STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FELIX HAYES ROBINSON,

Defendant-Appellant.

UNPUBLISHED
August 23, 1996

No. 171186
LC No. 93-122970 FC

Before: MacKenzie, P.J., and Saad and Youngblood,* JJ.

PER CURIAM.

The trial court convicted defendant of three counts of first-degree felony murder, MCL 750.316; MSA 28.548, larceny over $100, MCL 750.356; MSA 28.588, fleeing and eluding a police officer resulting in injury, MCL 750.479a(5); MSA 28.747(1), and driving while license suspended (DWLS), MCL 257.904(1); MSA 9.2604(1). The judge sentenced defendant to concurrent prison terms of life without parole for each murder conviction, forty to sixty months for larceny, thirty-two to forty-eight months for fleeing and eluding, and ninety days for DWLS. Defendant appeals, and we affirm.

Defendant broke into the Nova Computer store in Madison Heights at around 5:30 a.m. He was interrupted by police and fled in a van. While fleeing, defendant drove at a high rate of speed with the lights off. He ran a red light while traveling between seventy and ninety-five miles per hour and struck a car containing three passengers. All three passengers in the car struck by defendant died from injuries sustained in the accident.

Defendant raises four issues on appeal, none of which merits reversal.

I.

Defendant first argues that his felony murder convictions must be reversed due to insufficient evidence. Defendant maintains that the prosecutor did not show willful or wanton conduct sufficient to

* Circuit judge, sitting on the Court of Appeals by assignment.

meet the mens rea required for murder. Defendant further asserts that the felony murder rule should not be applied where the underlying felony is a nonviolent larceny. We disagree with both these contentions.

Viewed in a light most favorable to the prosecutor, the evidence supports the trial judge's finding that defendant possessed the necessary mental state for murder. The evidence showed that defendant drove his van with the lights off at a high speed when he ran the red light. One eyewitness estimated that he was traveling between ninety and ninety five miles per hour when he struck the other car. A reasonable trial judge could infer that defendant intentionally created a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result of his actions. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985); *People v Dykhouse*, 418 Mich 488, 495; 345 NW2d 150 (1984).

MCL 750.516; MSA 28.548 states: "Murder. . . which is committed in the perpetration or attempt to perpetrate. . . larceny of any kind. . . is murder in the first degree. . ." The law does not recognize any distinction between violent and nonviolent larcenies. The trial judge properly found defendant guilty of felony murder arising from the commission of an ordinarily nonviolent larceny offense. *People v Gimotty*, 216 Mich App 254; ___ NW2d ___.

II.

Defendant next argues that the prosecutor abused his charging discretion by charging defendant with larceny over $100 rather than the more appropriate charge of breaking and entering a building. Defendant maintains that the prosecutor abused his charging discretion in order to pursue felony murder charges against defendant. We find no abuse of charging discretion.

The statutory crimes of breaking and entering a building and larceny over $100 are distinct; breaking and entering a building is not a more specific, less serious version of larceny over $100. MCL 750.110; MSA 28.305; MCL 750.356; MSA 28.588. Accordingly, the prosecutor had complete discretion to charge defendant under either statute. *People v Carter*, 106 Mich App 765, 769; 309 NW2d 33 (1981).

III.

Defendant claims that the trial judge's factual findings regarding his diminished capacity defense were not supported by the evidence and therefore clearly erroneous. We disagree.

Defendant basically asserts that the trial judge erred by failing to accept the conclusions of his expert witness over the conclusions of the prosecutor's expert. Witness credibility questions should be resolved by the trier of fact, here the trial judge. *People v Vaughn*, 186 Mich App 376, 380-381; 465 NW2d 365 (1990). The trial judge was aware of the relevant issues and correctly applied the law. *People v Wardlaw*, 190 Mich App 318, 321; 475 NW2d 387 (1991). The trial judge did not clearly err by finding that the prosecutor's expert presented a more logical explanation of defendant's behavior. As pointed out by the prosecutor's expert, defendant was goal-driven during the crime: he was

attempting to steal laptop computers from the store because he knew they were valuable and easy to carry. Defendant was able to form the specific intent to steal, and was not suffering from diminished capacity.

IV.

Finally, defendant contends that the application of the felony-murder rule to his case constitutes cruel or unusual punishment. We disagree.

Defendant committed what would otherwise be three second-degree murders. These murders were elevated to first-degree murder because they were committed during the course of a larceny. MCL 750.316; MSA 28.548. Life imprisonment without possibility of parole is not an unjustifiably disproportionate response to such crimes, and does not constitute cruel or unusual punishment in this case. *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992).

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Henry William Saad
/s/ Carole F. Youngblood