STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 30, 2013
v	No. 309171 Oakland Circuit Court
ROBERT CURTISBILL DENHAM, Defendant-Appellant.	LC No. 2011-237743-FC

Before: STEPHENS, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of first-degree felony murder, MCL 750.316(1)(b); unlawfully driving away an automobile (UDAA), MCL 750.413; operating a vehicle without a license causing death, MCL 257.904(4); and first-degree fleeing and eluding an officer, MCL 257.602a(5). Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to mandatory life in prison for the conviction of felony murder, six to 20 years in prison for the UDAA conviction, 19 to 60 years in prison for the conviction of operating a vehicle without a license causing death, and 19 to 60 years in prison for the fleeing-and-eluding conviction. We affirm.

I. ASSISTANCE OF COUNSEL

Defendant's convictions stemmed from events that occurred on the evening of June 9, 2011, during which defendant stole a car from an apartment complex in Oak Park and, in attempting to flee, crashed into another car, severely injuring the teenaged driver and killing the passenger, the driver's mother. Defendant claims that he was denied the effective assistance of counsel at trial because his counsel failed to properly defend him against the charge of felony murder; defendant contends that counsel improperly conceded that a larceny occurred.

Whether a defendant received effective assistance of counsel is a mixed question of fact and law. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). We review a trial court's findings of fact, if any, for clear error, and the ultimate constitutional issue arising from an ineffective-assistance claim de novo. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). Because defendant failed to make a testimonial record in the trial court, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Effective assistance of counsel is presumed, and it is the defendant's burden to prove otherwise. *Petri*, 279 Mich App at 410. To succeed on an ineffective-assistance claim, a defendant must show that trial counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the trier of fact would not have convicted the defendant. *People v Musser*, 259 Mich App 215, 221; 673 NW2d 800 (2003). A defendant must overcome a strong presumption that trial counsel's performance constituted sound trial strategy. *Petri*, 279 Mich App at 411. Furthermore, "[t]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant was charged with first-degree felony murder with the predicate felony of larceny. This Court has defined the elements of larceny as follows:

> "(1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the subject matter must be the goods or personal property of another, (5) the taking must be without the consent and against the will of the owner." [*People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999), quoting *People v Anderson*, 7 Mich App 513, 516; 152 NW2d 40 (1967).]

Defense counsel argued several theories of the case, most of which encouraged the jury to look hard at the lesser-included offenses. He asserted that defendant was guilty of the lesser offense of UDAA, not carjacking, because defendant used no threats of harm against the car's owner when stealing the vehicle. Defendant admits that his trial counsel's strategy regarding the charge of carjacking was sound and successful.

Regarding the charge of felony murder, defense counsel claimed that defendant was acting with gross negligence, not wanton and willful disregard for the safety of others, at the time of the crash and that the predicate crime of stealing the vehicle was complete at the time of the deadly car crash. It is the latter argument with which defendant takes issue. Defendant directs this Court's attention to some arguments his trial counsel made during which, defendant claims, counsel effectively conceded that defendant was guilty of larceny and thus of felony murder.

In support of his theory that the felony was complete at the time of the crash, defense counsel asserted, "[O]nce Mr. Denham was able to drive that vehicle away from that parking lot, once it was clear to [the owner] that she was not going to get her vehicle back, at that point in time the larceny was complete." Counsel also stated, "[I]t was clear at that point that vehicle was stolen, that larceny was complete." Further, defense counsel argued that fleeing and eluding was a "superseding event" that made "the larceny . . . done and over."

Assuming defense counsel's statements constituted a concession of larceny, they were not an admission of guilt of felony murder. Whether a larceny happened was not crucial to the defense theory that the taking of the vehicle without the owner's permission was a completed offense at the time of the crash and could not be used as a predicate felony for the charge of first-degree felony murder. While defense counsel could have also argued that no larceny occurred, "[t]he role of defense counsel is to choose the best defense for the defendant under the circumstances." *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994). The defense that

counsel chose was not an unreasonable option given the circumstances of this case. Specifically, it was not unsound to propose this theory because there was significant inculpatory evidence presented that defendant stole the car[1] and was driving the car when he crashed into the victims. Indeed, there was evidence that the car's owner did not give defendant permission to be in her vehicle. She observed defendant cracking the steering column and driving away with her car. There was evidence that defendant was driving and crashed the stolen car between five and six minutes after the car's owner called 911 to report the theft. Investigators found a flat-head screwdriver in the stolen car after the crash. There was testimony that a screwdriver could be used to turn the ignition of a car that had a broken steering column.

Defense counsel chose not to deny that defendant stole a car, drove at a high speed, ran a red light, and crashed into the victims' vehicle. However, he sought to lessen the impact of the evidence against defendant by concentrating on the lesser offenses and asserting that there were mitigating factors, such as defendant's alleged intoxication, his attempted braking in the intersection, and the alleged completion of the larceny, which supported a rejection of the most serious charges of felony murder and carjacking. Defense counsel's strategy was sound given the significant inculpatory evidence against defendant. Accordingly, defendant has failed to overcome the presumption that counsel's representation at trial was effective.

Further, defendant has failed to show a reasonable probability that defense counsel's actions changed the outcome of the trial. *Musser*, 259 Mich App at 221. Even if counsel had not used the word "larceny" in his arguments during closing and had vehemently asserted that defendant committed no larceny, the evidence established the opposite. Because of the great amount of evidence of guilt in this case, a defense argument that defendant did not commit larceny would most likely have been unsuccessful. In sum, defense counsel's trial strategies for defending against the charge of felony murder were sound and no prejudice resulted from his failure to argue against the larceny offense. Therefore, defendant has failed to establish a claim of ineffective assistance of counsel.

II. SUFFICIENCY OF THE EVIDENCE

Defendant claims that there was insufficient evidence that he committed the predicate offense of larceny that supported the conviction of first-degree felony murder.

We review de novo a sufficiency-of-the-evidence challenge. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). There was sufficient evidence to sustain a conviction if, after examining the evidence in the light most favorable to the prosecution, this Court determines that a rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt. *Id*. at 196. This Court must draw all reasonable inferences and evaluate credibility issues in support of the verdict. *People v Malone*, 287 Mich App 648, 654; 792 NW2d 7 (2010). A trier of fact can infer a defendant's intent from his words or from the act, means, or manner used to commit the offense. *People v Hawkins*, 245 Mich App 439,

[1] The elements of larceny as applied to this case are discussed more fully in section II, *infra*.

458; 628 NW2d 105 (2001). Indeed, circumstantial evidence can operate as proof of a defendant's intent. *Id*.

To prove felony murder, the prosecution must establish the following:

> (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 [the statute . . .]. [*People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000) (internal citations and quotation marks omitted).]

Larceny is a predicate felony under the felony-murder statute. MCL 750.316(1)(b). As noted above, larceny is the taking of goods or property of another, without the owner's consent, and a carrying away of that property with felonious intent. *Cain*, 238 Mich App at 120. "The felonious intent required for larceny . . . is an intent to permanently deprive the owner of his property." *People v Goodchild*, 68 Mich App 226, 232; 242 NW2d 465 (1976).

We find ample evidence in the record supporting the jury's conclusion that the prosecutor proved beyond a reasonable doubt that defendant committed larceny. The trial transcript contains evidence that a vehicle was taken without the owner's consent. The owner testified that she was surprised to see defendant in her car, a car that she had previously locked. She banged on the car window and yelled for defendant to get out of her car. She also ran in front of the car, as defendant drove forward, in an attempt to stop defendant from leaving with her vehicle. There was evidence of an asportation; the evidence established that defendant drove the stolen car out of a parking lot, continued driving the car while being pursued by police, and, shortly after the taking, ran a red light and crashed into another car in which the passenger was killed. Felonious intent was also present. There was no evidence that defendant attempted to abandon the vehicle. Rather, he never stopped, or even slowed down by any significant degree, throughout the course of events leading up to his approach into the intersection where the deadly crash occurred. We emphasize once again that a trier of fact can infer a defendant's intent from the act, means, or manner used to commit the offense. *Hawkins*, 245 Mich App at 458. From the evidence as a whole, including the manner in which defendant took the automobile, the jury was free to make the reasonable inference that defendant took the car with the felonious intent to steal. Given that defendant used a complicated means of taking the car, in full view of the owner, and then drove away at a high rate of speed, it was highly unlikely that defendant lacked felonious intent and was merely planning to use the car temporarily and then return it to the owner.

Moreover, the jury's rejection of the carjacking charge in favor of the lesser offense of UDAA is not inconsistent with its conclusion that defendant committed a larceny. The larceny charge was part of a completely different count than the carjacking/UDAA count. In count I, defendant was charged with first-degree felony murder with the predicate offense of larceny. In a separate count, defendant was charged with carjacking, but the jury was instructed on the lesser offense of UDAA.

The elements of UDAA are: (1) taking possession of a vehicle, (2) driving or taking it away, (3) willfully, and (4) without authority. *People v Talley*, 67 Mich App 239, 242; 240

NW2d 496 (1976). UDAA does not require proof of an intent to permanently deprive the owner of the vehicle and is therefore not considered larceny. *Goodchild*, 68 Mich App at 233. The crime of carjacking is accomplished when "[a] person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle . . . ." MCL 750.529a. Therefore, larceny is part of carjacking—that offense occurs when force or violence is used or threatened during the commission of a larceny.

The jury's verdict finding defendant guilty of larceny but not guilty of carjacking was not inconsistent because the jury was free to find that a larceny occurred in regard to the felony-murder count but to reject the carjacking charge based on a lack of force, violence, threats, or the induction of fear.

III. JURY INSTRUCTION

In a Standard 4 brief, submitted in propria persona pursuant to Administrative Order 2004-6, defendant argues that the trial court erred by giving the jury an instruction that allegedly improperly defined the phrase "wanton and willful disregard" relating to the felony-murder charge. "When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011), citing *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000). Defendant waived appeal of this issue when his trial counsel, as well as defendant, agreed to the trial court's curative instruction and revised definition of the phrase at issue. Because defendant waived this matter, there is no error to review. *Kowalski*, 489 Mich at 504; *Carter*, 462 Mich at 219. At any rate, we note that we find no error with regard to the instruction provided.[2]

Affirmed.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Patrick M. Meter

[2] In addition, the trial court specifically instructed the jury to disregard the earlier definition it had provided and to follow the revised definition.