STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 17, 2013
v	No. 311047 Wayne Circuit Court
ROBERT QUINTONE CRUMMIE, Defendant-Appellant.	LC No. 11-004659-FC

Before: MURPHY, C.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant was convicted of felony murder, MCL 750.316(1)(b); armed robbery, MCL 750.529; two counts of assault with intent to commit armed robbery, MCL 750.89; and possession of a firearm during the commission of a felony, MCL 750.227(b) following a jury trial. The trial court sentenced defendant to concurrent terms of life imprisonment for the felony murder conviction and 70 months to 20 years' imprisonment for the assault with intent to commit armed robbery and armed robbery convictions, which were to be served consecutive to a two-year sentence for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise from an illegal gun transaction. The victim, Marcus Norris, had contacted his cousin Michael Johnson seeking to purchase a weapon. An acquaintance of Johnson, Robert Doss, who was with Johnson at the time, telephoned a man known as "Cease" about purchasing a gun. Doss and Cease arranged the transaction. Johnson, Doss and Norris drove to the planned location and met with the defendant, who Cease had sent to sell Norris a gun. After Norris had paid defendant for the gun, defendant turned the loaded gun toward Norris, Johnson and Doss, and demanded all their money. Johnson and Doss were able to escape from the car and left Norris behind. Norris and defendant wrestled for the gun and Norris was shot in the process.

On appeal, defendant first argues that the trial court erred when it denied his renewed motion for a directed verdict. Specifically, defendant contends that the prosecution failed to present evidence that he acted with malice and that Marcus Norris' death occurred during the perpetration of the predicate felony.

We review a trial court's ruling on a renewed motion for a directed verdict under the same standard as a challenge to the sufficiency of the evidence. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001); *People v Lewis (On Remand)*, 287 Mich App 356, 365;

788 NW2d 461 (2010), aff'd in part and vacated in part on other grounds 490 Mich 921 (2011). "A claim of insufficient evidence is reviewed de novo, in a light most favorable to the prosecution, to determine whether the evidence would justify a rational jury's finding that the defendant was guilty beyond a reasonable doubt." *Lewis (On Remand)*, 287 Mich App at 365 (quotation omitted). We are "required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Felony murder is the killing of a human being, with malice, "while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.31(1)(b)." *People v Bobby Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007) (quotation and alteration omitted); see also MCL 750.316(1)(b) (stating that a person is guilty of first-degree murder if he commits a murder "in the perpetration of, or attempt to perpetrate" an enumerated felony). A felony is ongoing until the perpetrator has escaped. *People v Gillis*, 474 Mich 105, 116; 712 NW2d 419 (2006) (quotation and alterations omitted). Therefore, a homicide committed during an attempt to escape "is committed in the perpetration of that felony." *Id*. When determining whether a murder was committed during the "unbroken chain of events surrounding the predicate felony" and, therefore, occurred during the perpetration of that felony, a jury should consider the "(1) time; (2) place; (3) causation; and (4) continuity of action" between the predicate felony and the murder. *Id*. at 125, 127.

Robbery is a predicate offense to felony murder. MCL 750.316(1)(b). Armed robbery occurs when

> (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).]

A homicide that occurs during the commission of a crime, including a felony, constitutes murder only if the defendant acted with malice. *People v Holtschlag*, 471 Mich 1, 9; 684 NW2d 730 (2004); *People v Aaron*, 409 Mich 672, 727-728; 299 NW2d 304 (1980). A defendant acts with malice if he possessed "an intent to kill, an intent to commit great bodily harm, or an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result." *Gillis*, 474 Mich at 138. For purposes of felony murder, malice may not be proven solely by showing that a defendant intended to commit the underlying felony, but the fact that a defendant committed a felony may still be relevant evidence that he acted with malice. *Holtschlag*, 471 Mich at 9, 10 n 6.

The evidence, when viewed in the light most favorable to the prosecution, would justify a rational jury's finding that defendant shot Norris during the perpetration of the armed robbery. *Lewis (On Remand)*, 287 Mich App at 365. Investigator Charles Weaver, the officer in charge of

the investigation, in his written synopsis of his interview with defendant noted that defendant admitted that, although he did not initially intend to go through with the robbery, he changed his mind when he saw that the other men in the car, Michael Johnson and Robert Doss, were speaking with "Cease" on the telephone. According to Johnson and Doss, defendant, once in the car, refused to remove the bullets from the gun and, after receiving money from Norris for the gun, pointed the gun at the men in the car and instructed them to empty their pockets and give him their money. Johnson attempted to give defendant some money and Doss attempted to hand over his cellular telephone. Defendant then pointed the gun at Norris, who grabbed it, and a struggle over the gun ensued. The struggle ended when Norris was shot. Because defendant had not yet escaped from the location of the armed robbery when Norris was shot, a rational jury would be justified in finding that Norris' death occurred during the perpetration of the armed robbery.

In addition, the evidence, when viewed in the light most favorable to the prosecution, would justify a rational jury's finding that defendant acted with malice. *Id.* As previously stated, defendant admitted to Weaver that, although he initially decided not to go through with the robbery, he changed his mind when he saw that the men in the car were talking on the telephone to Cease. Although defendant's intent to commit the armed robbery is not dispositive of whether defendant acted with malice, it remains relevant evidence. *Holtschlag*, 471 Mich 9, 10 n 6. Defendant's intent to commit the armed robbery, along with the evidence that defendant had a loaded gun, refused to remove the bullets after twice being asked to do so, and pointed the gun at the men in the car, while robbing them, would justify a rational jury in finding that, at the very least, defendant intentionally created a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. *Gillis*, 474 Mich at 138. The trial court did not err in denying defendant's renewed motion for a directed verdict.

Next, defendant argues that the trial court erred when it found that the prosecution exercised due diligence in its efforts to produce Doss at trial.[1] We review a trial court's finding of due diligence for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004). "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

Due diligence is satisfied when the prosecution makes a good faith effort to do "everything reasonable, not everything possible, to obtain the presence of" a witness at trial. *People v Watkins*, 209 Mich App 1, 4; 530 NW2d 111 (1995). It requires that "serious pre-trial efforts [be made] to locate and subpoena the missing witness." *People v Cummings*, 171 Mich App 577, 586; 430 NW2d 790 (1988). "Where there are no leads as to a witness's whereabouts, the prosecutor should inquire of known persons who might reasonably be expected to have information that would help locate the witness. Where there are specific leads as to a witness's location, the prosecutor must check them out." *People v Starr*, 89 Mich App 342, 346; 280

[1] The result of the trial court's due diligence finding was that Doss's preliminary examination testimony was read into the record. See MRE 804(a)(5), (b)(1).

NW2d 519 (1979). The test for due diligence does not, however, require "a determination that more stringent efforts would not have produced the testimony." *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). The test is one of reasonableness and depends on the facts and circumstances of each case. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998); *People v Dye*, 431 Mich 58, 67; 427 NW2d 501 (1988).

At the due diligence hearing, Weaver testified regarding his efforts to produce Doss at trial. He began his search for Doss immediately after learning of the trial date and continued his efforts up until the day of the due diligence hearing. He called the telephone number and visited the address Doss had listed on his witness statement. The man who answered Weaver's telephone call told Weaver that he had the wrong number, and Weaver received no response at the address. Weaver contacted Doss' mother, who said that she was not in contact with Doss. He checked with the United States Postal Service for a forwarding address for Doss, but there was none. He contacted the Department of Agriculture to see if Doss had been assigned a Bridge Card, but there was no card assigned to him. The department gave Weaver an address for Doss' father, who possessed a Bridge Card. Weaver went to that address, but Doss' father no longer lived there. Weaver checked the Law Enforcement Information Network, but the system did not have a current address for Doss. In addition, Weaver contacted Doss' former school, the Oakland County Probation Department, local jails, and the Michigan Department of Corrections.

We conclude that the trial court did not abuse its discretion in finding that the prosecution exercised due diligence. *Eccles*, 260 Mich App at 389. As summarized above, Weaver made serious pretrial efforts to locate Doss, *Cummings*, 171 Mich App at 586, and there were no specific leads that Weaver did not follow, *Starr*, 89 Mich App at 346. Even if there were additional methods that Weaver could have used to locate Doss, the due diligence standard does not require that all efforts be exhausted. *Watkins*, 209 Mich App at 4. We reject defendant's argument that, because Doss had refused to provide Weaver with his home address before the preliminary examination, due diligence should have required the prosecution to obtain a detainer bond for Doss. Doss had not only provided an address and a telephone number in his witness statement, but the prosecutor at the time of the preliminary examination believed that Doss would appear for trial. It was on this recommendation that Weaver did not obtain a detainer bond. Under the circumstances, the trial court's determination that due diligence was exercised did not fall outside the range of reasonable and principled outcomes. *Young*, 276 Mich App at 448.

Finally, defendant argues that the trial court erred by not instructing the jury on the offenses of careless, reckless, or negligent discharge of a weapon with injury or death resulting and involuntary manslaughter. A claim of instructional error is reviewed de novo. *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003). However, we review a trial court's determination whether a jury instruction is applicable to the facts of the case for an abuse of discretion. *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002).

MCL 768.32(1) provides that "upon an indictment for an offense, consisting of different degrees . . . the jury . . . may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense." Inferior offenses under MCL 768.32(1) are limited to necessarily included lesser offenses, the elements of which are

"completely subsumed in the greater offense." *People v Mendoza*, 468 Mich 527, 540; 664 NW2d 685 (2003); *People v Randy Smith*, 478 Mich 64, 69; 731 NW2d 411 (2007). A trial court must give a requested instruction on a necessarily included lesser offense "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, 361; 646 NW2d 127 (2002). Conversely, instructions on cognate lesser offenses are not permissible. *People v Heft*, 299 Mich App 69, 74; 829 NW2d 266 (2012). Cognate offenses are those that "share several elements, and are of the same class or category, but may contain some elements not found in the higher offense." *Cornell*, 466 Mich at 345 (quotation omitted).

The trial court did not err in failing to instruct the jury on careless, reckless, or negligent discharge of a weapon with injury or death resulting, MCL 752.861. To prove careless, reckless, or negligent discharge of a firearm with injury or death resulting, the prosecution must show that the defendant, "because of carelessness, recklessness or negligence, but not willfully or wantonly, . . . cause[d] or allow[ed] any firearm under his immediate control, to be discharged so as to kill or injure another person." MCL 752.861. The discharge of a firearm is an element of careless, reckless, or negligent discharge of a firearm with injury or death resulting. *People v Lowry*, 258 Mich App 167, 174; 673 NW2d 107 (2003). It is not an element of felony murder, however. See *Bobby Smith*, 478 Mich at 318-319 (listing the elements of felony murder). Consequently, it is possible to commit felony murder without first committing the crime of careless, reckless, or negligent discharge of a firearm with injury or death resulting. Therefore, the offense of careless, reckless, or negligent discharge of a weapon with injury or death resulting is a cognate offense of felony murder, *Mendoza*, 468 Mich at 540; *Heft*, 299 Mich App at 74, and the trial court was prohibited under MCL 768.32(1) from instructing the jury on it, *Cornell*, 466 Mich at 359.

Involuntary manslaughter is a necessarily included lesser offense of murder. *Mendoza*, 468 Mich at 533. Thus, defendant was entitled to an instruction on involuntary manslaughter if a rational view of the evidence supported it. *Cornell*, 466 Mich at 357. "Manslaughter is the unlawful and felonious killing of another without malice, either express or implied." *Holtschlag*, 471 Mich at 6 (quotation omitted). The presence of malice is the sole difference between murder and manslaughter. *Randy Smith*, 478 Mich at 70. If a homicide that is not justified or excused was committed with malice, it is murder. *Gillis*, 474 Mich at 138. If it is not voluntary manslaughter and was "committed with a lesser mens rea of gross negligence or an intent to injure, and not malice, it is not murder, but only involuntary manslaughter." *Id.*

The only evidence in support of an involuntary manslaughter instruction was defendant's statement to Weaver. Defendant told Weaver that, although he did not initially intend to go through with the robbery, he changed his mind when he saw that the men in the car were speaking to Cease He also told Weaver that he showed the gun to the men in the car. Defendant's statement was silent on the issue whether he pointed the gun at the men in the car, but both Johnson and Doss testified that he did. Furthermore, defendant stated that he attempted to leave the car with the gun and the money Norris had paid for it. Norris grabbed the gun, and a struggle over the gun ensued, during which Norris was fatally shot.

A rational view of defendant's statement may support a finding that he did not have the intent to kill or to do great bodily harm, but it does not support a conclusion that he did not intend to commit acts that created a high risk of death or great bodily harm and did not know that death or great bodily harm was a probable result of his actions. *Gillis*, 474 Mich at 138. Defendant, by his own statement, never intended to sell a gun to the men in the car. He intended to commit a robbery against them. Moreover, he brought a loaded gun to that robbery, a gun that he knew the men were expecting to buy. Regardless whether defendant pointed the gun at the men, he did not keep the gun hidden from them. He showed it to them. Under these facts, it would be irrational to "conclude that defendant's actions" in bringing a loaded gun into a car with men who he intended to rob, knowing that they expected him to bring a gun "were anything other than acts that 'create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result.'" *Id*. at 139. Therefore, "[n]o rational view of the evidence could support a finding of gross negligence or an intent to injure without malice." *Id*. The trial court did not err by failing to give an involuntary manslaughter instruction.

Affirmed.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens