STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KIRK WALTER MARCICKY,

Defendant-Appellant.

UNPUBLISHED
October 30, 1998

No. 192055
Recorder's Court
LC No. 95-003397

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER ALLEN SCHEMA,

Defendant-Appellant.

No. 192389
Recorder's Court
LC No. 95-003397

Before: Young, Jr., P.J., and Wahls and White, JJ.

PER CURIAM.

Following a joint trial with separate juries, defendants were both convicted of first-degree felony murder, MCL 750.316; MSA 28.548, assault with intent to murder, MCL 750.83; MSA 28.278, and two counts of armed robbery, MCL 750.529; MSA 28.797. In addition, defendant Marcicky was convicted of second degree murder, MCL 750.317; MSA 28.549, while defendant Schema was convicted of first degree premeditated murder, MCL 750.316; MSA 28.548. Schema was also convicted as a habitual offender, fourth offense. MCL 769.12; MSA 28.1084. At sentencing, the trial court recognized that defendants should only be sentenced for one murder conviction, and that defendants were entitled to have one of their armed robbery convictions vacated.[1] The trial court then sentenced both defendants to life in prison without possibility of parole for their murder convictions, and to terms of fifteen to thirty years for their assault and armed robbery convictions. The trial court also

sentenced defendant Schema to life in prison for being an habitual offender. We have consolidated defendants' appeals as of right. We now affirm in all respects, except as to defendant Schema's habitual offender sentence, which we vacate.

Defendants' convictions arise from a killing and robbery in Dearborn Heights in November of 1994. On the Friday after Thanksgiving, defendant Schema picked up codefendant Marcicky and the two men went out drinking. The men eventually stopped at a bar that had a predominantly gay clientele. Upon enter the bar, defendants split up. Schema struck up a conversation with the victims, Gary Rocus and Curtis Padgett,[2] over a game of darts, while Marcicky sat down at the bar next to another patron. When last call was announced, Rocus invited defendants and Padgett back to his house to shoot pool. The four men left the bar, with Schema and Rocus riding in Rocus' car, while Marcicky drove Schema's car, and Padgett drove his own car. While there was conflicting testimony regarding exactly what happened at Rocus' house, it is essentially undisputed that Rocus was beaten to death, Padgett was beaten and tied up, Padgett's car was stolen and burned, some of Rocus' personal possessions were stolen, and defendants sold or pawned some of the stolen possessions.

Docket No. 192055

Defendant Marcicky first argues that he was denied the effective assistance of counsel when his attorney failed to call defendant Schema to testify, and failed to ask prospective jurors whether they were biased in favor of homosexuals. We disagree.

To establish an ineffective assistance of counsel claim, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he or she was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show, without the benefit of hindsight, that the claimed error would have made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens, supra* at 312, 314.

The decision whether to call a witness is a matter of trial strategy and therefore cannot be the basis of an ineffective assistance claim unless it deprives defendant of a substantial defense which may have affected the outcome. See *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated on other grounds 453 Mich 902 (1996). Here, Schema testified before his own jury. Based on that testimony, we conclude that counsel's decision not to call Schema to testify before Marcicky's jury was legitimate trial strategy. Schema's testimony would have provided evidence that Marcicky participated in beating Padgett after Padgett sought to come to Rocus' assistance. Similarly, the conduct and scope of an attorney's voir dire is a matter of trial strategy. *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986). This Court will not substitute its judgment for that of defense counsel on matters of trial strategy absent strong proof that counsel's conduct was objectively unreasonable and prejudicial. *People v Mitchell*, 454 Mich 145, 156, 163-165; 560 NW2d 600 (1997). Here, defendant has failed to show that his attorney's conduct was unreasonable, or that it deprived him of a fair trial, and his claims must fail.[3]

Next, defendant Marcicky argues that the trial court erred in denying his motion for a directed verdict of acquittal because there was no evidence that he aided and abetted defendant Schema in the commission of these crimes. We disagree.

The sufficiency of the evidence is to be evaluated in the light most favorable to the prosecution. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). The test is whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *Id*.

Taken in a light most favorable to the prosecution, the evidence presented to defendant Marcicky's jury showed the following. A short time after entering the bar, defendants split up, and Marcicky sat down next to a patron who was sitting at the bar. That patron testified that Schema introduced Marcicky to him using a fake name, but Marcicky later admitted that his real name is Kirk. Marcicky asked the patron f he was gay, and indicated that he himself was bisexual. The patron testified that he felt that Marcicky was trying to pick him up. On three or four occasions, defendant Schema came over and whispered something to Marcicky. Marcicky seemed to get nervous when Schema was approaching and talking to others in the bar, and asked the patron for a ride home. The patron said he would drive him home if he really needed a ride, but that he thought that Marcicky should leave with Schema since he came with him. After some time, Marcicky joined defendant Schema and the victims at the dart board. The bartender overheard Marcicky asking Curtis Padgett for a ride home. Shortly thereafter, the other victim, Gary Rocus, invited defendants and Padgett back to his house to shoot pool. When the men left the bar, Schema rode with Rocus in Rocus' car, and Marcicky followed Padgett.[4] At Rocus' house, the men played pool and continued to drink. After several games of pool, defendant Schema suddenly yelled "Let's get them." Schema then charged at Padgett with a cue stick, and the two men struggled with the stick. During this struggle, Rocus was standing approximately ten feet away at the corner of the pool table. Padgett was then struck on the head from behind. Padgett then let go of the stick that he and Schema had been struggling over, and Schema struck him in the face. Padgett was knocked unconscious, and when he came to, his hands and feet were bound. While Padgett had been knocked out in the basement of Rocus' home, he was now on the first floor. There were marks on Padgett's neck suggesting he had been strangled. Rocus was lying nearby, beaten and strangled, and his hands and feet were also tied. Rocus died from his injuries.

Several items were taken from Rocus' house, including a television and a guitar. The television and guitar appeared without explanation in the basement of defendant Schema's brother's house shortly after the incident. Defendant Marcicky sold the television to a friend, and Schema pawned the guitar. Marcicky shaved his mustache and goatee just after the incident. There was also evidence that, the night after the incident, defendants watched a movie at Schema's brother's house.

The evidence that Schema yelled "Let's get them," and that another person then struck Padgett from behind, suggests that Marcicky was prepared to attack the victims when Schema yelled "Let's get them," the inference being that the attack was planned. That inference is bolstered by other evidence, including the evidence that defendants were whispering to each other in the bar, the evidence that Schema introduced Marcicky using a false name, the evidence that Marcicky became nervous when Schema approached and talked to patrons in the bar, and the evidence that Marcicky asked at least two strangers for a ride home, but, when he had access to a car, he made no attempt to go home. The

inference that the attack was planned is further bolstered by Marcicky's actions after the killing. For instance, Marcicky's continued association with Schema after the incident, and his involvement in the sale of the stolen television set are both inconsistent with the actions of a person who had unexpectedly become part of a murder. His attempt to change his appearance after the crime also suggests a consciousness of guilt.

Having summarized the evidence, we must address the sufficiency of that evidence as to each conviction. Defendant Marcicky was charged as an aider and abettor. Under Michigan law, one who "procures, counsels, aids, or abets" in the commission of an offense may be convicted and punished as if he committed the offense directly. MCL 767.39; MSA 28.979; *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). In order to prove a charge of aiding and abetting, the prosecutor must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *Id.*

The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute. MCL 750.529; MSA 28.797; *Id.* at 569.

Here, as noted above, there was evidence from which the jury could properly have inferred that Marcicky was aware of a plan to assault the victims. The evidence clearly established that both victims were assaulted, that at least one of the defendants was armed with a pool cue,[5] and that property was stolen from both victims after they had been incapacitated by force. In addition, the jury could have inferred that Marcicky aided Schema in the commission of the offense by hitting Curtis Padgett in the head from behind and incapacitating him. Further, Marcicky later sold some of the stolen property. Thus, there was sufficient evidence to support defendant Marcicky's armed robbery convictions.

