STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN B. TALMAGE,

Defendant-Appellant.

UNPUBLISHED
January 16, 1998

No. 193657
Oakland Circuit Court
LC No. 95-138762-FC

Before: Hoekstra, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder for committing murder during the perpetration of first-degree child abuse, MCL 750.316(1)(b); MSA 28.548(1)(b). He was sentenced to mandatory life imprisonment. Defendant now appeals as of right. We affirm.

Defendant's conviction arises out of the death of his live-in girlfriend's infant son. Defendant admitted that on the night of April 6, 1995, he punched the baby in the side with his fist, shook the baby, and then slammed the baby's head against the ground three times. Although the baby was transported to the hospital, he died after being disconnected from life support systems on the night of April 8, 1995.

Defendant first argues that his conviction should be reversed because first-degree child abuse, MCL 750.136b(2); MSA 28.331(2)(2), is a cognate lesser included offense to second-degree murder. This argument is without merit. As an initial matter, defendant did not properly preserve this issue because he did not raise it below. See *People v Carrick*, 220 Mich App 17, 19; 558 NW2d 242 (1996). In any event, the double jeopardy clause is not implicated because defendant was only convicted of a single crime. See *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995).

Defendant also argues that his conviction was improper because the underlying felony, first-degree child abuse, was not independent of the murder. However, this Court has already rejected this argument in *People v Jones*, 209 Mich App 212, 215; 530 NW2d 128 (1995). We likewise reject defendant's argument in the present case.[1] We note that defendant's reliance on *People v Dumas*, 454

Mich 390; 563 NW2d 31 (1997), is misplaced. In *Dumas*, the trial court gave an erroneous instruction regarding the intent required for felony-murder. No such error occurred in this case.

Finally, defendant challenges the trial court's determination that his inculpatory statements to the police were voluntarily made. We defer to the trial court's credibility determination that no promises of leniency were made to defendant, *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992), and conclude after our independent review of the record that defendant's statements were voluntarily made in light of the totality of the circumstances. *People v Krause*, 206 Mich App 421, 423; 522 NW2d 667 (1994).

In a supplemental brief, defendant raises an additional argument which we address only briefly. Defendant argues that the jury instructions improperly allowed the jury to find defendant guilty if he "knowingly" caused serious physical harm to the victim. He essentially argues that the prosecutor had to prove that he *desired* to cause serious physical harm to the victim, relying on *People v Gould*, ___ Mich App ___; ___ NW2d ___ (Docket No. 184342, issued 8/15/97). We disagree with this contention. *Gould* does indeed hold that first-degree felony murder is a specific intent crime. However, specific intent can consist of *either* a subjective desire *or* knowledge that the prohibited result will occur. *Id.*, slip op at 3 (citing *People v Lerma*, 66 Mich App 566, 569-570; 239 NW2d 424 (1976)). In this case, the prosecutor's remarks and the trial court's instructions regarding intent were proper.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Myron H. Wahls
/s/ Roman S. Gribbsd

[1] We note that defendant's statement of the questions presented to this Court raised a challenge to the sufficiency of the evidence. However, defendant merely reasserted his contention that his conviction should be overturned because the felony was not independent of the murder. In any event, there was clearly sufficient evidence to support defendant's conviction.