STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 1998
v	No. 203281 Ingham Circuit Court
ROBERT NEIL DURFEE, Defendant-Appellant.	LC No. 96-070838 FH

Before: Cavanagh, P.J., and Markman and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony-murder, MCL 750.316(1)(b); MSA 28.548(1)(b), and arson of a dwelling house, MCL 750.72; MSA 28.267. Defendant was sentenced to life imprisonment without parole for the first-degree murder conviction and as a third-felony habitual offender, MCL 769.11; MSA 28.1083, to sixty to ninety years' imprisonment for the arson conviction. Defendant appeals as of right. We affirm.

Defendant first contends that the prosecutor failed to present sufficient evidence to support his convictions. In reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. *People v Gould*, 225 Mich App 79, 86; 570 NW2d 140 (1997).

The elements of first-degree felony-murder are (1) the killing of a person, (2) with intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with the knowledge that death or great bodily harm was the probable result, (3) done while committing, attempting to commit, or assisting in the commission of an enumerated felony, of which larceny is one. MCL 750.316(1)(b); MSA 28.548(1)(b); *People v Hutner*, 209 Mich App 280, 282-283; 530 NW2d 174 (1995). Defendant's malicious intent cannot be inferred solely from the commission of the underlying offense unless "the facts and circumstances of the intent to commit the underlying crime warrant the inference." *People v Dumas*, 454 Mich 390, 408; 563 NW2d 31 (1997). "It is not necessary that the murder be

contemporaneous with the enumerated felony. The statute requires only that the defendant intended to commit the underlying felony at the time the homicide occurred." *People v Brannon*, 194 Mich App 121, 125; 486 NW2d 83 (1992). Thus, where the underlying crime "is part of a continuous transaction or is otherwise immediately connected with the killing, it is immaterial whether the underlying felony occurs before or after the killing." *Hutner, supra* at 284. "However, the felony-murder doctrine will not apply if the intent to steal property of the victim was not formed until after the homicide." *Brannon, supra* at 125.

The evidence showed that the victim was beaten up, strangled and then stabbed, which is sufficient proof of an intent to kill. Also, traces of the victim's blood on defendant's body and clothing, defendant's statements to others, and defendant's conduct after the murder were sufficient to identify him as the killer. Furthermore, the victim was killed in his home, the victim's ring, wallet and a pair of scissors were missing, and defendant had possession of the ring, scissors, and business cards from the wallet. One could reasonably "infer from the evidence that the killing and the underlying felony were so closely connected in point of time, place, and causal relation that the homicide was incident to the felony and associated with it as one of its hazards." *Brannon, supra* at 126. Accordingly, the first-degree felony-murder charge was properly submitted to the jury for determination.

The elements of arson are that the defendant (1) intentionally (2) burned (3) a dwelling house (4) knowing that this would cause injury or damage to another person or property and (5) without just cause or excuse. CJI2d 31.2; see also *People v Williams*, 114 Mich App 186, 193; 318 NW2d 671 (1982). "Where only a burning is shown, a presumption arises that it was accidentally caused." *Williams, supra*.

The evidence, viewed most favorably to the prosecution, showed that the victim's dwelling house was partially destroyed by fire. There was no electrical or mechanical cause for the fire and a gas leak that was found was ruled out as a cause. The manner in which the fire burned was indicative of use of an accelerant and a trained dog detected an accelerant in the area of the fire and also the area where the victim's body was found. Although scientific tests did not show traces of accelerant in the debris, the trained dog was able to detect lesser amounts of gasoline than the test apparatus could register. Further, defendant's statements and traces of the victim's blood on defendant's body and clothing placed him at the scene and the dog detected an accelerant on defendant's clothing. Such evidence, if believed, was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that the fire was intentionally set and that defendant was the person who set it. Therefore, the court did not err in submitting the arson charge to the jury.

Next, defendant contends that the prosecutor committed misconduct by eliciting numerous instances of improper and prejudicial other acts into evidence without prior notice. See MRE 404(b). However, whether characterized as a claim of prosecutorial misconduct or evidentiary error, we need not address this claim because defendant failed to preserve this issue by making a timely objection below on the ground he now asserts on appeal. *People v Kilbourn*, 454 Mich 677, 684-685; 563 NW2d 669 (1997); *People v Graham*, 219 Mich App 707, 711-712; 558 NW2d 153 (1996). In any event, we find no error because the challenged testimony concerned defendant's conduct and statements before and after the crime and the jury was entitled to an intelligible presentation of the full

context in which the disputed events of this case took place. *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996).

Next, defendant contends that he was denied the effective assistance of counsel because his attorney did not object to the prosecutor's failure to establish that generally accepted procedures of polymerase chain reaction (PCR) DNA testing were followed in this case. Because defendant failed to preserve this issue by moving for a *Ginther*[1] hearing or a new trial, our review is limited to mistakes apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995).

"[T]rial courts in Michigan may take judicial notice of the reliability of DNA testing using the PCR method." *People v Lee*, 212 Mich App 228, 282-283; 537 NW2d 233 (1995). "However, before a court admits the test results into evidence in a given case, the prosecutor must still show that generally accepted laboratory procedures were followed." *Id*. at 283. In *Lee*, this Court explained that the process of DNA testing using the PCR method essentially involves (1) purifying the DNA; (2) amplifying (replicating) the DNA, and (3) viewing the amplified DNA. *Id*. at 266-267. The third step involves placing the amplified DNA

> onto a nitrocellulose filter to view what has been amplified. The allele-specific DNA being searched for is already on the filter. Only the DNA from the sample that is compatible with the gene being searched for will adhere to the filter. By washing the DNA strip with an enzyme, the filter should turn blue if the DNA has bound to it. A blue dot is a match; a blank is a non-match. The amplified DNA may then be typed for the various DQ alpha genotypes. This process is referred to as the reverse-dot blot procedure or the blue-dot procedure. [*Id*. at 267.]

In this case, DNA samples from the victim and defendant were tested using the PCR method. The test results and statistical analysis of these results were presented for the prosecution by a witness qualified as an expert in forensic DNA analysis. The expert witness was employed by the lab that did the PCR testing in this case. At one point during the expert's testimony, the expert briefly described the process of PCR testing done in this case. It is true that the prosecutor never specifically established that these procedures were generally accepted procedures of PCR testing. However, a review of the expert's testimony in this regard indicates that the PCR testing method explained in *Lee* was used, i.e., purifying, amplifying and then viewing the DNA using the blue-dot procedure. Moreover, when asked by the prosecutor whether the DNA test results in this case were "legitimate results?" the expert responded "Oh, yes. The controls that we employ in the testing react – gave us the reaction that we expected. And both of the results are reliable and legitimate." Thus, where it appears on the record that the PCR testing procedures described in *Lee* were used in this case, we conclude that defendant was not prejudiced by any error on counsel's part in failing to object to the prosecutor's failure to specifically establish that the procedures used in this case were generally accepted laboratory procedures. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Accordingly, defendant has failed to establish ineffective assistance of counsel. *Id*.

Finally, defendant contends that the trial court erred in failing to give CJI2d 4.4, CJI2d 4.11, and CJI2d 8.5 to the jury. However, defendant did not request these instructions or object to the

instructions given. "This Court will not reverse a conviction on the basis of alleged instructional error unless the defendant has requested the omitted instruction or objected to the instructions given." *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996). Defendant further contends that counsel was ineffective in failing to request these instructions. We disagree and conclude that the instructions requested by counsel in this case was a matter of trial strategy. Accordingly, defendant has failed to establish that he was denied the effective assistance of counsel. *Stanaway*, *supra*.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Stephen J. Markman
/s/ Michael R. Smolenski

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).