STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 23, 2010
v	No. 291774 Oakland Circuit Court
JAQUAN EDWARD LOVE, Defendant-Appellant.	LC No. 2008-222579-FC

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

A jury convicted defendant of first-degree felony murder, MCL 750.316, three counts of armed robbery, MCL 750.529, assault with intent to murder, MCL 750.83, two counts of assault with intent to commit great bodily harm, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and eight counts of possession of a firearm during the commission of a felony (felony-firearm). The trial court sentenced defendant to prison terms of life without parole for the felony murder conviction, 20 to 40 years for each of the armed robbery and assault with intent to murder convictions, 10 to 15 years for each of the assault with intent to commit great bodily harm convictions, 60 to 90 months for the felon in possession conviction, and two consecutive years for each of the eight felony-firearm convictions. Defendant appeals as of right. We affirm.

I. FACTS

Defendant's convictions arise from two robberies committed in Pontiac by defendant and his accomplice, Eric Corr, in the early morning of July 12, 2008. The first robbery occurred at approximately 2:30 a.m., and the second occurred at approximately 4:45 a.m.

According to David Chavez and Fidel Diosado, the victims of the earlier robbery, the two were robbed as they were walking home from a nightclub. Chavez testified that as he and Diosado were crossing a street, two black men began to cross toward them. After the groups passed, the two assailants turned around and came up behind Chavez and Diosado. Both assailants had handguns, and one of them put his handgun to Chavez's head, demanded money, and threatened to kill him. Chavez gave the man his money, which amounted to approximately $15 and a $100 peso bill, as well as his cell phone. Chavez could see Diosado wrestling with the other man, who had his gun pointed at Diosado and his hand in Diosado's pockets. The assailants then shot Diosado and Chavez. Diosado testified that the men who shot him took $60 and a $50 peso note he had in his wallet as he lay on the ground.

The victims of the later shooting, Thomas Daniels and Jason McNeil, were driving with Jason's wife, Cora McNeil, Tonya Ortiz, and Kyle Sylva on the way to a bar in Flint when they decided to purchase some cocaine. While driving, they saw defendant and Corr and approached them to ask whether they had any cocaine. Cora McNeil stated that Daniels and her husband gave defendant a $100 bill after exiting the car. When Jason McNeil gave Corr a $1 bill, Corr demanded his own $100 bill. According to Mrs. McNeil, after her husband took back the dollar, defendant grabbed the lower part of Daniels's shirt, pulled it up, and stated, "we're going to take all your money." She maintained that, as Jason McNeil tried to pull Daniels away, a weapon "was pulled" and Daniels was shot. Daniels died as a result of the gunshot. As Jason McNeil turned to run, he was also shot. Ortiz and Sylva provided similar testimony about the shooting. However, they maintained that after Daniels pulled out the bill, one of the assailants "snatched" it from him. Cora McNeil, Ortiz, and Sylva all identified defendant at the scene after he and Corr were arrested.

Officers who chased and eventually apprehended the two assailants testified that a .380 handgun fell from defendant's waistband during the chase. In defendant's pockets officers also found two cartridges of the same caliber and crumpled money, including a $100 bill. When apprehended while hiding in a garage, Corr had a Spanish language cell phone. The officers also found a $100 bill, a $20 bill, a $5 bill, thirty-five $1 bills, and a $50 peso note in the yard next door in a matted down area "as if someone or something had been laying down on the ground crushing the weeds and the grass down" in a yard next door.

Gunshot residue was found on both defendant's and Corr's hands. The prosecution's firearm expert examined spent cartridge casings from both sites, bullets taken from Daniels's body and recovered from Diosado following surgery, and the handgun dropped by defendant. He testified that the bullets that struck Daniels and Diosado were fired from defendant's gun. He also opined that two of the casings from the site of the second shooting, and one of the casings from the other location, matched the spent casings from test firings from the recovered gun.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the evidence was insufficient to support his felony murder conviction. We review a defendant's allegations regarding insufficiency of the evidence de novo, viewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). Satisfactory proof of the elements of the crime can be shown by circumstantial evidence and the reasonable inferences arising therefrom. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It is for the trier of fact to determine what inferences can be fairly drawn from the evidence and the weight to be accorded to those inferences. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended on other grounds 441 Mich 1202 (1992); *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

"Felony murder consists of second-degree murder in combination with one of the felonies enumerated in MCL 750.316." *People v Bulls*, 262 Mich App 618, 624; 687 NW2d 159 (2004). In this case, the underlying felony was larceny. Thus, the elements of felony murder in this case are: (1) the killing of a human being, (2) with malice, meaning 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, (3) while committing or attempting to commit a larceny. *Carines*, 460 Mich at 759. The mens rea for second-degree murder "does not mandate a finding of specific intent to harm or kill. The intent to do an act in obvious disregard of life-endangering consequences is a malicious intent." *People v Goecke*, 457 Mich 442, 466; 579 NW2d 868 (1998) (citation omitted). In other words, malice "can be inferred from evidence that the defendant 'intentionally set in motion a force likely to cause death or great bodily harm.'" *Bulls*, 262 Mich App at 626 (citations omitted).

As defendant notes, obtaining money by false pretenses is not a predicate offense to felony murder. *People v Malach*, 202 Mich App 266, 270-272; 507 NW2d 834 (1993). Defendant argues that, like the defendant in *Malach* who gave fake cartons of cigarettes in exchange for money, *id*. at 269, he could not be found guilty of felony murder because the evidence here showed that he at most committed the offense of obtaining money by false pretenses when Daniels gave him the $100 bill in exchange for what he believed would be a quantity of cocaine.

However, even if the only testimony here was that of Cora McNeil, who stated that Daniels handed defendant or Corr the $100 bill during an attempt to buy cocaine, the felony murder conviction would still be sufficiently supported. Larceny is the intentional taking and carrying away of another's property without consent and with the intent to permanently deprive the person of it. *People v Cain*, 238 Mich App 95, 120-121; 605 NW2d 28 (1999). "'In larceny, the owner of the thing stolen has no intention to part with his property therein; in false pretenses, the owner does intend to part with his property in the thing, but this intention is the result of fraudulent contrivances.'" *People v Long*, 409 Mich 346, 350; 294 NW2d 197 (1980), quoting *People v Martin*, 116 Mich 446, 450; 74 NW 653 (1898). "The distinction between the two offenses therefore depends entirely upon the intent of the victim: if the owner of the goods intends to keep title but part with possession, the crime is larceny; if the owner intends to part with both title and possession, albeit for the wrong reasons, the crime is false pretenses." *Malach*, 202 Mich App at 271 (citations omitted). Thus, a defendant who first gains temporary, but not absolute, access to the property and then uses the advantage of momentary custody to carry it away is still guilty of larceny. *Malach*, 202 Mich App at 270-271. Here, Daniels had not received anything in return for the money at the time of the shooting. A reasonable inference could be made that at the time of the shooting Daniels had transferred possession, but not title in the absence of any exchange, and that the shooting thus occurred during a larceny, as opposed to occurring during a taking under false pretenses.

In any event, a jury is free to believe or to disbelieve all or part of any of the evidence presented, *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999), and here the jury could have focused more on the description of the events leading up to Daniels's shooting provided by Ortiz and Sylva. According to their testimony, Daniels held the money up, had it "snatched" from his hands, and was then shot when he tried to take the money back. In addition, defendant possessed a $100 bill when he was apprehended, and another one was located close to where Corr was apprehended. When viewed in the light most favorable to the prosecution, this evidence was sufficient to support defendant's felony murder conviction.

III. JOINDER

Defendant also argues the trial court abused its discretion when it denied defendant's motion to sever the charges against him, *People v Williams*, 483 Mich 226, 234 n 6; 769 NW2d 605 (2009), because they stem from two separate incidents involving two separate sets of victims. We disagree.

Recently, our Supreme Court has provided the following standard of review concerning joinder decisions:

> Generally, this Court reviews questions of law de novo and factual findings for clear error. The interpretation of a court rule, like matters of statutory interpretation, is a question of law that we review de novo. To determine whether joinder is permissible, a trial court must first find the relevant facts and then must decide whether those facts constitute "related" offenses for which joinder is appropriate. Because this case presents a mixed question of fact and law, it is subject to both a clear error and a de novo standard of review. [*Id.* at 231 (citations omitted).]

MCR 6.120 provides in pertinent part as follows:

> (B) On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.
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> (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
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> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
>
> (c) a series of acts constituting parts of a single scheme or plan.
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> * * *
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> (C) On the defendant's motion, the court must sever for separate trials offenses that are not related as defined in subrule (B)(1).

Defendant's argument that two separate trials should have been held is premised on *People v Tobey*, 401 Mich 141; 257 NW2d 537 (1977), which has been superseded by court rule.

Williams, 483 Mich at 238-239.[1] *Williams* involved two drug transactions, one that occurred on November 4, 2004, and one that occurred on February 2, 2005. *Id.* at 228-229. The trial court concluded that the two transactions were "'parts of a single scheme or plan; namely, drug trafficking.'" *Id.* at 230. *Williams* agreed, reasoning as follows:

> The charges stemming from both arrests were not "related" simply because they were "of the same or similar character." Instead, the offenses charged were related because the evidence indicated that defendant engaged in ongoing acts constituting parts of his overall scheme or plan to package cocaine for distribution. [*Id.* at 235 (footnotes omitted).]

The *Williams* Court cautioned that "joinder may not be permitted if a reviewing court concludes that the only link to an ongoing scheme or plan is 'to earn money' through some criminal enterprise." *Id*. at 235 n 10. The instant case does not present such a situation, as the circumstances of the initiation of the two robberies were different. However, taken together, the similar methods used in perpetrating the robberies and in shooting the victims, the short time frame and distance between the robberies, and the obvious similarity in motive, support the trial court's finding that defendant and Corr committed the acts to further their common plan of robbing persons that evening.

We further conclude that joinder was appropriate under MCR 6.120(B)(1)(b). The two robberies consisted of "a series of connected acts" such that there was a substantial commonality of the evidence used to prove both. Indeed, evidence concerning the identity of the assailants in the robbery of David Chavez and Fidel Diosado, who could not identify the men, was highly dependent on the identification evidence from the witnesses to the other robbery. Additionally, the forensic evidence, the police chase evidence, and the evidence concerning the possessions the robbers had on their persons or near their locations when apprehended related to both offenses and was so intertwined that severance would have been impractical. Thus, under *Williams*, we find that the trial court did not abuse its discretion when it refused to sever the charges.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Jane M. Beckering

[1] The Court in *Williams* analyzed an earlier version of MCR 6.120. However, the two versions contain only minor variations, along with a substitution of "the same conduct or transaction" for "the same conduct."