# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>December 9, 2004 |
| v | No. 246810<br>Wayne Circuit Court |
| BARBARA J. DAVIS,<br><br>Defendant-Appellant. | LC No. 02-009234-02 |

Before: Cavanagh, P.J., and Jansen and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), and armed robbery, MCL 750.529. She was sentenced to concurrent prison terms of life without parole for the murder conviction, and five to fifteen years for the robbery conviction. Defendant appeals as of right. We vacate defendant's conviction and sentence for armed robbery, but affirm in all other respects.

Defendant argues that the police lacked probable cause for her arrest and, therefore, her custodial statements should be suppressed as a product of the illegal arrest. We disagree.

In *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998), this Court provided:

> A police officer may arrest an individual without a warrant if a felony has been committed and the officer has probable cause to believe that the individual committed the felony. MCL 764.15(c); *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). In reviewing a challenged finding of probable cause, an appellate court must determine whether the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected individual has committed the felony.

An arrest merely for investigation or for questioning is illegal. *Id.* at 633-634.

According to the testimony at the *Walker*[1] hearing, the police found the decedent's body in his driveway at approximately 8:15 to 8:30 a.m. on July 10, 2002, and rigor mortis had set in. Sergeant Isaiah Smith indicated that it takes eight to twelve hours for rigor mortis to occur, which led him to believe that the decedent was killed before 8:30 to 10:00 p.m. the night previous. Neighbors reported hearing gunshots at approximately 10:00 p.m. on July 9, 2002. One neighbor heard someone jump her fence shortly after hearing the shots.

The police learned from witnesses and neighbors that defendant was with the decedent the prior evening, as late as 9:00 p.m. Defendant was "possibly" driving a black Jeep, and defendant's mother owned a black Jeep that fit this description. One neighbor went to the decedent's house at approximately 9:00 p.m. and saw such a vehicle parked in the driveway. The neighbor knocked at the door, but no one answered.

The police also had information that defendant and the decedent were involved in a relationship. The neighbors directed the police to a man who knew where defendant lived. Later that day, at 3:30 p.m., the police brought defendant to the police station. According to Sergeant Smith, on July 10, 2002, the police advised defendant of her rights at 3:45 p.m., and she gave a statement at 4:30 p.m.

The present case is similar to *People v Dean*, one of the cases at issue in *People v Cipriano*, 431 Mich 315, 335-336; 429 NW2d 781 (1988). In *Dean*, the police found bodies at a home, and a witness saw a person meeting the defendant's description present in the home on the evening of the homicides. Another witness, who was walking by the home when shots were fired, saw a person with the defendant's characteristics leave the residence and drive off in an orange Cougar. A third witness identified the defendant as being in the home before the shootings. A fourth witness indicated that the defendant drove an orange Cougar and had been introduced to the victims. This Court concluded that the police had probable cause to arrest the defendant. *Id*. at 338.

In the present case, the police received information placing defendant at the crime scene near the time when the victim was thought to have been killed (the time of death was evidenced by the onset of rigor mortis). We conclude that the facts available to the police were sufficient to establish probable cause for defendant's arrest.

Defendant next argues that trial counsel was ineffective because he failed to call her as a witness at the *Walker* hearing in order to have her testify, as she did at trial, that her statements were induced by promises of leniency. We disagree. Had defendant testified at the *Walker* hearing as she did at trial, it would have created a credibility contest between herself and the interrogating officer, who denied making any promises. A promise of leniency is only one factor to be considered in evaluating whether statements were given voluntarily. *People v Shipley*, 256 Mich App 367, 373; 662 NW2d 856 (2003). Defendant does not contend that any other factors weighed in favor of a finding that her statements were not voluntary. Pursuing suppression on the mere ground that defendant's statements were not voluntary because of the alleged promises

[1] *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

of leniency would have been futile. Counsel was not ineffective for failing to present defendant's testimony in support of a theory for suppression that was unsustainable. Cf. *People v Flowers*, 222 Mich App 732, 737-738; 565 NW2d 12 (1997).

Defendant also argues that counsel was ineffective for failing to object to the prosecutor's rebuttal argument concerning consideration of defendant's mother's and sister's prior statements to the police and their prior testimony at an investigative subpoena hearing. The record discloses that the challenged argument was actually made by defense counsel, not the prosecutor. Moreover, the argument was made in the context of explaining that the consistency between the witnesses' prior statements and their prior testimony was not significant and suggesting that "everybody is out to get out of this." The argument did not suggest that the jury could consider the prior evidence as substantive evidence of defendant's guilt. Therefore, there is no merit to this issue.

Defendant additionally argues that her trial counsel was ineffective for failing to object to the trial court's jury instructions. We disagree. The court's instruction comported with MRE 801(d)(1)(A). Defendant correctly notes that the trial court had previously ruled that her mother's and sister's testimony at the investigative subpoena hearing was not admissible as substantive evidence under this rule because the witnesses were not "subject to cross-examination" at that hearing. The court's prior ruling was based on a flawed interpretation of MRE 801(d)(1)(A). The requirement that the declarant be "subject to cross-examination" does not mean that the declarant must have been subject to cross-examination *at the time the statement was made*. See *People v Malone*, 445 Mich 369; 518 NW2d 418 (1994). Rather, the declarant must be available for cross-examination at trial, which defendant's sister and mother both were. The fact that defendant may have earlier had the benefit of an erroneous ruling does not mean that counsel performed below an effective standard of reasonableness for failing to object to the court's later legally accurate instruction. For this reason, defendant has not shown that, by failing to object, trial counsel's performance fell below an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Defendant argues that she is minimally entitled to a remand for an evidentiary hearing concerning her ineffective assistance of counsel claims. However, because she has not advanced claims that would be aided by the development of a factual record, remand is not warranted.

Defendant also seeks a remand to develop the record concerning whether a particular juror ("Juror C") failed to disclose a prior felony conviction that would have subjected him to dismissal for cause under MCR 2.511(D)(2) and MCR 6.412(D)(2).

Generally, "[t]o be entitled to a new trial on the basis of juror misconduct, a defendant must 'establish (1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause.'" *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000), quoting *People v Daoust*, 228 Mich App 1, 9; 577 NW2d 179 (1998). In this case, however, Juror C was excused at the end of trial and did not participate in the deliberations. None of the cases cited by defendant involved a juror who did not participate in deliberations. Courts in other jurisdictions have unequivocally rejected claims involving allegedly objectionable jurors who did not participate in deliberations. See *State v Kuhn*, 139 Idaho 710; 85 P3d 1109 (Idaho App, 2003); *United States v Scull*, 321 F3d 1270, 1279 (CA 10, 2003); *Enoch v Gramley*, 70 F3d 1490, 1506 (CA 7, 1995); *State v Carter*, 335 NC 422, 428; 440 SE2d

268 (1994); *Cooks v State*, 844 SW2d 697, 722 (Tex Crim App, 1992); *State v White* 706 SW2d 280, 281-282 (Mo App, 1986), and cases cited therein; *United States v Wolf*, 102 F Supp 824, 825 (DC Pa, 1952); see also *People v Fountain*, 392 Mich 395, 397-400; 221 NW2d 375 (1974); *People v Carroll*, 396 Mich 408, 413-414; 240 NW2d 722 (1976) (rejecting related claims of error where the error was predicated on a juror who did not participate in deliberations). Therefore, even if Juror C was excusable for cause because of a prior felony conviction, because he did not participate in deliberations, appellate relief would not be warranted. Therefore, remand is unnecessary.

Finally, we agree that defendant's dual convictions and sentences for felony murder and the predicate felony of armed robbery violate double jeopardy. *People v Coomer*, 245 Mich App 206, 224-225; 627 NW2d 612 (2001); *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996). The appropriate remedy is to vacate the conviction and sentence for the underlying felony. *Coomer*, *supra.* Accordingly, we vacate defendant's conviction and sentence for armed robbery. *Id.*

Affirmed in part and vacated in part.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood