STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 11, 2002
v	No. 232657 Berrien Circuit Court
ROGER DALE WARD, JR., Defendant-Appellant.	LC No. 2000-410980-FC

Before: Fitzgerald, P.J., and Holbrook, Jr. and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of premeditated first-degree murder, MCL 750.316(1)(a), and felony murder, MCL 750.316(1)(b), for which he was sentenced as a fourth habitual offender, MCL 769.12, to life in prison. We affirm but remand for entry of an amended judgment of sentence indicating a single conviction and sentence for first-degree murder, supported by the alternative theories of premeditation and felony murder.

Defendant was charged with the killing of Kenneth Marlin. The prosecution's theory of the case was that defendant, in the early morning of April 9, 2000, robbed the victim, ordered him into the trunk of his own car, and drove off with him. Later, in an attempt to conceal what he had done, defendant, with help from an accomplice, Melissa Gray,[1] drove the car to Plym Park, a nearby golf course, and set the car on fire, resulting in the victim's death. Gray entered into a plea agreement with the prosecution and testified against defendant.

Defendant's first issue on appeal relates to the trial court's statement that Gray's plea agreement was made in exchange for her truthful testimony. Defendant contends that the statement served to bolster Gray's testimony. We disagree. Because defendant did not object to the statement at trial, this issue is forfeited unless plain error is established. See *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999).

In *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), our Supreme Court held that:

[1] The record reflects that Gray pleaded guilty to second-degree murder, MCL 750.317, for her involvement in the crime.

> reference to a plea agreement containing a promise of truthfulness is in itself [not] grounds for reversal. A more accurate statement of the law appears to be that, although such agreements should be admitted with great caution, admissibility of such an agreement is not necessarily error unless it is used by the prosecution to suggest that the government had some special knowledge, not known to the jury, that the witness was testifying truthfully. [Citation omitted.]

Here, there was no mention by the prosecutor about Gray's plea agreement during closing arguments; nor was there any further mention by the trial court. As plaintiff argued, there was no way for the jury to know whether the trial court believed or disbelieved Gray – it was just as possible that the court did not believe her. The trial court's statement represented that it would sentence Gray after her testimony, and the sentence would reflect whether it believed she was telling the truth. In this regard, the trial court was expressing that it had not yet formed any opinion as to whether Gray's testimony was truthful. Consequently, defendant has failed to show any error, plain or otherwise, on the part of the trial court warranting reversal of his conviction.

Defendant next argues that the trial court erred by failing to sua sponte instruct the jury on the issue of accomplice testimony with regard to Dennis Davis.[2] We disagree. In *People v McCoy*, 392 Mich 231, 236; 220 NW2d 456 (1974), our Supreme Court reiterated that, because accomplice testimony is inherently suspect, a "defendant has a right to have a special cautionary instruction given to the jury concerning such testimony." This instruction takes the form of CJI2d 5.5.

Here, there was evidence to support a conclusion that Davis was an accomplice. However, the trial court is not required to sua sponte provide a cautionary instruction and such failure to instruct may be reversible error if the defendant's guilt is closely drawn. *People v Reed*, 453 Mich 685, 692-693; 556 NW2d 858 (1996); *McCoy*, *supra*. A defendant's guilt may be considered closely drawn if the trial is essentially a credibility contest between the defendant and the accomplice. See *People v Jensen*, 162 Mich App 171, 188; 412 NW2d 681 (1987). A "credibility contest" in this context is one in which, absent the accomplice's testimony, a rational trier of fact could not conclude beyond a reasonable doubt that the defendant committed the offense. *People v Perry*, 218 Mich App 520, 530; 554 NW2d 362 (1996).

In this case, considering the evidence adduced at trial, the issue of defendant's guilt was not closely drawn. Even without the testimony of either Gray or Davis, the purported accomplices, a rational trier of fact could find beyond a reasonable doubt that defendant committed this crime. The evidence included, but was not limited to: (1) witness testimony that someone resembling defendant was seen at the victim's house at approximately the time the victim was alleged to have been taken from his home; (2) defendant's handprint was found on the victim's home telephone; (3) defendant's friend, Loren McTheeney, testified that after defendant left to get some drugs, he returned to the house and was driving a "loud car" which he was not driving earlier and that before defendant left again, he asked McTheeney for a gas can;

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[2] We note that a cautionary instruction relating to accomplice testimony was read with regard to Gray.

(4) other witnesses identified defendant driving a car similar to the one the victim owned; (5) defendant, as seen on surveillance videotape and by several witnesses, visited a gas station that morning and purchased a gas can and some gasoline; (6) two witnesses observed defendant and Gray walking in Plym Park around the time of the fire; (7) when the police seized the clothing defendant was suspected of having worn on the night of the fire, one of the sleeves on defendant's jacket was singed; and (8) a police officer testified that defendant confessed to the crime. Considering this evidence, the issue of defendant's guilt was not closely drawn. Therefore, defendant's contention that the trial court's failure to sua sponte instruct the jury on the issue of accomplice testimony is without merit.

Defendant alternatively argues that, if the trial court did not err in instructing the jury on its own, his counsel was ineffective for failing to request such an instruction. We again disagree. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *Id*. at 385-386. This Court will not second-guess counsel regarding matters of trial strategy and, even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999).

Here, defendant fails to rebut the presumption that his trial counsel's actions amounted to strategy. Defendant's theory of the case was that he was not involved in the victim's death and that he had no knowledge of the crime. For defense counsel to illustrate that it was necessary to have an instruction about the unreliability of Davis' testimony, he would have had to show that Davis was an accomplice to the crime. See *McCoy*, *supra*. However, to do so, the jury would have had to believe, in part, defendant's confession to Officer Merrimen. Defendant vehemently denied making that confession. Therefore, we regard defense counsel's failure to request such an instruction a strategic decision. This Court will not review defendant's trial strategy with the benefit of hindsight.

Defendant, through his Standard 11 brief, challenges the trial court's denial of his motion to exclude crime scene photographs on the grounds that the photographs were not relevant and were unduly gruesome. We disagree. This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

In *People v Coddington*, 188 Mich App 584, 598; 470 NW2d 478 (1991), this Court stated:

> Photographic evidence is admissible if relevant, pertinent, competent, and material to *any* issue in the case. The admission of this evidence is within the sound discretion of the trial court. Photographs are not inadmissible merely because they may be gruesome and shocking; however, the trial court should preclude those which could lead the jury to abdicate its truth-finding function and convict on passion. [Citations omitted, emphasis in original.]

Evidence is relevant if it has any tendency to make the existence of a fact which is of

consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388-389; 582 NW2d 785 (1998). Here, the photographs were relevant because they were helpful to illustrate the fire pattern. By looking at the deposits of soot in the car, plaintiff's fire investigator was able to testify as to where the accelerant was placed in the car. This evidence was also helpful to corroborate Gray's testimony about how defendant poured gasoline on the car before lighting it on fire. Moreover, by looking at the photographs and studying the damage done to the victim's body, the expert was able to gauge the intensity of the fire. The fact that the fire burned as hot as it did led to the examiner's conclusion that the fire was most likely set by an accelerant. Finally, the photographs were helpful for maintaining the chain of custody. Accordingly, the evidence was relevant for those issues, and was not merely admitted to play on the jurors' emotions. Although defendant suggests that he would have been willing to stipulate to the cause of the victim's death, a prosecutor is under no obligation to use the least prejudicial evidence available to establish a fact at issue. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995). Further, we reject defendant's contention that the relevance of these photographs was outweighed by their unfair prejudice.

Defendant also challenges his sentence, contending that he should not have been sentenced as a fourth habitual offender because two of his convictions actually stemmed from one transaction. Defendant is correct that multiple convictions that arise out of a single transaction may count only as a single prior conviction for the purpose of the habitual offender statute. *People v Stoudemire*, 429 Mich 262, 278; 414 NW2d 693 (1987), modified by *People v Preuss*, 436 Mich 714, 717; 461 NW2d 703 (1990). However, if the convictions arise from separate criminal incidents, each conviction may be counted as a prior conviction under the statute. *Id*.

Here, defendant presents no evidence that his convictions stemmed from a single transaction. In fact, both defendant and his counsel represented to the trial court at resentencing that they accepted the fact that the convictions at issue could serve as the basis for defendant's habitual offender enhancement. Because defendant failed to show any evidence to the contrary, we must reject his argument. Further, the sentence for first-degree murder is mandatory life imprisonment whether or not defendant was sentenced as an habitual offender.

Finally, defendant argues that he was improperly convicted of two first-degree murders when it was uncontroverted at trial that only one person was killed. We agree. Separate convictions for both premeditated murder and felony murder in connection with a single instance of criminal conduct violate the rule against double jeopardy. *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998). Accordingly, we remand this case to the trial court with instructions to issue an amended judgment of sentence reflecting a single conviction for first-degree murder, supported by the alternative theories of premeditation and felony murder. See *People v Herndon*, 246 Mich App 371, 392-393; 633 NW2d 376 (2001); *Bigelow*, *supra*.

Affirmed, but remanded for issuance of a corrected judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh