

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FLOYD PHILLIP ALFRED,

Defendant-Appellant.

UNPUBLISHED

March 4, 1997

No. 188635

Recorder's Court

LC No. 95-000820

Before: Jansen, P.J., and Reilly and W.C. Buhl,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of first-degree felony murder, MCL 750.316; MSA 28.548. Defendant was sentenced to the mandatory term of life imprisonment without the possibility of parole. We affirm.

First, defendant argues that the prosecution's failure to provide defendant, before trial, with his statement made to the police denied him his due process right to a fair trial. We disagree. If a party fails to comply with MCR 6.201, the court has the discretion to fashion a remedy, including ordering that testimony or evidence be excluded. MCR 6.201(I). The remedy imposed must fairly balance the interest of the courts, the public, and the parties, and the exclusion of otherwise admissible inculpatory evidence should occur only in the most egregious cases. *People v Williams*, 188 Mich App 54, 58-59; 469 NW2d 4 (1991); *People v Taylor*, 159 Mich App 468, 487; 406 NW2d 859 (1987). At the time that defense counsel first learned of the existence of defendant's statement, no witnesses had been presented and defendant had not given his opening statement. After balancing the interests of the parties and the public, the trial court concluded that the prosecution's failure to turn over the statement before trial did not require dismissal of the case. Defendant failed to present any evidence that the prosecution deliberately withheld the statement or that defendant did not have the mental ability to know that he made a statement to the police. Moreover, we reject defendant's argument that the court abused its discretion in presiding over the *Walker*¹ hearing. See *People v Garwood*, 205 Mich App 553; 517 NW2d 843 (1994).

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

Defendant further asserts that the trial court erred in concluding that his statement to the police was voluntary. We disagree. Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law which the court must determine under the totality of the circumstances including the education, experience, and conduct of the defendant, as well as the credibility of the police. *People v Garwood*, 205 Mich App 553, 555-556; 517 NW2d 843 (1994). The exculpatory nature of defendant's statement given to the police "lends credence to its voluntariness." *People v Johnson*, 65 Mich App 290, 293; 237 NW2d 295 (1975).

In this case, following a *Walker* hearing, the trial court indicated that defendant's credibility was detrimentally affected by his "selective memory" of the events which transpired when he was interrogated. Credibility is crucial in determining a defendant's level of comprehension and the trial judge is in the best position to make this assessment. *People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1996). After a thorough review of the record, we conclude that the trial court correctly determined that defendant voluntarily, knowingly, and intelligently waived his rights. *People v Johnson*, 202 Mich App 281, 287-288; 508 NW2d 509 (1993).

Next, defendant maintains that the trial court erred in ruling that the prosecution exercised due diligence in attempting to locate prosecution witness Patricia Posey and, thus, abused its discretion in admitting her preliminary examination testimony. We disagree. Former testimony of a witness is admissible in a later proceeding where that witness is unavailable to testify and the party against whom the testimony is being admitted "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." MRE 804(b)(1). The declarant is unavailable when he is absent from the hearing and the proponent of his statement has used due diligence to procure his attendance. MRE 804(a)(5). We conclude that the trial court did not err in finding that prosecution made a reasonable, good faith effort in attempting to secure Patricia's presence at trial. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). Contrary to defendant's assertions, the prosecution was not required to exhaust all avenues in attempting to locate Patricia. *Id.* at 16.

Finally, defendant contends that there was insufficient evidence to support his felony murder conviction. We disagree. 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). Larceny is the taking and carrying away of the property of another, with felonious intent and without the owner's consent. *People v Malach*, 202 Mich App 266, 270; 507 NW2d 834 (1993).

Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could find that the essential elements of felony murder were established beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). The testimony established that, contrary to defendant's statement to the police, he had been inside of the victim's house. In fact, the evidence established that defendant was drinking and playing cards with the victim for several hours the night that she was murdered. Defendant was the last person to be seen with the

victim before she was murdered and he admitted to his friends that he killed the victim. Also, after defendant left the victim's house, he had food stamps, which he sold to his friend. Accordingly, we hold that there was sufficient evidence that defendant maliciously killed the victim during the commission of a larceny.

Affirmed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ William C. Buhl

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).