STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 15, 2004
v	No. 245615 Wayne Circuit Court
BRENT DAVID SEEVER, Defendant-Appellant.	LC No. 01-013990

Before: Murphy, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, first-degree felony murder, MCL 750.316(1)(b), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750. 227b. Defendant was sentenced to life in prison for the first-degree felony murder conviction, and two years in prison for the felony-firearm conviction. The sentence for defendant's second-degree murder conviction was vacated. We affirm.

Defendant first argues that there was insufficient evidence to sustain his conviction for first-degree felony murder premised upon first-degree home invasion. We disagree.

A challenge to the sufficiency of the evidence is reviewed de novo and in a light most favorable to the prosecution to determine whether any rational factfinder could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002); *People v Knowles*, 256 Mich App 53, 58; 662 NW2d 824 (2003). Felony murder consists of the killing of a human being with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b). *People v Lee*, 212 Mich App 228, 258; 537 NW2d 233 (1995). The underlying felony involved in this case is home invasion in the first degree, a felony enumerated in MCL 750.316(1)(b). The elements of first-degree home invasion applicable to this case are as follows:

> A person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the

> first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
> (a) The person is armed with a dangerous weapon.
> (b) Another person is lawfully present in the dwelling. [MCL 750.110a(2); see also *People v Silver*, 466 Mich 386, 390; 646 NW2d 150 (2002).]

The home invasion charge was based on defendant committing an assault. An assault is defined as "'either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.'" *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995), quoting *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979). A battery is defined '"the willful touching of the person of another by the aggressor or by some substance put in motion by him; or, as it is sometimes expressed, a battery is the consummation of the assault.'" *People v Bryant*, 80 Mich App 428, 433; 264 NW2d 13 (1978) quoting *Tinkler v Richter*, 295 Mich 396, 401; 295 NW 201, 203 (1940).

Defendant claims that there was insufficient evidence to support a conviction for felony murder based upon first-degree home invasion, as there was no evidence that defendant intended to commit an assault when he entered his ex-girlfriend Cathy Harcourt's house. But according to the statute, defendant did not need to have the requisite intent to commit assault when entering the house. The statute requires that (1) defendant entered the house without permission; (2) defendant committed an assault while entering, being present in, or exiting the dwelling; and (3) defendant was either armed with a dangerous weapon, or another person was lawfully present in the dwelling.

Upon review de novo, we find, viewing the evidence in a light most favorable to the prosecution, that there was sufficient evidence to prove all of the elements of first-degree felony-murder premised on first-degree home invasion. See *Hunter, supra* at 6. First, defendant admitted that he entered the dwelling in question without permission. Second, defendant testified that he walked into Harcourt's bedroom at approximately 5:30 a.m., with a gun in his waistband, and turned on the lights to wake Ali Almansoop, the victim in this case. Defendant further testified that Almansoop became frightened, began to yell, jumped out of bed and ran towards the front door. Defendant testified that, when Almansoop jumped out of bed, he drew his gun and began to run after Almansoop. Harcourt testified that her children were in the house at the time this incident occurred. This evidence, most of which was defendant's own testimony, satisfies the elements of first-degree home invasion. It is sufficient to show that defendant (1) entered Harcourt's house without permission; (2) while inside the dwelling, defendant drew a gun on Almansoop, and therefore, willfully committed an unlawful act which placed Almansoop in reasonable apprehension of receiving an immediate harmful or offensive touching; and (3) defendant was armed with a dangerous weapon and Harcourt's children and Almansoop were lawfully present in the dwelling at the time of the incident. We find that, based on the above discussed evidence, a reasonable jury could convict defendant of first-degree felony murder premised upon first-degree home invasion. See *id.*

Defendant next argues that the trial court erred in admitting defendant's statement at trial, as it was obtained after his arrest, which was not supported by probable cause. Defendant further claims that his statement should have suppressed, as it was obtained in violation of his Fifth Amendment right to counsel. We disagree with both contentions.

We review for clear error a trial court's findings of fact regarding a motion to suppress evidence. *People v Williams*, 240 Mich App 316, 319; 614 NW2d 647 (2000). However, we review de novo the trial court's ultimate decision regarding a motion to suppress. *Williams, supra* at 319. Both the United States and Michigan Constitutions require that an arrest, with or without a warrant, be supported by probable cause. US Const, Am IV; Const 1963, art 1, § 11. The law permits a police officer to arrest an individual without a warrant "if a felony has been committed and the officer has probable cause to believe that the individual committed the felony." *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998); see also MCL 764.15(1)(c). Probable cause will be found when the facts and circumstances within an officer's knowledge are sufficient to warrant a reasonable person to believe that an offense had been or is being committed. *People v Champion,* 452 Mich 92, 115; 549 NW2d 849 (1996). Police officers may make a valid investigatory stop, even without probable cause, if they possess reasonable suspicion that a suspect is armed and dangerous. *Terry v Ohio*, 392 US 1, 24; 88 S Ct 1868; 20 L Ed 2d 889 (1968). The Court has since expanded *Terry* stops to crimes that have already occurred. *United States v Hensley*, 469 US 221, 229; 105 S Ct 675; 83 L Ed 2d 604 (1985).

Here, an evidentiary hearing was conducted to determine whether the police had probable cause to arrest defendant and whether defendant's statement was improperly taken after his requests for counsel. The trial court found that probable cause existed at the time of defendant's arrest. The trial court's decision was largely based on Lincoln Park Police Sergeant Anthony Klaft's testimony. Klaft testified that, at the time of defendant's arrest, he had the following information: (1) Almansoop was Harcourt's friend, who had stayed the night at Harcourt's house that night; (2) defendant was Harcourt's ex-boyfriend and had stopped by recently to rekindle the relationship, however, Harcourt was not interested in rekindling the relationship; (3) a neighbor saw a light-colored mini-van leaving the scene of the crime; (4) defendant owned a light-colored mini-van; (5) several .45 caliber shell casings were found near Almansoop's body; and, (6) defendant owned several guns, including a .45 caliber handgun. Klaft further testified that he went to defendant's place of work to question him regarding the incident. Upon arrival, Klaft introduced himself to defendant and stated that he wanted to talk to him regarding an incident that occurred in Lincoln Park that morning. Klaft testified that defendant immediately stiffened up, looked down, began trembling and placed his hands behind his back in the handcuffing position. Klaft then arrested defendant and brought him back to the Lincoln Park Police Department. The trial court found that the information that the police had before the arrest, coupled with defendant's actions upon Klaft's initiation of conversation with him, was sufficient probable cause to allow the police to arrest defendant.

We find that, upon arrival at defendant's work, the police had reasonable suspicion, grounded in specific and articulable facts, that defendant was armed and involved in Almansoop's murder, and therefore, had the right to question defendant to further investigate that suspicion. *Hensley, supra* at 229. We further find that defendant's behavior, upon investigation, coupled with the information already known by the police, was enough to raise the level from reasonable suspicion to probable cause, as it was sufficient to warrant a reasonable person to believe that defendant committed the offense. See *Champion, supra* at 115. Accordingly, the trial court did not err in finding that the police possessed sufficient probable cause to arrest defendant, and therefore, properly admitted defendant's statement into evidence.

Defendant also claimed that the trial court erred in failing to suppress his statement, as it was taken after defendant's repeated requests for counsel. The trial court found that defendant initially invoked his Fifth Amendment right to counsel, but subsequently initiated further contact with the police, and therefore, denied his motion to suppress. During a custodial interrogation, the police must immediately cease questioning a suspect who has clearly asserted his right to have counsel present until counsel has been made available, unless the accused himself initiates further communication, exchanges, or conversations with the police. *People v Kowalski*, 230 Mich App 464, 478; 582 NW2d 613 (1998). For purposes of *Miranda*,[1] interrogation refers to express questioning or its "functional equivalent." *Kowalski, supra* at 479, citing *Rhode Island v Innis*, 446 US 291, 300- 301; 100 S Ct 1682; 64 L Ed 2d 297 (1980).

Upon arrival to the police station, defendant was placed in a holding cell. After approximately one hour, Klaft retrieved defendant and brought him to the detective bureau conference room for an interview. At this time, Klaft read defendant his *Miranda* rights, provided defendant with the form containing the rights, and asked defendant to initial the form next to each right. Defendant indicated that he understood his rights, but refused to initial the form without an attorney. Klaft then terminated the interview and returned defendant to the holding cell. Two hours later, at approximately 4:00 p.m., defendant asked Lincoln Park Detention Officer Tara Kennedy for a pain reliever, but she did not have any to give him. Defendant then requested to speak with Klaft. Klaft again retrieved defendant from the holding cell and brought him to the detective bureau conference room. Defendant was again advised of his *Miranda* rights, and this time, defendant initialed the form next to each right. Defendant indicated to Klaft that he was now willing to speak about the incident and gave a statement regarding the events that took place that morning. Defendant now claims that he merely reinitiated the conversation with Klaft to ask for a pain reliever and not for the purpose of further discussing the investigation.

There is no question in this case that defendant was subjected to a custodial interrogation, thus, triggering the need to give *Miranda* warnings to defendant. Further, it is undisputed that defendant requested an attorney during his initial interrogation, thus, invoking his Fifth Amendment right to counsel. It is further undisputed that defendant subsequently reinitiated contact with Klaft, however, the reason for the reinitiation is in dispute. Defendant now claims that he merely reinitiated contact with Klaft to request a pain reliever. At trial, however, defendant testified that he sought to speak with Klaft regarding the incident in question. Klaft testified at the evidentiary hearing that defendant reinitiated contact with him in order to discuss the incident. Klaft further testified that, at the time of reinitiation, defendant indicated that he was willing to speak and that he wanted to write out a statement. Based on the above testimony, we find that the trial court's findings were not clearly erroneous and on review de novo find that, based on these factual findings, defendant reinitiated contact with Klaft, subsequent to invoking his Fifth Amendment right to counsel, for the purpose of discussing the incident in question and, therefore, defendant's assertion of his right to counsel no longer protected his statement. *Kowalski, supra* at 471-472, 478. Because defendant's statement was not obtained in violation

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 694 (1966).

of his Fifth Amendment right to counsel, the trial court did not err in admitting the statement at trial.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Jessica R. Cooper