STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 22, 2016
v	No. 328558 Saginaw Circuit Court
MICHAEL DUANE LAWRENCE, Defendant-Appellant.	LC No. 2013-039441-FC

Before: BOONSTRA, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Defendant was convicted of first-degree felony murder, MCL 750.316(b), child abandonment, MCL 750.135, and unlawful driving away of an automobile (UDAA), MCL 750.413 following a jury trial.[1] Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to life in prison without the possibility of parole for the felony murder conviction, 152 to 300 months for the child abandonment conviction, and 76 to 180 months for the UDAA conviction. Defendant appeals by leave granted.[2] We affirm.

I. FACTUAL BACKGROUND

The victim in this case was the mother of defendant's three year old child, ML. Around 2:30 p.m. on April 15, 2013, ML was found by Pedro Delgado, who testified that when he approached ML, the boy told him that "his dad killed his mom." Delgado asked ML where he lived, and ML walked Delgado to his house. Delgado testified that he looked under the door and saw a body lying on the floor. Delgado then went outside and called 911. Police were then dispatched to the home. Officers testified that they observed the victim lying on her back on the

[1] Defendant was also charged with but found not guilty of first-degree premeditated murder, MCL 750.316(a).

[2] *People v Lawrence*, unpublished order of the Court of Appeals, entered November 10, 2015 (Docket No. 328558). It appears that at the conclusion of sentencing the complete appointment of appellate counsel form was not conveyed to the trial court. Defendant then filed an untimely request for appointment of appellate counsel, who in turn filed this delayed application for leave to appeal, which we granted.

floor in the front bedroom. Officers then walked ML to his grandmother's house. One of the officers, Officer Busch, testified that while he attempted to keep conversation "light with little [ML]," the young boy told him that his mother had died and that he had seen his father hit her in the nose. Another officer also testified that he attempted to speak to ML only about subjects unrelated to the killing but that ML repeatedly stated "Dad just killed my mom." Upon arrival at ML's grandparents' house, Busch testified that ML told his grandfather that his mother had died. Detectives then arrived and took ML to a forensic interview.

ML was then given a forensic interview by Barb Andrews. Andrews testified that she asked ML how his mom had died and that he answered "[d]addy beat her up." She asked him whether he saw this happen, and he answered, "Yes." Defense counsel asked Andrews if at any point in the interview ML suggested that he saw defendant choke the victim, and she answered, "No." Officers testified that they suspected whoever killed the victim had stolen her car because the car was not located at the house and because neighbors told them that when the victim was home her car was usually parked in the front. The victim's car, a 2002 Dodge Neon, was found abandoned in Lansing, eight days later. DNA was collected from the vehicle, and the lab analysts were able to identify the major donor as the victim. Lab analysts were also able to identify the presence of a second donor. However, the lab analysts testified that they were not able to collect a sufficient amount of DNA from the second donor to make an identification. The medical examiner testified that the cause of death was "manual strangulation," but that there was no physical injury to the nose or eyes and no indication that the victim had been beaten or kicked. Forensic biologists testified that fingernail clippings were taken from the victim that contained small amounts of DNA though not enough "to be tested under the normal nuclear DNA testing."

II. EXPERT TESTIMONY REGARDING DNA FOUND ON THE VICTIM'S FINGERNAILS

The forensic biologists that assisted the investigation testified that because the male DNA taken from the victim's fingernails could not be tested under normal nuclear DNA testing, a technique called Y-STR testing was used that looks only at male DNA. The biologist who performed the Y-STR testing in this case testified that she found that there was DNA from more than one male present but that the "major donor" matched the DNA of defendant. On cross-examination, the biologist further explained that Y-STR DNA is inherited completely through the paternal line, so a man's father, paternal grandfather, and sons will all have identical Y-STR DNA.

Defendant argues that he was denied his right to a fair trial when the trial court allowed the prosecution to present this Y-STR DNA evidence without accompanying statistical evidence as required by our opinion in *People v Coy*, 243 Mich App 283, 294, 301-302; 620 NW2d 888 (2000). Because defendant's trial counsel did not object to the introduction of DNA evidence or to the arguments made by the prosecution at trial regarding the DNA evidence, this issue is unpreserved, *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994), and our review is limited to plain error affecting a substantial right. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). This requires a "showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.*

In *Coy*, we addressed MRE 702[3] in the context of testimony that established that the defendant's DNA was "consistent" with the DNA found on a knife blade and a doorknob. 243 Mich App at 294-296. However the evidence presented at trial in that case lacked "any supplemental probability or statistical analysis giving meaning to the fact of the potential DNA match" such as evidence that would answer, "to what extent was it likely that [the] defendant represented an individual who contributed to the mixed samples." *Id.* at 296-297. Therefore, we "conclude[d] that absent some analytic or interpretive evidence concerning the likelihood or significance of a DNA profile match, [expert] testimony concerning the potential match between [the] defendant's DNA and the DNA contained in the mixed blood samples found on the knife blade and the doorknob was insufficient to assist the jury in determining whether defendant contributed DNA to the mixed sample." *Id.* at 301.

The DNA evidence in the present case does not suffer from the same flaws as the DNA evidence in *Coy*. The expert testified that the DNA belonged to defendant, his son, his father or his grandfather. Unlike the situation in *Coy*, this was not generalized testimony that the DNA could have come from defendant; rather, it was testimony that it came from either defendant or a living male son or ancestor. Given the absence of evidence that defendant's father or grandfather had any involvement in the case, this testimony narrowed the sources of the DNA to either defendant or his son. That the DNA belonged to either defendant or his son was sufficiently specific for the jury to consider it and assign it whatever weight it concluded the evidence deserved. The evidence was relevant, at least to show that no male, other than defendant and the child, was the major donor of the DNA on the victim's fingernails.

III. SUFFICIENCY OF THE EVIDENCE

"The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Id*. at 400. "The evidence is sufficient to convict a defendant when a rational factfinder could determine that the prosecutor proved every element of the crimes charged beyond a reasonable doubt." *People v Cain*, 238 Mich App 95, 117; 605 NW2d 28 (1999).

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[3] MRE 702 states:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

> 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 of the felonies specifically enumerated in [the statute . . . .] [*Nowack*, 462 Mich at 401 (citation and quotation marks omitted; bracketed material in original).]

The enumerated felonies in MCL 750.316(b) are:

> [A]rson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, kidnapping, vulnerable adult abuse in the first or second degree under section 145n, torture under section 85, aggravated stalking under section 411i, or unlawful imprisonment under section 349b.

The thrust of defendant's argument is that there was insufficient evidence to support the third element of felony murder, i.e., that defendant killed the victim during the commission of one of the enumerated felonies. Defendant presents two alternative arguments: (1) that no larceny was proven, and (2) that, even if a larceny was proven, defendant did not form the intent to steal the victim's property until after the killing.

A. SUFFICIENT EVIDENCE OF A LARCENY

While defendant does not contest that there was sufficient evidence to convict him of UDAA, UDAA is not an enumerated felony in the felony murder statute and defendant correctly asserts that UDAA is not a form of larceny because it does not require the intent to permanently deprive the owner of his or her property. "The essential elements of UDAA are (1) possession of a vehicle, (2) driving the vehicle away, (3) that the act is done wilfully [sic], and (4) the possession and driving away must be done without authority or permission." *People v Hendricks*, 200 Mich App 68, 71; 503 NW2d 689, 691 (1993), aff'd 446 Mich 435 (1994). Larceny on the other hand requires the following elements: "(a) a trespassory taking and (b) the carrying away (c) of the personal property (d) of another (e) with intent to steal that property." *People v March*, 499 Mich 389, 401; ___ NW2d ___ (2016). UDAA is not a form of larceny. *People v Goodchild*, 68 Mich App 226, 233; 242 NW2d 465 (1976).

However, that UDAA is not an enumerated felony and not a form of larceny is not controlling because we have previously held that Michigan's felony-murder statute has "no additional requirement that the defendant be charged and convicted of the underlying felony." *People v Seals*, 285 Mich App 1, 16; 776 NW2d 314 (2009). The jury only need to find that the defendant killed the victim "while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [MCL 750.316(b).]" *Nowack*, 462 Mich at 401. In the present case, the trial court instructed the jury on felony murder as follows:

> In Count I-A, the defendant is charged with first-degree felony murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First: That the defendant caused the death of [the victim]; that is, that [the victim] died as a result of being strangled by the defendant.

Second: That the defendant had one of these three states of mind: He intended to kill; or he intended to do great bodily harm to [the victim] or he knowingly created a very high risk of death or great bodily harm, knowing that death or such harm would likely be the result of his actions.

Third: That when he did the act that caused the death of [the victim], the defendant was committing or attempting to commit the crime of larceny.

For the crime of larceny, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First: That the defendant took someone else's property.

Second: That the property was taken without consent.

Third: That there was some movement of the property.

Fourth: That at the time the property was taken, the defendant intended to permanently deprive the owner of the property.

Based on the testimony of ML and the statement of the neighbor who spoke to officer Wortley, it would be rational to conclude that defendant took the victim's car after killing her. However, defendant asserts that because the car was abandoned, there was no evidence of intent to permanently deprive the owner of the car. Defendant's argument is logically flawed. That defendant later abandoned the car does not negate the possibility that he intended to steal it at the time he took it away. It is reasonable to conclude that he formed the intent to steal the car, took the car, used it for his own purposes, and later decided to abandon it. See *People v Jones*, 98 Mich App 421, 423-426; 296 NW2d 268 (1980) (finding evidence sufficient to prove larceny where the defendants took a ring from a jewelry store and the ring was found in the parking lot several hours later), and *People v Williams*, 63 Mich App 531, 532-534; 234 NW2d 689 (1975) (stating that abandonment of an attempt to remove goods from a store was not a defense when the intent to steal was formed at the time of taking possession).

That the jury was instructed with respect to the UDAA charge that it "[d]oes not matter whether the defendant intended to keep the vehicle" is also not controlling in the circumstances of this case. That was the proper instruction for UDAA. The separate instruction for felony murder was also given and that instruction correctly stated that the jury must find that defendant committed the crime of larceny and instructed the jury that in order to find a larceny it must find that "at the time the property was taken, the defendant intended to permanently deprive the owner of the property." Jurors are presumed to follow their instructions, *People v Graves*, 458

Mich 476, 486; 581 NW2d 229 (1998), so presumably the jury found that the crime of larceny had been committed.[4] That finding was rational given the facts and circumstances of this case.

B. SUFFICIENT EVIDENCE OF DEFENDANT'S FORMED INTENT AT THE TIME OF THE LARCENY

Defendant is correct that "[t]he felony-murder doctrine does not apply if the intent to steal the victim's property was not formed until after the homicide." *People v Orlewicz*, 293 Mich App 96, 111; 809 NW2d 194 (2011). It appears that the jury had some confusion around this issue because they submitted a question to the Court that was presented on the record as follows:

> THE COURT: Thank you. "Do you have to be in the act of committing larceny for it to be felony murder or can it be after the murder is done?"
>
> After conferring with counsel, I'm going to read you the following instruction:
>
> In determining whether the act causing death occurred while the defendant was committing or attempting to commit the crime of larceny, you should consider:
>
> (1): The length of time between the commission of the larceny and the murder.
>
> (2): The distance between the scene of the larceny and the scene of the murder.
>
> (3): Whether there is a causal connection between the murder and the murderer -- the larceny and the murder.
>
> (4): Whether there is continuity of action between the larceny and the murder.
>
> (5): Whether the murder was committed during an attempt to escape.

While it is an element of the crime of felony murder that the intent to commit the underlying felony, in this case larceny, be formed prior to the homicide, intent "may be inferred from all the facts and circumstances," including the defendant's actions, *People v Cameron*, 291

[4] Likewise, the prosecutor's statement in his opening remarks that the underlying felony offense for the felony-murder charge was UDAA does not negate the jury's ability to find that a larceny took place. The jury was given the following instruction by the court: "It is my duty to instruct you on the law. You must take the law as I give it to you. If a lawyer says something different about the law, follow what I say." Again, jurors are presumed to follow their instructions. Graves, 458 Mich at 486.

Mich App 599, 615; 806 NW2d 371 (2011). Because proving a defendant's state of mind is difficult, "minimal" circumstantial evidence may prove intent. *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). The jury was presented with evidence that defendant was a fugitive from justice in connection with a "serious felony" at the time of the victim's murder and that defendant had attempted to borrow the victim's car in the past. From this evidence, the jury could infer that defendant formed the intent to take the victim's car as a means of continuing to elude capture and killed the victim when she refused to allow him to do so. Defendant does not argue that either the instruction on felony murder or the clarifying instruction were inadequate. Nor does he argue that the jury did not properly understand the issue. In this case, we find that there was sufficient evidence to support the jury's verdict.

IV. THE PRECLUSION OF DEFENDANT'S ALIBI DEFENSE

MCL 768.20(1) provides as follows:

> (1) If a defendant in a felony case proposes to offer in his defense testimony to establish an alibi at the time of the alleged offense, the defendant shall at the time of arraignment on the information or within 15 days after that arraignment but not less than 10 days before the trial of the case, or at such other time as the court directs, file and serve upon the prosecuting attorney a notice in writing of his intention to claim that defense. The notice shall contain, as particularly as is known to the defendant or the defendant's attorney, the names of witnesses to be called in behalf of the defendant to establish that defense. The defendant's notice shall include specific information as to the place at which the accused claims to have been at the time of the alleged offense.

Defendant's amended alibi notice stated that the evidence would show that "[d]efendant was not in the state of Michigan on the date and time in question, and he was in, or en route to, the state of Texas[,]" and it listed two potential witnesses for defendant to call at trial stating that both would testify that they received telephone calls from defendant on the date of the incident from an out of state telephone number. The amended alibi notice also stated that defendant had subpoenaed documents from Sprint regarding the targeted out of state number belonging to defendant.

The trial court correctly struck this amended notice as being deficient and not in compliance with the statute. The notice did not contain "specific information as to the place at which the accused claims to have been at the time of the alleged offense," MCL 768.20(1), because it simply stated that defendant "was in, or in route to, the State of Texas." Being in or in route to the State of Texas is not specific information regarding defendant's location at the time of the incident because it essentially means that defendant could have been anywhere provided he was headed in the general direction of the State of Texas at the time. Additionally, the fact that the two witnesses would have simply testified that defendant called them from an out of state number is effectively meaningless given the ubiquity of cell phones, and the alibi notice did not allege that he had called from a land line. While defendant has a constitutionally guaranteed right to present a defense, he "must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.' " *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1985) quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Defendant failed to comply

with the requirements of the statute and was not denied his constitutional right to present a defense.

V. OFFICER BUSCH'S TESTIMONY

Defendant argues that a statement made by Officer Busch during his testimony violated the trial court's ruling limiting the testimony that could be given regarding the reason defendant was a fugitive at the time of the death of the victim.

Officer Busch's testimony was the subject of a pretrial dispute regarding whether the prosecutor could introduce evidence that on the date of the killing, defendant was a fugitive from justice and wanted in connection with another murder in Saginaw. The trial court initially stated that it would not allow any reference to that other case. The trial court then stated:

> I have a suggestion that, I think, takes care of this, and it would be limited or reads as follows:
>
> On September 4, 2012, defendant was charged for his alleged involvement in another serious offense that occurred on August 29, 2012. The defendant was a fugitive from justice in that case at the time of the instant offense. The victim in this case was an endorsed witness in that particular matter, and therefore, he didn't want her to appear.
>
> Or you can fashion your own wording but that doesn't get into the facts of the case, doesn't talk about Layla Jones, doesn't do any of those things. It allows you to indicate he was on the run, and so that's what I'm thinking about doing.

The jury was then instructed before the start of the trial as follows:

> You all understand that [defendant] was a fugitive from justice based upon another case. He was ultimately convicted of a serious crime in that matter. You should clearly understand and are instructed that you are not to use the facts of that case and subsequent conviction against the defendant in this case in any fashion.[5]

The prosecution called the investigating officer, Officer Busch, as a witness, and Busch gave testimony that clearly went outside the limits imposed by the court. Busch identified a picture of ML and his father, defendant, that he testified had been hanging on the wall in the home. Busch testified about the picture as follows:

> *Officer Busch:* The young child is going to be the — again, the juvenile. It looks like a portrait with him and his father. The young child is [ML] that was

[5] The trial court read this instruction prior to the beginning of Voir Dire and before the jury was sworn.

out in front of the venue. And the older gentleman's going to be [defendant], so —

Q [by the prosecutor]. All right. And how is it that you're able to identify [Defendant]?

A. I had prior knowledge — we had a homicide earlier.

Q. Well —

Mr. Johnson [Defense Counsel]: Objection, Your Honor.[6]

Mr. Boyd: Let me just ask you this. Was there another case that you were aware of?

A. Yes.

Q. All right. And did you come to know him by his face?

A. Yes.

Q. And how was it that you came to know him by his face?

A. By posters being circulated throughout the department and city with his face on them.

Q. Wanted posters?

A. Correct.

Defendant does not argue that the prosecutor's questions were improper and does not assert that they were intended to solicit the officer's prejudicial statements, and we have held that "an unresponsive, volunteered answer to a proper question is not grounds for granting of a mistrial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1994). However, defendant argues that the officer's statement was so prejudicial as to violate defendant's right to a fair trial. Moreover, as the record reflects, defense counsel made a timely objection and, given its prior ruling, the trial court should have sustained the objection and considered whether to direct the jury to disregard what it had just heard.

We must therefore determine whether, under the circumstances of this case, the officer's unsolicited statement and the trial court's failure to immediately address that statement require reversal as having denied defendant a fair trial. Taking all the evidence into account, we conclude that it does not. First, the officer did not testify that defendant had committed a prior murder; rather the officer's statement was that defendant was "wanted" in connection with a

[6] There is no indication that this objection was ruled on by the court.

"homicide." While this did carry significant potential for prejudice, it was not as great as a statement that defendant had previously committed murder. Second, the jury was already informed, and properly so, that defendant was a fugitive in a case involving a "serious crime." Third, the trial court did eventually provide a curative instruction before deliberations, advising the jury that:

> You've heard evidence that was introduced to show that the defendant was charged with another serious crime for which he is not on trial. If you believe this evidence, you must be very careful to only consider it for certain purposes. You may only think about whether this evidence tends to show that the defendant had a reason to commit the crimes alleged in this case. You must not consider this evidence for any other purpose.

Finally, the evidence that defendant murdered the victim was very strong, and we see no likelihood that this one improper statement, rather than that evidence, led to defendant's conviction. There was a highly credible eyewitness to the crime, i.e. the victim's child, who saw and heard the altercation. In addition to his testimony, several other witnesses testified that on the day of the victim's death, ML stated without being prompted that "daddy" (i.e., defendant) killed his mother. Moreover, there was no evidence suggesting that anyone else might have committed the murder. Officers also testified that there were no signs of forced entry into the home suggesting that someone with access to the home was the killer; no belongings (other than the car) were stolen; the victim was not sexually assaulted; and no other adult male left any DNA traces. Accordingly, there was ample evidence for the jury to conclude that defendant was in fact guilty beyond a reasonable doubt without consideration of the officer's improper statement.

Affirmed. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola