State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 20, 2019 109584

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
v MEMORANDUM AND ORDER

ROBERT HENRY,
Appellant.

Calendar Date: May 1, 2019

Before: Egan Jr., J.P., Lynch, Devine, Aarons and Rumsey, JJ.

Paul J. Connolly, Delmar, for appellant.

Jason M. Carusone, District Attorney, Lake George (Rebecca Nealon of counsel), for respondent.

Rumsey, J.

Appeal from a judgment of the County Court of Warren County (Hall Jr., J.), rendered May 16, 2017, upon a verdict convicting defendant of the crimes of murder in the second degree, robbery in the first degree, burglary in the first degree, grand larceny in the fourth degree (four counts), criminal possession of stolen property in the third degree and unauthorized use of a vehicle in the first degree.

In July 2016, defendant was charged by indictment with murder in the second degree, robbery in the first degree, burglary in the first degree, four counts of grand larceny in the fourth degree, criminal possession of stolen property in the

third degree and unauthorized use of a vehicle in the first degree based on allegations that defendant and Kevin Chapman entered the victim's home under false pretenses, restrained the victim before strangling him to death, looted the victim's home and stole the victim's Cadillac. After a jury trial, defendant was convicted as charged and was sentenced, as a persistent violent felony offender, to prison terms of 25 years to life for his convictions of murder in the second degree, burglary in the first degree and robbery in the first degree and, as a persistent nonviolent felony offender, to prison terms of 25 years to life for his convictions of grand larceny in the fourth degree, criminal possession of stolen property in the third degree and unauthorized use of a vehicle in the first degree.[1] All sentences are to run concurrently, except the sentence imposed for unauthorized use of a vehicle in the first degree, which is to run consecutively to the sentences imposed on the other convictions. Defendant appeals.

We first consider defendant's contention that County Court committed reversible error because the record fails to establish that the court provided defense counsel with meaningful notice of the contents of a jury note. CPL 310.30 provides that, "[a]t any time during its deliberations, the jury may request the court for further instruction or information with respect to . . . any . . . matter pertinent to the jury's consideration of the case. Upon such request, the court must direct that the jury be returned to the courtroom and, after notice to both the [P]eople and counsel for the defendant, and in the presence of the defendant, must give such requested information or instruction as the court deems proper." The Court of Appeals has held that "CPL 310.30 imposes two responsibilities on trial courts upon receipt of a substantive note from a deliberating jury: the court must provide counsel with meaningful notice of the content of the note, and the court must provide a meaningful response to the jury. Meaningful notice means notice of the actual specific content of the jurors' request. The purpose of this requirement is to give counsel an opportunity to

[1] Chapman pleaded guilty to murder in the second degree in full satisfaction of all charges against him arising from the incident.

participate in the formation of a response to the jury's substantive inquiry. . . . [W]hen the trial court fails to provide counsel with meaningful notice of a substantive jury note, a mode of proceedings error has occurred and reversal is required" (People v Parker, 32 NY3d 49, 58-59 [2018] [internal quotation marks, ellipses, brackets and citations omitted]).

During deliberations, the jury sent a note to County Court that stated: "Repeat Count 1 Murder 2nd in whole [and] Define 'In concernt [sic] with.'" The entire record regarding the jury note consists of the court stating that the note had been marked as a court exhibit and, after informing the jury that it had received the note, the court then stating that "[t]he lawyers and I just discussed it. We decided it was a pretty simple note. You'd like me to repeat the instructions on Count 1, that's Murder in the Second on a whole, that would include the affirmative defense. Also define what it means to be acting in concert with. So I'll read that part too." There were no objections, and the court proceeded to read the complete instructions, including burden of proof, on murder in the second degree, which included robbery in the second degree and its elements, the complete instructions and burden of proof on the affirmative defense, and the complete instructions and burden of proof on accessorial conduct.

Notably, although the record shows that County Court and counsel engaged in an off-the-record conference during which the note was discussed, without a record of the discussion, we have only the court's response to the jury concerning the note. A divided Court of Appeals has held that meaningful notice is not provided where there is no record indicating that counsel was informed of the "precise contents" of the note before the response is given to the jury, or where the trial court paraphrases or summarizes a jury note (People v Parker, 32 NY3d at 59; see People v Mack, 27 NY3d 534, 542 [2016]). Given the court's statement to the jury that it had an off-the-record conversation with counsel regarding the note, it would not be unreasonable to believe that County Court had informed counsel of the note's precise contents. However, the record contains no specific indication that the court provided counsel with the

precise content of the note before it delivered its response to the jury, nor was the note read verbatim on the record before the response was given. Thus, the record fails to establish that counsel had the opportunity to participate in the formation of the court's response to the jury's substantive inquiry. In that regard, we note that the jury did not specifically refer to "instructions" or the "affirmative defense," which formed the basis of the court's response to the jury. Thus, on this record, we are constrained to follow the Court of Appeals' admonition that defense counsel's awareness of the existence and "gist" of a jury note does not satisfy the "affirmative obligation [of] a trial court to create a record of compliance under CPL 310.30 and [People v O'Rama (78 NY2d 270 [1991])]" (People v Morrison, 32 NY3d 951, 952 [2018] [internal quotation marks and citation omitted]; see People v Walston, 23 NY3d 986, 990 [2014]). Inasmuch as the note related solely to count 1 of the verdict sheet (count 11 of the indictment) concerning murder in the second degree, defendant's conviction for this crime only must be reversed and that count dismissed (see People v Walston, 23 NY3d at 990).

As to his remaining convictions, defendant contends that they were not supported by legally sufficient evidence and were against the weight of the evidence. "When reviewing a legal sufficiency claim, we view the evidence in the light most favorable to the People and evaluate whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial and as a matter of law satisfy the proof and burden requirements for every element of the crime charged" (People v Haggray, 164 AD3d 1522, 1524 [2018] [internal quotation marks and citations omitted], lv denied 32 NY3d 1111 [2018]).[2] "In conducting a weight of the evidence review, we

[2] Defendant's legal sufficiency challenge to his convictions for grand larceny in the fourth degree was not preserved for our review because defense counsel did not move for dismissal of these four counts (see People v Vega, 170 AD3d 1266, 1267 [2019]). Nevertheless, when conducting our weight of the evidence review, we must determine whether each element of this crime was proven beyond a reasonable doubt (see id.; People

view the evidence in a neutral light and determine first whether a different verdict would have been unreasonable and, if not, weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony to determine if the verdict is supported by the weight of the evidence" (People v McCoy, 169 AD3d 1260, 1261-1262 [2019] [internal quotation marks and citations omitted], lv denied ___ NY3d ___ [May 15, 2019]).

As relevant here, a person is guilty of robbery in the first degree "when he [or she] forcibly steals property and when, in the course of the commission of the crime . . ., he [or she] or another participant in the crime . . . [c]auses serious physical injury to any person who is not a participant in the crime" (Penal Law § 160.15 [1]). A person is guilty of burglary in the first degree when he or she knowingly enters a dwelling with the intent to commit a crime therein and, while in the dwelling, causes physical injury to any person who is not a participant in the crime (see Penal Law § 140.30 [2]). As charged herein, a person is guilty of grand larceny in the fourth degree when he or she steals property having a value of more than $1,000, or steals a credit or debit card or steals a motor vehicle having a value exceeding $100 (see Penal Law § 155.30 [1], [4], [8]). A person is guilty of criminal possession of stolen property in the third degree when he or she knowingly possesses stolen property having a value exceeding $3,000 with the intent to benefit any person other than the owner thereof (see Penal Law § 165.50). Finally, a person is guilty of unauthorized use of a vehicle when, knowing that he or she does not have the consent of the owner, he or she "exercises control over . . . or otherwise uses a vehicle with the intent to use the same in the course of or the commission of a . . . felony" (Penal Law § 165.08).

Turning to the events leading up the incident, Crystal Quayle testified that, in July 2016, she was living at a motel in the Village of Ilion, Herkimer County when defendant, who also lived at the motel, asked her to accompany him to the City

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v Junior, 119 AD3d 1228, 1229 [2014], lv denied 24 NY3d 1044 [2014]).

of Glens Falls, Warren County the next day – July 6, 2016 – to have sex with someone while defendant robbed him; she declined. The next day, she had a conversation with Chapman, who also tried to convince her to accompany him and defendant to the victim's residence to assist in the planned robbery. Quayle also declined Chapman's request; after she gave Chapman $5 to purchase gas for the trip to Glens Falls, she observed Chapman walking to defendant's room at the motel. Quayle further testified that, based on her conversations with defendant and Chapman, neither of them intended to have sex with the victim. Another resident of the motel, Vanessa Hempstead, testified that, on the evening of July 6, 2016, defendant asked her for gas money to drive to Glens Falls. After she gave defendant $7, she saw him driving a van owned by his girlfriend, Janet Johnson, with Chapman in the passenger seat. The manager of the motel testified that defendant stated that he planned to drive to a place in Glens Falls to rob it and that he was looking for a woman to participate by engaging in sexual activity with the victim during the robbery. On July 6, 2016, the day of the incident, the motel manager observed Chapman leaving the motel with a gun that Chapman waved at him before Chapman got into a van being driven by defendant.

The victim's daughter testified that the victim lived in an apartment located in Glens Falls and that the victim identified as a gay man. A series of electronic messages exchanged between defendant and the victim revealed that the victim had posted an ad on Craigslist seeking a sexual encounter with another man or men. On July 5, 2016, defendant responded to the ad by asking the victim if he was available to have a sexual encounter with defendant and defendant's friend on July 6, 2016. The victim responded affirmatively and provided defendant with his address. On July 6, 2016, defendant and the victim exchanged additional messages confirming a meeting later that day at the victim's residence.

Chapman testified that, on July 6, 2016, defendant asked him for assistance in robbing the victim and offered Chapman 40% of the proceeds. Chapman believed that his role would be to place stolen property in the van or to serve as a lookout and

that there was never any discussion of potential sexual conduct with the victim. Chapman also stated that, in response to defendant's request, he provided defendant with a BB gun to use during the robbery. Chapman testified that he accompanied defendant to the victim's residence in Johnson's van and that, after he and defendant entered the victim's home, the victim began asking Chapman about his sexual preferences. According to Chapman, defendant then called the victim and Chapman into the bedroom where defendant removed his clothes, except for his underwear, and the victim completely undressed. Chapman stated that, as the victim began to get into the bed, defendant jumped on him, pulled out the gun, put it to the victim's head and asked the victim for his wallet, credit cards and personal identification numbers for the cards. Chapman testified that defendant then told him to bind the victim; Chapman bound the victim's ankles with two socks and defendant used two socks to tie the victim's arms.

Chapman further testified that, after the victim provided the personal identification numbers, defendant went to a nearby Family Dollar store and made a purchase to confirm that he could use the cards. When defendant returned, Chapman and defendant loaded items from the victim's residence into the van and the victim's Cadillac. Chapman further testified that after stolen items were loaded into the van and the Cadillac, he restrained the victim while defendant used a cord from a television to choke the victim. When defendant was unable to kill the victim with the cord, he used his hands to strangle the victim to death. Chapman drove the Cadillac and defendant drove the van as they returned to the motel, making stops along the way at an ATM to withdraw cash, at an automobile store to repair a broken headlight and to purchase gas. Chapman admitted that any prior inconsistent statements that he had given to the police and had made during his plea allocution were lies.

Bank records confirmed that purchases were made with the victim's credit cards on July 6, 2016 at the Family Dollar store located near the victim's residence, at an automobile store and at a gas station, where a video recording depicted defendant making purchases. Bank records further confirmed that the

victim's card was used to withdraw cash from two different ATMs and to make purchases at several other stores, and that it was also used in an unsuccessful attempt to make a purchase at a Walmart store where a video recording depicted defendant attempting to complete the transaction.

Quayle testified that, during the evening of July 6, 2016, she observed a Cadillac in the parking lot of the motel and that the next day Chapman asked her if she knew of someone who could trade a gold watch for cocaine. Hempstead similarly testified that, on the evening of July 6, 2016, she observed Chapman pulling into the parking lot of the motel driving a Cadillac and that he later asked her if she knew where "to get rid of the Cadillac [Chapman] was driving for $5,000." Hempstead and several other witnesses also testified that they saw Chapman and defendant retrieving some items from the Cadillac and taking them into defendant's room at the motel.

On July 7, 2018, the victim's daughter discovered the victim's body in his bedroom and called 911. The victim's missing phone was tracked to the motel. On July 8, 2016, Chapman was taken into custody and, after a search warrant was obtained, the police recovered numerous items of the victim's personal property from Chapman's and defendant's motel rooms. The police also recovered items of the victim's personal property from the motel room of Johnson, who testified that they had been given to her by defendant.

Forensic pathologist Michael Sikirica testified that he performed an autopsy on the victim and concluded that the victim's death was a homicide caused by strangulation from the application of force by the hands of another person. Sikirica also opined that the lack of struggle by the victim – who weighed over 200 pounds – indicated that at least two people participated in killing the victim, with one restraining him as the other strangled him.

During a recorded interview made after he was arrested, defendant gave varying accounts of the incident. Initially, defendant stated that he knew the victim, acknowledged that he

went to the victim's residence with the intent to rob the victim, but remained in the car waiting for Chapman, and he did not observe the victim's death. He then changed his story by admitting that he was in the bedroom for a few minutes and observed the victim tied up with a sock in his mouth. Defendant then again changed his version of the events by stating that he was stealing jewelry from the victim's bedroom while the victim was tied up. Finally, defendant acknowledged that he witnessed the victim's death when he went into the bedroom and saw Chapman strangle the victim. Defendant admitted that his purpose in going to the victim's residence was to rob the victim, that he used the victim's credit cards and that he had been in possession of the stolen items from the victim's residence.

The People also submitted a letter that defendant wrote to his defense attorney and sent to Johnson, which corroborated the final version of events that defendant related during his postarrest interview. In the letter, defendant stated that, after Chapman told him that Chapman needed to make some money quickly, he offered to drive Chapman to the victim's residence where the victim would pay Chapman for sex. Upon arrival, Chapman and the victim went into the victim's bedroom. After approximately 20 minutes, Chapman exited the bedroom and defendant looked into the room where he observed the naked victim tied to the bed with a sock in his mouth. When defendant attempted to untie the victim, Chapman pointed the gun at defendant and told defendant that "something bad" would happen to Johnson's mother if defendant failed to follow Chapman's directions. Chapman and defendant then loaded the stolen items into the vehicles and Chapman directed defendant to wait in the van. After a long wait, defendant returned to the victim's bedroom where he saw Chapman sitting on top of the victim and pushing a pillow into the victim's face. Defendant further wrote in the letter that after Chapman stated "it's done," they left the victim's residence.

When viewed in a light most favorable to the People, the foregoing evidence provided a valid line of reasoning and permissible inferences from which a rational jury could conclude that defendant and Chapman planned to rob the victim, used

deception to enter his residence for the purpose of committing the robbery, forcibly restrained the victim before killing him and used his automobile to complete their commission of the robbery. Thus, the evidence was legally sufficient to support the convictions for robbery in the first degree, burglary in the first degree, criminal possession of stolen property in the third degree and unauthorized use of a vehicle in the first degree. As to the weight of the evidence, we conclude that a different verdict would have been unreasonable, as to these convictions, as well as the four convictions of grand larceny in the fourth degree, and reject this claim outright (see People v Cloonan, 166 AD3d 1063, 1065 [2018]; People v Wheeler, 159 AD3d 1138, 1140 [2018], lv denied 31 NY3d 1123 [2018]).[3]

We are unconvinced by defendant's argument that County Court erred in refusing to suppress statements that he made to police during a recorded interrogation. Defendant concedes that he received Miranda warnings, but contends that any subsequent waiver of those rights was conditioned on his understanding that the interview was not being recorded and, therefore, the fact that the police officers lied to him when they told him that the interview was not being recorded rendered his statements involuntary.[4] "The police are permitted to lie or use some deceptive methods in their questioning as long as the deception was not so fundamentally unfair as to deny due process [and] was not so extensive as to induce a false confession or overcome [a] defendant's will" (People v Berumen, 46 AD3d 1019, 1020-1021 [2007] [internal quotation marks, brackets and citations omitted], lv denied 10 NY3d 808 [2008]). The police did not coerce or threaten defendant, who testified that he preferred that his statement not be recorded so that he could be more at ease. Notably, defendant further testified that he suspected the interview was being recorded. Under these circumstances,

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[3] As previously noted, the murder conviction has been reversed and the legal sufficiency challenge as to the grand larceny convictions was not preserved.

[4] Defendant provided no legal authority for the novel argument that a defendant may condition the waiver of his or her Miranda rights.

County Court properly denied defendant's motion to suppress the statements that he made during the interview (see People v Weaver, 167 AD3d 1238, 1240-1244 [2018], lv denied 33 NY3d 955 [2019]).

Defendant also contends that County Court erred by admitting a letter that defendant wrote to his counsel on the basis that it was protected by the attorney-client privilege. Defendant authored the handwritten letter while he was in jail and sent it to Johnson with instructions that she forward it to his counsel and retain a copy. Defendant contends that he sent the letter via Johnson rather than directly to his counsel because he feared that jail officers were tampering with his mail.[5] "The attorney-client privilege, which is codified in CPLR 4503 (a), enables one seeking legal advice to communicate with counsel for this purpose secure in the knowledge that the contents of the exchange will not later be revealed against the client's wishes. The privilege belongs to the client and attaches if information is disclosed in confidence to the attorney for the purpose of obtaining legal advice or services" (People v Osorio, 75 NY2d 80, 84 [1989] [internal citation omitted]). Although communications made between a defendant and his or her counsel in the known presence of a third party are not privileged, communications made to counsel through one serving as an agent of either the attorney or the client to facilitate communication will be privileged if the client had a reasonable expectation of confidentiality under the circumstances (see id.).

In these circumstances, we conclude that Johnson was acting as defendant's agent. Thus, whether the letter was protected by the attorney-client privilege turns on whether

[5] We note that, if defendant's fears were true, jail officers could have read or tampered with defendant's outgoing mail whether it was addressed to his counsel or to Johnson; thus, sending the letter to Johnson would not necessarily protect against defendant's fears. Nevertheless, we have assumed for purposes of our analysis that defendant expected that sending the letter to Johnson would protect it from being intercepted or copied by jail personnel.

defendant had a reasonable expectation of confidentiality when he sent it to Johnson. In that regard, there was contradictory evidence regarding whether defendant authorized Johnson to share a copy of the letter with her mother, which County Court resolved by determining that defendant had authorized disclosure to Johnson's mother.[6] The determination that defendant specifically authorized disclosure of the letter to a third party, i.e., Johnson's mother, established that defendant had no reasonable expectation of confidentiality and, therefore, defeated the attorney-client privilege. Thus, County Court did not err in admitting the letter.

Defendant argues that County Court erred in denying his motion to suppress the evidence that was seized from his motel room because the police had searched his room before they obtained a search warrant. State Police investigator Susannah Rose testified that she went to the motel on July 8, 2016 at approximately 7:00 p.m. with four other police officers to investigate the incident, and she arrested Chapman. It is undisputed that police officers continuously observed the entrance to defendant's room from 8:55 p.m. on July 8, 2016 until 9:00 a.m. on July 9, 2016 and nobody entered his room during this time. Defendant conceded that the only time during which the police officers could have entered the room prior to obtaining the search warrant at 7:51 a.m. on July 10, 2016 was

[6] In a pretrial hearing considering the admissibility of the letter, a recording of a phone call that defendant made to Johnson from jail was played. As summarized by County Court, during the call, defendant expressed his anger at Johnson for having shared a copy of the letter with individuals other than her mother. Based on this recorded conversation, County Court concluded that defendant had authorized Johnson to disclose the contents of the letter to her mother. At trial, Johnson testified that defendant instructed her that she was not to share a copy of the letter and, over defendant's objection, County Court adhered to its original determination. The phone call is not part of the record on appeal, thus, we must defer to County Court's resolution of this factual issue based on its ability to listen to the call and consider the credibility of Johnson's trial testimony.

from 7:45 p.m. through 8:55 p.m. on July 8, 2016, and he contends that, based on the testimony of the motel manager, police entered the room during that time. County Court conducted a Mapp hearing and heard testimony from several police officers who were at the scene that the police did not enter defendant's room during the disputed time period. We must accord great deference to County Court's factual determination and, therefore, discern no basis upon which to disturb its denial of defendant's motion to suppress the evidence that was seized from his motel room (see People v Cummings, 157 AD3d 982, 984-985 [2018], lv denied 31 NY3d 982 [2018]; People v Hayden, 155 AD3d 1309, 1310 [2017]).

We also reject defendant's argument that the grand jury proceeding was defective. "Inasmuch as the verdict was not against the weight of the evidence, it was necessarily founded upon legally sufficient evidence, and, as a result, defendant's challenges to the grand jury proceeding are precluded to the extent they involve the sufficiency of the evidence presented or the instructions given to the grand jury" (People v Secor, 162 AD3d 1411, 1413 [2018] [internal quotation marks and citations omitted], lv denied 32 NY3d 941 [2018]; accord People v Robinson, 156 AD3d 1123, 1128 n 8 [2017], lv denied 30 NY3d 1119 [2018]). Our review of the grand jury minutes shows that a quorum was present and does not reveal any flaw in the proceeding that would "'warrant the exceptional remedy of reversal'" (People v Secor, 162 AD3d at 1413, quoting People v Robinson, 156 AD3d at 1128 n).

We find no error in County Court's sentencing of defendant as a persistent felony offender. Defendant concedes that his criminal history satisfied the definition of a persistent felony offender pursuant to Penal Law § 70.10. Moreover, nothing in the record suggests that County Court abused its discretion by determining that defendant should be sentenced as a persistent felony offender in light of his extensive criminal history and the violent nature of the crimes for which he was convicted (see People v Swartz, 160 AD3d 1296, 1296 [2018]).

Finally, defendant contends that County Court was not authorized to make the sentence for his conviction of unauthorized use of a vehicle in the first degree run consecutively to the sentences imposed on the other convictions. "Penal Law § 70.25 (2) mandates that concurrent sentences be imposed for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other. . . . [T]o determine whether consecutive sentences are permitted, a court must first look to the statutory definitions of the crimes at issue to discern whether the actus reus elements overlap. Even where the crimes have an actus reus element in common, the People may yet establish the legality of consecutive sentencing by showing that the acts or omissions committed by [the] defendant were separate and distinct acts. Conversely, where the actus reus is a single inseparable act that violates more than one statute, a single punishment must be imposed" (People v Rodriguez, 25 NY3d 238, 244 [2015] [internal quotation marks, brackets and citations omitted]).

County Court charged the jury that a person is guilty of unauthorized use of a vehicle in the first degree when, "knowing that he or she does not have the consent of the owner[,] that person takes, operates, exercises control over, rides in or otherwise uses a vehicle with the intent to use the vehicle in the course or commission of [r]obbery in the [f]irst [d]egree[,] . . . or in the immediate flight therefrom" (see Penal Law § 165.08). The People concede, and we agree, that the sentence for unauthorized use of a vehicle in the first degree may not run consecutively to the sentence for robbery in the first degree, which is an element of unauthorized use of a vehicle in the first degree in this case.[7] We further conclude that the sentence for unauthorized use of a vehicle in the first degree may not run consecutively to the sentences imposed for grand larceny in the fourth degree because the actus reus of grand

[7] Even if we had not reversed defendant's conviction for murder in the second degree, his sentence for unauthorized use of a vehicle in the first degree could not have properly run consecutively to his sentence for murder in the second degree.

larceny – stealing property – is a material element of robbery in the first degree, which, in this case, is a material element of unauthorized use of a vehicle in the first degree. Further, inasmuch as the crime of robbery in the first degree was not complete until defendant stole the victim's property, there was no separate act that would permit the imposition of a consecutive sentence for these two crimes (cf. People v Brahney, 29 NY3d 10, 14-16 [2017]; People v Rodriguez, 25 NY3d at 244-245).

We conclude, however, that the sentence imposed for defendant's conviction of unauthorized use of a vehicle in the first degree may run consecutively to the sentences imposed for his convictions of burglary in the first degree and criminal possession of stolen property in the third degree. A person is guilty of burglary in the first degree when he or she knowingly enters a dwelling with the intent to commit a crime therein and, while in the dwelling, causes physical injury to any person who is not a participant in the crime (see Penal Law § 140.30 [2]). Burglary may be committed without stealing property and, in this case, was complete when the victim was killed. Accordingly, although the victim's death was also an element of robbery in the first degree, taking and using the automobile was a separate and distinct act that was performed subsequent to completion of the burglary (see e.g. People v Brahney, 29 NY3d at 14-16; People v Rodriguez, 25 NY3d at 244-245). With respect to criminal possession of stolen property in the third degree, we have previously held that the statutory elements of the crimes of larceny and possession are distinct and the acts of stealing and possessing property are separate acts (see People v Garcia, 129 AD3d 1383, 1384 [2015]). Defendant's remaining arguments have been considered and found to lack merit.

Egan Jr., J.P., Lynch, Devine and Aarons, JJ., concur.

ORDERED that the judgment is modified, on the law, by (1) reversing defendant's conviction of murder in the second degree under count 11 of the indictment and (2) vacating that part of the sentence imposed for defendant's conviction of unauthorized use of a vehicle in the first degree as ordered said sentence to run consecutively to all other sentences; count 11 dismissed and the sentence imposed thereon vacated, with leave to the People to re-present any appropriate charge to a new grand jury, and the sentence for unauthorized use of a vehicle in the first degree shall run concurrently to the sentences imposed for robbery in the first degree and grand larceny in the fourth degree, but consecutively to the sentences imposed for burglary in the first degree and criminal possession of stolen property in the third degree; and, as so modified, affirmed.

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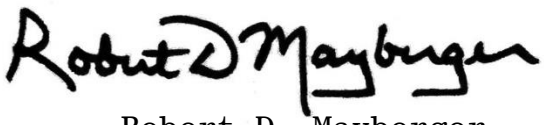

Robert D. Mayberger
Clerk of the Court