STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANTA J. DAVIS,

Defendant-Appellant.

UNPUBLISHED
December 26, 2000

No. 207725
Genesee Circuit Court
LC No. 97-000544-FC

Before: White, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Defendant and a codefendant, Nathan Bell, were tried jointly, before separate juries, on charges arising from the deaths of Sheila Jones and her two children, Darquelle Ray and Shawanna Ray. Defendant was convicted of first-degree premeditated murder of Sheila Jones, MCL 750.316(1)(a); MSA 28.548(1)(a); first-degree premeditated murder of Darquelle Ray, MCL 750.316(1)(a); MSA 28.548(1)(a); first-degree felony-murder of Darquelle Ray, MCL 750.316(1)(b); MSA 28.548(1)(b); first-degree premeditated murder of Shawanna Ray, MCL 750.316(1)(a); MSA 28.548(1)(a); first-degree felony-murder of Shawanna Ray, MCL 750.316(1)(b); MSA 28.548(1)(b); first-degree home invasion of a dwelling, MCL 750.110a(2); MSA 28.305(a)(2); disinterment and mutilation of Sheila Jones' body, MCL 750.160; MSA 28.357; and receiving or concealing stolen property, MCL 750.535; MSA 28.803. Defendant was sentenced to concurrent terms of life imprisonment without parole for each of the first-degree murder convictions, six to ten years for the mutilation of a body conviction, three to five years for the receiving or concealing stolen property conviction, and a consecutive term of thirteen to twenty years' imprisonment for the home invasion conviction. Bell was convicted of the same eight counts except that he was convicted of unlawful driving away a motor vehicle rather than receiving or concealing stolen property. This Court affirmed Bell's convictions, but remanded the case for resentencing. *People v Bell*, unpublished per curiam opinion of the Court of Appeals, issued August 10, 1999 (Docket No. 207548). Defendant appeals of right. We affirm, but remand for correction of the judgment of sentence.

I

Defendant raises several issues involving Damaris Jordan,[1] a proposed defense witness, who asserted the privilege against self-incrimination at trial. Jordan was at defendant's father's house with defendant and codefendant Bell on the evening in question and when Sheila Jones was beaten. Jordan gave two pretrial statements, one to the police shortly after the homicides and another to a private investigator just before trial. The statements corroborated defendant's claim that codefendant Bell alone beat Jones and dragged her to the garage. The prosecutor had subpoenaed Jordan for the preliminary examination, but did not call him as a witness. Both sides listed Jordan as a witness for trial, and his pretrial statements had been exchanged in discovery.

Defendant's motion for a new trial argued that the prosecutor had intimidated Jordan into asserting his privilege against self-incrimination, that trial counsel was ineffective for failing to move for the admission of Jordan's pretrial statements pursuant to MRE 804(b)(3) or (6), that the prosecutor denied him a fair trial by not granting Jordan immunity, and that the trial court erred by refusing to compel Jordan to testify. Following an evidentiary hearing, the trial court rejected each of these claims and denied defendant's motion for a new trial.

The decision whether to grant a new trial is within the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *People v Jones (On Remand)*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

Defendant first claims that a new trial is warranted because the prosecutor intimidated Jordan into not testifying at trial. We disagree. The Fifth Amendment states, in pertinent part, that "No person ... shall be compelled in any criminal case to be a witness against himself." US Const, Am V. A witness may invoke this exception to the government's power to compel testimony in a criminal, civil, administrative, or legislative proceeding and choose to remain silent. *Kastigar v United States*, 406 US 441, 444-445; 92 S Ct 1653, 32 L Ed 2d 212 (1972); *People v Cheatham*, 453 Mich 1, 10, n 12; 551 NW2d 355 (1996). When a witness asserts the privilege against self-incrimination, the focus is on the consequences that a truthful answer might disclose. *Zicarelli v New Jersey State Comm of Investigation*, 406 US 472; 92 S Ct 1670; 32 L Ed 2d 234 (1972). However, attempts by the prosecutor to intimidate proposed defense witnesses from testifying, if successful, may constitute a denial of a defendant's right to due process of law. See *People v Hooper*, 157 Mich App 669, 674-675; 403 NW2d 605 (1987). When a trial court finds that it is necessary to inform a witness of his Fifth Amendment rights, the court should do so out of the presence of the jury. *People v Dyer*, 425 Mich 572, 578, n 5; 390 NW2d 645 (1986); *People v Clark*, 172 Mich App 407, 416; 432 NW2d 726 (1988); *People v Callington*, 123 Mich App 301, 307; 333 NW2d 260 (1983).

Contrary to defendant's claim, the instant case is clearly distinguishable from *People v Butler*, 30 Mich App 561; 186 NW2d 786 (1971). In *Butler*, this Court, reversing the defendant's conviction, found that the defendant was denied due process of law when the prosecutor intimidated a potential defense witness by telling him outside the courtroom that he was under investigation, regardless of whether he testified at the trial, and advising him of his

[1] The trial transcript spells this name as Demaris Jourdan.

right not to testify. In the instant case, the prosecutor properly informed the trial court that Jordan, a proposed defense witness, was a suspect in the case and, therefore, should be advised of his constitutional right not to incriminate himself. As the trial court noted, there had been testimony in the prosecution's case in chief implicating Jordan. There had also been testimony at the preliminary examination implicating Jordan. We find no error.

We also reject defendant's claim that trial counsel was ineffective for not requesting admission of Jordan's pretrial statements under MRE 804(b)(3) or (6).

To establish ineffective assistance of counsel, defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability that, but for any unprofessional error, the outcome of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defendant must also overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Although Jordan's pretrial statements place him at the crime scene and inculpate codefendant Bell in the murder of Jones, they do not disclose a statement that is "probative of an element of a crime" and do not otherwise subject him to criminal liability. Accordingly, they do not qualify as statements against his penal interest for purposes of MRE 804(b)(3); *People v Barrera*, 451 Mich 261, 267; 547 NW2d 280 (1996); *People v Ortiz-Kehoe*, 237 Mich App 508, 517-518; 603 NW2d 802 (1999). That Jordan was allowed to invoke his privilege against self-incrimination is not inherently inconsistent with a determination that the statements in question are not against Jordan's penal interest.

Defendant has also failed to demonstrate that, under the totality of the circumstances, Jordan's statements bear inherent guarantees of trustworthiness so as to justify their admission under the "catch-all" exception to the hearsay rule. MRE 804(b)(6); *People v Welch*, 226 Mich App 461; 574 NW2d 682 (1997). As the trial court observed, the statements were made to the police and a private investigator at a time when there was "pressure . . . to put his best foot forward and not incriminate himself."

Accordingly, defendant has failed to demonstrate that defense counsel was ineffective for not seeking admission of Jordan's pretrial statements under either MRE 804(b)(3) or (6).

Next, because the prosecutor had no duty to grant immunity to witness Jordan, *People v Lawton*, 196 Mich App 341, 346; 492 NW2d 810 (1992), the trial court did not abuse its discretion in denying defendant's motion for a new trial on this basis.

Regarding the trial court's decision to allow Jordan to invoke the privilege against self-incrimination, while the trial court improperly stated that Jordan had a constitutional right not to testify if he believed that his testimony would be self-incriminating, the trial court also found that there was a reasonable basis for Jordan to fear self-incrimination, especially during questioning on cross-examination, and the record amply supports this determination. Thus, the trial court did not err in refusing to compel Jordan to testify. *Dyer*, *supra* at 578.

Defendant also raises two double jeopardy issues. First, we agree that defendant is entitled to have his first-degree home invasion conviction and sentence vacated where that conviction also served as the predicate felony for the felony-murder convictions. *People v Wilder*, 411 Mich 328, 342-347; 308 NW2d 112 (1981); *People v Warren*, 228 Mich App 336, 354-355; 578 NW2d 692 (1998) aff'd in part, rev'd in part 462 Mich 415; 615 NW2d 691 (2000). Second, with respect to the deaths of the two children, the trial court shall modify the judgment of sentence to reflect that defendant was convicted of one count of first-degree murder for each death, each conviction being supported by two theories: premeditated murder and felony-murder. *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998).

Affirmed, but remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell