

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACINTO PENA,

Defendant-Appellant.

UNPUBLISHED

March 13, 2008

No. 275508

Kent Circuit Court

LC No. 05-012514-FC

Before: Fitzgerald, P.J., and Smolenski and Beckering, JJ.

PER CURIAM.

A jury convicted defendant of felony murder, MCL 750.316, first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(f), first-degree premeditated murder, MCL 750.316, and mutilation of a dead body, MCL 750.160. The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to life imprisonment for his murder convictions, 20 to 60 years' imprisonment for his first-degree CSC conviction, and 5 to 15 years' imprisonment for mutilating a dead body. We affirm in part, vacate in part, and remand.

Defendant's convictions arise from a forcible rape and a related murder. Defendant raped the victim in his bedroom. When she subsequently screamed and kicked out a window, defendant threw her to the ground and strangled her, first with his hands and then with her shirt. He subsequently moved the victim's dead body to the bathroom, where he shoved his fist into her vagina, causing damage to her vaginal area. He then went to sleep. On the following day, defendant turned himself in to the police and confessed to his crimes. Defendant was thereafter tried and convicted for the rape, murder, and mutilation of the victim's body.

Defendant argues that the evidence of malice was insufficient to support the felony murder conviction, and that the evidence was insufficient within the meaning of the criminal statute to support a finding that he mutilated the victim's dead body. We review an argument challenging the sufficiency of the evidence to determine whether, "[t]aking the evidence in a light most favorable to the prosecution, . . . a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Hardiman*, 466 Mich 417, 420-421; 646 NW2d 158 (2002).

The elements of 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], (3) while

committing, attempting to commit, or assisting in the commission of any” specifically enumerated felony, here first-degree criminal sexual conduct. *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007). A defendant’s intent to commit the predicate felony does not per se establish that he had the requisite malice to support a felony-murder conviction; rather, malice must be specifically proved. *People v Wilder*, 411 Mich 328, 339; 308 NW2d 112 (1981), citing *People v Aaron*, 409 Mich 672, 727-729; 299 NW2d 304 (1980). Malice is the “intent to kill, intent to do great bodily harm, or wanton and willful disregard of the likelihood that the natural tendency of a person’s behavior is to cause death or great bodily harm.” *Aaron*, *supra* at 728-729. Malice is also described as “an intent to create a risk of great bodily harm with knowledge that such is the probable result.” *People v Neal*, 201 Mich App 650, 654; 506 NW2d 618 (1993). The facts and circumstances of a killing may lead to an inference of malice, and “[i]t is for the jury to determine whether the element of malice can be inferred from all the evidence.” *People v Flowers*, 191 Mich App 169, 176-177; 477 NW2d 473 (1991). Evidence of manual strangulation may be used to show that a defendant had the opportunity to consider his actions before he committed them. See *People v Johnson*, 460 Mich 720, 733; 597 NW2d 73 (1999). “[I]t is not a defense to any crime that defendant was, at that time, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound.” MCL 768.37(1).

Here, evidence was presented at trial that defendant admitted to his mother, his girlfriend, and several police officers that he raped the victim and subsequently strangled her. A forensic pathologist testified that after 20 seconds of strangulation, a person can lose consciousness, but it takes several minutes before the oxygen in the brain is sufficiently depleted to cause death. If defendant’s intent was merely to silence the victim or keep her from kicking out any more windows, he could have stopped strangling her as soon as she lost consciousness. But evidence was presented that defendant strangled the victim for several minutes before she died. Moreover, at some point during the strangulation, defendant released his hands from the victim’s neck in order to tie her shirt tightly around her neck to complete the strangulation. Considering this evidence in a light most favorable to the prosecution, a reasonable jury could have concluded beyond a reasonable doubt that defendant had the intent to kill, the intent to cause great bodily harm, or the intent to cause a risk of great bodily harm with knowledge that such was the probable result. Defendant’s claimed intoxication during these events is not a defense. MCL 768.37(1). Sufficient evidence of malice was presented to support defendant’s felony murder conviction.¹

With respect to defendant’s mutilation conviction, the mutilation of a dead body is prohibited by statute, as follows:

¹ In reaching our conclusion, we decline to consider defendant’s assertion that a lack of nexus between the murder and the predicate felony indicates that there was not sufficient evidence of his malice to sustain a felony murder conviction. Defendant does not support his contention with the use of authority or any reasoning or explanation. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

A person, not being lawfully authorized to do so, who shall . . . mutilate, deface, remove, or carry away a portion of the dead body of a person, whether in his charge for burial or otherwise, whenever the mutilation, defacement, removal, or carrying away is not necessary in any proper operation in embalming the body or for the purpose of a postmortem examination . . . shall be guilty of a felony. . . [MCL 750.160.]

While this statute has not been construed by this Court or our Supreme Court, the Legislature is presumed to have intended the meaning it has plainly expressed. *People v Petty*, 469 Mich 108, 114; 665 NW2d 443 (2003). If the wording or language of a statute is unambiguous, no judicial construction is required or permitted and the statute must be enforced as written. *Id.*; *People v Williams*, 268 Mich App 416, 425; 707 NW2d 624 (2005). Unless the words have been defined in the statutes, they are to be given their plain and ordinary meanings, considering the context in which the words are used. *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007); MCL 8.3a. If the Legislative intent is not apparent from the statute itself, this Court may consult dictionary definitions. *People v Peals*, 476 Mich 636, 641; 720 NW2d 196 (2006).

Black's Law Dictionary (8th ed) defines "mutilation" as the "act of cutting off or permanently damaging a body part." To "mutilate" is otherwise defined as "to injure or disfigure by removing or irreparably damaging parts." *Random House Webster's College Dictionary* (2001). To "deface" means "to mar the surface or appearance of; disfigure." *Random House Webster's College Dictionary* (2001). To "remove" means "to move or shift from a place or position." *Random House Webster's College Dictionary* (2001). Thus, according to the plain language² of the statute, a person may not cause irreparable or permanent damage or injury to, change the appearance of, or remove a portion of, the dead body.

The record reveals that defendant shoved his fist into the victim's vagina after he moved her dead body from his bedroom to the bathroom. The victim had large lacerations, tears, and bruises that were consistent with a fist or some other human or foreign object being inserted into the victim's vagina. Considering these facts together and in a light most favorable to the prosecution, the jury could have concluded beyond a reasonable doubt that defendant irreparably damaged and disfigured the victim's vagina when he shoved his fist inside her after she died.

Defendant next argues that his confessions were coerced and not voluntary under the totality of the circumstances, including a failure to *Mirandize*³ him. The only issue considered

² Because the plain language of the statute is clear and unambiguous, we decline to adopt defendant's more restrictive definition of mutilation for which he finds support in this Court's cases related to the common-law tort for mutilation of a dead body. See *Dampier v Wayne Co*, 233 Mich App 714, 729; 592 NW2d 809 (1999) (defining mutilation as the "active incision, evisceration, or dismemberment of a dead body"). We are not persuaded that this tort definition has become a technical, common-law definition, which should affect our analysis of the criminal statute. We note that other defendants have been criminally convicted of this crime where they burned a dead body. *People v Williams*, 265 Mich App 68, 70; 692 NW2d 722 (2005). Burning does not involve cutting, eviscerating, or dismembering a body.

³ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

during the *Walker*⁴ hearing below was whether defendant's confession was coerced by promises of leniency. Therefore, that is the only question preserved for appeal. We review a trial court's ultimate decision on a motion to suppress evidence de novo. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). However, we will "not disturb a trial court's factual findings with respect to a *Walker* hearing unless those findings are clearly erroneous. *Id.* A finding is clearly erroneous where we are left with a definite and firm conviction that a mistake has been made. *Id.* With respect to defendant's unpreserved allegations of error related to the admission of his statements to police, he may obtain a reversal of his conviction where the error was plain and affected his substantial rights. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

A defendant's confession must be "free and voluntary; that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence" *People v Daoud*, 462 Mich 621, 632; 614 NW2d 152 (2000). Whether defendant was promised leniency is determined from the defendant's point of view by considering "whether defendant is likely to have reasonably understood the statements in question to be promises of leniency." *People v Conte*, 421 Mich 704, 739-740; 365 NW2d 648 (1984). Furthermore, to make a defendant's confession involuntary, the promise of leniency has to be one "relied upon by the defendant in making his decision and one that at least in part prompted the defendant to confess." *Id.* at 741.

