as he was running away. Given this evidence, we find no error in the trial court's refusal to give the requested instruction on the defense of others.

III

Defendant next argues that the trial court erred in denying his motion to quash the felony murder charge on the ground that the magistrate abused his discretion in binding defendant over for trial on that charge. We review a circuit court's decision concerning a defendant's challenge to the bind over de novo to determine whether the magistrate abused his discretion. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). Here, we find no error in the trial court's denial of defendant's motion to quash.

"A district court must bind a defendant over for trial when the prosecutor presents competent evidence constituting probable cause to believe that (1) a felony was committed and (2) the defendant committed that felony." *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998); see also MCR 6.110(E). Probable cause that the defendant has committed the crime is established by evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of defendant's guilt. *People v Justice*, 454 Mich 334, 344; 562 NW2d 652 (1997). To establish that a crime has been committed, a prosecutor need not prove each element beyond a reasonable doubt, but must present some evidence of each element. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). Circumstantial evidence and reasonable inferences from the evidence are sufficient to support a bind over. *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997).

The elements of first-degree felony murder are the killing of a human being with malice, during the commission, attempted commission, or assistance in the commission of one of the felonies enumerated in MCL 750.316(1)(b). *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999). Here, defendant argues that plaintiff did not demonstrate that the murder occurred during the commission or attempted commission of an enumerated felony. We, however, disagree.

Included within the felonies enumerated in MCL 750.316(1)(b) is "larceny of any kind." As previously noted, the altercation that led to Brown's murder was prompted by Brown having backed into Hampton's car in the parking lot of a store. While it is unlikely that Hampton and defendant could have anticipated this event, this does not require us to conclude that at some point after the accident, Hampton and defendant did not agree to kill or otherwise harm Brown and then take his car. Testimony offered at the preliminary examination showed that, despite

Brown's repeated attempts to apologize for the accident, Hampton approached and struck Brown. Defendant also approached the car at this point and, although initially urging Hampton to "let it go," ultimately pulled a gun and began firing as Hampton and Brown began to fight. Immediately thereafter, and without any discussion, defendant and Hampton approached Brown's niece and prevented her from getting into Brown's car. Hampton then drove away in Brown's car, followed by defendant, who was driving Hampton's vehicle. Given the proximity in time between the murder and the larceny, as well as the fact that defendant and Hampton, without discussion, left with the cars in the same direction, we find that there was probable cause to conclude that defendant murdered Brown and that the murder occurred while defendant and Hampton intended to commit a felony specifically enumerated in MCL 750.316(1)(b), to wit, a larceny.[3] Accordingly, the trial court did not err in denying defendant's motion to quash.

In reaching this conclusion, we reject defendant's contention that, because the murder occurred before the larceny, he could not have been convicted of felony murder. As this Court recognized in *People v Hutner*, 209 Mich App 280, 284; 530 NW2d 174 (1995), "where the predicate crime underlying a charge of felony murder is part of a continuous transaction or is otherwise immediately connected with the killing, it is immaterial whether the underlying felony occurs before or after the killing." It is necessary "only that the defendant intended to commit the underlying felony at the time the homicide occurred." *People v Kelly*, 231 Mich App 627, 643, 588 NW2d 480 (1998). Thus, contrary to defendant's assertion, it is irrelevant that Brown was murdered before his car was stolen.

IV

Finally, defendant argues that he is entitled to a new trial because he was denied the effective assistance of counsel when his trial counsel stated during opening argument that defendant "may very well be . . . guilty." While we agree that this statement was inappropriate, we do not conclude that the comment requires reversal of defendant's convictions.

To establish ineffective assistance of counsel, a defendant must show both that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994), and that there is a

[3] For these same reasons, we reject defendant's contention that the trial court erred in denying his motion for a directed verdict on the felony murder charge because there was no evidence from which a jury could conclude that the murder occurred during the commission or attempted commission of a felony. The evidence at trial was, in all material respects, the same as that presented at the preliminary examination. As discussed above, such evidence was sufficient to support the conclusion that the murder occurred during the commission of a felony enumerated in MCL 750.316(1)(b). In any event, defendant does not contend that the charge of which he was convicted, second-degree murder, was improperly submitted to the jury. As our Supreme Court has stated: "[A] defendant has no room to complain when he is acquitted of a charge that is improperly submitted to a jury, as long as the defendant is actually convicted of a charge that was properly submitted to the jury." *People v Graves*, 458 Mich 476, 486-487; 581 NW2d 229 (1998). Accordingly, defendant is not entitled to relief on his claim that the charge of felony murder was improperly submitted to the jury. *Id.*

reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). Defendant must further overcome a strong presumption that counsel's tactics constituted sound trial strategy See *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). Here, a review of the context of defense counsel's statement does not clarify its purpose or intended meaning. Therefore, we cannot conclude that this was a matter of trial strategy. Indeed, the statement is inconsistent with defendant's defense of mistaken identification and we are therefore compelled to find that defense counsel's statement was unreasonable.

Nevertheless, in light of the overwhelming evidence of defendant's guilt in this case, we conclude that the outcome would not have been different even if defense counsel had not made the challenged statement. Brown's nephew testified at trial that he observed defendant, who he identified in a lineup as the shooter, fire several gunshots in Brown's direction. Consistent with this testimony, Brown's niece testified that after the shooting defendant approached and hit her in the jaw with a gun. Further, Robert Harris and Darryl Tripp, who were both acquainted with defendant, each testified that just hours after the shooting defendant parked Brown's car near their homes and attempted to remove the speakers, radio, and rims from the car. Defendant even bragged to Harris that someone was trying to be "tough" and that he had to "pop him." Defendant also told Harris that he had to hit a girl in the chin with the butt of his gun and was observed cleaning a .32 caliber handgun; the same caliber as the empty shell retrieved from the scene and the bullet obtained from Brown's body. Defendant similarly told Tripp that a fight had started that night when someone "banged" into his cousin's car. Defendant explained that he had to shoot a man and hit a girl in the chin because they had "jumped" on his cousin. Police also found defendant's palm print on Brown's car. Given this evidence, defendant cannot demonstrate that, without defense counsel's statement, the outcome of the proceedings would have been different. See *Rice*, *supra* at 445.

We affirm.

/s/ Richard A. Bandstra
/s/ Michael R. Smolenski
/s/ Patrick M. Meter