

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODGERECK HERBERT,

Defendant-Appellant.

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UNPUBLISHED

June 16, 2009

No. 284313

Wayne Circuit Court

LC No. 07-011024-FC

Before: Fort Hood, P.J., and Cavanagh and K.F. Kelly, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction.<sup>1</sup> He appeals as of right. We affirm.

Defendant's convictions arise from the shooting death of 16-year-old Walvon Holland, who was shot three times in the head and once in the chest while inside the basement bedroom of his friend, Kurtis Kelm. Testimony at trial indicated that Holland and Kelm sold marijuana together, and kept their supply of marijuana in Kelm's bedroom. Kelm testified that he was sleeping in his bedroom and awoke when he heard defendant demanding drugs and money from Holland. Kelm stated that, from his partially concealed location, he saw defendant pointing a gun at Holland. When Holland refused to comply with defendant's demands, defendant shot him. Kelm heard a second person enter the basement but could not see who it was. Kelm remained hidden and heard the sound of someone rummaging through his cupboard. After defendant and the other person had left, Kelm discovered that the supply of drugs and money were missing.

I. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to support his conviction for first-degree felony-murder. We disagree.

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<sup>1</sup> The trial court vacated defendant's armed robbery conviction.

In reviewing a challenge to the sufficiency of the evidence, this Court reviews the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). The standard of review is deferential and this Court is required to draw all reasonable inferences and make credibility choices in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

To prove first-degree felony murder, there must be evidence of a killing, with malice, during the commission or attempted commission of one of the felonies enumerated in the statute, one of which is robbery. *People v Ream*, 481 Mich 223, 241; 750 NW2d 536 (2008); *People v Smith*, 478 Mich 292, 324; 733 NW2d 351 (2007). Malice is "an act done with either an intent to kill, an intent to commit great bodily harm, or an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result." *People v Gillis*, 474 Mich 105, 138; 712 NW2d 419 (2006) (citation and internal quotations omitted). Malice may be inferred from the facts and circumstances of a crime, including the use of a dangerous weapon. *People v Carines*, 460 Mich 750, 760; 597 NW2d 130 (1999).

Kelm's testimony that defendant shot Holland in the head after Holland refused to comply with defendant's demands for the marijuana and money, and that the drugs and money were missing after defendant left, viewed in a light most favorable to the prosecution, was sufficient to prove beyond a reasonable doubt that defendant killed Holland during the commission of a robbery, and that he acted with the requisite malice to be guilty of felony murder. Although defendant argues that Kelm's testimony was not credible, questions of credibility are left to the trier of fact and, when reviewing a claim of insufficient evidence, this Court must resolve credibility choices in favor of the jury's verdict. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Thus, we reject defendant's claim that the evidence was insufficient to support his felony murder conviction.

## II. Defendant's Standard 4 Brief

Defendant raises three issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

### A. Eliciting False Testimony

Defendant argues that the prosecutor violated his right to due process by eliciting Kelm's testimony, which defendant maintains was false.

It is well-settled that a prosecutor may not knowingly use false testimony to secure a conviction and has a duty to correct false testimony when it arises. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001). Here, defendant maintains that inconsistencies between Kelm's direct examination testimony and his testimony on cross-examination and at the preliminary examination indicate that his direct examination testimony was false. However, merely because there were some inconsistencies in Kelm's testimony does not establish that Kelm provided false testimony, or that the prosecutor knew that his testimony was false. Moreover, the alleged inconsistencies were presented to the jury. Thus, there was no due process violation.

### B. Prosecutor's Conduct Involving Juan and Jovan Smith

Defendant argues that the prosecutor improperly argued that Jovan Smith let defendant inside Kelm's house, and that the prosecutor had a duty to call both Juan and Jovan Smith as witnesses. Because defendant did not object to the prosecutor's comments at trial, or to the prosecutor's failure to call Jovan or Jajuan Smith as witnesses, this issue is not preserved. Appellate review of prosecutor conduct that is allegedly improper is precluded where the defendant fails to timely and specifically object; we will only review the defendant's claim for plain error. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003).

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), but a prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Roxanne Kelm's testimony that she let a person inside the house who looked like Juan Smith and who identified himself as Juan's brother supports the prosecutor's argument that it was Jovan Smith who Roxanne let inside the house before she left for work. Further, although there was no direct evidence that Jovan let defendant inside the house, it was reasonable to infer from Kurtis Kelm's testimony that he saw defendant in the basement and that he later heard a second unidentified person inside the house that Jovan was the second person and that, there being no one else home at the time, it was Jovan who let defendant inside the house. Thus, the prosecutor's argument was not improper.

In addition, the prosecutor was not under a duty to call all known witnesses, only a duty to provide notice of all known witnesses, and reasonable assistance in locating them upon request. MCL 767.40a; *People v Koonce*, 466 Mich 515, 522-523; 648 NW2d 153 (2002). Here, it is clear from the information produced during discovery and from defendant's recorded statement that he had notice of both Juan and Jovan Smith as potential witnesses. These witnesses were not listed on the prosecution's witness list and the prosecutor had no duty to call them. Defendant could have requested assistance in locating them, if necessary, and could have called them at trial himself, but did not do so. No plain error has been shown.

### C. Effective Assistance of Counsel

Finally, defendant argues that defense counsel was ineffective at trial. Because defendant did not raise this issue in a motion for a new trial or request for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973), our review is limited to mistakes apparent from the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

To establish ineffective assistance of counsel, the burden is on defendant to show that counsel made an error so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and that the deficient performance so prejudiced the defense as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). Defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy. *Stanaway, supra* at 687. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

Defendant argues that defense counsel was ineffective for failing to object to the prosecutor's conduct previously addressed in this opinion. But because the prosecutor's conduct was not improper, defendant's challenge is without merit.

Defendant also argues that counsel was ineffective for failing to highlight inconsistencies in Kelm's testimony, particularly with respect to whether Kelm saw a gun. It was undisputed, however, that Holland had been shot, thereby establishing that a gun was used. Instead, counsel argued that the gunshot trajectories were physically impossible under Kelm's explanation. Counsel also argued that it was too dark for Kelm to see who was standing over Holland, and that other testimony indicated that defendant was at home with his great aunt when the offense was committed. Counsel's decisions regarding what arguments to make were matters of trial strategy, and defendant has not overcome the presumption of sound strategy. The record does not support defendant's claim that he was denied the effective assistance of counsel.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Mark J. Cavanagh

/s/ Kirsten Frank Kelly