STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO DAVIS,

Defendant-Appellant.

UNPUBLISHED
November 16, 2001

No. 218206
Wayne Circuit Court
Criminal Division
LC No. 98-004378

Before: Owens, P.J., and Holbrook, Jr. and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony-murder, MCL 750.316(1)(b), arson of a building, MCL 750.73, discharging a firearm at a dwelling, MCL 750.234b, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court vacated the first-degree premeditated murder conviction, and sentenced defendant to concurrent prison terms of natural life for the felony-murder conviction, five to ten years for the arson conviction, and two to four years for the discharging a weapon conviction. In addition, defendant was sentenced to a consecutive, two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm in part and vacate in part.

Defendant argues that the evidence was insufficient to support his convictions for both arson and felony-murder. A challenge to the sufficiency of the evidence requires us to determine "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). Here, defendant's argument on appeal is not so much directed at a claim that the evidence was factually insufficient to support a felony-murder conviction, but that double jeopardy principles prohibited consideration of the same evidence for purposes of both offenses. We find no support for defendant's argument that the same evidence could not have been considered as factual support for both crimes. We agree, however, that double jeopardy principles require that defendant's arson conviction be vacated where defendant was also convicted of felony-murder with arson serving as the underlying felony. *People v Minor*, 213 Mich 682, 690; 541 NW2d 576 (1995).

Defendant raises several additional matters, all of which were not preserved for an appeal with an appropriate objection below. Nevertheless, this Court reviews unpreserved issues for

plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-766; 597 NW2d 130 (1999).

Defendant argues that the trial court erred by failing to instruct the jury that, if they found that he did not make the statement police attributed to him, they could not consider it for any purpose. A review of the record reveals that the trial court instructed the jury that it "cannot consider" defendant's statement unless if first found that he actually made the statement, and that, "[i]f you find that [defendant Davis] did not make the statement at all, you shouldn't consider it." Viewed as a whole, the court's instructions were essentially what defendant now argues should have been given. Accordingly, we find no plain error. *Carines, supra* at 763.

Defendant also argues that the trial court erred in failing to instruct the jury concerning the quantum of proof applicable to the determination of whether he made the alleged statement to the police. Defendant has not cited any authority specifying the applicable quantum of proof or holding that such an instruction is required. "A party may not merely state a position and leave it to this Court to discover and rationalize the basis of the claim." *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999). Regardless, we do not believe that the trial court instructions deprived defendant of a fair trial. Accordingly, he has failed to establish plain error . *Carines, supra* at 763.

Defendant next argues that his dual convictions for discharging a firearm at a dwelling and felony-firearm violate his constitutional protections against double jeopardy. We disagree. Because discharging a firearm at a dwelling is not one of the four exceptions listed in the felony-firearm statute, MCL 750.227b, defendant properly could be convicted of both offenses. *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998). Moreover, we have specifically opined that double jeopardy does not prevent a defendant from being convicted of both felony-firearm, MCL 750.227b, and discharge of a firearm at a dwelling, MCL 750.234b. *People v Guiles*, 199 Mich App 54, 60-61; 500 NW2d 757 (1993). Consequently, defendant's argument is without merit.

Defendant next argues that the trial court's alibi instruction erroneously failed to inform the jury that an alibi could lead to an acquittal either if the jury believed the alibi, or if the alibi raised reasonable doubts about defendant's presence at the crime scene. Defendant also claims that the instruction impermissibly shifted the burden of proof. We disagree.

Although some panels of this Court have held that, upon request, a trial court should instruct the jury that an alibi offers two avenues of relief: "clear proof of the alibi" (also known as the greater standard or perfect defense), and "reasonable doubt that the defendant was present at the time that the crime was committed" (also known as the lesser standard). *People v Prophet*, 101 Mich App 618, 625; 300 NW2d 652 (1980). However, we recognized that these decisions stopped short of "unequivocally requiring instruction on both 'avenues of relief' whenever an alibi instruction is requested." *Id.* at 627. For example, in the absence of an objection, the failure to instruct on the perfect defense avenue of relief does not result in sufficient prejudice to constitute a showing of manifest injustice." *Prophet, supra* at 626-627, quoting *People v Adams*, 66 Mich App 616, 619; 239 NW2d 683 (1976). In contrast, instructing the jury only on the perfect defense avenue of relief, and not the lesser reasonable doubt standard, may be prejudicial

error because it tends to shift the burden of proof to the defendant. *Prophet*, *supra* at 627-628. We further opined as follows:

> [T]he giving of both instructions may be unnecessarily confusing to a jury which must first determine why the natural corollary of the reasonable doubt concept was given before it can apply both instructions to its analysis of the evidence. Where the jury is instructed to acquit if it finds a reasonable doubt as to defendant's presence at the scene of the crime, and it nevertheless finds defendant guilty, such verdict implies that, even if the perfect defense instruction had been given, acquittal would not have resulted." [*Id*. at 628.]

In the instant matter, the trial court gave only the lesser reasonable doubt instruction, specifically mentioning that defendant did not have the burden of proving that he was somewhere else. Accordingly, under *Prophet*, there was no error and no prejudice. Thus, having failed to establish plain instructional error, appellate relief on the basis of this unpreserved issue is not warranted. *Carines*, *supra* at 763.

Defendant also claims that the trial court gave a confusing aiding and abetting instruction. We disagree. It is not error to charge a defendant alternatively as a principal or an aider and abettor where, as here, there is substantial evidence that the defendants helped each other. See *People v Smielewski*, 235 Mich App 196, 202-205; 596 NW2d 636 (1999). Further, the court in this case specifically instructed the jury "to consider the concept of aiding and abetting because the instruction[s] I give you on the crimes require that you find either that the defendant, Mr. Davis or Mr. Reeves[,] committed the crimes themselves or that they aided and abetted in the commission of the offense." The court also instructed the jury "that at the time the defendant gave his assistance, he intended to help someone else commit the crime." Moreover, the court's intent instruction was actually more favorable to defendant Davis than the formulation of intent endorsed by our Supreme Court. See *Carines*, *supra* at 768. Thus, defendant has failed to show a plain error affecting his substantial rights. *Carines*, *supra* at 763

Defendant also argues that counsel was ineffective for not properly preserving the aforementioned issues. Again, however, because defendant did not raise the issue of ineffective assistance of counsel in an appropriate motion below, our review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). Generally, there is a strong presumption that counsel was effective. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). To overcome this presumption, defendant must establish that "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, but for counsel's unprofessional error, the outcome of the proceedings would have been different." *Id.* Here, defendant has failed to establish any errors; thus, we are not persuaded that the performance of his counsel deviated from an objective standard of reasonableness or that any of the purported errors would have impacted the outcome of the proceedings. Consequently, we conclude that defendant's contention that he was deprived of his constitutional right to effective assistance of counsel is without merit.

Lastly, defendant argues that he was deprived of due process because, despite requests, he never received a full transcript of his *Walker*[1] hearing, thereby preventing him from effectively challenging the voluntariness of his police statement on appeal. Although the transcript that was prepared does appear to be incomplete, it clearly indicates that defendant waived the issue of voluntariness by admitting at the hearing that he voluntarily signed the written document containing the statement attributable to him. Defendant did not claim that the officer forced him to say the words contained in the document. Instead, defendant suggested that he did not make the statement itself. Under these circumstances, the only issue to be decided was whether defendant made the statement, and this issue was properly submitted to the jury at trial. *People v Neal*, 182 Mich App 368, 371-373; 451 NW2d 639 (1990); *People v Weatherspoon*, 171 Mich App 549, 553-555; 431 NW2d 75 (1988). Thus, we are not persuaded that the failure to provide a complete transcript of the *Walker* hearing, although error, affected defendant's substantial rights. *Carines*, *supra* at 763.

Affirmed in part, vacated in part, and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Talbot

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).