

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE TYRONE STALLWORTH,

Defendant-Appellant.

UNPUBLISHED

September 13, 1996

No. 170796

LC No. 93006075

Before: MacKenzie, P.J., and Cavanagh and T.L. Ludington*, JJ.

PER CURIAM.

Defendant was convicted in a bench trial of first-degree felony murder, MCL 750.316; MSA 28.548. He was sentenced to life in prison without parole. Defendant appeals as of right, and we affirm.

In the information charging defendant, the predicate felony for the felony murder charge was larceny. In making her findings of fact, the trial judge stated that she believed defendant had committed both breaking and entering and larceny. Based on this finding, defendant argues that his conviction should be reversed because the trial court lacked jurisdiction to convict him of felony murder based on a breaking and entering. A trial court lacks jurisdiction to convict a defendant of an offense not specifically charged unless the defendant has had adequate notice of the latter charge. *People v Usher*, 196 Mich App 228, 231-232; 492 NW2d 786 (1992). Defendant's conviction, however, was not based on a breaking and entering, but on a larceny. The trial judge's conclusion that defendant was also guilty of breaking and entering, as well as larceny, is irrelevant. The trial court convicted defendant based on the crime charged, and did not exceed its jurisdictional authority.

Defendant next argues that there was not sufficient evidence presented to satisfy each element of the charged offense of felony murder. Specifically, defendant argues that the trial court failed to place findings of fact on the record indicating that defendant committed the underlying larceny with the knowledge of a high probability of death or great bodily harm, and that there were insufficient findings of fact as to defendant's intent. We disagree. Sufficient evidence was presented at trial to support both

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

the intent and probable harm elements of defendant's conviction. Felony murder can be established by proof of (1) the killing of a human being, (2) committed while defendant was committing an enumerated felony, and (3) 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 would be the probable result. *People v Brannon*, 194 Mich App 121, 124-125; 486 NW2d 83 (1992). Defendant does not dispute that he killed the victim, or that he committed larceny from the victim. Instead, he argues that insufficient evidence was presented to establish the intent of felony murder, claiming that he was "under the influence" at the time of the crime. It is not clear from defendant's brief on appeal if he is arguing that the court erred by failing to make findings of fact with respect to defendant's intoxication or that there was insufficient evidence to support a finding of intent in light of defendant's cocaine intoxication. We reject both arguments.

Defendant's "intoxication defense" at trial consisted entirely of a single reference made by his attorney in closing argument that defendant was "under the influence" at the time of the murder. Defendant presented no evidence on this issue. Defendant's version of the crime was that he was invited into the home of the 71-year-old victim, his neighbor, that she asked him to come down into the basement and began waving a knife in defendant's face. Defendant claimed that he grabbed the knife from the victim and in the struggle struck her on the neck with the knife and then slipped and fell on her, striking her with the knife in the chest area. The court made sufficient findings of fact, concluding that defendant's version of the offense was incredulous. The court further found that defendant broke into the victim's home, beat her up, stabbed her, and then stole her money and her car.

The court stated:

The Court finds that the defendant broke and entered into the decedent's home and that he knowingly created a high risk of death or great bodily harm knowing that death or such harm was the likely result of his action. This is indicated to this Court by a number of factors, including the testimony of the medical examiner. The medical examiner testified to numerous blows on the body of the decedent. First, on the left side forehead there were abrasions, to her left side forehead. There were abrasions to the left cheek into the bridge of the nose. There were contusions on the left side of the neck. And both orbits were blackened. There was a stab wound to her neck on the left side beneath her ear. There was a stab wound to the middle of the chest. There is a stab wound to the midline of the chest which penetrated the ascending aorta in which it apparently punctured her heart sac.

This is an indication to the Court that the defendant used blunt force to cause the numerous abrasions and contusions as well as the stab wounds to the decedent. This does not show to this Court that it was an accidental event.

These findings were supported by the evidence and support a finding that defendant's actions were such that a high risk of death or serious bodily injury was present. We find no error. With respect to the court's findings of fact concerning defendant's intent due to his intoxication, the court specifically stated

that it considered defendant's explanation of the crime as contained in his statements to the police (which included his statement that he was intoxicated on cocaine). Furthermore, neither defendant nor the prosecution introduced any evidence at trial of defendant's intoxication at the time of the murder. Under these circumstances, we find the record sufficient to find that the court was aware of and resolved the intent issue. See *People v Johnson (On Rehearing)*, 208 Mich App 137, 141; 526 NW2d 617 (1994). Remand for additional articulation on this point is unnecessary.

In a pro per supplemental brief, defendant argues that his trial counsel was ineffective for failing to assert an insanity defense based on voluntary intoxication, depriving defendant of "his most viable defense" to the crime charged. We disagree. Defendant correctly observes that voluntary intoxication can be a defense to a specific intent crime. *People v Fisk*, 62 Mich App 638, 643; 233 NW2d 684 (1975). However, an *insanity* defense which is based on voluntary intoxication is a very different matter. In general, an individual who is voluntarily intoxicated cannot argue that his intoxication rendered him insane. MCL 768.21a(2); MSA 28.1044(a)(2); *People v Caulley*, 197 Mich App 177, 187; 494 NW2d 853 (1992). While there was some evidence that defendant was high on crack cocaine at the time of the killing, there is absolutely no evidence indicating that defendant's voluntary continued use of crack cocaine resulted in the "settled condition of insanity" as required in *People v Matulonis*, 115 Mich App 263; 320 NW2d 238 (1982). See also *People v Conrad*, 148 Mich App 433, 441; 385 NW2d 277 (1986). Defendant's argument that his attorney was ineffective on this basis therefore fails. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Mark J. Cavanagh

/s/ Thomas L. Ludington