Whether a defendant's confession was otherwise voluntary is determined by examining the conduct of the police. *People v Shipley*, 256 Mich App 367, 373; 662 NW2d 856 (2003). "The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Id.* at 374. Several factors should be considered, including:

the 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. [*Id.* at 373-374.]

Each factor should be considered, and none of the factors is determinative. *Id.* at 374. Where defendant is in custody during interrogation, he must "voluntarily, knowingly, and intelligently" waive his Fifth Amendment rights to remain silent and to an attorney before any of his statements obtained during the custodial interrogation can be used against him. *Akins, supra* at 564. A person is in custody where the "person has been formally arrested or subjected to a restraint on freedom of movement or of the degree associated with a formal arrest." *People v*

⁴ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

Peerenboom, 224 Mich App 195, 197; 568 NW2d 153 (1997). Once a defendant is in custody and has been instructed about his rights, the police are not required to reread his rights every time they question him. *People v Littlejohn*, 197 Mich App 220, 223; 495 NW2d 171 (1992).

Here, after a de novo review of the entire record, we are not left with a definite and firm conviction that the trial court made a mistake when it found that defendant's claims that he was promised leniency were fabricated and otherwise unsupported by the objective evidence available on the record. There was no objective evidence on the record that Detective McGee ever talked to defendant, let alone had the time to promise defendant leniency in exchange for his confession. Defendant was escorted from the lobby of the police department to the interview room by Officer Zabriskie. Officer Zabriskie did not leave until Detectives Jorgensen and DeVries arrived to question defendant. Furthermore, we will not disrupt on appeal the trial court's determination that defendant's story was not credible. *People v Noble*, 238 Mich App 647, 657; 608 NW2d 123 (1999).

Furthermore, we do not believe that any plain error exists with respect to the voluntariness of defendant's confessions. Both confessions were made without substantial questioning from police officers. Defendant came, with his family, to the police station before the police were aware that a crime had been committed, and stated that he had "murdered someone." Defendant was instructed of his Fifth Amendment rights as soon as Officer Zabriskie understood that defendant intended to confess to a murder. During defendant's subsequent recorded statement, he admitted he was already informed of his rights, and then signed a waiver of those rights. The five-minute delay during the recorded interview, before defendant was reinstructed of his rights, does not automatically make his confessions involuntary because defendant had been previously advised of his *Miranda* rights. *Littlejohn*, *supra* at 223. Furthermore, although defendant admitted to drinking and taking cocaine during the previous night, defendant did not appear drunk during his statements, his speech was not slurred, and he was able to stand. Finally, defendant was not in custody for long before making his statements. There was no evidence that he was deprived of food, water, sleep, or medical attention, or that he was threatened or coerced in any manner. See *Shipley*, *supra*. Considering the totality of the circumstances, the trial court did not commit plain error when it admitted defendant's confessions into evidence.

Finally, defendant argues that his dual convictions for both first-degree felony murder and the predicate CSC felony violate his right to be protected from double jeopardy. We agree. Under the Double Jeopardy Clause, a defendant may not be convicted of, and sentenced for, both felony murder and its underlying felony. See *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998). When a defendant is convicted and sentenced for both felony murder and the predicate felony, the underlying felony conviction and sentence must be vacated. *Bigelow*, *supra* at 220-221. Therefore, we vacate defendant's first-degree CSC conviction and sentence.

Additionally, defendant's separate convictions and sentences for first-degree premeditated murder and first-degree felony murder arising from the death of one victim are improper. *Bigelow*, *supra* at 220. On remand, the trial court shall modify the judgment of sentence to reflect a single conviction and sentence of first-degree murder, supported by two different theories. See *People v Joezell Williams*, 475 Mich 101, 103; 715 NW2d 24 (2006).

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald

/s/ Michael R. Smolenski

/s/ Jane M. Beckering