STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 25, 2011
v	No. 293148 Washtenaw Circuit Court
DERRICK LAJUAN OLIVER, Defendant-Appellant.	LC No. 08-001138-FC

Before: METER, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for felony murder, MCL 750.316, first-degree criminal sexual conduct (CSC), MCL 750.520b, and larceny in a building, MCL 750.360. Defendant was sentenced to life imprisonment for felony murder, 23 years 7 months to 60 years' imprisonment for first-degree CSC, and 376 days' in jail for larceny in a building. We affirm.

The victim was found face-down in her bathtub, in five or six inches of standing water, wearing only an askew bra, with a clump of her own hair on her heel, the bathmat on top of her, and the smell of bleach in the air. The victim's friend contacted the police the day after she failed to hear back from the victim after planning some social activities, and she and a police officer obtained a key and entered the victim's apartment. The victim had several injuries on her body, including bruising all over her body, apparent ligature and fingernail marks on her neck, and a stretching tear at the beginning of her vagina. It would later be determined that she also had defendant's DNA under her fingernails and a sperm fraction in her vagina that could not be excluded as coming from defendant. An autopsy revealed that she had died of "asphyxia by strangulation," and that the tear had been caused by forceful stretching. The victim's apartment was superficially "immaculate," but closer inspection revealed that a number of things had been moved; and although the victim's computer and flat-screen television were present, her purse, keys, cellular telephone, and clothes she was wearing at the time she was attacked were never found.

The police initially interviewed defendant and his then-girlfriend, with whom he lived at the time, simply because they lived directly below the victim's apartment. Defendant had been home all day on the day the victim died. At that time, defendant denied knowing the victim anything more than casually, and he stated that he had not seen her for at least a week.

Subsequently, the victim's family discovered in her possessions one of defendant's business cards, on which had been written, "Hi. I would like to know if you need a friend. If so, call me [telephone number omitted]. I like U," with a smiley-face. Defendant was interviewed again and arrested after the DNA match was discovered. Defendant told the police that he had consensual sexual intercourse with the victim two days before the murder, then changed that statement to one day before the murder, and then recanted the statement entirely and indicated that he had never had sexual intercourse with the victim. Defendant's girlfriend at the time of the murder testified that their relationship had been "going downhill" by that time, and she had stopped having sexual intercourse with defendant by about a month prior to the murder.

Defendant argues that the prosecution presented insufficient evidence to prove first-degree CSC and felony murder. We disagree. In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

First-degree CSC may be proved by several alternative sets of facts. In relevant part, the prosecutor must show either sexual penetration either (1) occurred under circumstances involving another felony or (2) was accomplished through force or coercion. MCL 750.520b(1)(c) and (f). "Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of the crime." *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998). When viewed in the light most favorable to the prosecution, the evidence in this case—the DNA under the victim's fingernails, the tear to the victim's vagina, defendant's opportunity to commit the crime, defendant's apparent motive to commit the crime, defendant's multiple lies, and the extensive injuries the victim sustained—was amply sufficient for the jury to have found beyond a reasonable doubt that defendant sexually penetrated the victim through the use of force or under circumstances involving another felony.[1] *People v Sabin (After Remand)*, 463 Mich 43, 68; 614 NW2d 888 (2000); *Herndon*, 246 Mich App at 415; *Plummer*, 229 Mich App at 299; *People v Dandron*, 70 Mich App 439, 443; 245 NW2d 782 (1976).

Felony murder may be proved by showing that defendant caused the victim's death; that at the time he did so he intended to kill her or cause her great bodily harm, or he knowingly created a very high risk of death or great bodily harm; and he committed first-degree criminal sexual conduct or larceny at the time. MCL 750.316. "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 Kelly*, 231 Mich App 627, 643; 588 NW2d 480 (1998). We find that the evidence was sufficient for the jury to find that defendant committed first-degree CSC or larceny in a building along with the victim's murder.

---

[1] As will be discussed, there was sufficient evidence for the jury to find beyond a reasonable doubt that defendant committed larceny in a building and felony-murder along with the rape.

The same evidence supporting the jury's conviction of defendant for CSC supports a finding that defendant killed the victim. A reasonable fact-finder could conclude that defendant had the intent to kill based on the fact that the victim died by strangulation. *People v Hoffmeister*, 394 Mich 155, 160; 229 NW2d 305 (1975); *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001). In addition, intent to kill the victim could be inferred by leaving the victim face-down in the bathtub in several inches of water. *Id*. The victim's lack of clothing suggests that defendant strangled her during or shortly after defendant forcefully sexually penetrated her. *Plummer*, 229 Mich App at 299. The evidence was also sufficient for the jury to conclude that the victim's clothing and effects were worth something and that defendant took them without the victim's consent and with no intent to return them as part of the same assault—particularly because the apartment showed no signs of having been entered by anyone other than defendant. There was sufficient evidence for a reasonable fact-finder to conclude that defendant committed larceny in a building when he killed the victim. MCL 750.360; *Plummer*, 229 Mich App at 299; *Herndon*, 246 Mich App at 415.

Therefore, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the crimes of first-degree CSC, larceny in a building and felony murder were proved beyond a reasonable doubt. *Herndon*, 246 Mich App at 415.

Defendant next argues that the trial court abused its discretion when it denied defendant's motion to suppress his statements to the police. According to defendant, the police violated his right against self-incrimination and to an attorney when officers ignored defendant's requests for an attorney and continued to interrogate him. We review a trial court's findings of fact during a suppression hearing for clear error, "giving deference to the trial court's resolution of factual issues." *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001). However, we review "de novo the trial court's ultimate decision on a motion to suppress." *Id*. The police must terminate any interrogation of a defendant immediately upon an assertion of the right to counsel, but only when that assertion is unequivocal. *People v Tierney*, 266 Mich App 687, 711; 703 NW2d 204 (2005) (citations omitted); see also *Davis v United States*, 512 US 452, 459; 114 S Ct 2350; 129 L Ed 2d 362 (1994).

In this case, defendant inquired into the availability of an attorney by asking the interviewing police officers, "yeah can I have a [sic] attorney present?" The officers told him that he could, at which point defendant asked to speak to his mother first. The officers allowed defendant to do so, and during that conversation they did not hear him unequivocally tell his mother that he wanted an attorney, nor did he tell the officers that he wanted an attorney. After defendant terminated his telephone call with his mother, he continued the interview and never unequivocally stated that he did want an attorney. Therefore, defendant did not invoke his right to counsel and the trial court properly denied his motion to suppress his statements to the police. *Davis*, 512 US at 462; *Tierney*, 266 Mich App at 711; *Frohriep*, 247 Mich App at 702.

Defendant argues that the prosecutor committed misconduct during opening statements and closing arguments by attacking defendant's character. Defendant specifically asserts that the prosecutor engaged in misconduct by emphasizing defendant's poor financial status and his repeated lies, arguing that he was a lazy loser, and insinuating that he raped and killed the victim because his girlfriend had "cut him off." We review defendant's unpreserved claims of

prosecutorial misconduct for plain error that affected his substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). In order for the error to have affected defendant's substantial rights, it must have affected the outcome of the trial court proceedings. *Id*. We find no such error here.

"Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial. They are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). The prosecutor is also not required to state arguments in the blandest possible terms. *Id*. at 239. Evidence of poverty is generally inadmissible to show motive because it is not very probative but is highly prejudicial, but a defendant's financial situation may be admissible in particular cases to show that it is atypical or novel for that person. *People v Henderson*, 408 Mich 56, 66; 289 NW2d 376 (1980), see also *Smith v Mich Basic Prop Ins Ass'n*, 441 Mich 181, 192-195; 490 NW2d 864 (1992).

We find from the record that the prosecutor's statements were made to show that defendant was in a downward spiral financially, personally, and professionally, which ultimately led to him becoming completely frustrated with his life and interested in trying to connect with a different woman that was very successful and doing well in her life. These statements by the prosecutor supported his theory of the case. *Unger*, 278 Mich App at 236. The prosecutor reminded the jury that defendant lied to his girlfriend, which was a proper "argu[ment] from the facts that a . . . defendant, is not worthy of belief." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). An argument relating to "credibility . . . is always an appropriate subject for the jury's consideration." *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995). We find no plain error. *Thomas*, 260 Mich App at 453-454.

Defendant also claims that the prosecutor committed misconduct by eliciting hearsay evidence from Detective Babycz, who testified that he created a timeline of events regarding Cody Watkins, the victim's personal trainer, and that that timeline was inconsistent with Watkins being at the victim's apartment at the time of the crimes. This was inadmissible hearsay because it constituted testimony about an out-of-court statement made by Watkins. MRE 801(c); MRE 802; *People v Lucas*, 138 Mich App 212, 220; 360 NW2d 162 (1984). However, trial counsel did not challenge the admission of this statement, so the trial court was never asked to rule on it. But its admission did not affect the outcome of defendant's trial, because there was ample evidence of defendant's guilt and no evidence beyond mere speculation implicating Watkins. See *Carines*, 460 Mich at 763; *Lucas*, 138 Mich App at 223-224. Nor is there any indication that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, or that defendant is actually innocent. *Carines*, 460 Mich at 763; *Thomas*, 260 Mich App at 453-454; *Ackerman*, 257 Mich App at 448-449. Therefore, any error did not deny defendant a fair trial. *Thomas*, 260 Mich App at 453.

Defendant argues that he received ineffective assistance of counsel because trial counsel failed to object to the prosecutor's alleged misconduct or to the admission of Detective Babycz's statement from Watkins. We disagree. First, because the prosecutor's statements were not improper, it follows that defense counsel was not ineffective for failing to object. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). Second, even if trial counsel's failure to object to Detective' Babycz's statement was a mistake that fell below an objective standard of

reasonableness, defendant has not shown that he received ineffective assistance because the statement did not affect the outcome of the trial. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant argues that the trial court violated his right to present a defense by refusing to allow a complete cross-examination of Detective Babycz regarding Watkins's timeline, refusing to allow him to call Watkins as a witness, and refusing to show Watkins to the jury. We disagree.

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). However, whether a defendant's right to present a defense was violated by the exclusion of evidence is a constitutional question. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). We review constitutional questions de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

We do have concerns about defendant being precluded from cross-examining Detective Babycz regarding Watkins's timeline. Having introduced the testimony in the first place, basic fairness, of the sort underlying the common-law "rule of completeness," calls for a defendant to have some opportunity to follow up on it. See, e.g., *People v Shepard*, 70 Mich 132; 37 NW 925 (1888) (explaining that where a prosecutor had introduced testimony tending to inculpate the defendant, the defendant had the right on cross-examination to inquire into the exculpatory rest of the witness's conversation, even though the resulting testimony would be self-serving hearsay). Therefore, we are sympathetic to defendant's argument that he should have been afforded the opportunity to cross-examine Detective Babycz regarding Watkins's timeline, despite the fact that it would have been hearsay to do so because Detective Babycz would have been testifying about an out-of-court statement made by Watkins. MRE 801(c).

However, it was not an abuse of discretion for the trial court to exclude this hearsay evidence. MRE 802; *McDaniel*, 469 Mich at 412. Admission of Detective Babycz's testimony about the Watkins timeline did not affect the outcome of the proceedings. There was simply no evidence, direct or circumstantial, implicating Watkins. Importantly, Watkins' DNA was *excluded* from the semen fraction or from the DNA found under the victim's fingernails. Defendant was able to argue to the jury that Detective Babycz never explained why Watkins had been doing during the time of the rape and murder. Defendant also introduced testimony that only someone very strong like Watkins would have been able to move the victim—who weighed 180 pounds—to the bathtub, the fact that a vehicle similar to Watkins's was photographed leaving the victim's apartment complex at mid-day on the day of the murder, and that Watkins was a frequent texter[2] but sent no text and conducted no telephone calls at roughly the time of the rape and murder. Defendant was able to show the jury a photograph of Watkins, and defendant repeatedly suggested that Watkins was the actual perpetrator. Under the circumstances, defendant was not denied the opportunity to present a meaningful defense.

[2] "Texting" means sending and receiving text messages to and from cellular telephones.

Defendant contends that he should have been permitted to call Watkins as a witness. We disagree. Watkins stated that if called, he would exercise his Fifth Amendment right to remain silent. Watkins was not offered any sort of immunity, but rather the opposite: the prosecutor confirmed that if Watkins said anything incriminating, he would be investigated and possibly charged, and the reason defendant sought to call Watkins as a witness was to implicate him in the crimes. A party may not call a witness who he knows will assert his Fifth Amendment right not to testify. *People v Avant*, 235 Mich App 499, 514; 597 NW2d 864 (1999). The trial court did not abuse its discretion by precluding defendant from calling Watkins as a witness. *Avant*, 235 Mich App at 514; *McDaniel*, 469 Mich at 412.

We likewise conclude that the trial court did not abuse its discretion by refusing to permit defendant to show Watkins, live, to the jury. As noted, defendant was able to show a photograph of Watkins to the jury. We agree with the trial court that bringing Watkins into the courtroom in front of the jury and then walk out again would have been confusing. Furthermore, the trial court observed that doing so could lead to the jury wondering "what was that all about and why didn't anybody ask him any questions," thus undermining the rule against compelling a witness to take the witness stand in the face of foreknowledge that he would assert his Fifth Amendment right to silence. Again, defendant was able to present his defense to the jury that Watkins was the real perpetrator, so he was not prejudiced.

Defendant finally argues that the cumulative effect of any errors merits reversal. We disagree. The only error that occurred was the admission of Detective Babycz's hearsay testimony about Watkins's timeline, so there can be no cumulative effect of multiple errors. In any event, the cumulative effect of any errors must be seriously prejudicial in order to warrant reversal. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). The only error did not affect the outcome of the trial, so neither could any cumulative effect from that error.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause