

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHANIEL TYRONE GILBERT,

Defendant-Appellant.

UNPUBLISHED

December 20, 2007

No. 273644

Macomb Circuit Court

LC No. 2006-000173-FC

Before: Whitbeck, C.J., and White and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of first-degree felony murder, MCL 750.316(1)(b). The jury also convicted defendant of third-degree criminal sexual conduct (victim aged 13 to 15), MCL 750.520d(1)(a), but the trial court vacated that conviction on the prosecutor's motion. Defendant was sentenced to life in prison. We affirm.

Defendant first argues that there was insufficient evidence of malice to support his conviction. In reviewing this issue, we must determine whether, viewing the evidence in a light most favorable to the prosecution, a reasonable trier of fact could find each element of the crime beyond a reasonable doubt. *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). Any murder, including first-degree felony murder, includes the element of malice - - the intent to kill, do great bodily harm, or create a high risk of death or great bodily harm with knowledge that death is the probable result. *People v Dumas*, 454 Mich 390, 396-397; 563 NW2d 31 (1997). In this case, a reasonable trier of fact could find the required intent beyond a reasonable doubt based on defendant's statement to police that he submerged the victim's head in water, strangled her, and disposed of her body, and the medical examiner's testimony that the death required neck compression for at least four minutes.

Defendant also argues that the death and the felony (CSC) were insufficiently connected to support a conviction of felony murder. We disagree. First-degree felony murder is "murder committed in the perpetration of, or attempt to perpetrate" certain enumerated felonies, including third-degree criminal sexual conduct. MCL 750.316(1)(b). While defendant urges us to conclude that there was insufficient evidence that the CSC and the murder involved an unbroken chain of events uninterrupted by an intervening act, we are satisfied that there was ample evidence from which a reasonable jury could conclude that "defendant's felony dictated his conduct which led to the homicide," LaFave & Scott, [Criminal Law, § 71, p 557], cited with approval in *People v Gillis*, 474 Mich 105, 127; 712 NW2d 419 (2006), quoting *People v*

Goddard, 135 Mich App 128, 135-136; 352 NW2d 367 (1984), rev'd on other grounds 429 Mich 505 (1988), and that the murder was part of the unbroken chain of events surrounding the CSC. *Gillis*, *supra* at 125. The murder occurred in the same location as the CSC, in the same relatively short period, and in an apparent attempt to avoid the victim's reporting what happened. While defendant maintains that the sex was consensual, and that the homicide was the result of a desire that the victim not tell others that defendant tried to kill her when she accidentally hit her head on the tub, the jury was free to reject defendant's account of the events. Further, defendant fails to explain on appeal what intervening event broke the sequence of events that led from the sex to the murder. The connection between the felony and the murder was no more attenuated than in *People v Thew*, 201 Mich App 78, 87; 506 NW2d 547 (1993), where defendant pleaded guilty of felony-murder on the basis that he ran over the eleven-year-old CSC victim ten or fifteen minutes after consensual intercourse, after the defendant and the victim got into an argument about unrelated events. This Court found that defendant's admission that at the time he ran over the victim, he was concerned about the victim telling others about the intercourse, was sufficient to support an inference that the argument was part of a continuous transaction that resulted in the victim's death. Here, defendant's admission that he strangled the victim shortly after the intercourse supports the same inference. The evidence was sufficient for a reasonable trier of fact to determine that the death occurred in the perpetration of the felony.

Defendant next argues that the trial court erred when it admitted a photograph of the victim's body as it was found. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006). The proper analysis for admission of a photograph is whether the evidence was relevant, MRE 401, and whether that probative value was substantially outweighed by the danger of unfair prejudice, MRE 403. *People v Mills*, 450 Mich 61, 66, 76; 537 NW2d 909 (1995). Photographs are not excluded merely because a witness could testify regarding the information, nor are they excluded merely because they are gruesome. *Id.* at 76. The photograph here was relevant to corroborate and demonstrate the medical examiner's testimony regarding the victim's appearance. The marks on her body, the state of her clothes, and how dry or damp her head and hair were, gave the jurors relevant information about what happened, and whether defendant's statement was credible. Further, although there was some risk of unfair prejudice inherent in the nature of the photograph, that risk did not substantially outweigh its probative value. Therefore, the trial court did not abuse its discretion when it admitted the photograph. See MRE 403; *Mills*, *supra* at 66, 76.

Finally, defendant argues that the trial court erred when it denied his motion for mistrial after the victim's mother collapsed in court. A trial court should grant a mistrial only for an irregularity that impairs a defendant's ability to receive a fair trial. *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). An emotional outburst is grounds for a mistrial only when it was so egregious that the prejudicial effect can not be cured. *Id.*; *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992). In the present case, the record states that the jurors left the courtroom before the victim's mother received medical attention, and the trial judge believed the jurors did not even know who collapsed. After the incident, the trial court instructed the jurors that they must not let sympathy or prejudice influence their decision. Juries are generally presumed to follow instructions. *Bauder*, *supra* at 195. This incident was not so egregious that a cautionary instruction could not cure the prejudicial effect. Therefore, the trial court did not err when it denied the mistrial motion.

Affirmed.

/s/ William C. Whitbeck

/s/ Helene N. White

/s/ Brian K. Zahra