The evidence was also sufficient to support defendant Marcicky's felony murder conviction. The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548. First, as noted above, there was sufficient evidence to support Marcicky's conviction of armed robbery, which is one of the specifically enumerated felonies in the statute. Second, Gary Rocus was killed during the perpetration of that felony. Finally, based on the evidence that Marcicky used a pool cue to strike Padgett in the head with considerable force when Schema yelled "Let's get them,"[6] the jury could further conclude that Marcicky intended to do great bodily harm to the victims.[7] Alternatively, the jury could have concluded that Marcicky was aware of defendant Schema's intent to do great bodily harm to the victims, and that Marcicky aided Schema by hitting Padgett over the head.[8] Thus, the evidence was sufficient to support defendant Marcicky's conviction for felony murder on an aiding and abetting theory.

Marcicky also challenges the sufficiency of the evidence supporting his conviction for assault with intent to murder. However, Marcicky relies on a bare assertion that the evidence was insufficient to sustain his conviction, without further argument or citation to any authority. Under these circumstances, we will not search for authority to support defendant's position. We simply conclude that the totality of the evidence, including evidence that Padgett was strangled, and evidence regarding the nature of Rocus' injuries,[9] was sufficient circumstantial evidence to support Marcicky's conviction for assault with intent to murder.

Lastly, defendant Marcicky argues that the trial court erred in re-reading the entire aiding and abetting instruction in response to a question from the jury regarding "mere presence." We disagree. Whether to give the jury additional requested instructions is a matter within the trial court's discretion. *People v Martin*, 392 Mich 553, 558; 221 NW2d 336 (1974); *People v Fisher*, 166 Mich App 699, 714; 420 NW2d 858 (1988). Here, taking the mere presence instruction out of context would have created the potential for confusion, and the trial court did not abuse its discretion in re-reading the whole aiding and abetting instruction.

Docket No. 192389

Defendant Schema first argues that the trial court erred in failing to give instructions regarding intoxication, self-defense, the use of deadly force in self-defense, imperfect self-defense, and the need for contemporaneous intent to steal in order to support an armed robbery conviction. We disagree.

"The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused." MCL 768.29; MSA 28.1052. Similarly, reversal may not be premised on a trial court's "misdirection" of the jury absent a miscarriage of justice. See MCL 769.26; MSA 28.0196; see also MCR 2.516(C). Finally, a defendant may not harbor error as an appellate parachute. *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991). Here, defendant admits that he either failed to request these instructions or, having initially requested them, withdrew his request. Under these circumstances, we find no grounds for reversal.

Next, defendant Schema argues that the prosecutor improperly questioned him regarding statements he made to a doctor at the forensic center. While we agree that the prosecutor's questions were improper, we find the error harmless.

It is true that statements made to doctors at the center for forensic psychiatry are inadmissible except on the issue of insanity or mental illness. MCL 768.20a(5); MSA 28.1043(1)(5). Here, the prosecutor used defendant Schema's statements for impeachment purposes. This was improper under the statute. See *People v Jacobs*, 138 Mich App 273, 278; 360 NW2d 593 (1984). However, defendant failed to object to these questions and thereby failed to preserve this issue for appeal. In any event, the substance of the exchange was insignificant: Defendant Schema admitted that he told the doctor that he did not remember much of the incident. Upon further questioning, Schema explained that, at the time he met with the doctor, he was medicated, groggy and tired, and he simply "didn't want to talk about it." This series of questions came immediately after Schema admitted that he had lied to

the police about his involvement in the crimes. Under these circumstances, we conclude that the error was harmless beyond a reasonable doubt.

Defendant Schema further argues that he was denied the effective assistance of counsel because his attorney withdrew his request for instructions on intoxication and diminished capacity, and because his attorney admitted defendant's guilt to some of the lesser included offenses. We cannot agree.

Whether to request a particular instruction is a matter of trial strategy because it affects the relevance of evidence which the defense may wish to keep out. *People v Robinson*, 154 Mich App 92, 93-94; 397 NW2d 229 (1986). Specifically, whatever else defendant told the doctor at the center for forensic psychiatry might have been admissible had he decided to pursue an intoxication or diminished capacity defense. MCL 768.20a(5); MSA 28.1043(1)(5). In addition, defendant admitted during his testimony that he knew what he was doing during the entire incident. Under these circumstances, there was no basis for intoxication or diminished capacity instructions, and his requests for those instructions would have been properly denied. Finally, a lawyer does not render ineffective assistance by conceding certain points at trial, including defendant's guilt of a lesser offense, even if the strategy does not work. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). Defendant Schema has failed to rebut the presumption of sound trial strategy by showing that counsel's conduct was objectively unreasonable and prejudicial. *Mitchell, supra* at 156, 163-165.

Lastly, defendant Schema argues that he was improperly sentenced both as an habitual offender and also for each of the underlying convictions. We agree that the trial court made a technical error in sentencing Schema. After sentencing Schema on the underlying convictions, the trial court addressed his habitual offender status:

> The Court: Now, as to the fourth felony offender?
>
> [Prosecutor]: I would ask the Court to simply impose the same sentence as a fourth offender. I think that's all we need to do.
>
> The Court: Any position from the defense?
>
> [Defense Counsel]: No, sir.
>
> The Court: All right. Under the fourth felony offender statute, it will be the sentence that the defendant be sentenced to serve a prison term of life.

In fact, the trial court should have determined defendant Schema's status as an habitual offender before sentencing him on the underlying offenses, and then enhanced his sentences on the underlying offenses accordingly. In this case, however, it is clear that the prosecutor did not request any enhancement of Schema's sentences, perhaps because Schema was already facing life in prison without possibility of parole. It is also clear that the trial court did not enhance defendant's sentences. Under these circumstances, we simply vacate the trial court's sentence on the habitual offender charge, and leave his sentences on the underlying offenses intact.

In Docket No. 192055, defendant Marcicky's convictions are affirmed. In Docket No. 192389, defendant Schema's convictions and sentences are affirmed, except his habitual offender sentence, which is vacated.

/s/ Robert P. Young, Jr.
/s/ Myron H. Wahls
/s/ Helene N. White

[1] Where, as here, there was only one murder, sentencing on more than one count of murder would violate double jeopardy. Similarly, sentencing a defendant for felony murder and for the underlying felony would violate double jeopardy. See *People v Bigelow*, 229 Mich App 218, 221-222; 581 NW2d 744 (1998), lv pending. Thus, the trial court properly consolidated defendants' murder convictions, and vacated the armed robbery convictions underlying their felony murder convictions.

[2] Rocus and Padgett had arrived at the bar separately, but had apparently known each other for several years.

[3] Defendant Marcicky also suggests that his attorney's use of the term "fags" may have alienated the jury. While the use of this term may have been inappropriate, there is no reason to believe that it so prejudiced the jury that the outcome of the trial was affected. Thus, this conduct did not rise to the level required to show ineffective assistance of counsel under *Pickens*.

[4] Padgett drove his own car. According to Padgett's testimony, Marcicky "was in his automobile." In fact, it appears that Marcicky was driving Schema's car.

[5] We have no doubt that a pool cue is a dangerous weapon when it is used to strike someone, and defendant Marcicky does not dispute this point.

[6] While Padgett could not testify that he saw Marcicky strike him, he did testify that he could see both defendant Schema and the other victim, but that he did not see who struck him from behind. Thus, the conclusion that Marcicky struck Padgett is less an inference than a simple deduction.

[7] While there was no evidence that Marcicky hit Rocus when Schema yelled "Let's get them," Marcicky's act of hitting Padgett was relevant regarding Marcicky's intent toward Rocus, who was one of "them."

[8] This combination would be sufficient to support a conviction for aiding and abetting felony murder. See *People v Kelly*, 423 Mich 261, 278-279; 378 NW2d 365 (1985).

[9] Evidence regarding Rocus' injuries is relevant, indirectly, to show defendants' intent toward Padgett.