# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES W. MCGUFF,

Defendant-Appellant.

UNPUBLISHED
December 18, 1998

No. 202466
Recorder's Court
LC No. 96-000348

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Before: Kelly, P.J., and Holbrook, Jr. and Murphy, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316; MSA 28.548, first-degree felony-murder, MCL 750.316; MSA 28.548, and armed robbery, MCL 750.529; MSA 28.797. Defendant was sentenced to life imprisonment on one count of first-degree murder and the sentence of twenty to forty years on the armed robbery conviction was vacated. On appeal, defendant raises several issues which he claims require reversal of his convictions. We affirm in part and vacate in part.

First, defendant argues that there was insufficient evidence to support his convictions for first-degree premeditated murder and first-degree felony murder We agree that there was insufficient evidence to support a conviction of first-degree premeditated murder. We disagree as to defendant's first-degree felony murder conviction. When reviewing a claim regarding the sufficiency of the evidence, this Court examines 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 proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 516 n 6; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

*A. First-degree premeditated murder.*

Defendant contends that the evidence was insufficient to support a conviction for first-degree premeditated murder because there was no evidence of premeditation. We agree. Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *People v Schollaert,*

194 Mich App 158, 170; 486 NW2d 312 (1992). In *People v Plummer*, 229 Mich App 293; 581 NW2d 753 (1998), this Court explained the elements of premeditation and deliberation:

> It underscores the difference between the statutory degrees of murder to emphasize that premeditation and deliberation must be given independent meaning in a prosecution for first-degree murder. The ordinary meaning of the terms will suffice. To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of choice or problem. As a number of courts have pointed out, premeditation and deliberation characterize a thought process undisturbed by hot blood. While the minimum time necessary to exercise this process is incapable of exact determination, the interval between initial thought and ultimate action should be long enough to afford a reasonable man time to subject the nature of his response to a "second look." [*Id.* at 300; citing *People v Morrin*, 31 Mich App 301, 329-331; 187 NW2d 434 (1971).]

Based on the evidence presented at trial, we conclude that a rational trier of fact could not have been left with a clear conviction that the essential elements of premeditated murder had been proven beyond a reasonable doubt.

Taking the evidence in the light most favorable to the prosecution, the jury could infer that defendant was present and did in fact kill the victim but there was no evidence sufficient to establish the defendant's state of mind at the time of the killing. The prosecution was required to prove beyond a reasonable doubt that defendant killed defendant intentionally, that the killing was deliberate and premeditated, *People v Vail*, 393 Mich 460; 227 NW2d 535 (1975). The mere fact that a knife or knives was the murder weapon does not raise an inference of premeditation; *People v Oster*, 67 Mich App 490; 241 NW2d 260 (1976).

*B. First-degree Felony Murder*

The elements of 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, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548. *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995). It is not necessary that the murder be contemporaneous with the enumerated felony. *People v Brannon*, 194 Mich App 121, 125; 486 NW2d 83 (1992). The statute requires only that the defendant intend to commit the underlying felony at the time the homicide occurred. *Id.*

Defendant contends that the evidence was insufficient to support a conviction for felony-murder because there was (1) no evidence regarding whether the robbery preceded or followed the killing and (2) nothing showing that the robbery was accomplished through the use of an assault. Defendant ignores critical pieces of evidence.

Defendant's girlfriend testified that defendant admitted to killing the victim because he refused to loan defendant his truck. The victim's bedroom was in disarray, suggesting that a struggle ensued in that

room. From this evidence, the jury could reasonably infer that either the two struggled over the keys to the truck or that defendant killed the victim so that there would be no interference with the taking of the truck. The jury could infer that the killing was done to facilitate the taking of the vehicle. Thus, we conclude that there was sufficient evidence from which the jury could find that defendant was guilty of felony-murder.

Next, defendant argues that the trial court erred in denying his motion for mistrial after a witness made reference to defendant's involvement in another murder case. A trial court's grant or denial of a motion for mistrial will be reviewed for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). "[A]n unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *Id.*

During the testimony of the witness, the prosecutor asked why she had waited so long to inform the police that defendant had admitted to killing the victim. The witness' response was, "Um, because me and him, we was in another murder charge with my uncle." Defense counsel immediately asked the jury to be excused and proceeded to move for a mistrial. The trial judge then decided to offer a limiting instruction to the jury. The proposed instruction read as follows,

> Ladies and gentlemen, these proceedings were stopped because witness Miss Meredith alluded to another trial that she and the defendant were involved in, in which she and the defendant were involved.
>
> First, any other proceedings are not relevant to this trial. I do not know any facts with regard to any other trial, and if so, if there was a trial at all, it's possible that Miss Meredith and defendant were witnesses in those proceedings. It's not clear if at all there was a trial so in what capacity they were participating, but what, as I've indicated, is not relevant to this trial and the statement will be stricken. The court will instruct you that a non-responsive answer is not evidence and Miss Meredith's answer will be stricken and you are not to consider it in any in these proceedings.

Defense counsel did not want this instruction offered for fear that it would exacerbate the situation. As such, no instruction was given to the jury. Contrary to defendant's assertions, we find that this limiting instruction would have cured any impairment of defendant's right to a fair trial. *Id*. Therefore, the trial court did not abuse its discretion in refusing to grant defendant's motion for mistrial.

Next, defendant contends that the manner in which the prosecutor used police statements to cross-examine two witnesses constituted prosecutorial misconduct. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). For all practical purposes, the prosecutor read the statements into the record while examining the witnesses. Defendant contends, therefore, that inadmissible hearsay was improperly injected into the record. Defendant failed to object to the line of questioning on hearsay grounds. Therefore, we will reverse only on the showing of a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1986). Because we find that the statements would have been admissible pursuant to MRE 803(5) as a recorded recollection, we find

no grounds to support a claim of prosecutorial misconduct. In order for these statements to be admissible under the recorded recollection exception to the hearsay rule, a foundation must be established. The foundational requirements are:

> (1) the document must pertain to matters about which the declarant once had knowledge; (2) The declarant must now have an insufficient recollection as to such matters; (3) The document must be shown to have been made by the declarant or, if made by one other than the declarant, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge when the matters were fresh in his memory. [*People v Daniels*, 192 Mich App 658, 668-669; 482 NW2d 176 (1992).]

In this case, both witnesses testified that they made signed statements to the police. While on the witness stand, both indicated that they could not recall the details of their statements. As such, the foundational requirements had been established to allow the prosecution to read the statements into the record. As noted above, we find no grounds to establish prosecutorial misconduct that would hinder defendant's right to a fair trial.

Defendant also claims that the trial court erred in instructing that jury on first-degree murder because it failed to advise the jury that it could not convict defendant unless it found that defendant committed an act that caused the victim's death. Defendant did not object at trial. Failure to object precludes appellate review absent manifest injustice. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Because the instructions, read as a whole, adequately instructed the jury as to the elements of first-degree premeditated murder and first-degree felony murder, we are not persuaded that manifest injustice would result from our refusal to conduct further review.

Defendant also contends that the trial court erred when it failed to instruct the jury on the crime of voluntary manslaughter. Because defendant specifically requested that this instruction *not* be given, we find no error. "Absent a request to instruct on lesser included offenses, the trial court is under no obligation to do so." *People v Tenbrink*, 93 Mich App 326, 331; 287 NW2d 223 (1979).

Finally, defendant argues that his convictions for first-degree premeditated murder and first-degree felony murder violated the prohibition against double jeopardy because, although the court instructed the prosecutor to elect to vacate the first-degree premeditated murder and the armed robbery counts, this was never done. After reviewing the sentencing transcript and the Judgment of Sentence, we disagree. However, based on our decision today to vacate defendant's first-degree premeditated murder conviction, any double jeopardy problem is thereby obviated.

Affirmed in part and vacated in part.

/s/ Michael J. Kelly
/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy