STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2001
v	No. 220715 Saginaw Circuit Court
DANIEL JESSE GONZALEZ, Defendant-Appellant.	LC No. 98-015361-FC

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree premeditated murder, 750.316(1)(a); MSA 28.548(1)(a), felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), first-degree criminal sexual conduct (CSC I), MCL 750.520b(1); MSA 28.788(2)(1), and arson of a dwelling house, MCL 750.72; MSA 28.267. Following his convictions, he was sentenced to concurrent terms of life imprisonment for the murder conviction, thirty to fifty years' imprisonment for the CSC I conviction, and ten to twenty years' imprisonment for the arson conviction. Defendant was tried for these crimes after the victim's burned body was found, tied face-down to a bed, with plastic bags covering her face. We affirm in part and vacate in part.

On appeal, defendant argues that there was insufficient evidence to support his conviction of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a). We disagree.

When reviewing claims of insufficiency of the evidence, this Court employs a deferential standard, viewing the evidence in the light most favorable to the prosecution and resolving all reasonable inferences and credibility choices against the defendant, in order to determine whether a reasonable juror could conclude that the defendant was guilty beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999); *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

To convict a defendant of first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). In addition, while mere speculation is not enough, premeditation and deliberation may be inferred from the circumstances surrounding the killing. *People v Coy*, 243 Mich App 283, 315; 620 NW2d 888

(2000); *People v Ortiz-Kehoe*, 237 Mich App 508, 520; 603 NW2d 802 (1999); *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Further, if the defendant had time to take a "second look," then there was sufficient time for premeditation and deliberation. *Plummer, supra* at 301; *Kelly, supra*.

Premeditation may be established through evidence of the following factors: (1) the prior relationship of the parties; (2) the defendant's actions before the killing itself; and (3) the circumstances of the killing, including the weapon used and the location of the wounds inflicted; and (4) the defendant's conduct after the killing. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999); *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992); *People v Coddington*, 188 Mich App 584, 600; 470 NW2d 478 (1991).

In the instant case, the evidence demonstrates that the victim suffered extensive wounds to her head, including several skull fractures, as a result of blunt force trauma. In addition, the forensic pathologist who performed the autopsy noted that the victim was manually strangled. Evidence of manual strangulation can be used to infer that the defendant had time to take a "second look." *People v Johnson*, 460 Mich 720, 733; 597 NW2d 73 (1999). Further, defendant's actions after the killing suggest premeditation and deliberation; after raping, beating, and strangling the victim, defendant used electrical wire to tie her face-down to a bed and placed a plastic bag over her head.

Defendant also destroyed the victim's apartment by intentionally starting four separate and distinct fires in the apartment's kitchen, living room, rear bedroom, and by igniting the bed where the victim was bound. These actions indicate defendant's careful, methodical and deliberate attempts to dispose of evidence that could implicate him in these crimes; therefore, we conclude that there was ample evidence concerning the elements of premeditation and deliberation that could lead a reasonable juror to conclude defendant was guilty beyond a reasonable doubt.

Defendant next argues that the trial court erred in failing to sua sponte provide cautionary instructions regarding Woodrow Couch's testimony, maintaining that the cautionary instructions were necessary because Couch was a potential accomplice. Alternatively, defendant suggests that his trial counsel was ineffective for failing to ensure that the jury was properly instructed on accomplice testimony. Again, we disagree.

Here, it is apparent that defendant's theory of the case was that he did not commit the crimes and was not present during the commission of the crimes. In this regard, Couch's testimony to this effect as well as his credibility was attacked by defense counsel during both cross-examination and closing arguments. The instructions provided by the trial court properly presented the elements of the crimes and properly informed the jury as to what should be considered when determining the credibility of a particular witness. See *People v Lee*, 243 Mich App 163, 183; ___ NW2d ___ (2000). Further, DNA analysis of the sperm swabs taken from the victim's vagina, rectum, and mouth established a match with defendant's DNA and excluded Couch as a potential donor. Under these circumstances, the trial court did not err when it failed to provide cautionary instructions regarding accomplice testimony in this case. See *People v Reed*, 453 Mich 685, 692-693; 556 NW2d 858 (1996); *People v McCoy*, 392 Mich 231, 240; 220 NW2d 456 (1974); *People v Atkins*, 397 Mich 163, 168-171-172; 243 NW2d 292 (1976).

Rather, we find that the jury was properly instructed on the applicable law and the trial court presented the case to the jury in a full and fair manner. *Lee*, *supra*.

Because defendant did not request a *Ginther*[1] hearing, our review of defendant's ineffective assistance claim is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997); *Lee*, *supra*. In the instant case, we are unable to find any apparent error. As previously stated, defendant's theory of the case was that defendant did not take part in the crimes. Since complete innocence was defendant's theory, requesting an accomplice instruction would have undermined, not strengthened defendant's case before the jury; thus, defendant has failed to demonstrate to this Court that counsel's performance was unreasonable and that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994); *Lee*, *supra* at 185.

Defendant further contends that his conviction of felony murder and the predicate felony of CSC I violate his double jeopardy rights. We agree.

Defendant's double jeopardy challenge is a question of law that this Court reviews de novo. *People v Squires*, 240 Mich App 454, 456; 613 NW2d 361 (2000). Both the Michigan and federal constitution prohibit multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000). Our Supreme Court has consistently held that convictions for both felony murder and the underlying predicate felony violates the double jeopardy provision of the Michigan Constitution because it constitutes multiple punishment for the same offense. *People v Perry*, 460 Mich 55, 60 n 15; 594 NW2d 477 (1999); *People v Harding*, 443 Mich 693, 714; 506 NW2d 482 (1993); *People v Wilder*, 411 Mich. 328, 347; 308 NW2d 112 (1981); Cf *People v Sturgis*, 427 Mich 392, 400; 397 NW2d 783 (1986); *People v Wakeford*, 418 Mich 95, 105; 341 NW2d 68 (1983). In addition, this Court has consistently concluded that where a defendant has been convicted of both felony murder and the underlying felony, the conviction and sentence for the predicate felony should be vacated. See *People v Bigelow*, 225 Mich App 806, 807; 571 NW2d 520 (1997); *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 69 (1996); *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995); *People v Allen*, 201 Mich App 98, 105-106; 505 NW2d 869 (1993). The purpose of this prohibition is to ensure that a felon does not endure more punishment for an offense than that which was intended by the Legislature. *Squires*, *supra* at 456; *People v Griffis*, 218 Mich App 95, 100; 553 NW2d 642 (1996).

Here, defendant was convicted of felony murder, arson, and CSC I. Both arson and CSC I are predicate felonies for felony murder;[2] however, in the instant case, it is unclear which felony

---

[1] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973)

[2] MCL 750.316(1)(b); MSA 28.548(1)(b) states:

> (1) A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:
>
> * * *

(continued…)

– arson or CSC I – served as the underlying felony for defendant's felony murder conviction. Therefore, because it is impossible for us to determine whether defendant received multiple punishments for the same offense, and since defendant ultimately faces life imprisonment without parole based on his first-degree murder conviction, we conclude that vacating defendant's convictions and sentences for both arson and CSC I is appropriate.

Accordingly, we affirm defendant's first-degree murder conviction and sentence, but remand with instructions that defendant's convictions and sentences for arson and CSC I be vacated. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder

(…continued)

(b) Murder committed in the preparation of, or attempt to perpetrate, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, or kidnapping.