

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY ALLEN NYE,

Defendant-Appellant.

UNPUBLISHED

April 14, 2005

No. 252557

Oakland Circuit Court

LC No. 2002-186168-FC

Before: Donofrio, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b), and second-degree murder, MCL 750.317, arising from the death of Jessica Seabold. The trial court sentenced defendant to life imprisonment without parole for the first-degree murder conviction and life imprisonment for the second-degree murder conviction. Although defendant does not raise it on appeal, because defendant's convictions and sentences for both first-degree felony murder and second-degree murder arise out of the death of a single victim, they clearly violate double jeopardy principles. We vacate defendant's conviction and sentence for second-degree murder. Because none of defendant's arguments on appeal are persuasive, we affirm the remaining conviction and sentence.

Both the United States Constitution and the Michigan Constitution prohibit multiple punishments of a defendant for the same offense. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). The prohibition extends to both multiple prosecutions for the same offense after an acquittal or conviction and multiple punishments for the same offense. *Id.* Multiple murder convictions and sentences that arise out of the death of a single victim violate double jeopardy. *People v Adams*, 245 Mich App 226, 241-242; 627 NW2d 623 (2001). Because defendant was convicted and sentenced for second-degree murder and felony murder arising out of the death of a single victim, there has been a clear violation of the double jeopardy protections afforded by the United States and Michigan Constitutions. The general remedy for a double jeopardy violation arising out of multiple murder convictions is to "affirm the greater conviction." *Herron, supra* at 609. Accordingly, we vacate defendant's conviction and sentence for second-degree murder.

Defendant first argues that the trial court improperly admitted evidence of his statements to police informants Phillip Turner and William Dunlap. We disagree. This Court reviews for an abuse of discretion a trial court's decision regarding the admission of evidence. *People v*

Aldrich, 246 Mich App 101, 113; 631 NW2d 67 (2001). An abuse of discretion occurs only if an unprejudiced person, considering the facts on which the trial court relied, would find that there was no justification or excuse for the ruling made. *Id.* A decision on a close evidentiary question ordinarily cannot constitute an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000); *Aldrich, supra* at 113. The determination whether an individual is a government agent is a mixed question of law and fact. *People v McRae*, 469 Mich 704, 710; 678 NW2d 425 (2004). This Court reviews for clear error a lower court's findings of fact and reviews de novo questions of law. *Id.*

The Sixth Amendment right to counsel attaches at the initiation of adversary judicial criminal proceedings. *Moore v Illinois*, 434 US 220, 226-227; 98 S Ct 458; 54 L Ed 2d 424 (1977); *People v Hickman*, 470 Mich 602, 607; 684 NW2d 267 (2004). The right prohibits government agents from using incriminating statements deliberately elicited from an accused without the presence or waiver of counsel after the initiation of such proceedings. *Illinois v Perkins*, 496 US 292, 299-300; 110 S Ct 2394; 110 L Ed 2d 243 (1990); *Massiah v United States*, 377 US 201, 205-206; 84 S Ct 1199; 12 L Ed 2d 246 (1964). There are three basic requirements for finding a Sixth Amendment violation: "(1) the right to counsel must have attached at the time of the alleged infringement; (2) the informant must have been acting as a 'government agent'; and (3) the informant must have engaged in 'deliberate elicitation' of incriminating information from the defendant." *Matteo v Superintendent, SCI Albion*, 171 F3d 877, 892 (CA 3, 1999).

In *Perkins, supra*, the police placed an undercover agent in the respondent's cell. *Perkins, supra* at 294. The respondent was suspected of murder, but was incarcerated on unrelated charges. *Id.* The undercover agent asked the respondent whether he had ever killed anyone, and the respondent described the murder in question in detail. *Id.* at 295. He was thereafter charged with murder and moved to suppress his statements to the undercover agent. *Id.* The United States Supreme Court held that because no charges had been filed against the respondent with respect to the murder at the time the statements were made, the respondent's Sixth Amendment right was not implicated. *Id.* at 299.

Similarly, in this case, defendant's Sixth Amendment right had not attached when Turner elicited statements from defendant. Defendant was not charged with murdering Seabold until after Turner obtained the two statements from defendant implicating him in the offense. Thus, defendant's Sixth Amendment right was not implicated. *Id.* Defendant argues that *Perkins* is distinguishable because the respondent in that case made his initial incriminating statement to a fellow inmate who was not acting as a government agent. This factor, however, was irrelevant to the holding of *Perkins*. Regardless of whether defendant's initial incriminating statement was made to a government agent, defendant's Sixth Amendment right was not implicated because defendant had not yet been charged with Seabold's murder. *Matteo, supra* at 892. Accordingly, the trial court properly admitted defendant's statements to Turner.

Defendant's Sixth Amendment right was implicated with respect to his discussions with Dunlap because defendant had been charged with murder by that point. Once the right attached, it prohibited the use of statements at trial deliberately elicited from defendant by a government agent without the presence or waiver of counsel. *Perkins, supra* at 299-300; *McRae, supra* at 715. Thus, we must determine whether Dunlap was acting as a government agent, and whether he deliberately elicited statements from defendant. *Matteo, supra* at 892.

The United States Supreme Court has not established any bright line rule for determining whether an informant is a government agent for purposes of the Sixth Amendment. *Id.*; *Lightbourne v Dugger*, 829 F2d 1012, 1020 (CA 11, 1987); *United States v Taylor*, 800 F2d 1012, 1015 (CA 10, 1986). Thus, courts must make this determination under the particular facts and circumstances of each case. *Id.*

The facts in *Taylor, supra*, are similar to this case. In *Taylor*, the defendant was indicted on two counts of bank robbery. *Id.* at 1014. While awaiting trial, he encountered Wayne Nave, a fellow inmate with whom he used to work. *Id.* The defendant made incriminating statements to Nave, which Nave communicated to an FBI agent who Nave sought out for the purpose of informing the agent of the defendant's statements. *Id.* The defendant was thereafter placed in the same cell as Nave, and he eventually confessed to Nave that he committed both bank robberies and provided details of the crimes. *Id.* Nave testified at the defendant's trial and admitted that he hoped to receive preferential treatment for cooperating with the authorities. *Id.* He stated, however, that the government had not made any promises or guarantees of benefits for his assistance. *Id.* The appellate court held that Nave was not a government agent because no agreement had been made between Nave and the government, and no benefits accrued to Nave for his cooperation. *Id.* at 1016. The court stated that any benefits that Nave hoped to obtain were "mere expectancies." *Id.* The court concluded that Nave was not a government agent "[i]n the absence of any express or implied *quid pro quo* underlying the relationship between Nave and the Government" and "in the absence of any instructions or directions by the Government." *Id.*

In *Lightbourne, supra*, the petitioner made incriminating statements regarding a murder for which he had been indicted to a jail cellmate, Theodore Chavers. *Lightbourne, supra* at 1019. Chavers contacted a police investigator before the petitioner had been charged with the murder, but was sent back to the cell and told to "keep [his] ears open." *Id.* After the petitioner had been charged with murder, he told Chavers that he entered the victim's house and sexually assaulted her. *Id.* Chavers was released from custody shortly thereafter and received a \$200 reward for supplying information. *Id.* On appeal, the court affirmed the lower courts' rulings that no agency was created between the government and Chavers. *Id.* at 1020-1021. The court reasoned that Chavers had no history of acting as a paid informant and that the investigator did not solicit Chavers' assistance or encourage the elicitation of incriminating statements from the petitioner. *Id.* at 1020. The investigator further did not promise or suggest that Chavers would be compensated or rewarded for his assistance. *Id.* The court noted that while the investigator offered to help Chavers' obtain bail, this offer was not made until after the petitioner told Chavers of his involvement in the homicide, and the offer was not conditioned upon Chavers obtaining further information. *Id.* at 1020-1021. The court also noted that Chavers was not aware of the \$200 reward until after he was released from custody. *Id.* at 1021. The court further stated that Chavers' motives alone could not make him an agent of the police even if the police knew that his motives were self-serving and probably an effort to obtain police cooperation in his own case. *Id.* Thus, the court determined that no agency was established. *Id.*

In *United States v Henry*, 447 US 264, 265-266; 100 S Ct 2183; 65 L Ed 2d 115 (1980), the defendant was charged with bank robbery and housed in the same cellblock as Nichols, who had previously acted as a paid informant for the FBI. A government agent contacted Nichols and told him to be alert to statements made by the defendant, but not to initiate any conversations

with him regarding the bank robbery. *Id.* at 266. After Nichols was released from jail, he told the agent that the defendant had made statements concerning the bank robbery. *Id.* Nichols was paid for providing the information. *Id.* Nichols also testified regarding the defendant's incriminating statements at the defendant's trial. *Id.* at 267. The United States Supreme Court held that Nichols was acting as a government agent who "deliberately elicited" incriminating statements from the defendant. *Id.* at 270-271. The Court reasoned that Nichols was acting under instructions as a paid informant for the government and that he deliberately used his position as a fellow inmate to secure incriminating information from the defendant. *Id.* at 270. The Court stated that Nichols was ostensibly no more than a fellow inmate and that the defendant was under indictment and in custody at the time that Nichols engaged him in conversation. *Id.* The Court noted that Nichols had been acting as a paid government informant for more than one year and that Nichols had access to the defendant and would be able to engage him in conversations. *Id.* The Court also noted that the arrangement between Nichols and defendant was a contingent-fee agreement in which Nichols would be paid only if he provided useful information. *Id.* The Court held that, under these circumstances, the lower court correctly determined that Nichols deliberately used his position to secure information from the defendant and that Nichols' conduct was attributable to the government. *Id.*

We find the facts and circumstance of this case similar to those in *Taylor*. Dunlap and the detectives did not enter into any agreement of any kind, and although Dunlap hoped to benefit from his actions, he was not promised any benefit or reward for his assistance. Like the informant in *Taylor*, Dunlap's hopes to obtain benefits were "mere expectancies." *Taylor, supra* at 1016. This case is also similar to *Lightbourne, supra*, in that Dunlap did not have a history of acting as a paid informant, the detectives did not seek out Dunlap to assist them, and they did not encourage Dunlap to elicit incriminating statements from defendant. *Lightbourne, supra* at 1020. Unlike *Henry*, Dunlap was not paid on a contingency basis for information only if it proved useful and did not have a previous history of acting as an informant. *Henry, supra* at 270.

Defendant principally relies on two factors that he argues compels a finding that Dunlap was acting as a government agent. The first is Dunlap's statement to the detectives regarding obtaining a confession from defendant. Dunlap told Sergeants Miller and Harvey, "I can get him to say that [he committed the murder] if I had to." Dunlap testified both at trial and at the evidentiary hearing that by this statement he meant that he thought defendant would confess if he merely listened to him. Further, Dunlap made the statement to Miller and Harvey at their first meeting and was thereafter instructed not to initiate any conversations with defendant. Thus, the statement is not indicative of an agency relationship between Dunlap and the detectives.

The second factor upon which defendant relies is Detective-Sergeant Harvey's statements to Dunlap that Dunlap was "working for us" and "an agent of ours." Dunlap testified that the last statement was made during his first meeting with the detectives to inform him that he had to "follow the rules" and not initiate conversations with defendant regarding the offense. This is because an initiation of conversation by Dunlap resulting in the elicitation of an incriminating statement would result in Dunlap being deemed an agent of law enforcement. Harvey's statements to Dunlap are not dispositive of whether Dunlap was a government agent and were not proof that an agency relationship in fact existed. The determination whether a person is a government agent depends upon the particular facts and circumstances of each case. *Taylor,*

supra at 1015. Harvey's statements to Dunlap that Dunlap was "an agent of ours" and "working for us" are not indicative of an agency relationship under the facts and circumstances of this case.

Even if Dunlap was a government agent, however, he did not "deliberately elicit" incriminating statements from defendant. In *Kuhlmann v Wilson*, 477 US 436, 459; 106 S Ct 2616; 91 L Ed 2d 364 (1986), the Court stated:

[T]he primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation. Since "the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached," a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks. [Internal citation omitted.]

Dunlap and Detective-Sergeant Miller repeatedly testified at the evidentiary hearing that Dunlap was instructed to listen to defendant and not to initiate any conversations with defendant concerning Seabold's death. Dunlap testified that he never initiated any discussions with defendant regarding the crime, he never intentionally solicited statements from defendant, and he never engaged defendant in general conversation regarding defendant's case. Although Dunlap sometimes asked clarifying questions regarding matters that defendant raised, such questions were permissible. In *Matteo, supra*, the court held that clarifying questions directly responsive to statements that the petitioner had made did not alter the fundamental nature of the exchange between the petitioner and the informant. *Matteo, supra* at 896. Accordingly, Dunlap did not engage in investigatory techniques equivalent to direct police interrogation and did not take action designed deliberately to elicit incriminating remarks. *Kuhlmann, supra* at 459. Thus, he did not engage in "deliberate elicitation" of incriminating information, and defendant's statements to Dunlap were properly admitted at trial. *Matteo, supra* at 892.

Defendant also challenges the trial court's denial of his motion to admit evidence of the origin of semen found in Seabold's underwear. "Generally, all relevant evidence is admissible at trial." *Aldrich, supra* at 114. Under MRE 401, "relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Thus, evidence is admissible if it is helpful in shedding light on any material point. *Id.* The origin of the semen discovered in Seabold's underwear did not tend to make any fact of consequence to the case more or less probable than it would have been without the evidence. It was undisputed that Seabold and her boyfriend, Ronald Campbell, engaged in consensual sexual intercourse within twenty-four hours before Seabold's death. The parties stipulated as such at trial. Thus, evidence that Campbell was the source of semen found in Seabold's underwear would not have been indicative of defendant's guilt or innocence. It would not have shed light on any material point. The prosecutor did not imply that semen linked to defendant was recovered. Moreover, a forensic scientist testified that no seminal fluid or semen linked to defendant was recovered from Seabold's undergarments. Thus, because the parties did not dispute that Campbell and Seabold

engaged in sexual intercourse within twenty-four hours before Seabold was killed, the fact that Campbell was the source of the semen found in Seabold's underwear was not relevant to any issue at trial and was properly excluded.

Defendant further argues that the trial court improperly admitted the statement of his mother that she thought that defendant "might have done it." This statement, although not relevant substantively, was properly admitted for impeachment purposes. Defendant's mother, Andrea Nye, testified at trial that defendant was with her at their apartment during the time that Seabold was killed. Thus, the statement was relevant regarding her credibility. Moreover, she wavered regarding whether she made the statement in the first instance. Initially, she did not recall making the statement, but then testified that she did not make the statement. Thereafter, she again testified that she could not recall making the statement. Finally, she testified that if Sergeant Elliott's report stated that she made the statement, then she must have made it. Because she wavered regarding whether she made the statement, the trial court properly allowed the prosecutor, over defense counsel's objection, to elicit testimony from Sergeant Elliott regarding the statement. Such evidence was relevant regarding Andrea's credibility. Moreover, the trial court gave a limiting instruction under MRE 105 regarding the proper use of the evidence. Accordingly, the evidence was properly admitted.

Finally, defendant contends that the evidence was insufficient to support his convictions. When determining whether sufficient evidence exists to support a conviction, a court must view the evidence in the light most favorable to the prosecution and determine whether a rational factfinder could conclude that the prosecutor proved every element of the crime charged beyond a reasonable doubt. *People v Sherman-Huffman*, 466 Mich 39, 40-41; 642 NW2d 339 (2002); *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). A reviewing court must draw all reasonable inferences and make credibility determinations in support of the jury verdict. *Id.* at 400. Circumstantial evidence and reasonable inferences drawn therefrom can constitute sufficient proof of the elements of an offense. *Id.*; *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

First-degree felony murder includes murder committed in the perpetration of, or attempted perpetration of, criminal sexual conduct in the first, second, or third degree. MCL 750.316(1)(b); *People v Akins*, 259 Mich App 545, 552; 675 NW2d 863 (2003). In addition, "[t]he elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Fletcher*, 260 Mich App 531, 559; 679 NW2d 127 (2004), quoting *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Malice includes the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *Goecke, supra* at 464; *Fletcher, supra* at 559. "Malice can be inferred from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm." *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998). Second-degree murder, however, is a general intent crime. *Fletcher, supra* at 559.

Contrary to defendant's argument that the evidence was insufficient to support his convictions, the evidence was overwhelming. Two witnesses saw defendant's car traveling down Thomas Street at around the time Seabold was killed. Carpet fibers consistent with the carpet in the bedroom where Seabold was killed were found on defendant's clothing despite defendant's claim that he had never been in the room. Defendant described the offense in detail

to Turner, Dunlap, and Cornelius Harris, including slashing Seabold's throat because she refused to engage in sexual intercourse with him. Although Harris told Detective-Sergeant Miller certain information that was at odds with the testimony of Turner and Dunlap and the physical evidence, Harris' credibility was for the jury to determine. In any event, Harris provided numerous other details that Turner and Dunlap corroborated. Further, when Deputy Lanfear interviewed defendant and asked "why this would have happened," defendant responded, "She screamed."

The above evidence, along with reasonable inferences drawn from the evidence, was sufficient to support defendant's convictions. Defendant admittedly killed Seabold because she refused to submit to his attempt to have sexual intercourse with her. She was also found lying on the floor with her buttocks exposed and her pants and underwear pulled down between her hips and knees. Further, an intent to kill Seabold can be inferred from the fact that defendant slashed Seabold's throat until he nearly severed her head. Accordingly sufficient evidence was presented to support defendant's convictions of first-degree felony murder and second-degree murder.

We vacate defendant's conviction and sentence for second-degree murder and affirm the remaining conviction and sentence.

/s/ Pat M. Donofrio

/s/ William B. Murphy

/s/ Stephen L. Borrello