

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DEREK ALBANE,

Defendant-Appellant.

UNPUBLISHED

March 19, 2013

No. 304331

Wayne Circuit Court

LC No. 09-001844-FC

Before: MURPHY, C.J., and O'CONNELL and BECKERING, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b). The trial court sentenced defendant to life in prison. He appeals as of right. We affirm but remand to the trial court for the ministerial task of correcting a clerical error in the Judgment of Sentence.

Defendant's conviction arose from the death of Richard Colson, who died after being severely beaten during an apparent attempt to steal illegal drugs. Defendant first argues that the prosecution failed to present sufficient evidence to prove, beyond a reasonable doubt, that defendant had the malice necessary for the felony-murder conviction. We disagree.

Sufficiency of the evidence questions are reviewed de novo in a light most favorable to the prosecution. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). This Court determines whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010). The prosecution may use circumstantial evidence and reasonable inferences to prove the elements of the crime. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of first-degree 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 MCL

750.316(1)(b). [*People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007) (citations omitted).]

The jury may infer malice from “[t]he facts and circumstances of the killing,” the use of a deadly weapon, or “evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm.” *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999). However, proving the intent to commit the underlying felony by itself is insufficient to show the requisite intent for a felony-murder conviction. *People v Dumas*, 454 Mich 390, 402; 563 NW2d 31 (1997).

Viewing the facts in a light most favorable to the prosecution, the jury could have easily inferred malice from the circumstances surrounding Colson’s death. At the very least, defendant’s actions during the assault show defendant intended to do great bodily harm. Defendant and his codefendants, Jared Kienbaum and Troy Timarac, planned to rob Colson after he entered their van to engage in a drug transaction. Defendant initiated the unprovoked physical violence by turning around and hitting Colson in the face three or four times. Colson, at this point, was already bleeding from his face. This by itself was enough “evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm.” *Carines*, 460 Mich at 759. However, defendant continued the attack by choking Colson from behind. Once Timarac had pulled Colson out of the van, defendant again hit Colson while he was in the street. Timarac, Kienbaum, and defendant then left Colson bleeding in the street and did not call an ambulance. Therefore, a reasonable jury could have determined that defendant had the requisite intent to commit felony murder.

Next, defendant argues the trial court violated defendant’s due process rights by telling the jury that defendant was charged with “first-degree murder.” We disagree.

Generally, “[t]his Court reviews de novo claims of instructional error.” *People v Dupree*, 284 Mich App 89, 97; 771 NW2d 470 (2009). However, this Court reviews unpreserved claims of instructional error for plain error that affected substantial rights. *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001). Under plain error review, there must be an error, the error must be plain (clear or obvious), the error must have affected the appellant’s substantial rights (outcome determinative), and “the error must have resulted in the conviction of an actually innocent defendant, or seriously affected the fairness, integrity or public reputation of judicial proceedings.” *People v Borgne*, 483 Mich 178, 196; 768 NW2d 290 (2009).

In this case, there was no plain error. The trial court referenced defendant’s felony-murder charge as “first-degree murder” several times throughout the trial. However, it is an accurate statement of the law to refer to felony murder as first-degree murder. See MCL 750.316(1)(b).

The jurors’ initial confusion about felony murder does not indicate that they were confused about the difference between first-degree premeditated murder and felony murder or that they convicted defendant on an uninstructed charge. Courts presume that jurors follow the trial court’s instructions. *People v Meissner*, 294 Mich App 438, 457; 812 NW2d 37 (2011). The trial court read the jury the instructions for the charged offenses, which were felony murder and second-degree murder. During its deliberations, the jury indicated that it was confused by

felony murder. The trial court read the jury instructions on felony murder two more times. The jurors indicated that they understood. The trial court did not instruct the jury on first-degree premeditated murder. The jury checked “guilty” under the heading “Murder-First Degree Felony” on the verdict form. Therefore, the jury clearly convicted defendant of first-degree felony murder, not first-degree premeditated murder.

Finally, defendant correctly notes that the Judgment of Sentence lists his conviction as first-degree premeditated murder instead of first-degree felony murder. However, without defendant showing the jury actually convicted him of the wrong offense, this is nothing more than a clerical error. The proper remedy is to remand for the trial court to amend the Judgment of Sentence. See *People v O’Neal*, 488 Mich 952; 791 NW2d 105 (2010).

Defendant’s conviction and sentence are affirmed; the case is remanded for the correction of the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Peter D. O’Connell

/s/ Jane M. Beckering