

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEOFFREY EMANUEL THOMAS,

Defendant-Appellant.

UNPUBLISHED

June 11, 2002

No. 230384

Oakland Circuit Court

LC No. 99-167032-FC

Before: Murphy, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), first-degree fleeing and eluding a police officer, MCL 750.479a(5), and failure to stop at the scene of a serious personal injury accident, MCL 257.617. Defendant was sentenced, as a fourth-offense habitual offender, MCL 769.12, to the mandatory term of life imprisonment without parole for the first-degree felony murder conviction, a term of twelve to twenty years for the first-degree fleeing and eluding conviction, and a term of five to fifteen years for the failure to stop at the scene of a serious personal injury accident conviction. Defendant appeals as of right and we affirm.

I

This case involves the theft of two vehicles that resulted in a brief police chase and a fatal collision, the scene from which defendant fled on foot. On March 31, 1999, police saw a red van crossing a red traffic light on Fourteen Mile Road, east of Rochester Road, in the city of Clawson. The red van was pushing a small gray car. The patrol unit initiated its overhead lights and pulled up behind the red van. The van pushed the car into a parking lot on the north side of the road, and continued to drive east on Fourteen Mile Road. Before reaching Rochester Road, the van made a u-turn in what appeared to be a move to return to the gray car. Although the police officer had established eye contact with the van's driver, and the police car's overhead lights were still on, the van did not stop. Instead, it paused at the parking lot where it had pushed the gray car, and then made another u-turn, again heading eastbound on Fourteen Mile Road. Unable to successfully complete the u-turn, the van drove over the curbs, sidewalks, and front yard lawns of the houses on the south side of Fourteen Mile Road. The van then headed south on Rochester Road. The police car followed with sirens and overhead lights.

Thirty-one-year-old Amy Aplin was driving in a lane ahead of the van. She stopped at that lane to make a left turn onto her residential street. The van, instead of slowing down, moved to the northbound lane, increased its speed to over sixty miles an hour, and drove south in the northbound lane. The van struck Aplin's car that was turning left, instantly killing Aplin, and pushing her car about one hundred feet to the southeast corner of Rochester Road and Montrose Avenue. The driver fled the scene into the Royal Oak neighborhood east of Rochester Road, and was seen by different witnesses who observed his erratic behavior in running, entering backyards, jumping fences, breathing heavily, and looking over his shoulder toward Rochester Road. He was apprehended ten minutes after the collision.

II

Defendant first argues that the evidence was insufficient to support his felony murder conviction. Specifically, defendant asserts that the evidence was insufficient to establish malice or to prove the elements of larceny for purposes of felony murder.

The test for determining whether sufficient evidence was presented to support a criminal conviction is whether the evidence, viewed in a light most favorable to the prosecution, would warrant a rational factfinder in finding that the essential elements of an offense were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

Felony murder consists of the following elements: (1) the killing of a human being, (2) with malice, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in the felony murder statute, MCL 750.316. *Id.* at 401. Malice is defined as (1) the intent to kill, (2) the intent to do great bodily harm, or (3) the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). It is the third definition of malice that is at issue in this case.

Viewed in a light most favorable to the prosecution, the evidence adduced at trial was sufficient for the jury to reasonably infer that defendant placed himself in a position, the results of which a reasonable person would know, had the natural tendency to cause death or great bodily harm. *Id.* at 471-472. The evidence adduced at trial was also sufficient for the jury to rely solely on common sense and personal driving experiences to infer that defendant knew of the very high risk of death or great bodily harm that would result from driving over sidewalks and front yard lawns of residential houses, and from driving over sixty miles an hour in the lane of opposite traffic. A reasonable inference may be made that defendant simply took a fatally dangerous risk by miscalculating that the car ahead of him would have cleared the northbound speed lane before he reached it. Viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient to support the jury's verdict.

Defendant relies on four different cases¹ and argues that the fact he accelerated the speed of the van was insufficient for a finding of malice to satisfy the second element of felony murder

¹ The four cases are *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998); *People v Vasquez*, 129 Mich App 691; 341 NW2d 873 (1983); *People v Goodchild*, 68 Mich App 226; 242 NW2d 465 (1976); and *People v Hoss*, unpublished opinion per curiam of the Court of (continued...)

because there was proof that he attempted to avoid the collision when he applied the brakes. Defendant argues that the most he could have been convicted of was second-degree murder. Defendant's reliance on these cases is misplaced. These cases showed that the state of mind of the respective defendants were affected by intoxication, mental and physical illness, or lack of an intent to permanently deprive the rightful owner of possession. There was no evidence in this case to that effect.

Defendant next argues that the evidence was insufficient for a finding of larceny. Defendant asserts that, instead, the evidence regarding the red van he was driving only proves that he was guilty of unlawfully driving away an automobile (UDAA), while the evidence regarding the gray car that he had pushed into a parking lot shows that defendant may have been merely assisting a stranded motorist.

In cases involving the taking of an automobile, if the prosecution believes that the evidence so warrants, it has discretion to charge the suspect either with UDAA or with larceny. *People v Goodchild*, 68 Mich App 226, 233-234; 242 NW2d 465 (1976). The essential elements of larceny are: (1) an actual or constructive taking of goods or property; (2) a carrying away or asportation; (3) the carrying away must be with a felonious intent; (4) the subject matter must be the goods or personal property of another; and (5) the taking must be without the consent and against the will of the owner. *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999). Larceny requires that the defendant intend to permanently deprive the victim of the property which is the subject of the larceny. *People v Murph*, 185 Mich App 476, 480-481; 463 NW2d 156 (1990). UDAA, on the other hand, does not require an intent to permanently deprive the owner of his property. *Id.* at 481.

Here, the evidence adduced at trial showed that at least twenty minutes after the red van was stolen from a parking lot, and only a few miles away, it was seen pushing what turned out to be another stolen vehicle with a dead battery. The short time frame and distance in which the red van was seen after having been stolen, the fact that it was pushing another stolen car, coupled with the fact of defendant's brief return to the stolen car when defendant was being followed by a police car provided sufficient evidence for a finding that, for purposes of larceny, defendant intended to deprive from possession the rightful owners of either the van or the car, or both.

Defendant argues, however, that it may be inferred from the evidence that he was merely acting as a Good Samaritan, assisting a stranded driver. Even assuming that such an inference could have been reasonably made, the prosecution was not required to negate every reasonable theory of innocence, but was only required to prove its own theory beyond a reasonable doubt in the face of whatever contradictory evidence defendant provided. *Nowack, supra* at 400. At trial, defendant provided no contradictory evidence. Consequently, there was sufficient evidence presented by the prosecution to sustain the underlying offense of larceny for the felony murder conviction.

(...continued)

Appeals, issued October 31, 1997 (Docket No. 195661).

III

Defendant next argues that the prosecutor overcharged him. Defendant failed to preserve the issue of prosecutorial overcharge because it was not raised before the trial court. See *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). This Court reviews unpreserved constitutional claims of error for plain error that affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999).

It is well settled that "the decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor." *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998). The prosecutor is given broad charging discretion, and judicial review of the exercise of that discretion is limited to whether an abuse of power occurred, i.e., whether the charging decision was made for reasons that are unconstitutional, illegal, or ultra vires. *People v Conat*, 238 Mich App 134, 149; 605 NW2d 49 (1999).

Here, defendant's contention that the prosecution overcharged him is premised solely on the same arguments that defendant raised regarding the sufficiency of the evidence, and we reject them for the same reasons. The evidence was sufficient for a finding of malice on the part of defendant for purposes of murder, and the evidence was sufficient for a finding of defendant's intent to permanently deprive either the van owner or the car owner of their possession for purposes of larceny. Therefore, the prosecution, in charging defendant with felony murder, did not abuse its charging discretion.

IV

Defendant also challenges the prosecutor's comments during closing argument regarding a baseball cap that defendant was allegedly wearing at the time of his arrest, but was not admitted into evidence because of the prosecutor's failure to establish the chain of custody. Defendant failed to preserve the issue because no objection was made in the trial court to the prosecutor's comments. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). A defendant's unpreserved claim of prosecutorial misconduct is reviewed for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). In order to avoid forfeiture of an unpreserved claim, the defendant must demonstrate plain error that affected his substantial rights. *Id.*, quoting *Carines, supra* at 763.

Prosecutors cannot make statements of fact unsupported by the evidence, but remain free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *Schutte, supra* at 721. Our review of the prosecutor's remarks, in context, reveals that the prosecutor was merely summarizing the facts in evidence, as testified to by several witnesses, and encouraging the jury to draw reasonable inferences from those facts. Four witnesses at trial testified to seeing defendant wearing a baseball cap; therefore, the prosecutor's comments were based on witness testimony. Further, we note that the jury was properly instructed on the definition of evidence, particularly excluded evidence. Because the prosecutor's comments at closing argument about the baseball cap were based on the testimony of four witnesses, the prosecutor's comments were not improper and defendant has failed to show plain error affecting his substantial rights.

Lastly, defendant argues that he was denied the effective assistance of counsel because trial counsel failed to call an expert witness to explain the fallibility of eyewitness identification and also failed to request a supplemental jury instruction regarding the issue of identification. Defendant did not move for a new trial or for an evidentiary hearing below; therefore, our review of the issue is limited to the record on appeal. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). In order to establish a claim of ineffective assistance of counsel, a defendant has the burden of establishing that his counsel's representation fell below an objective standard of reasonableness and that the deficient representation was so prejudicial that the defendant was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

With regard to counsel's failure to call an expert witness to explain the fallibility of eyewitness identification, we first note that the decision whether to call a witness is presumed to be a matter of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). Defendant stresses that the prosecutor relied heavily on eyewitness testimony to establish that defendant was the driver of the red van; however, our review of the eyewitness testimony reveals that it was consistent, contrary to defendant's claim. Importantly, the record shows that the residential neighborhood witnesses were particularly consistent in describing what they noticed most about the man they saw in the area: his erratic behavior. He was running, breathing heavily, sweating, crossing through private backyards, jumping over fences, and looking over his shoulder toward Rochester Road. At one point, he knocked on the door of one witness' house, but then walked away when the witness approached him from the back door. Other evidence offered at trial was a shoe print found in the red van that matched defendant's shoe. Defendant's statements to the police immediately before his arrest provided additional circumstantial evidence from which an inference could have been made that he was the perpetrator of the crime because he provided the police with a false name and a false birth date. Any inconsistencies in the eyewitness' testimony could have been, and were, attacked on cross-examination. Therefore, counsel's failure to call an expert witness regarding eyewitness identification was neither deficient nor prejudicial to defendant.

Defendant also argues that counsel failed to request an additional jury instruction regarding eyewitness identification. There is nothing in the record to indicate any unusual circumstance that would require additional attention to the matter in the instant case. The inconsistencies in the testimony regarding the color of defendant's shirt, along with counsel's competent cross-examination, was sufficient to place doubt in the minds of the jurors regarding the reliability of the testimony identifying defendant as the perpetrator of the crime. Consequently, the standard jury instructions were sufficient to protect defendant's rights. Our review of the record does not support defendant's claim that an additional jury instruction regarding eyewitness testimony may have changed the outcome of the proceeding. Accordingly, defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly