STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRAVIS TILLMAN,

Defendant-Appellant.

UNPUBLISHED
September 27, 2002

No. 231988
Wayne Circuit Court
LC No. 00-002283

Before: O'Connell, P.J., and Griffin and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), second-degree murder, MCL 750.317,[1] and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to life imprisonment for the felony murder conviction and to a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence to convict him of felony murder because there was no evidence that he committed or attempted to commit the underlying offense of larceny. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514-515. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime, *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996), and all conflicts in the evidence must be resolved in favor of the prosecution, *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

[1] The trial court vacated defendant's second-degree murder conviction.

The elements of first-degree felony murder are (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, i.e., malice, and (3) while committing, attempting to commit, or assisting in the commission of any of the felonies enumerated in MCL 750.316(1)(b). *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000). Defendant challenges the third element.

"[L]arceny of any kind" is among the felonies enumerated in MCL 750.316(1)(b). "Larceny is the taking and carrying away of the property of another, done with felonious intent and without the owner's consent." *People v Gimotty*, 216 Mich App 254, 257-258; 549 NW2d 39 (1996). An attempt consists of the intent to do an act or to bring about consequences that would amount to a crime, and an act in furtherance of that intent that goes beyond mere preparation. *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993).

Viewed in a light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to conclude that defendant killed the decedent while attempting to commit larceny. Defendant admitted in his statement to the police that he went to the decedent's apartment to "do a lick." Defendant explained that a "lick" is jargon for robbery. Defendant stated that he had been given information that he could rob the decedent of a pound of "weed." There was independent testimony that the decedent sold marijuana. Defendant stated that he took a nine-millimeter gun, that he and his accomplice got a ride to the decedent's residence from an acquaintance, and that they were let out across the street from the decedent's apartment. According to defendant, he and his accomplice put on black ski masks, went up to the decedent's door, and knocked. When the decedent opened the door, defendant told him to get on the floor, but the decedent instead slammed the door. Defendant stated that he shot numerous times into the door and ran, because someone in the decedent's apartment had a gun. Defendant and his accomplice fled back to the car and told the driver to pull off. The decedent died from a single gunshot wound in the head.

A witness saw the driver parked outside of the decedent's apartment, with the car running, and did not see the car after the gunshots. Two of the decedent's friends, who were visiting him during the incident, testified that they heard knocking on the door, saw the decedent open the door, and then saw the decedent placing his weight against the door in an attempt to close it. As the decedent tried to close the door, gunshots rang through the door, and a bullet hit the decedent in the head. There was testimony that no one present in the decedent's apartment, including the decedent, had a weapon, and the police did not locate any weapons in the apartment. The police located nineteen bullet holes, some of which may have been caused by ricocheting, and nine shell castings. All of the shell castings were from the same nine-millimeter weapon. When defendant's bedroom was searched, the police found a black ski mask. This evidence, viewed in a light most favorable to the prosecution, is sufficient to sustain defendant's conviction for felony murder.

Defendant also argues that the trial court improperly excluded evidence, thereby violating his constitutional right to present a defense. The trial court limited the testimony of a police

polygraph examiner, who took defendant's first statement, regarding his role in extracting a false confession in an unrelated case from a retarded suspect, who was later proven to be innocent.[2]

This Court reviews a trial court's evidentiary rulings and limitation of cross-examination for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000); *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

A defendant's constitutional right to present a defense and confront his accusers is secured by the right to cross-examination guaranteed by the Confrontation Clause. US Const, Am VI; Const 1963, art 1, § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). However, the right to present a defense is not absolute and cross-examination may be limited. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). "[N]either the Confrontation Clause nor due process confers an unlimited right to admit all relevant evidence or cross-examine on any subject." *Adamski, supra*. Rather, a court has wide latitude to impose reasonable limits on cross-examination based on concerns such as prejudice, confusion of the issues, or questioning that is only marginally relevant, among others. *Id.*; *Canter, supra* at 564.

We find no abuse of discretion. Based on the defense's argument in the lower court, it appears that defendant sought to demonstrate that the investigator had a propensity to obtain false confessions from young, retarded suspects. However, during trial, it was not apparent that the same investigator had taken both statements. Rather, the investigator testified that he had only read in the paper what transpired in the other case and, thus, the facts surrounding the suspect's statement were unknown. Further, even considering the newspaper article, there is no evidence that the investigator actually *coerced* the suspect into giving a false statement. Rather, the article simply provides that, after the suspect failed the polygraph, he stated that he was involved in the murder. In short, defendant has failed to persuasively demonstrate how evidence relating to a suspect's false confession in an unrelated case shows that his confession in the instant case was false, without more information. MRE 401. As such, the inferences defendant is trying to draw between the suspect's false confession in the unrelated case and defendant's statement in this case are highly tenuous and may have confused the issues. MRE 403.

We also reject defendant's claim that the trial court's evidentiary ruling deprived him of his constitutional right to present a defense. The trial court's ruling did not amount to a blanket exclusion of all evidence challenging the investigator's credibility or suggesting that the investigator coerced defendant into making a statement. Further, contrary to defendant's

[2] According to the article, the police investigator in this case had previously taken the statement of a suspect in another case, the suspect being an eighteen-year-old with an IQ of 71, who insisted he was innocent. The article states that the investigator gave the suspect a polygraph, which he failed, and the suspect then indicated that he was involved in a murder. The investigator had the suspect write a statement. The police later released the suspect after DNA evidence established that he did not commit the offense.

implication, evidentiary rulings do not ordinarily rise to the level of a constitutional violation. See *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). Accordingly, we are not persuaded that the trial court abused its discretion in this matter.

Next, defendant argues that the trial court erred in denying his motion to suppress his statements to the police. Defendant contends that his statement was coerced by the polygraph examiner's statement that he had failed the polygraph, particularly since defendant, who was seventeen, is mentally retarded, and therefore defendant's statement was not voluntary. He also contends that his second statement made to the officer-in-charge of the case should also be suppressed as the "fruit of the poisonous tree." We disagree.

Whether a defendant's statement was knowing, intelligent, and voluntary is evaluated under the totality of the circumstances. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). 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. *Id.* A finding is clearly erroneous if it leaves the reviewing court with a definite and firm conviction that a mistake has been made. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

Statements of a defendant made during a custodial interrogation are inadmissible unless the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). Whether a statement was voluntary is determined by examining police conduct, while whether it was made knowingly and intelligently depends in part upon the defendant's capacity. *Abraham, supra* at 645; *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). The prosecutor must establish a valid waiver by a preponderance of the evidence. *Abraham, supra* at 645.

In *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), our Supreme Court set forth the following nonexhaustive list of factors that a trial court should consider in determining whether a statement is voluntary:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

We conclude that the trial court did not clearly err in finding that defendant's statements were voluntarily made. Initially, we note that an extensive suppression hearing was conducted, and the trial court engaged in an in-depth analysis of the testimony presented. Despite defendant's IQ of sixty-one or sixty-three and his mild mental deficiency, the court found that

defendant did not appear to suffer from a serious mental impairment. In pertinent part, the trial court appeared to be impressed with defendant's ability to comprehend and write out his statement, the "logical flow" of the facts in that handwritten statement, and defendant's ability to relate information relating to the interviews that were conducted. In addition, the polygraph examiner testified that he asked defendant a series of questions in order to determine his mental ability, comprehension, and attention span, among other things, and saw nothing to prevent defendant from making a voluntary decision. Further, the prosecution's expert witness in forensic and clinical psychology testified that defendant understood his rights, was capable of waiving those rights voluntarily, and did not exhibit indications that he was mentally retarded but, rather, poorly educated. Although defendant introduced contrary evidence through his expert witness, this Court will defer to the "trial court's superior ability to view the evidence and witnesses." *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997).

Moreover, although a defendant's mental condition is certainly relevant to a determination of his susceptibility to police coercion, mere examination of the defendant's subjective state of mind can never conclude the due process inquiry. *Colorado v Connelly*, 479 US 157, 163-165; 107 S Ct 515; 93 L Ed 2d 473 (1986). A showing of police coercion must also be made before a confession will be suppressed as involuntary. *Id.* Here, the investigators testified that defendant was not threatened or abused, and there is no indication that defendant was deprived of sleep, food or drink. Defendant was advised of his polygraph and *Miranda* rights before he was questioned, and testified that he understood those rights after they were read aloud and explained to him. Although defendant claimed that he requested an attorney and his mother, neither the polygraph examiner nor the officer in charge of the case heard defendant request anyone, and the trial court found the officers credible.

In addition, we are not persuaded that the polygraph examiner's statement to defendant regarding the results of the polygraph examination was coercive and caused him to involuntarily confess to the crime. See *People v Emanuel*, 98 Mich App 163, 180-181 and n 5; 295 NW2d 875 (1980). Both officers testified that defendant was not forced to take the polygraph or give a statement. Defendant admitted in his testimony that he was not forced to take the polygraph, and that he wanted to do it because he believed he was innocent. Further, defendant's own testimony does not support his contention that the polygraph examiner's statement caused him to confess. In fact, defendant testified that he wanted to give a statement to help his accomplice. Defendant also admitted that the first statement was written in his own handwriting, and he was able to read the statement to the court. He also admitted that he was told he could have a lawyer present, and that the polygraph examiner told him that he did not have to talk to him about the homicide if he did not want to. In sum, 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 statements to the police.[3]

[3] We reject defendant's claim that his second statement should be suppressed because it was the "fruit of the poisonous tree." Even if the second statement flowed inevitably from the first, it would not be invalid because the first statement was valid.

Defendant also argues that the corpus delicti was not adequately established for first-degree murder, because there was no evidence, apart from his confession, that he committed the offense. Again, we disagree. This Court reviews a lower court's decision regarding the corpus delicti requirement for an abuse of discretion. *People v Biggs*, 202 Mich App 450, 455; 509 NW2d 803 (1993).

The purpose of the corpus delicti rule is to prevent the use of a defendant's confession to convict the defendant of a crime that did not occur. *People v Konrad*, 449 Mich 263, 269; 536 NW2d 517 (1995); *People v Williams*, 422 Mich 381, 388; 373 NW2d 567 (1985); *People v Emerson (After Remand)*, 203 Mich App 345, 347; 512 NW2d 3 (1994). The corpus delicti rule provides that a defendant's confession may not be admitted as evidence unless there is direct or circumstantial evidence independent of the confession establishing the occurrence of a specific injury and some criminal agency as the source of the injury. *Konrad, supra* at 269-270. The identity of the offender is not part of the corpus delicti. *Id*.

This Court has previously held that "the corpus delicti rule is satisfied in prosecutions of first-degree felony murder by showing that a death has occurred as a result of some criminal agency." *Emerson, supra* at 347-348; *People v Hughey*, 186 Mich App 585, 589; 464 NW2d 914 (1990) (with regard to the corpus delicti of felony murder, there is no requirement of a showing of the commission of the underlying felony). Here, there was independent evidence that the decedent died from a single gunshot wound in the head, and that the manner of death was homicide. Accordingly, the corpus delicti rule was fully satisfied for first-degree felony murder.

Defendant further argues that he was entitled to a mistrial because of a witness' reference to the "polygraph man," which implied that the witness had taken a polygraph and passed. We disagree. We review a trial court's ruling on a motion for a mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id*. (citation omitted).

Generally, reference to a polygraph examination at a defendant's criminal trial is not permitted. *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000); *People v Rocha*, 110 Mich App 1, 8; 312 NW2d 657 (1981). However, the introduction of such evidence will not always warrant reversal. *Nash, supra* at 98. This Court has identified a number of factors that should be considered in determining whether reversal is required:

> (1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. [*Id*. (citations omitted).]

Reviewing the facts in light of these factors, we conclude that there was no error requiring reversal. The record demonstrates that the witness' reference to the "polygraph man" was an inadvertent and unsolicited answer to a properly asked question. The prosecutor merely asked the witness whether the police told him to write down the events in his own words, a question that required a negative or affirmative response. Generally, "an unresponsive, volunteered

answer to a proper question is not grounds for the granting of a mistrial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Further, there were no repeated references to a polygraph and, as the trial court noted, there was no indication or implication that a polygraph test was actually administered. Accordingly, defendant has not shown prejudice warranting a mistrial and, thus, the trial court did not abuse its discretion in denying defendant's motion.

Defendant's final claim is that he is entitled to a new trial because the trial court erroneously refused to instruct the jury on voluntary and involuntary manslaughter, MCL 750.321 and MCL 750.329, as cognate lesser offenses of murder, or give the "missing witness" instruction, CJI2d 5.12, as a result of the prosecutor's failure to produce an endorsed witness. We disagree.

Generally, claims of instructional error are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). However, this Court reviews a trial court's denial of a request for a "missing witness" instruction for an abuse of discretion. *People v Snider*, 239 Mich App 393, 422; 608 NW2d 502 (2000). Jury instructions are reviewed in their entirety to determine if there is error requiring reversal. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997). "The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them." *Id*. (citation omitted).

A. Manslaughter Instructions

Because this issue was preserved at trial and has been raised on appeal, it is controlled by our Supreme Court's recent decision in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002). In *Cornell*, our Supreme Court concluded that MCL 768.32 only permits instruction on necessarily lesser included offenses, not cognate lesser offenses. *Id*. at 354-355, 357. Voluntary and involuntary manslaughter are cognate lesser included offenses of murder. *People v Pouncey*, 437 Mich 382, 387-388; 471 NW2d 346 (1991); *People v Heflin*, 434 Mich 482, 496-497; 456 NW2d 10 (1990); *People v Zak*, 184 Mich App 1, 6; 457 NW2d 59 (1990). Therefore, an instruction on involuntary or voluntary manslaughter would not have been proper. *Cornell, supra*. Accordingly, no error occurred.

B. Missing Witness Instruction

Defendant also argues that, because the prosecutor dismissed an endorsed witness without calling her, or alerting defense counsel that she was present in court, defendant was entitled to an adverse witness or "missing witness" jury instruction. See CJI2d 5.12.

If a prosecutor fails to produce an endorsed witness, he may be relieved of the duty by showing that the witness could not be produced despite the exercise of due diligence. *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). The trial court should give CJI2d 5.12 if the due diligence issue is raised during trial and the court finds a lack of due diligence. *Snider, supra* at 422. The instruction informs the jury that the missing witness' "appearance was the responsibility of the prosecution," and allows the jury to infer that the missing witness' testimony would have been unfavorable to the prosecution's case. See CJI2d 5.12.

We agree with the trial court's conclusion that the instruction was inapplicable because the witness had been present in court and, thus, the prosecutor produced the witness. Indeed, on appeal, defendant even acknowledges that the witness was in court, but maintains that defense counsel "did not realize" she was present. Accordingly, we find no abuse of discretion.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Joel P. Hoekstra