STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 5, 2000
v	No. 215213 Wayne Circuit Court Criminal Division
JERMANOVICH HUMPHREY, Defendant-Appellant.	LC No. 98-004883

Before: Markey, P.J., and Murphy and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b). He was sentenced to life imprisonment. Defendant appeals as of right. We affirm.

Defendant contends that there was insufficient evidence to support his felony murder conviction. We disagree. In reviewing a claim of insufficient evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). Circumstantial evidence and reasonable inferences arising from that evidence may be sufficient to prove the elements of a crime. *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999).

> 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, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548. [*People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995).]

Defendant only disputes that the death of the victim, George Staples, occurred during the commission or attempt to commit the underlying felony, a larceny. However, "where the predicate crime underlying a charge of felony murder 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." *People v Hutner*, 209 Mich App 280, 284; 530 NW2d 174

(1995). "The statute requires only that the defendant intended to commit the underlying felony at the time the homicide occurred." *People v Kelly*, 231 Mich App 627, 643; 588 NW2d 480 (1998).

In his statement to police, defendant admitted that he entered the home of the victim, a family friend, to ask for money. Defendant also told police that he became angry after the victim refused to give him money unless defendant performed a sexual act. Defendant hit the victim several times, knocking him unconscious. Defendant then tied the victim to a chair with some rope in the basement of the victim's home. He also wound a rope around the victim's neck, put the rope over pipes near the ceiling above the victim, and then bound the victim's hands with the rope. Defendant admitted that after tying up the victim, he took two televisions, a VCR, and a cassette player out to the victim's car. Defendant returned to remove a ring and watch from the victim, and then left in the victim's car. He later pawned a number of the items and traded others for drugs.

A police officer who investigated the crime testified that he found the victim's body "half on a chair and half off of a chair and he was suspended by a rope that led to some black pipes in the ceiling." The officer explained further:

> There was a yellow braided rope that had been tied to two black pipes in the ceiling. That yellow braided rope led down to the right side of Mr. Staples' neck, and was tied about his neck. It was tied down to his hands and around his chest, tieing [sic] him to-—round his chest and tieing [sic] him to the chair. He was also tied with a gray clothesline type of rope around his chest and arms to the chair also, and his hands were tied in front of him with yellow braided rope and some electrical wires.

Also, the assistant medical examiner testified that the cause of death was ligature strangulation from the rope tied around the victim's neck, and that death by ligature strangulation requires four to five minutes of continual pressure.

We find that this evidence would have allowed a reasonable trier of fact to conclude that the death of the victim occurred while defendant was committing the larceny. However, regardless of when the death occurred, the evidence shows that defendant's actions were part of one continuous transaction. *Hutner, supra.* Accordingly, we conclude that there was sufficient evidence to find defendant guilty beyond a reasonable doubt of felony murder.

Defendant's remaining issues on appeal concern the trial court's instructions to the jury. First, defendant contends that the trial court erred in failing to instruct the jury on voluntary manslaughter. However, defendant concedes that he did not request that instruction. "The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused." MCL 768.29; MSA 28.1052. In any event, because the evidence in this case could not support a conviction of voluntary manslaughter, we find no error in the court's failure to instruct on that cognate lesser offense. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991).

Next, defendant contends that the trial court incorrectly instructed the jury on involuntary manslaughter. Because defendant failed to object to the jury instructions as given, in order to avoid forfeiture of this unpreserved issue, defendant must show: (1) that an error occurred; (2) that the error was plain, i.e. clear or obvious; and (3) that the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant claims that the trial court erred in instructing the jury only on the "intent to injure" theory of involuntary manslaughter instead of on both the "intent to injure" and "gross negligence" theories of involuntary manslaughter. See CJI2d 16.10. We disagree. Because the evidence in this case could not support a conviction of involuntary manslaughter under a gross negligence theory, we find no error in the court's failure to instruct on that version of the cognate lesser included offense of involuntary manslaughter. *People v Zak*, 184 Mich App 1, 6; 457 NW2d 59 (1990). In any event, because the instruction given denied the jury the opportunity to base a conviction on an alternative theory, indeed, one that has a less stringent mens rea standard than that of "intent to injure," *People v Datema*, 448 Mich 585, 604-605; 533 NW2d 272 (1995), defendant was not prejudiced by any alleged error in instructing the jury on involuntary manslaughter. See *People v Henderson*, 113 Mich App 505, 507; 317 NW2d 340 (1982), rev'd on other grounds 417 Mich 891 (1983).

Finally, defendant contends that the trial court erred by failing to instruct the jury that it could find defendant not guilty of felony murder, but guilty of the separate offenses of manslaughter and larceny. Defendant argues that because the court did not inform the jury of this possible verdict, the jury felt compelled to find defendant guilty of felony murder, and that the court's instruction negated his defense of "hot blood/provocation." Again, we find no error. The court instructed the jury on the predicate felony of larceny when instructing them on felony murder. Contrary to defendant's assertions, the underlying felony is not a lesser included offense of felony murder. *People v Sanders (On Remand)*, 190 Mich App 389, 392; 476 NW2d 157 (1991). The underlying felony is more accurately classified as an element of the offense of felony murder. *Id.* Moreover, defendant was not charged with the separate offense of larceny, nor does the record show that he requested a separate instruction on larceny. Under these circumstances, we find that the court did not err in failing to instruct on the separate offense of larceny. Further, because defendant did not present a defense of "hot blood/provocation" and because, as we concluded above, the court's failure to instruct on voluntary manslaughter was not error, defendant's argument that the court's instructions negated his defense is without merit.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Jeffrey G. Colllins