

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CURTIS WARREN DAWKINS,

Defendant-Appellant.

UNPUBLISHED

March 22, 2007

No. 265579

Kalamazoo Circuit Court

LC No. 04-002148-FC

Before: O’Connell, P.J., and Murray and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for felony murder, MCL 750.316(1)(b); assault with a dangerous weapon, MCL 750.82(1); discharge of a firearm in a building, MCL 750.234b(1); and six counts of possession of a firearm during the commission of a felony, MCL 750.227b(1). We affirm.

This case arises out of a scheme defendant devised to “get money from people,” pursuant to which he purchased a gun, a speedloader, and some costumery. He consumed alcohol, obtained some cocaine, and went to an area known as “the student ghetto” due to its high population of college students. He initially put a gun to the head of an individual who believed it to be fake but ran away and entered the house of the victim. The victim apparently demanded that defendant leave, whereupon defendant shot the victim, killing him. Defendant threatened several other individuals in the house, including taking one of them hostage, and fired several more shots before eventually surrendering to police.

Defendant first argues that the trial court erred in declining to instruct the jury on the lesser offense of voluntary manslaughter, pursuant to CJI2d 16.9. We disagree. We review de novo claims of instructional error. *People v Fennell*, 260 Mich App 261, 264; 677 NW2d 66 (2004). However, we review for an abuse of discretion a trial court’s determination whether a jury instruction is applicable to the facts of a case. *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003).

A requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense, and a rational view of the evidence would support it. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). The sole element distinguishing manslaughter from murder is the absence of malice, *People v Holtschlag*, 471 Mich 1, 21; 684 NW2d 730 (2004),

and proof of voluntary manslaughter requires a showing of adequate provocation as “the circumstance that negates the presence of malice.” *People v Mendoza*, 468 Mich 527, 535-536; 664 NW2d 685 (2003). “[A]ny special traits of the particular defendant cannot be considered,” and “[t]he fact that [the] defendant may have had some mental disturbance is not relevant to the question of provocation.” *People v Sullivan*, 231 Mich App 510, 519-520; 586 NW2d 578 (1998). Rather, adequate provocation must be a sufficient stimulus to “cause a *reasonable person* to lose control.” *Id.*, 518. Here, at most, defendant asserted that the victim “set him off” and “came at him,” after defendant had wrongfully entered the victim’s house with a gun. We are unable to perceive anything in the record hinting at anything the victim might have done that would have caused an ordinary, reasonable person to act out of passion instead of reason. The trial court’s refusal to give a voluntary manslaughter instruction was proper.

Defendant additionally argues that he was denied the effective assistance of counsel by his attorney’s failure to request the trial court to instruct the jury on second-degree murder as a lesser included offense of felony murder. We perceive no merit to this argument, because defendant’s contention that the jury was not instructed on second-degree murder as a lesser offense of felony murder is simply mistaken. A review of the record reveals that, while defense counsel did not specifically request such an instruction on the record, the jury was instructed on second-degree murder as a lesser offense of felony murder. Accordingly, no error should be imputed to defense counsel for failing to request a jury instruction on second-degree murder as a lesser offense of felony murder when it was already included in the instructions as given. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Defense counsel was not ineffective for failing to make a superfluous request. See *People v Matuszak*, 263 Mich App 42, 57-58; 687 NW2d 342 (2004). We agree that the jury verdict form was not a model of clarity, and it could have been improved if second-degree murder was listed as an optional lesser charge after both first-degree premeditated murder and first-degree felony murder. However, defendant was not entitled to a perfect trial, only a fair one, and juries are presumed to follow their instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). The jurors here were clearly given detailed verbal instructions specifying that second-degree murder was an option. Defendant has failed to show that any arguable errors made by counsel prejudiced him.

Defendant finally argues that no evidence of a felony murder was introduced into evidence other than his own statements to the police, thereby violating the corpus delicti rule. We disagree.

The term “corpus delicti” refers not to the dead body, but “instead to the body (corpus) of the wrong (delicti,) ‘the loss sustained.’” *People v Williams*, 422 Mich 381, 390; 373 NW2d 567 (1985). The corpus delicti rule is intended to prevent a person from being convicted of a crime that was not actually committed by anyone; in a homicide case, the prosecution must show, “independent of the defendant’s statement, that the named victim is dead as a result of some criminal agency,” the purpose being “to preclude, conviction for a criminal homicide when none was committed.” *Id.*, 388. The parties stipulated to the admission of the autopsy report, which, when combined with the witness testimony, clearly established without reference to defendant’s confession that the victim died because defendant shot him in the chest. This clearly establishes the corpus delicti of homicide: a death by a criminal agency. That being the case, the rule does not additionally require “independent proof of each and every element of the particular grade and kind of common-law or statutory criminal homicide charged as a condition of admissibility of a

defendant's confession." *Id.*, 391. There is no possibility here that defendant might have been convicted of a homicide that was not, in fact, committed. Although "it is surely critical to a defendant" what *degree* of homicide he is convicted of, that question is outside the scope of the protection the corpus delicti rule is intended to provide. *Id.*, 391-392.

Defendant nevertheless asserts that, because he was convicted of felony murder predicated on the commission of a larceny, the corpus delicti rule requires additional proof, again independent of his confession, of larceny. That is contrary to the law in this state. *People v Hughey*, 186 Mich App 585, 588-589; 464 NW2d 914 (1990); *People v Emerson (After Remand)*, 203 Mich App 345, 348; 512 NW2d 3 (1994). Defendant impliedly urges us to conclude that these cases were wrongly decided. Although it is true, as the *Emerson* Court noted, that a given defendant might confess to *any* felony that did not actually happen just as much as to a nonexistent homicide, we remain convinced that the corpus delicti rule does not require what defendant asks. The "loss suffered" in *any* homicide remains that some person lost his or her life because of a criminal act. The rule does not require independent proof of the aggravating circumstances that increase the classified degree of the essential crime and that warrant more severe penalties. *Williams, supra* at 391.

Felony murder is an established common-law murder that is *elevated in degree* to a first-degree classification *for punishment purposes* because it took place while the defendant intended to commit an enumerated other felony. *People v Jones*, 209 Mich App 212, 215; 530 NW2d 128 (1995); *People v Brannon*, 194 Mich App 121, 125; 486 NW2d 83 (1992); see also *Williams, supra* at 388 n 3. Therefore, as *Hughey* concluded, the underlying felony, for the purpose of a felony murder charge, constitutes an aggravating circumstance affecting the homicide charge, not an independent matter requiring independent application of the corpus delicti rule. The prosecution satisfied the corpus delicti rule for homicide by establishing, without resort to defendant's confession, that a death had occurred by a criminal agency; the prosecution then properly used defendant's confession to elevate the homicide to first-degree felony murder. *People v Cotton*, 191 Mich App 377, 389-390; 478 NW2d 681 (1991).

Affirmed.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Alton T. Davis