STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 17, 2004
v	No. 245012 St. Clair Circuit Court
JOHN ALBERT GILLIS, Defendant-Appellant.	LC No. 02-000601-FC

Before: Jansen, P.J., and Meter and Cooper, JJ.

PER CURIAM.

Defendant John Albert Gillis appeals as of right his jury trial convictions for two counts of first-degree felony murder.[1] Defendant was sentenced to life imprisonment without the possibility of parole on each count. We vacate defendant's convictions and remand for a new trial consistent with this opinion.

I. Facts

On the afternoon of May 24, 2001, defendant pulled into the driveway of the home of Steven Albright. Defendant proceeded to break into the home through a steel garage door. Mr. Albright saw defendant pull into the driveway and was waiting with his dog when defendant entered the home. Defendant quickly turned around, ran back down the driveway, returned to his vehicle and drove away. Mr. Albright initially attempted to follow defendant, but returned home minutes later to call 911 to describe the vehicle and inform the police of its direction.

About fifteen minutes later, State Trooper Steven Kramer received a radio notice to look for defendant's white Dodge Shadow while patrolling I-94. A few minutes later, Trooper Kramer spotted defendant, driving normally, on the other side of the expressway. Trooper Kramer cut across the median, followed defendant's vehicle and attempted to effectuate a stop. Defendant moved onto the shoulder and slowed to thirty miles an hour, but then darted back into traffic at a high rate of speed and exited the expressway. Other police officers joined the pursuit as it continued through a neighborhood. Defendant reentered I-94, on an exit ramp, and traveled eastbound in the westbound lanes. Defendant veered across I-94 and drove against traffic onto

[1] MCL 750.316(1)(b).

the entrance ramp from I-69. On the entrance ramp, defendant collided head-on with another vehicle traveling around fifty miles an hour. Nicholas and Gayle Ackerman, the occupants of that vehicle, were killed instantly. Defendant received a closed head injury and claims to have no memory of that day.

II. Felony Murder

Defendant contends that the trial court improperly denied his motion to quash the information charging him with felony murder based on the underlying home invasion. We agree, and therefore, are not required to analyze defendant's other arguments regarding his felony murder convictions.[2]

Generally, we review a circuit court's decision regarding a motion to quash a felony information de novo to determine if the district court abused its discretion in ordering the bindover.[3] A defendant must be bound 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."[4] We must defer to the district court's determination that probable cause existed unless the decision was "wholly unjustified" on the record.[5] Probable cause requires a reasonable belief that the evidence presented is consistent with the defendant's guilt.[6]

Felony murder is "[m]urder committed in the perpetration of, or attempt to perpetrate, . . . home invasion in the first or second degree."[7] In order to convict a defendant of felony murder, there must be a causal connection between the murder and the underlying felony.[8]

> "[I]f a murder is committed while attempting to escape from or prevent detection of the felony, it is felony murder, but only if it is committed as a part of a

---

[2] Defendant alternatively contended that the trial court erroneously instructed the jury that the home invasion was immediately connected to the murder, and thereby assured his convictions. Defendant also contended that there was insufficient evidence to support his convictions and that the trial court should have granted his motion for a directed verdict.

[3] *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998). In this case, however, no preliminary examination was conducted. The trial court took testimony from Mr. Albright and Trooper Kramer at the hearing on defendant's motion to quash.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 575.

[7] MCL 750.316(1)(b).

[8] *People v Goddard*, 135 Mich App 128, 135; 352 NW2d 367 (1984), rev'd in part on other grounds 429 Mich 505 (1988).

> continuous transaction with, or is otherwise 'immediately connected' with, the underlying felony."[9]

When the murder and predicate felony are not contemporaneous, the court must determine if the two were "'closely connected in point of time, place and causal relation.'"[10] Separation of time and space between the murder and the felony are proper considerations, although not outcome determinative.[11] The felony must dictate the defendant's conduct leading to the homicide and the homicide must be a hazard of the predicate felony.[12]

In this case, defendant had already escaped from the scene of the home invasion. Defendant was spotted about fifteen to twenty minutes after he left Mr. Albright's home while he was driving down the expressway in a normal manner.[13] Instead of pulling over, defendant led the police on a high speed chase against traffic on a busy expressway. Defendant was fleeing from the police when he collided with the Ackermans' vehicle, but their deaths were not a part of the continuous transaction of or immediately connected to the home invasion. Their deaths were immediately connected with defendant's act of fleeing and eluding, which is also a felony in this

---

[9] *People v Thew*, 201 Mich App 78, 85-86; 506 NW2d 547 (1993), quoting *People v Smith*, 55 Mich App 184, 189; 222 NW2d 172 (1974).

The continuous transaction/immediately connected test for felony-murder is similar to the same transaction test formerly employed to determine if successive prosecutions amounted to double jeopardy. In *People v White*, 390 Mich 245; 212 NW2d 222 (1973), the Michigan Supreme Court determined that the prosecutor must try in one case all charges arising from a single criminal transaction. *Id.* at 257-258. To determine if offenses were part of the same transaction, the court was required to first determine if all the offenses at issue were specific intent crimes. If all the offenses were specific intent crimes, the prosecutor was required to join the charges in one trial if they arose "out of a continuous time sequence and display[ed] a single intent and goal." *People v Rodriguez*, 251 Mich App 10, 17; 650 NW2d 96 (2002), citing *People v Sturgis*, 427 Mich 392, 401; 397 NW2d 783 (1986), *Crampton v 54-A Dist Judge*, 397 Mich 489, 501-502; 245 NW2d 28 (1976). If a charged offense was not a specific intent crime, the prosecutor was required to join the charges in one trial if "the offenses were part of the same criminal episode and involve[d] laws intended to prevent the same or a similar harm or evil, rather than substantially different harms or evils." *Id.* at 17 n 1, citing *Crampton*, *supra*. The Michigan Supreme Court recently overruled the long-standing legal precedent of *People v White*. *People v Nutt*, 469 Mich 565; 677 NW2d 1 (2004). However, the Court has not similarly addressed the felony murder test.

[10] *Goddard*, *supra* at 136, quoting *State v Adams*, 98 SW2d 632 (Mo, 1936).

[11] *Id.*

[12] *Id.*

[13] See *Thew*, *supra* at 88 (upholding a felony murder conviction where the murder occurred about twenty minutes after the defendant committed first-degree criminal sexual conduct by engaging in allegedly consensual intercourse with his eleven-year-old victim, as the murder occurred in the same location as the CSC, following an argument, and apparently to prevent the victim from telling others of his actions).

state.[14] Fleeing and eluding, however, is not an enumerated felony upon which a conviction for felony murder may be based.[15]

As the home invasion and subsequent death of the Ackermans were not connected in time, place or causal relationship, the trial court should have quashed the information charging defendant with felony murder. We, therefore, vacate defendant's convictions and sentences for felony murder. Defendant should properly have been charged with fleeing and eluding[16] and second-degree murder.[17] Defendant was fleeing from the police at the time of the collision causing the Ackermans' deaths. The malice necessary to establish a charge of second-degree murder may be inferred when a defendant uses an automobile in a reckless fashion to evade the police.[18] Accordingly, we remand to the trial court for a new trial on those charges.

III. Lesser Included Offenses

Defendant argues that the trial court erred by denying his request for an instruction on the lesser offense of involuntary manslaughter. Claims of instructional error are reviewed de novo on appeal.[19] As a general rule, "[w]e review jury instructions in their entirety to determine if error requiring reversal occurred."[20] It is the function of the trial court to clearly present the case to the jury and instruct them on the applicable law.[21] Even if somewhat imperfect, reversal is not required where the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights.[22]

Defendant correctly indicates that involuntary manslaughter is a necessarily included lesser offense of murder.[23] An involuntary manslaughter instruction must, therefore, be given "if supported by a rational view of the evidence."[24] "'Involuntary manslaughter is a catch-all concept including all manslaughter not characterized as voluntary: "Every unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse."'"[25] If the killing was not

[14] MCL 257.602(5) (fleeing and eluding resulting in the death of another).

[15] MCL 750.316(1)(b).

[16] MCL 257.602(5).

[17] MCL 750.317.

[18] *People v Vasquez*, 129 Mich App 691, 694; 341 NW2d 873 (1983), citing *People v Goodchild*, 68 Mich App 226; 242 NW2d 465 (1976).

[19] *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

[20] *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

[21] *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001).

[22] *Aldrich*, *supra* at 124.

[23] *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003).

[24] *Id.*

committed with malice, but rather "with a lesser mens rea of gross negligence or an intent to injure," the killing is involuntary manslaughter.[26]

We find that the evidence would support an instruction for involuntary manslaughter. Defendant collided with the Ackermans' vehicle while evading capture by the police and a jury could find that he did not intend their deaths. It is possible for a rational trier of fact to determine from the evidence that defendant only possessed the mindset of gross negligence. Therefore, the trial court must instruct the jury on the lesser offense of involuntary manslaughter.

IV. Evidentiary Issues

Generally, a trial court's decision to admit evidence will be reversed only for an abuse of discretion.[27] However, when a trial court's decision regarding the admission of evidence involves a preliminary question of law, this court reviews the issue de novo.[28]

A. Prior Bad Acts

Defendant argues that the trial court improperly admitted evidence regarding his involvement in a prior breaking and entering that also led to a police chase. Evidence of other crimes, wrongs or acts is inadmissible to show a defendant's character or propensity to commit the charged crime.[29] Evidence of other bad acts may be admissible if offered to prove the defendant's "motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material."[30] The trial court must also determine that the evidence is relevant pursuant to MRE 402 to a material fact,[31] and the evidence is more probative than prejudicial pursuant to MRE 403.[32] The evidence may tend to prove the defendant's propensity to commit the crime, but this may not be the sole purpose for presenting the evidence.[33]

The prosecutor in defendant's current case was required to show that defendant intended to commit a felony, larceny, or assault when he entered Mr. Albright's home, or that he actually committed one of these crimes once inside, in order to establish that he committed the predicate

---

(…continued)

[25] *People v Holtschlag*, ___ Mich ___; ___ NW2d ___ (Docket No. 123553, decided July 23, 2004), slip op at 27, quoting *People v Datema*, 448 Mich 585, 594-595; 533 NW2d 272 (1995).

[26] *Id.*

[27] *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

[28] *Id.*

[29] MRE 404(b)(1).

[30] *Id.*; see also *People v Sabin (After Remand)*, 463 Mich 43, 55; 614 NW2d 888 (2000).

[31] *Sabin*, *supra* at 55.

[32] *Id.* at 55-56, quoting *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

[33] *People v Martzke*, 251 Mich App 282, 289; 651 NW2d 490 (2002).

felony of first-degree home invasion.[34] As defendant did not commit an independent felony, larceny, or assault, the prosecutor was required to show that defendant intended to do so at the time he entered the house. Evidence of defendant's prior involvement in a breaking and entering is relevant to show "a common plan, scheme, or system" of breaking into people's homes.[35] The circumstances surrounding defendant's involvement in the previous breaking and entering, compared with the circumstances of the present case, suggest that defendant had a common plan, scheme, or system of breaking into homes, at times when he believed no one was there, in order to steal property. Thus, the evidence was probative of defendant's intent to commit a larceny when he entered Mr. Albright's home. Furthermore, given the lack of direct evidence of defendant's intent, the probative value of the evidence outweighs any potential prejudice.[36]

However, the trial court did abuse its discretion by admitting evidence of defendant's prior involvement in a police pursuit. The evidence that defendant drove in an unlawful and reckless manner to evade capture by the police was overwhelming. No further evidence was required to establish defendant's intent, motive, or any other permissible factor pursuant to MRE 404(b)(1). This evidence was, therefore, more prejudicial than probative. However, in light of the evidence that defendant engaged in a high speed chase traveling in the wrong direction on a busy expressway, the evidence was likely not outcome determinative. Accordingly, reversal is not warranted.

B. Photographs of the Crime Scene

Defendant alleges that the trial court improperly admitted two photographs of the Ackermans in their vehicle following the collision. However, defendant waived any error in the admission of the photographs. The photographs were used at trial without objection from defense counsel. Furthermore, defense counsel affirmatively stated, when asked by the court, that he had no objection to the admission of certain prosecution exhibits, including the photographs. In *People v Lueth*,[37] this Court found that the defendant waived appellate review of a claim of error in jury instructions by stating when asked that he had no objections to the jury instructions as read. Similarly, defendant waived appellate review regarding the admission of the photographs.

---

[34] MCL 750.110a(2).

[35] *People v Ackerman*, 257 Mich App 434, 440; 669 NW2d 818 (2003), quoting *Sabin*, *supra* at 63 (finding evidence of uncharged misconduct that was similar to the current charges could support an inference of a common plan, scheme, or system).

[36] MRE 403. We reject defendant's contention that the evidence was overly prejudicial based on his concession of the facts of the home invasion. Defense counsel clearly refuted the charge in opening argument by noting that defendant did not take any property from Mr. Albright's home and by stating that the prosecution had "to prove the intent in the home invasion." Defense counsel strictly held the prosecution to its obligation to prove that defendant intended to commit a felony, larceny, or assault inside the home.

[37] *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

V. Competency to Stand Trial

Defendant claims that the trial court abused its discretion by determining that he was competent to stand trial despite his apparent lack of memory regarding the incident.[38] We disagree.

MCL 330.2020(1) governs the determination of a criminal defendant's competency to stand trial as follows:

> A defendant to a criminal charge shall be presumed competent to stand trial. He shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner. The court shall determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during his trial.[39]

In *People v Stolze*,[40] this Court considered the application of MCL 330.2020(1) where the defendant apparently suffered amnesia in connection with the charged incident. As in the present case, expert testimony indicated that the defendant could not recall the events of the day of the incident, but could understand the charges against him and the consequences of his acts.[41] This Court found the defendant competent to stand trial because he "was able to consult with and assist his lawyer subject to the limitation imposed by the amnesia."[42] Furthermore, as the evidence against the defendant was overwhelming, the defendant's "testimony would have been largely cumulative."[43]

In this case, defendant, who undisputedly understood the nature and object of the proceedings, could consult with and assist his lawyer. Defendant could discuss and have input on matters of trial strategy, albeit with limitations imposed by his apparent amnesia. Although we conclude that defendant's convictions for felony murder were improper, the evidence of defendant's wrongdoing was overwhelming. Evidence of the high-speed pursuit and defendant's deadly manner of driving was established by the testimony of Trooper Kramer, a motorist who was in the vicinity of the collision, and an accident reconstructionist. In these circumstances, defendant could not plausibly have denied his responsibility for the collision or that his conduct involved the requisite intent for either murder or involuntary manslaughter. Thus, in light of

---

[38] *People v Newton (After Remand)*, 179 Mich App 484, 488; 446 NW2d 487 (1989).

[39] MCL 330.2020(1).

[40] *People v Stolze*, 100 Mich App 511; 299 NW2d 61 (1980).

[41] *Id.* at 513.

[42] *Id.* at 516.

[43] *Id.*

Stolze, the trial court did not abuse its discretion by determining that defendant was competent to stand trial.[44]

We vacate defendant's convictions and remand for a new trial consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Jessica R. Cooper

[44] Defendant points out that this Court in *Stolze* stated that "[p]erhaps a case could arise where an amnesiac condition seriously prejudices a defendant and renders him incompetent to stand trial." *Stolze, supra* at 515. However, this is not such a case. Defendant also refers to the test from Judge J. Skelly Wright's lead opinion in *Wilson v United States*, 129 US App DC 107; 391 F2d 460, 463-464 (1968), in support of his claim that he was incompetent to stand trial. Even if application of that test would be consistent with Michigan law, we conclude that it does not support a conclusion that defendant was incompetent to stand trial in light of the limited impairment to his defense from his apparent lack of recollection and the overwhelming evidence of his guilt.

Defendant also summarily contends, without citing any supporting case law, that the trial court's holding that he was competent to stand trial violated the Confrontation Clauses of the federal and state constitutions. US Cont, Am VI; Const 1963, art 1, § 20. The court's ruling did not preclude defendant from cross-examining or confronting any witness. Therefore, it did not violate or impair any rights protected by the Confrontation Clause. Thus, we conclude that defendant has abandoned this argument by failing to sufficiently argue its merits. See *People v Hicks*, 259 Mich App 518, 532; 675 NW2d 599 (2003).