STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STANLEY RICHARD FOWLE, JR.,

Defendant-Appellant.

UNPUBLISHED
February 3, 1998

No. 187018
Jackson Circuit Court
LC No. 93-066610-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STANLEY RICHARD FOWLE, JR.,

Defendant-Appellant.

No. 187019
Jackson Circuit Court
LC No. 93-066611-FC

Before: Jansen, P.J., and Doctoroff and Gage, JJ.

PER CURIAM.

On the first day scheduled for a joint jury trial on charges filed against defendant in two cases, defendant pleaded guilty to forgery, MCL 750.248; MSA 28.445, and uttering and publishing, MCL 750.249; MSA 28.446, in lower court no. 93-066610-FH. Following a jury trial, defendant was convicted of felony murder, MCL 750.316; MSA 28.548, and breaking and entering an occupied dwelling with intent to commit larceny, MCL 750.110; MSA 28.305, in lower court no. 93-066611-FC. Defendant also pleaded guilty to habitual offender, second offense, MCL 769.10; MSA 28.1082, in both cases. Defendant was sentenced to life imprisonment without the possibility of parole for felony murder, 15 to 22-1/2 years' imprisonment for the breaking and entering conviction, and 14 to 21 years' imprisonment for the forgery and uttering and publishing convictions. He appeals as of right. We affirm in part and vacate in part.

These cases stem from evidence that defendant broke into the house of his great grandmother, suffocated her by placing a pillow over her mouth and nostrils, stole her purse, and then enlisted the assistance of acquaintances to cash forged checks from her checkbook for the purpose of acquiring money to buy a motor vehicle and go on a shopping spree.

I

Defendant contends that the evidence was insufficient to establish the causation and intent elements of the felony murder conviction. When reviewing a challenge to the sufficiency of the evidence, the question to be decided is whether, viewed in a light most favorable to the prosecution, the evidence is sufficient to permit a rational trier of fact to find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Herbert*, 444 Mich 466, 473; 511 NW2d 654 (1993).

The causation element of felony murder does not require that the defendant be the sole cause of harm, only that he be a contributing cause that was a substantial factor in producing the victim's death. *People v Bailey,* 451 Mich 657, 676; 549 NW2d 325 (1996). Further, while a murder case that rests upon medical speculation regarding the cause of death is not a case that has been proven beyond a reasonable doubt, *People v Stevenson*, 416 Mich 383, 392-393; 331 NW2d 143 (1982), in the present case, the cause of death was not established by medical speculation. Rather, it was established by an expert opinion based on the science of forensic pathology as corroborated by other proofs. Viewed most favorably to the prosecution, the evidence was sufficient to establish the requisite causation.

Defendant's contrary argument that the expert's opinion lacked objective medical evidence and was meaningless, while being presented relative to the question of whether the evidence was sufficient, is in essence an attack on the admissibility of the expert's opinions because the argument implicates the rules of evidence on relevancy and the foundation requirements for expert testimony. See MRE 402; MRE 702 and *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485, 491; 566 NW2d 671 (1997) (to be derived from recognized scientific knowledge for purposes of MRE 702, the proposed testimony must contain inferences or assertions, the source of which rests in an application of scientific methods, and must be supported by appropriate objective and independent validation based on what is known, e.g., scientific and medical literature). Because there was no objection to the admissibility of the expert testimony at trial and defendant has failed on appeal to brief this evidentiary issue, the issue is abandoned. See *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992); *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992); see also MRE 103(d). In any event, there was evidence that the expert used a recognized scientific methodology of determining the cause of death and made inferences and conclusions based on an objective and independent evaluation of the victim's body and what was made known to him about the victim being found in bed. His testimony raised questions of the cause of death by pointing out the absence of organic disease which could have caused death, explaining the bruising found on the victim and how it presented anatomical evidence to interpret and understand how the process of asphyxia came about, and explaining the fact that suffocation with a pillow does not leave evidence such as fibers that would be found on the body. Viewed most favorably to the prosecution, we hold that a rational trier of fact could find from the evidence presented at trial that the victim died from asphyxiation rather than natural causes.

We also reject defendant's challenge to the intent or malice element of felony murder. Viewed most favorably to the prosecution, a rational trier of fact could find beyond a reasonable doubt that defendant intended to kill, do great bodily harm, or create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. *People v Hutner*, 209 Mich App 280, 282-283; 530 NW2d 174 (1995); *People v Flowers*, 191 Mich App 169, 176-177; 477 NW2d 473 (1991).

II

Defendant next claims that evidence of his statements should have been excluded at the preliminary examination and at trial on the ground that the prosecution did not establish the corpus delicti of the murder. We do not consider defendant's claim regarding the preliminary examination because this claim is subsumed by defendant's similar challenge to his conviction. *People v Hall*, 435 Mich 599; 460 NW2d 520 (1990); see also *People v Dilling*, 222 Mich App 44, 51; 564 NW2d 56 (1997); *People v Staffney*, 187 Mich App 660, 662-663; 468 NW2d 238 (1991). Also, defendant did not preserve the claim regarding his conviction because he did not move to suppress his confessions at trial based on the corpus delicti rule. See *People v Beard*, 171 Mich App 538, 548; 431 NW2d 232 (1988); *People v Harris*, 113 Mich App 333, 335-336; 317 NW2d 615 (1982). Because Michigan's corpus delicti rule is viewed as a common-law doctrine and a preliminary procedural device to the admissibility of the statements, *People v McMahan*, 451 Mich 543, 549; 548 NW2d 199 (1996), we, thus, consider defendant's claim under the standards for plain, unpreserved nonconstitutional error in *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994). Under this standard, a defendant must demonstrate an outcome determinative plain error. *Id.* at 553. In the case at bar, defendant has not shown such error.

The corpus delicti of murder requires proof of both a death and some criminal agency that caused the death, independent of the defendant's confessions. *McMahan, supra* at 549. Admissions of fact that do not amount to confessions of guilt are not subject to the corpus delicti rule. *People v Rockwell*, 188 Mich App 405, 407; 470 NW2d 673 (1991). Further, the corpus delicti need not be proven beyond a reasonable doubt. *People v Cadle*, 204 Mich App 646, 654; 516 NW2d 520 (1994); *People v Mumford*, 171 Mich App 514, 517; 430 NW2d 770 (1988); *People v Modelski*, 164 Mich App 337, 342; 416 NW2d 708 (1987).

In the present case, the forensic pathologist's expert testimony, coupled with the other evidence on how the victim appeared when she was discovered by her daughter in the bedroom, was sufficient to establish that the death was caused by a criminal agency. As with the prior issue, we are not persuaded that defendant has demonstrated any basis for attacking the evidentiary foundation of the forensic pathologist's expert opinion.

We have also considered defendant's alternative claim that his attorney's failure to object at trial to the admission of his statements based on the corpus delicti rule constitutes ineffective assistance of counsel. Limiting our review to the record, we find that defendant has failed to

establish this claim. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Armendarez*, 188 Mich App 61, 74; 468 NW2d 893 (1991).

III

Defendant next claims that the trial court erred in denying his motion to suppress evidence of his statements made relative to the felony murder charge during a custodial interrogation after he was arraigned and invoked his Sixth Amendment right to counsel relative to the forgery and uttering and publishing charges. While we review for clear error a trial court's ruling with respect to a motion to suppress evidence on legal grounds, the trial court's application of constitutional standards is not entitled to the same deference as factual findings. *People v Smielewski*, 214 Mich App 55, 62; 542 NW2d 293 (1995). Because the facts pertinent to defendant's Sixth Amendment issue are not in dispute, we are left with the strict application of the constitutional standard to uncontested facts. *People v Nelson*, 443 Mich 626, 631; 505 NW2d 266 (1993).

The Sixth Amendment, as applied to states through the Fourteenth Amendment, guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." US Const, Am VI. See also *People v Riggs*, 223 Mich App 662, 676; 568 NW2d 101 (1997) (opinion of Smolenski, J.); *Smielewski, supra* at 60, n 4. Once this right attaches, any subsequent waiver of the right to counsel during a police-initiated custodial interview is ineffective. *McNeil v Wisconsin*, 501 US 171, 175; 111 S Ct 2204; 115 L Ed 2d 158 (1991); *Smielewski, supra* at 61. However, this Sixth Amendment right does not attach until a prosecution is commenced, i.e., at or after the initiation of adversary judicial criminal proceedings whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. *McNeil, supra* at 175; *Riggs, supra* at 676. Further, under *McNeil, supra* at 175, the Sixth Amendment right to counsel is offense specific.

A strict application of this offense-specific rule to the case at bar would establish no Sixth Amendment right to counsel violation because defendant only invoked his right to counsel for the forgery and uttering and publishing charges. The dispositive question in this appeal is whether the facts fall within an exception to the offense-specific rule of *McNeil*. We note that this Court in *Smielewski, supra* at 62, looked to dictionary definitions of the word "related" and *State v Sparklin*, 296 Or 85; 672 P2d 1182 (1983), in determining if charges were sufficiently related or connected to extend a defendant's properly asserted Sixth Amendment right to counsel concerning one crime to a second crime for which the defendant was not yet charged. Under this approach, the factual similarity between the crimes, whether they rest on substantial identical facts, and whether there was a significant association between or among things (e.g., the relationship between cause and effect) were deemed appropriate considerations. *Smielewski, supra* at 62. However, because a federal question is involved, we believe that it is also necessary to consider federal decisions which have recognized an exception to the offense-specific rule of *McNeil*. See *Riggs, supra* at 675 (opinion of Smolenski, J.); *Young v Young*, 211 Mich App 446, 450; 536 NW2d 254 (1995) (Michigan follows the rule that state courts are bound by holdings of federal courts on federal questions when there is no conflict, but is free to choose the most appropriate view when the issue has divided the circuits of the federal courts).

The federal circuits which recognize an exception to the offense-specific rule fall within two lines of cases. One line of cases invokes an exception where the offenses are "closely related" (construing that phrase relatively broadly) and there is evidence of deliberate police misconduct in the process of eliciting the incriminating statements. The other line of cases focuses entirely on the facts underlying the charges and uncharged offenses, looking for similarities of time, place, person, and conduct to determine if the offenses are "closely related" or "inextricably intertwined" so as to fall within the exception. *United States v Arnold*, 106 F3d 37, 41 (CA 3, 1997); *Hellum v Warden, United States Penitentiary-Leavenworth*, 28 F3d 903 (CA 8, 1994) (finding it unnecessary to decide if the ninth circuit exception should be adopted where the facts would fall within that exception, even if adopted); *Hendricks v Vasquez*, 974 F2d 1099 (CA 9, 1992) (fact that two crimes had totally independent elements and did not arise from same conduct considered factors in determining that the exception did not apply).

In the present case, there is no evidence of deliberate police misconduct that warrants a broad construction of the phrase "closely related." Further, regardless of whether we apply the definitional approach of *Smielewski, supra* at 62, or the federal circuit court decisions on the "closely related" or "inextricably intertwined" exception to the offense-specific rule of *McNeil*, we would find that defendant's Sixth Amendment right to counsel was not violated when he was questioned about the felony murder after being arraigned for the forgery and uttering and publishing charges.

Although the offenses are not wholly unrelated, they do not share any elements because the intent to defraud is the gist of both the forgery and uttering and publishing offense. The elements of forgery are (1) an act which results in the false making or alteration of an instrument (which makes an instrument appear to be what it is not) and (2) a concurrent intent to defraud or injure. *People v Kaczorowski*, 190 Mich App 165, 171; 475 NW2d 861 (1991). The elements of uttering and publishing a forged instrument are (1) knowledge that the instrument was false, (2) an intent to defraud, and (3) presentation of the forged instrument for payment. *Id.*

Further, the forgery and uttering and publishing offenses occurred at a different time and place than the felony murder and involved different individuals. The bank was the recipient of the forged checks. Also, defendant elicited the assistance of individuals who had no part in the felony murder to cash the checks. The fact that the forged checks may have been stolen from the victim's house at the time of the felony murder is not enough to invoke the exception to offense-specific rule of *McNeil*.

Defendant's contrary argument relies heavily on showing a similarity between the instant case and a Texas Court of Criminal Appeals decision which refused to strictly apply *McNeil* to a situation where a defendant gave statements about a capital murder after he was arraigned for the theft of the vehicle because the theft was being used to prove an aggravating element for the capital murder charge. *Upton v State*, 853 SW2d 548, 555-556 (Tex Crim App, 1993). *Upton* differs from the present case because the forgery and uttering and publishing charges were not used as an aggravating element to establish felony murder. Therefore, *Upton* does not support defendant's contention that the forgery and uttering and publishing charges were closely related to the felony murder.

In sum, the Sixth Amendment right to counsel—an offense-specific right—that defendant invoked for the forgery and uttering and publishing charges did not extend to the felony murder case under either a strict application of *McNeil* or a recognized exception to the offense-specific rule. Therefore, the trial court correctly denied defendant's motion to suppress evidence of his statements made relative to the felony murder offense during the custodial interrogation which took place after defendant was arraigned on the forgery and uttering and publishing charges.

IV

Defendant next claims that his convictions and sentences for both felony murder and the predicate felony of breaking and entering deprived him of his state and federal constitutional rights against double jeopardy. The prosecutor concedes that defendant's conviction of breaking and entering must be vacated on double jeopardy grounds if the conviction of felony murder is upheld. We agree with defendant's contention that the convictions and sentences for both felony murder and the predicate offense violated his right against double jeopardy and, accordingly, vacate the conviction and sentence for breaking and entering. *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996); *People v Passeno*, 195 Mich App 91; 489 NW2d 152 (1992).

V

Defendant next claims that the trial court deprived him of his constitutional right to present a defense and confront witnesses by preventing defense counsel from cross-examining a prosecution witness on an interest that he had in testifying relative to charges pending against that witness in the State of Florida. Specifically, defendant contends that he should have been allowed to cross-examine the prosecution witness regarding his intent to bring up his cooperation in testifying at defendant's felony murder trial as a factor for the sentencing court to consider if he is convicted of pending theft and burglary charges in the State of Florida. Defendant argues that this evidence was crucial to attack the prosecution witness' credibility.

The trial court excluded this evidence pursuant to MRE 401 and MRE 403, finding that the proffered evidence had some relevancy but that the relevancy was substantially outweighed by the danger of unfair prejudice. We hold that defendant's failure to address the merits of the trial court's ruling pursuant to MRE 401 and MRE 403 constitutes a waiver of this issue. *Kent*, *supra* at 210. Further, defendant's constitutional challenge to the exclusion of this evidence is not properly before us because defense counsel did not make an offer of proof to the trial court premised on a constitutional need for the impeachment evidence. See MRE 103(a)(2).

This Court may nevertheless consider an important constitutional issue raised for the first time on appeal regarding the admissibility of evidence if it is decisive of the outcome of the case. *Grant*, *supra* at 547; *People v Catey*, 135 Mich App 714, 722; 356 NW2d 241 (1984); *People v Newcomb*, 190 Mich App 424, 431; 476 NW2d 749 (1991). Contrast *People v Belanger*, 454 Mich 571; 563 NW2d 665 (1997) (harmless beyond reasonable doubt standard applies to preserved constitutional error). However, we are not persuaded that the impeachment evidence was outcome determinative.

The witness in question was one of three witnesses who gave testimony on facts pertinent to the forgery and uttering and publishing aspect of defendant's conduct, which defendant had already conceded by pleading guilty. Further, the record shows that the witness' credibility was attacked by defense counsel through cross-examination on his involvement as a possible accomplice to the forged check cashing and by attempting to show similarities between his testimony and that of another witness who participated in the forged check cashing. Defendant also received the benefit of a jury instruction on how the jury should evaluate accomplice testimony. Moreover, the testimony itself, which defendant claims was critical to the defense at the felony murder trial, did not contain any testimony on statements made by defendant regarding whether he killed the victim. The witness testified that the defendant said that the victim gave him the checkbook on her deathbed at a hospital before "they pulled the plug." At most, this testimony provided a basis for inferring that defendant knew when he made the statement that the victim was dead and, thus to some extent, rebutted certain statements made by defendant during police interrogation about the victim being alive when he left her house. We also note that similar testimony regarding the fact that defendant made statements about the victim dying at a hospital were made by another witness who participated in the forged check cashing.

Because the witness' testimony was not outcome determinative, appellate review of defendant's newly raised constitutional claim is foreclosed. We note, though, that defendant's claim that this issue requires reversal would also fail under the standards for preserved constitutional error because it is clear from the record that, even if the limitation placed on defense counsel's cross-examination had some constitutional dimension, any error was harmless beyond a reasonable doubt. *Belanger, supra* at 50. See also *People v Minor*, 213 Mich App 682, 688; 541 NW2d 576 (1995).

VI

Defendant next claims that the prosecutor deprived him of a fair trial by eliciting a prejudicial response from another prosecution witness on his motive for testifying during redirect examination. Claims of prosecutorial misconduct are reviewed to determine whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). When the issue pertains to improper questioning and there is no objection, relief will not be granted if a timely objection by defense counsel to the alleged improper questioning could have cured any prejudice, either by precluding such further questioning or by obtaining an appropriate cautionary instruction. *People v Messenger*, 221 Mich App 171, 179-180; 561 NW2d 463 (1997).

Defendant has not established support for his contention that the prosecutor violated the principle that a prosecutor must refrain from injecting unfounded or prejudicial innuendo into the proceedings, *People v George*, 130 Mich App 174, 180; 342 NW2d 908 (1983), and that insinuations and questions which have a tendency to prejudice the jury (regarding defendant's witnesses) and relate to irrelevant matters denies a defendant a fair trial, *People v Whalen*, 390 Mich 672, 686; 213 NW2d 116 (1973). In this regard, we note that defendant's argument concerns a prosecution witness who testified that defendant made certain statements to him about the victim's death while they were both jail inmates. The witness further testified that his own criminal charges were resolved by a plea bargain agreement, but denied that he received any benefit for testifying against the defendant. The prosecutor's challenged question expounded on this issue during redirect examination by asking the

witness why he testified against the defendant at the preliminary examination if he was going to receive no benefit. The witness replied, "[b]ecause I think anybody that would kill their own eighty-six-year-old grandmother deserves to get whatever they can get."

Although it is improper for a witness to express an opinion on a defendant's guilt or innocence of a charged offense at trial, *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985), we are not persuaded that the prosecutor's question was improper inasmuch as the question was relevant to and limited to the issue of the witness' motive, which had already been raised at trial, and there is no evidence that the prosecutor sought to elicit an opinion from the witness relative to whether the defendant "killed" the victim. See *Bahoda, supra* at 279-280; *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Even if the prosecutor's question was improper, any possible prejudice could had been cured by a request for a curative instruction. We find no merit in defendant's contention that the jury could have found him guilty by deferring to the witness' "expertise" to detect crime as a criminal. The witness did not testify as an expert, bur rather as a lay witness whose credibility was being attacked on the basis of his prior convictions and alleged motive for testifying against defendant. Upon examining the prosecutor's brief question in the context of the trial record, we hold that defendant has demonstrated no basis for relief.

Considering defendant's alternative claim of ineffective assistance of counsel in light of the existing record, we hold that defendant has established neither the deficient performance nor the prejudice required to support a claim of ineffective assistance of counsel. *Mitchell, supra; Armendarez, supra*. Defendant was not deprived of a fair trial. *Pickens, supra* at 338.

VII

Defendant next claims that his sentences for the forgery, uttering and publishing, and breaking and entering convictions violate the principle of proportionality. We do not address defendant's claim regarding the sentence for the breaking and entering conviction because we have already vacated that sentence on double jeopardy grounds. Further, we decline to address defendant's claim regarding the sentences for the forgery and uttering and publishing convictions because, even if these sentences are disproportionate, this would afford defendant no relief given our affirmation of the conviction and sentence for felony murder. *Passeno, supra*, at 102.

Affirmed in part and vacated in part in accordance with this opinion.

/s/ Kathleen Jansen
/s/ Martin M. Doctoroff
/s/ Hilda R. Gage