

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOMMIE LEE SYKES III,

Defendant-Appellant.

UNPUBLISHED
February 12, 2004

No. 242736
Kalamazoo Circuit Court
LC No. 01-000810-FC

Before: Murray, P.J., and Murphy and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder under alternate theories of felony murder and premeditated murder, MCL 750.316, and of first-degree criminal sexual conduct, MCL 750.520b. He was sentenced to life imprisonment for his murder conviction, and his criminal sexual conduct conviction was vacated to avoid double jeopardy issues. He appeals as of right. We affirm.

Defendant argues that there was insufficient evidence to support his first-degree murder conviction under either a theory of felony murder or a theory of premeditated murder because the evidence did not establish that defendant committed the crime, that there was premeditation or deliberation, or that defendant killed the victim while committing criminal sexual assault. Reviewing this issue de novo, *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999), we disagree.

In reviewing the sufficiency of the evidence, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found all of the elements of the offense proven beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307, 319; 99 S Ct 2781; 61 L Ed 2d 560 (1979); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found all of the elements of first-degree murder beyond a reasonable doubt. The elements of first-degree murder are that the defendant killed the victim and that the killing was either “willful, deliberate, and premeditated,” MCL 750.316(1)(a), or committed in the course of an enumerated felony, such as criminal sexual conduct or larceny, MCL 750.316(1)(b). *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). Here, defendant was convicted under both theories.

There was evidence presented at trial from which a rational jury could have found beyond a reasonable doubt that defendant killed the victim. Forensic pathologist Stephen Cohle testified at trial that the primary cause of the victim's death was a stab wound to the neck. Frank Bates, an inmate housed in the same prison unit as defendant, testified at trial that defendant told him that defendant and a "white guy" killed a fourteen-year-old babysitter and that, because the "white guy" did not "finish the job," defendant had to stab the babysitter. Jeremiah Black, presumably the man to whom defendant referred as "the white guy" in his conversations with Bates, testified at trial that he was with defendant during the victim's murder. Black saw defendant "struggling" with the victim on her bed. Although Black did not testify to actually seeing defendant stab the victim, he did testify that, after helping defendant carry the victim to the basement, he saw defendant with a knife and noticed the victim had blood on her. Further, Black admitted that he told an officer during a police interview that defendant was the one who stabbed the victim. Because the jury could have concluded from this evidence that defendant stabbed the victim and that the stabbing was the primary cause of her death, the jury could have concluded beyond a reasonable doubt that defendant killed the victim.

The prosecution also presented evidence from which the jury could have concluded that defendant's killing was willful, deliberate, and premeditated. Premeditation and deliberation require sufficient time for the defendant to take a second look. *People v Passeno*, 195 Mich App 91, 100; 489 NW2d 152 (1992), overruled on other grounds by *People v Bigelow*, 229 Mich App 218, 221; 581 NW2d 744 (1998). Further, a jury may infer premeditation and deliberation from "the surrounding circumstances, including ... the defendant's actions before the killing ...[and] the circumstances surrounding the killing itself" *People v Buck*, 197 Mich App 404, 410; 496 NW2d 321 (1992), rev'd in part sub nom *People v Holcomb*, 444 Mich 853; 508 NW2d 502 (1993).

The evidence presented at trial indicates that defendant had ample time to "take a second look." Pathologist Cohle testified at trial that, from the amount of blood and fecal matter found in the basement near the victim's body, he was sure that the victim was stabbed in the basement. Further, there was evidence that before defendant made the decision to stab the victim, he and Black took the time to carry the victim down the basement stairs. Further, defendant had to locate and produce the knife that he used to stab the victim. Taken together, this evidence was sufficient for the jury to conclude that defendant had time to think about his actions before he stabbed the victim.

The jury could also have found from the evidence that defendant committed the killing during the course of criminal sexual conduct. First-degree criminal sexual conduct is committed where the perpetrator engages in sexual penetration with the victim and "the actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration." MCL 750.520b(1)(f). Pathologist Cohle testified at trial that an examination of the victim's genital region suggested forceful penetration because the scraping off, tearing and stretching of the skin in this sensitive area would be painful. Cohle described the necessary amount of force to cause these injuries as "very forceful." In addition, Jeremiah Black testified at trial that he witnessed defendant struggling with the victim on the bed. Black further admitted at trial that he had told a police officer he saw defendant rape the victim. Viewing this evidence in a light favorable to the prosecution, as we are required to do, we conclude that a rational trier of fact could conclude that defendant used force to penetrate the victim.

Further, the DNA evidence presented at trial confirms that defendant had intercourse with the victim. Dr. Steven Milligan testified that the vaginal swabs taken from the victim showed the presence of sperm. Milligan performed DNA testing on those vaginal swabs and compared the DNA profile obtained from the swabs with the DNA profile of defendant's blood sample. The DNA profiles matched. Milligan further testified that, after performing a statistical analysis to determine how common defendant's DNA profile is in the human population, he determined that defendant's profile is an "extremely rare profile." From this evidence, we conclude that a rational jury could have found beyond a reasonable doubt that the killing occurred in the course of defendant's act of first-degree criminal sexual conduct.

Further, we reject defendant's argument that no evidence was presented that established that defendant killed the victim while committing criminal sexual conduct. For a homicide to be felony murder, the homicide need not be contemporaneous with the felony if it is incident to the felony, is associated with one of the hazards of the felony, and is committed while the defendant had the intent to commit the felony. *People v Goddard*, 135 Mich App 128, 136; 352 NW2d 367 (1984), rev'd on other grounds 429 Mich 505 (1988). Here, the evidence presented at trial indicates that the victim's murder was incident to or an associated hazard of the sexual assault, and that defendant had the intent to commit the assault when he murdered her. Black told an officer that it was after defendant raped the victim and the victim announced that she would tell the police, that defendant stabbed the victim. Thus, the evidence presented would have led a rational jury to conclude that defendant murdered the victim in the course of committing either first-degree or third-degree criminal sexual conduct.

Defendant also argues on appeal that the trial court erred in denying his motion for a directed verdict. The sufficiency of the evidence standard articulated in *Wolfe* is the same standard used to determine whether the trial court erred in denying defendant's motion for directed verdict. *Wolfe, supra* at 513-516; *People v Hampton*, 407 Mich 354, 368, 377; 285 NW2d 284 (1979). Again, viewing the evidence in the light most favorable to the prosecution, the evidence was sufficient to permit a rational trier of fact to find the essential elements of first-degree murder and felony murder proven beyond a reasonable doubt. We therefore find no merit to defendant's argument.

Affirmed.

/s/ Christopher M. Murray
/s/ William B. Murphy
/s/ Jane E. Markey