STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 3, 2004
v	No. 237200 Genesee Circuit Court
LAQUAN TREMAINE JOHNSON, Defendant-Appellant.	LC No. 00-007029-FC

Before: O'Connell, P.J., and Wilder and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for second-degree murder, MCL 750.317, armed robbery, MCL 750.529, larceny in a building, MCL 750.360, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment for the murder conviction, thirty-nine to seventy-five years' imprisonment for the armed robbery conviction, thirty-two to forty-eight months' imprisonment for the larceny conviction, and two years' imprisonment for the felony-firearm conviction. We affirm in part, but vacate defendant's conviction for larceny in a building.

I. Material Facts and Proceedings

On July 27, 2000, Reginald Ross died as the result of a gunshot wound to his chest. Early that morning, two men entered Ross' home while its occupants were sleeping. Beside Ross, present in the home were his children and nephews, who were herded by the men into a dressing room. The men wore white hockey masks and referred to each other as "Q" and "T," although the person referred to as "Q" was once referred to as "Quan."[1] The men each carried a weapon, described as guns, although there was also testimony that one of the weapons was possibly a knife. The men took clothes, shoes, jewelry, video games, and tire rims, which were loaded into Ross' car, which the men drove away.

Ross' nephew, Jason Williams, testified that the shooting took place while he slept, but further indicated that he later heard Ross making gagging or choking noises in the adjoining

[1] Defendant's mother testified that defendant is known as "Quan," and defendant acknowledged that he is known as "Quan."

room. Jason indicated that each of the men lifted their masks while at Ross' house, and identified at trial defendant and his codefendant, Cortorian Gale, as the intruders. Another of Ross' nephews, Jermaine Williams, testified that he heard people trying to enter the house and then heard a gunshot from Ross' room. Jermaine also testified that the men woke the remaining occupants, ushered them into a back room, proceeded to take things, and threatened them that if they did anything stupid, they would kill them like they did Ross.

Defendant and Gale were subsequently arrested, and police searched the downstairs apartment of defendant's mother's house, where defendant had been staying. In the apartment, the police located clothing with a cleaning tag, stating "Ross," two semi-automatic pistols, a Rolex watch, two nine-millimeter rounds, and an empty magazine for a nine-millimeter handgun. Ronald Ainslie, a Detective Sergeant with the Michigan State Police, examined the weapons, and opined that the bullet taken from Ross was unequivocally fired from a nine-millimeter "Luger" gun found in defendant's apartment.

Defendant testified on his own behalf and indicated that on July 26 or July 27, he was in his apartment with his girlfriend and others. According to defendant, he escorted his girlfriend home on July 27, when it was "turning morning." Upon his return, Gale, or "Tory," asked defendant to come and look at his new tire rims. Defendant then assisted Gale in moving bags of clothing to defendant's residence. Defendant indicated that the Luger handgun belonged to Gale. Defendant admitted to writing a portion of a letter from defendant to Gale, but denied writing the entire letter, which stated, in part, "Tory, just think if I would have told the police that we killed Reggie."

II. Double Jeopardy

Defendant first argues that his convictions and sentences for both armed robbery and larceny in a building violate his federal and state constitutional prohibitions against double jeopardy. We agree.

"The issue of double jeopardy is generally a question of law, which this Court reviews de novo." *People v Rodriguez*, 251 Mich App 10, 17; 650 NW2d 96 (2002). "The double jeopardy clauses of the United States and Michigan constitutions protect against governmental abuses for both (1) multiple prosecutions for the same offense after a conviction or acquittal and (2) multiple punishments for the same offense." *People v Calloway*, __ Mich __; __ NW2d __ (Docket No. 122430, issued November 25, 2003), slip op at 2; see also US Const, Am V; Const 1963, art 1, § 15; *People v Barber*, 255 Mich App 288, 291-292; 659 NW2d 674 (2003). The protection against multiple punishments helps ensure that courts confine their sentences within the limits established by the Legislature. *Id*. at 292. In determining whether the prohibition against multiple punishments has been violated, the courts of this state must determine whether the Legislature intended to authorize cumulative punishments. *Calloway*, *supra*, slip op at 3; *Barber*, *supra* at 292; see also *People v Wilder*, 411 Mich 328, 343; 308 NW2d 112 (1981). "Where the issue is one of multiple punishment rather than successive trials, the double jeopardy analysis is whether there is a clear indication of legislative intent to impose multiple punishment for the same offense. If so, there is no double jeopardy violation." *People v Mitchell*, 456 Mich 693, 695-696; 575 NW2d 283 (1998).

Under the Michigan Constitution, the Legislature's intent is determined by traditional methods of examining the subject, language, and history of the statutes. *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997); see also *Wilder*, *supra* at 343. In order to have a successful double jeopardy claim, a defendant's guilt must arise out of the same acts or conduct. *People v Hill*, 257 Mich App 126, 150; 667 NW2d 78 (2003). "Where two statutes prohibit violations of the *same* societal norm, albeit in a different manner, as a general principle it can be concluded that the Legislature did not intend multiple punishments." *People v Herron*, 464 Mich 593, 605; 628 NW2d 528 (2001) (emphasis in original). Additionally, legislative intent may be discerned by reviewing the amount of punishment expressly authorized by the Legislature. *Denio*, *supra* at 708. "'Where one statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes." *Denio*, *supra* at 708, quoting *People v Robideau*, 419 Mich 458; 355 NW2d 592 (1984). "To the extent that legislative intent is not entirely free of doubt, the doubt must be resolved in favor of lenity." *Wilder*, *supra* at 343; see also *Denio*, *supra* at 708-709.

In the instant case, we find that the Legislature did not intend to provide for multiple punishment for the crimes of armed robbery and larceny in a building. Armed robbery has been described as a larceny from a person with the additional element of violence or intimidation. *People v Randolph*, 466 Mich 532, 544; 648 NW2d 164 (2002); *People v Beach*, 429 Mich 450, 484, n 17; 418 NW2d 861 (1988). The social norms protected by the statutory offense of armed robbery are primarily focused on the protection of persons, but also provides for protection of property. *People v Hendricks*, 446 Mich 435, 449-450; 521 NW2d 546 (1994). The elements of larcenous crimes, however, focus primarily on the taking of property. See, generally, *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999). Thus, although larcenous crimes are aimed at the protection of property, the offense of armed robbery proscribes similar conduct while simultaneously providing for the additional protection of persons.

As explained in *Denio*, *supra* at 708, although the crimes of larceny over $100, MCL 750.356, and larceny in a building, MCL 750.360, have separate elements, these statutes are "aimed at conduct too similar to conclude that multiple punishment was intended." Quite similarly, larceny in a building and armed robbery, an offense described as larceny with the use of force or coercion, may be described as statutes aimed at conduct "too similar to conclude that multiple punishment was intended." *Id*.

For larcenous crimes less than $200, the Legislature has determined such crimes constitute a misdemeanor punishable by no more than ninety-three days in jail, whereas larceny of property more than $200, but less than $1000 is a misdemeanor punishable by no more than one year in jail. MCL 750.356(4) and (5). For larcenous crimes of property valued at more than $1000, the crime becomes a felony punishable up to five or ten years depending on the value of the property. MCL 750.356(2) and (3). Larceny in a building is a felony punishable by imprisonment of up to four years, while larceny from a person is a felony punishable by imprisonment up to ten years. MCL 750.357; MCL 750.360, MCL 750.503. Finally, armed robbery is a felony punishable by imprisonment for life or any term of years. MCL 750.529.

In accordance with traditional means of determining the intent of the Legislature in imposing multiple punishments for the "same offense," we find that the Legislature did not intend to provide for multiple punishment for both larceny in a building and armed robbery. As

the offense of armed robbery is described as larceny with the additional element of violence or intimidation and there is a hierarchy of punishment relating to those crimes, it appears as though the Legislature decided to increase the punishment for the crime of larceny from a person with the aggravating conduct of violence and intimidation. *Denio, supra*. Accordingly, we conclude that defendant's convictions for both armed robbery and larceny in a building violate the protection provided by the Michigan Constitution against double jeopardy. Therefore, we vacate defendant's conviction for larceny from a building.[2]

III. Effective Assistance of Counsel

Next, defendant argues that the trial court erred in denying his motion to hold an evidentiary hearing. We disagree.

Defendant requested that the trial court hold an evidentiary hearing, reasoning that he was denied the effective assistance of counsel because defense counsel failed to impeach Jason's testimony and because he ineptly questioned Jermaine; however, the trial court denied defendant's request. A trial court's decision whether to hold an evidentiary hearing is reviewed for an abuse of discretion. *People v Mischley*, 164 Mich App 478, 482; 417 NW2d 537 (1987).

"In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "[W]here . . . a cognizable claim is raised that counsel did not investigate potentially meritorious defenses to the charges, and . . . a substantial possibility appears on the record that potential defenses suggested by defendant were not considered, . . . a full evidentiary hearing on the ineffective assistance of counsel allegation must be conducted." *People v Kimble*, 109 Mich App 659, 663; 311 NW2d 446 (1981).

First, defendant argues that trial counsel was ineffective because he failed to properly cross-examine Jason because he presented Jason's inconsistent preliminary examination testimony as part of the defense instead of using it to impeach him during cross-examination. A defendant claiming ineffective assistance of counsel must overcome a strong presumption that counsel's tactics were matters of sound trial strategy. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). It was reasonable for trial counsel to draw out the inconsistencies in Jason's testimony by reading the relevant portions of his preliminary examination testimony in

[2] The prosecution argues that because jury instructions on cognate lesser offenses are not appropriate, *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), it could be reasoned that convictions for armed robbery and the cognate lesser offense of larceny from a building do not violate the prohibition against double jeopardy. See *People v Colvin*, 467 Mich 944; 655 NW2d 764 (2003) (C.J. Corrigan, concurring). Although we acknowledge that larceny from a building is a cognate lesser offense of armed robbery, *Beach, supra*, we decline to determine what, if any, implication *Cornell* may have on this case. This Court is bound by Michigan Supreme Court case law until the Supreme Court overrules or expressly modifies that case law. *Boyd v WG Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993). Thus, we must apply the standards set forth previously by our Supreme Court regarding double jeopardy violations.

order to avoid permitting the witness the opportunity to explain or otherwise rehabilitate his testimony. Thus, defendant has failed to overcome the strong presumption that trial counsel's actions were sound trial strategy.

Defendant also argues that trial counsel was ineffective because, during the cross-examination of Jermaine, trial counsel shifted the jury's focus from whether defendant was at the scene of the crime to whether defendant removed his mask, thus inferring that defendant was present at the scene of the crime. Upon examination of the question in context, it is evident that defense counsel was merely contrasting Jermaine's plain identification of Gale with the absence of any identification of defendant. Additionally, the jury was instructed to decide the case solely on the evidence and that counsels' questions and statements were not evidence. As jurors are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 487; 581 NW2d 229 (1998), we find that trial counsel's question would presumably have no effect on the jury's verdict. Accordingly, defendant has failed to demonstrate that trial counsel's performance was objectively unreasonable or that defendant was prejudiced by counsel's performance. Finding no demonstration of ineffective assistance of counsel, we conclude that the trial court did not abuse its discretion by denying defendant's motion for an evidentiary hearing. *Mischley, supra*.

IV. Sufficiency of the Evidence

Next, defendant argues that his conviction for second-degree murder should be reversed because the prosecution failed to present sufficient evidence at trial. We disagree.

We review claims regarding the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). This Court views the evidence in a light most favorable to the prosecution and must determine whether a rational trier of fact could have found all the elements of the offense proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences from the evidence may constitute sufficient evidence, and credibility conflicts are resolved in favor of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

In order to convict a defendant of second-degree murder, the prosecution must prove that the defendant caused the death of another person with malice and without justification, mitigation, or excuse. *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325, amended 453 Mich 1204 (1996) (remanding for consideration of other issues). "The element of malice is defined as 'the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.'" *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999), quoting *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998).

In connection with the murder charges, defendant's jury was instructed on the law of aiding and abetting. "Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." MCL 767.39. To convict defendant as an aider and abettor, the prosecutor was required to demonstrate "(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." *People v Carines*, 460 Mich 750, 758; 597 NW2d 130 (1999). Aiding and abetting involves all forms of assistance rendered to the perpetrator of a crime, including all words or actions that might encourage or support the commission of the crime. *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991).

Defendant contends that the evidence demonstrated that Gale alone entered Ross' bedroom and killed him, and that there is no evidence that defendant aided or encouraged the shooting. Defendant also argues that there was no evidence that defendant entertained the same intent to kill as Gale.

Testimony was presented at trial indicating that both defendant and Gale were present in the house after the fatal shot was fired, that they herded the remaining occupants of the house into one room, that they ransacked the house, and that items were loaded into bags, which they drove away with in Ross' car. There was evidence that during the incident, each of the intruders repeatedly went into Ross' room while Ross gagged or otherwise struggled. Defendant and Gale were each armed, and they passed their weapons between themselves during the incident. The intruders referred to each other as "T" and "Q," and on one occasion, one was referred to as "Quan," a name defendant used. There was also evidence that the murder weapon was located in the basement where defendant lived, along with clothing bearing Ross' name. Additionally, a letter addressed to Gale bearing defendant's signature included the line, "just think if I would have told the police that we killed Reggie."

The evidence supported the conclusion that defendant assisted Gale throughout the entire criminal enterprise. Regarding the element of malice required for a conviction of second-degree murder, the evidence that defendant engaged in the larceny following the shooting of Ross and repeatedly entered Ross' room while he struggled from the shooting wound demonstrates that the killing comported with defendant's understanding of the nature of the endeavor. Additionally, defendant's actions of passing his weapon to and from Gale indicate that defendant acted with knowledge that his actions were very likely to place Ross in grave danger of life or limb.

Defendant asserts that Gale's testimony that he entered the bedroom and did the shooting alone demonstrates that the prosecution's theory was that Gale was the shooter. However, Gale's testimony placed defendant at Ross' home during the time of the incident, and may have been used to impeach defendant's testimony that he was not present in the house. Accordingly, there was sufficient evidence to support defendant's second-degree murder conviction.

V. Admission of Gale's Testimony

Defendant next argues that the trial court abused its discretion in denying his motion to exclude Gale's testimony and written statements from defendant's jury. Specifically, defendant argues that the admission of such evidence required defendant to rebut Gale's antagonistic defense in addition to the prosecution's case. Although we find that the trial court erred in admitting such evidence, any error was harmless.

This Court reviews a trial court's evidentiary rulings for an abuse of discretion. See *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 659 (1995). Likewise, a trial court's decision

on a motion for severance is reviewed for an abuse of discretion. See *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994).

MCR 6.121(C) provides that a trial court, on a defendant's motion, "must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant." Additionally, MCR 6.121(D) in turn provides that, on the motion of any party, a trial court "may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants."

Although "a joint trial of codefendants presenting antagonistic defenses has serious negative implications for the accused," severance is required only where the defense "clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Hana, supra* at 346-347. A primary concern is to avoid a situation where each defendant is placed in the position where he or she must seek to convict the other, and defend in turn against the other's antagonistic defense, while also defending against the prosecution's case. See *id.* at 349, quoting *State v Kinkade*, 140 Ariz 91, 93; 680 P2d 801 (1984). See also *Hana, supra* at 347, n 8, quoting *United States v Tootick*, 952 F2d 1078, 1082-1083 (CA 9, 1991). Accordingly, "[i]nconsistency of defenses is not enough to mandate severance; rather, the defenses must be 'mutually exclusive' or 'irreconcilable.'" *Hana, supra* at 349.

Here, defendant's alibi defense, that he was at home or walking his girlfriend home, could not be reconciled with Gale's account that defendant was present in the house when Ross was shot. Although Gale's and defendant's testimonies were in agreement that defendant did not himself participate in the homicide, Gale's testimony damaged defendant's alibi defense because the testimony of each put defendant in two different places at one time. The *Hana* Court, quoting *Kinkade, supra*, with approval, indicated that reversal is required "only when the competing defenses are so antagonistic at their cores that both cannot be believed." *Hana, supra* at 349-350. Here, the jury could not believe both defenses, in that defendant could not have been both at his own home (or nearby) and at Ross' home at the time the crimes occurred. Thus, the trial court erred in permitting each defendant to testify in front of both juries.

However, a preserved, nonconstitutional error is not a ground for reversal unless it shall affirmatively appear, upon examination of the entire cause, that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), citing MCL 769.26. Defendant has failed to demonstrate that it was more probable than not that the error in permitting the evidence to be presented before defendant's jury affected the outcome of the case. First, there was ample other evidence supporting defendant's presence and participation during the incident, including an eyewitness identification of defendant, the intruders' referrals to each other as "Q," "T," and on one occasion "Quan," the location of several stolen items and the murder weapon in defendant's home, and a letter addressed to Gale bearing defendant's signature indicating defendant's participation in the incident. Additionally, although Gale's testimony placed defendant at the scene of the incident, he further testified that defendant did not engage in criminal conduct. Therefore, any error committed by the admission of Gale's testimony before defendant's jury is deemed harmless. *Lukity, supra*.

VI. Sentencing

Finally, defendant argues that this Court should remand this case for resentencing of his armed robbery conviction because the trial court erroneously exceeded the recommended guidelines range. Specifically, defendant contends that the trial court's reasons for departure were neither objective nor verifiable. We disagree.

In reviewing a trial court's decision to depart from the guidelines, "whether a factor is objective and verifiable is reviewed de novo . . . ." *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). A trial court may depart from the statutory guidelines only if it finds a substantial and compelling reason for the particular departure and states that reason on the record. MCL 769.34(3); see also *Babcock, supra* at 256-261; *People v Lowery*, 258 Mich App 167, 169; __ NW2d __ (2003). As our Supreme Court recently explained in *Babcock*, quoting in part from *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995):

> [A] "substantial and compelling reason" must be construed to mean an "objective and verifiable" reason that "'keenly' or 'irresistibly' grabs our attention;" is "of 'considerable worth' in deciding the length of a sentence;" and "exists only in exceptional cases." *Babcock, supra* at 257-258.

The trial court's reason or reasons for a departure, as indicated by the *Babcock* Court, must be based on objective and verifiable factors. *Id.* at 256-257. Objective and verifiable factors are those that are external to the minds of the judge, defendant, and others involved in making the decision, and are capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003); *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991).

Regarding defendant's armed robbery conviction, the guidelines range was calculated to be 171 to 285 months' imprisonment; however, the trial court sentenced defendant to thirty-nine to seventy-five years' imprisonment, thus, exceeding the guidelines. At sentencing, the trial court stated, "Mr. Johnson – the sentences to the extent that they exceed the guidelines are prompted by the fact that Mr. Johnson is an extreme danger to the community." In the departure evaluation form, the trial court indicated, "Def[endant] is an extreme danger to the community – displayed little conscience in terrorizing young children and taking human life."

We first note that the trial court's reasoning that defendant "displayed little conscience" in terrorizing young children and taking human life is not objective and verifiable, as it represents an internal evaluation not capable of external proof. Further, the Supreme Court has stated that a defendant's remorse, or lack thereof, is not generally objective and verifiable. *People v Daniel*, 462 Mich 1, 8, 609 NW2d 557; 609 NW2d 557 (2000). As such, that defendant "displayed little conscience" is not a substantial and compelling reason for departure from the sentencing guidelines. See *Babcock, supra* at 256-258; *Abramski, supra*.

However, the trial court also indicated on the record that defendant was an extreme danger to the community. This finding represents an objective and verifiable reason for departure. Even if the trial court viewed its additional comments as multiple substantial and compelling reasons for departure, it is clear from the record that "the trial court would have departed and would have departed to the same degree on the basis of the [single] substantial and compelling reason[] alone." *Babcock, supra* at 260. Based on our holding that resentencing is not required, it is unnecessary for this Court to determine whether defendant should be sentenced before a different judge.

We vacate defendant's larceny conviction, but affirm in all other respects. We remand to the trial court for the ministerial task of amending the judgment to reflect that defendant's larceny conviction was vacated.

/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray