

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO M. ANDERSON,

Defendant-Appellant.

UNPUBLISHED

May 21, 2002

No. 230158

Wayne Circuit Court

LC No. 00-003679

Before: Markey, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felony murder, MCL 750.316(1)(b), first-degree home invasion, MCL 750.110a(2), and three counts of assault with intent to murder, MCL 750.83. The trial court sentenced defendant to concurrent sentences of life imprisonment for the felony-murder conviction, twenty-five to fifty years' imprisonment for each assault with intent to murder conviction, and thirteen to twenty years' imprisonment for the first-degree home invasion conviction. We affirm.

The prosecution presented evidence that during the early morning hours of January 21, 2000, defendant entered a house occupied by Latonya Sutherland, her sister Lashawn Sutherland, their mother Anita Sutherland, and defendant's and Lashawn's infant daughter, Jalein. Defendant attempted to smother Latonya with a pillow from her bed. Defendant repeatedly beat the women with a shovel, bound their wrists and ankles with duct tape and string, and placed plastic bags over their heads. Defendant hit Anita and Lashawn in their heads with a hammer, and he poured bleach into Anita's eyes. Defendant sexually assaulted Latonya and placed her in a closet. Latonya was able to partially free herself, and she called 911. While she was speaking with the 911 operator, defendant returned. Defendant pushed Latonya into the closet and beat her with a two-by-four piece of wood. Defendant also turned on the gas from the stove. Lashawn died of blunt force trauma to the head and smothering. In statements to the police, defendant admitted that he intended to kill the women and that he "turned the gas on to suffocate everyone."

Defendant first argues that the evidence was insufficient to support his felony-murder conviction based on the predicate felonies of robbery and home invasion. We disagree.

This Court reviews a defendant's claim of insufficient evidence to determine whether the evidence presented at trial, when viewed in the light most favorable to the prosecution, was

sufficient for a rational trier of fact to have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Where a defendant's conviction may be based on one of two theories, both of which are supported by sufficient evidence, the conviction need not be reversed when the jury fails to specify the theory on which it based its decision. *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991); *People v Acosta*, 153 Mich App 504, 510, 513; 396 NW2d 463 (1986); *People v Olsson*, 56 Mich App 500, 504-505; 224 NW2d 691 (1974).

A defendant's conviction for felony murder requires proof beyond a reasonable doubt that the defendant caused a person's death during the commission of any of the felonies enumerated in MCL 750.316(1)(b), and that the defendant possessed either the intent to kill or do great bodily harm, or that defendant created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result of the risk. MCL 750.316(1)(b); *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000); *People v McCrady*, 244 Mich App 27, 30-31; 624 NW2d 761 (2000). Robbery and home invasion are among the enumerated felonies in MCL 750.316(1)(b). In the absence of specification, defendant's felony-murder conviction required sufficient evidence to support the jury's finding beyond a reasonable doubt that defendant was guilty of both predicate felonies on which his felony-murder charge was based, robbery and home invasion. *Olsson*, *supra* at 504-505.

"The elements of unarmed robbery are: (1) a felonious taking of property from another, (2) by force or violence or assault or putting in fear, and (3) being unarmed." *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994). MCL 750.530. Latonya testified that she woke to find defendant in her bedroom. She stated that defendant attempted to smother her by holding a pillow over her face. He proceeded to beat her, bind her wrists and ankles with duct tape, and place plastic bags over her head. Defendant then asked Latonya where her ATM card was. Latonya told him, and defendant also forced her to give him her personal identification number. Defendant admitted in his statement to Officer Harris that he took Latonya's wallet and ATM card, and Anita's wallet and purse. We conclude that the evidence was sufficient to support defendant's felony-murder conviction predicated on robbery.

The evidence was also sufficient to support the predicate felony of home invasion. The first-degree home invasion statute, MCL 750.110a(2), provides:

A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:

- (a) The person is armed with a dangerous weapon.
- (b) Another person is lawfully present in the dwelling.

The evidence adduced at trial was sufficient for the jury to find that defendant entered the house without permission and committed an assault with intent to murder while inside the house. Latonya testified that defendant was no longer living in the house in January 2000, and defendant admitted that he entered the house through a basement window. The testimonies of Latonya and Anita, and also defendant's statement to police, established that defendant repeatedly beat all three women with a shovel, and defendant hit Anita and Lashawn in their heads with a hammer. Defendant stated that he left, and then returned to the house "to make sure everyone was dead so [he] could get away." He stated that he did not mean to leave Latonya alive, and that he "put the plastic bag over her head before [he] left to make sure she was dead." Regardless of defendant's intent at the time he entered the home, the evidence established that defendant committed an assault while present in the dwelling. MCL 750.110a(2). Therefore, the evidence was sufficient to support defendant's felony-murder conviction with home invasion as the predicate felony.

Defendant next contends that the trial court abused its discretion when it denied his motion for mistrial after a member of defendant's family brought evidence of juror misconduct to the court's attention. We disagree.

This Court reviews a trial court's ruling on a motion for mistrial based on juror misconduct for an abuse of discretion. *People v Fetterley*, 229 Mich App 511, 544-546; 583 NW2d 199 (1998); *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997). A juror's violation of the trial court's express instruction not to discuss the case during trial is not per se grounds for a new trial. *People v Rohrer*, 174 Mich App 732, 737; 436 NW2d 743 (1989). "A trial court's denial of a motion for a mistrial based on juror misconduct is an abuse of discretion only where the misconduct was such that it affected the impartiality of the jury or disqualified its members from exercising the powers of reason and judgment." *Messenger, supra* at 175. Before this Court will order a new trial on the ground of juror misconduct, a defendant must show that the misconduct affirmatively prejudiced his right to a trial before a fair and impartial jury. *Fetterley, supra* at 545; *Messenger, supra* at 175; *Rohrer, supra* at 737.

Defendant makes no affirmative showing of prejudice. The involved jurors denied discussing the testimony. They stated that their conversation was limited to speculation about the length of the trial and which witnesses might be called. The trial court investigated the matter and expressly found the member of defendant's family to be incredible. The trial court may assess the relative credibility of the involved juror and the member of defendant's family and conclude that the family member was less credible than the juror because of her connection to defendant. *Fetterley, supra* at 545. Finally, when asked by the trial court, none of the jurors indicated an inability to be fair and impartial. We conclude that the trial court did not abuse its discretion in denying defendant's motion for mistrial.

Defendant next argues that the trial court erred in its response to the jury's request for written instructions. However, defense counsel's express approval of the court's response extinguished any error and waived the issue for appeal. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant next contends that he was denied the effective assistance of counsel because his attorney did not challenge the evidence against him with regard to the three counts of assault with intent to murder. Because defendant failed to move for a new trial or an evidentiary

hearing, this Court's review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

In order to establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced him that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the strong presumption that the challenged action constituted sound trial strategy under the circumstances, and he must also demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different[.]" *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000), quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997).

The record does not support defendant's claim of ineffective assistance of counsel. Defense counsel's decision to focus on the felony-murder and home invasion charges and his lack of attention to the assault with intent to murder charges during closing argument were matters of trial strategy. We will not substitute our judgment for that of trial counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Further, it is unlikely that defense counsel could have affected the jury's verdict by disputing what defendant himself admitted and what direct and circumstantial evidence overwhelmingly proved at trial. *People v Ulman*, 244 Mich App 500, 515; 625 NW2d 429 (2001).

Affirmed.

/s/ Jane E. Markey
/s/ Michael J. Talbot
/s/ Brian K. Zahra