# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARIO CURVAN,

Defendant-Appellant.

UNPUBLISHED
June 29, 2004

No. 242376
Wayne Circuit Court
LC No. 01-010083-01

Before: Cooper, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for felony murder, MCL 750.316(1)(b), and armed robbery, MCL 750.529. Defendant was sentenced to life in prison for the felony-murder conviction and 20 to 40 years in prison for the armed robbery conviction. We affirm in part and reverse and remand in part.

Defendant first argues that the trial court erred in denying his pretrial motion to suppress his custodial statements. We disagree. When reviewing a trial court's determination of the voluntariness of a confession, an appellate court engages in a de novo review of the entire record but will not disturb a trial court's factual findings unless the ruling is found to be clearly erroneous. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000); *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). This Court will affirm the trial court's decision unless we are left with a "definite and firm conviction that a mistake has been made." *Daoud*, *supra* at 629; *Sexton*, *supra* at 752.

Defendant contends that the trial court erred by not applying *Edwards v Arizona*, 451 US 477, 484; 101 S Ct 1880; 68 L Ed 2d 378 (1981). Defendant contends that because he requested an attorney while being questioned by the police, all questioning should have ceased. See *Minnick v Mississippi*, 498 US 146, 150; 111 S Ct 486; 112 L Ed 2d 489 (1990). However, the trial court found that defendant signed a *Miranda* waiver on two separate occasions at the request of two different officers. Neither officer remembered defendant requesting an attorney. Following a suppression hearing, the trial court found that "defendant never requested a lawyer during any interrogation at any point that he was in custody prior to the time or concurrent with the time that the two statements at issue were made."

In *Sexton, supra*, our Supreme Court adopted the dissenting opinion of Judge Murphy which stated, in relevant part, "'Further, if resolution of a disputed factual question turns on the

credibility of witnesses or the weight of the evidence, we will defer to the trial court.'" *Sexton, supra* at 752, quoting *People v Sexton*, 236 Mich App 525, 543; 601 NW2d 399 (1999) (Murphy, J., dissenting). In this case, defendant stated that at some point during questioning he requested an attorney. The officers deny a request was ever made. Additionally, defendant signed two separate Waiver of Rights forms. Because we defer to the trial court's assessment of credibility, we affirm the finding of the trial court that defendant's confessions were voluntary. Additionally, we are not left with a definite and firm conviction that the trial court made a mistake in its finding of fact.

Defendant next argues that the trial court violated the Double Jeopardy Clauses of the Michigan and United States Constitutions when it sentenced defendant on both the felony-murder and armed robbery convictions. We agree.[1] Defendant was sentenced to life in prison

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[1] We are not persuaded that our Supreme Court in *People v Nutt*, 469 Mich 565, 677 NW2d 1 (2004) specifically instructed this Court to overturn its ruling in *People v Wilder*, 411 Mich 328, 308 NW2d 112 (1981). In *Nutt, supra*, our Supreme Court overturned its earlier decision in *People v White*, 390 Mich 245; 212 NW2d 222 (1973), and thus abandoned the "same transaction" test used to apply the double jeopardy clause in favor of the "same elements" test set forth in *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 2d 306; (1932). In *Nutt, supra*, our Supreme Court stated:

> We wish to stress at the outset that we are not here concerned with the meaning of the term "offense" as it applies to the double jeopardy protection against *multiple punishments.* See *People v Colvin*, 467 Mich 942 (2003) (Corrigan, C.J., concurring); *Herron, supra*; *People v Robideau*, 419 Mich 458; 355 NW2d 592 (1984). Our analysis is limited to the successive prosecutions strand of Const 1963, art 1, § 15. [*Nutt, supra* at 575.]

In *Colvin, supra*, Justice Corrigan stated:

> The analysis in *Wilder* deserves scrutiny. The fundamental question is whether the Legislature intended to permit multiple punishments. See *Ohio v Johnson*, 467 US 493, 499, n 8, 81 L Ed 2d 425, 104 S Ct 2536 (1984); *People v Sturgis*, 427 Mich 392, 400, 397 NW2d 783 (1986). Where legislative intent is unclear, federal courts apply the *Blockburger* test. "Looking to the elements of the offenses charged not to the proofs, if each offense requires proof of a fact that the other does not, then multiple convictions are permissible." *Gillespie*, [Michigan Criminal Law and Procedure, Practice Deskbook (2d ed)], § 8.47, pp 21-22. It is not clear why Michigan should follow a different test where the language of the federal and state double jeopardy provisions are identical in relevant respects. [*Colvin, supra* at 944-945.]

Thus, absent a specific directive from our Supreme Court, we must, for now, follow our Supreme Court's ruling in *People v Wilder*, 411 Mich 328; 308 NW2d 112 (1981).

for the felony-murder conviction and 20 to 40 years in prison for the armed robbery conviction. It violates the Double Jeopardy Clause of the United States Constitution, US Const, Am V, and the Double Jeopardy Clause of the Michigan Constitution, Const 1963, art 1, § 15, to sentence a defendant for both felony-murder and armed robbery convictions when the armed robbery conviction is the predicate felony for the felony-murder conviction. *People v Harding*, 443 Mich 693, 712; 506 NW2d 482 (1993). The appropriate remedy in this instance is to affirm the conviction of the higher charge and vacate the lower conviction. *Herron*, *supra* at 609. Accordingly, we vacate defendant's armed robbery conviction and sentence and remand for modification of the judgment of sentence.

Finally, defendant argues that the police did not have a warrant or probable cause to arrest him in his home. To preserve the issue of an illegal arrest for appellate review, a defendant must raise the issue before the trial court. *People v Van Sickle*, 116 Mich App 632, 637; 323 NW2d 314 (1982). Because defendant failed to raise this issue before the trial court, it is unpreserved and will be reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999).

If a police officer receives information that there is a warrant for a person's arrest, the officer may arrest that person without that warrant in his possession. MCL 764.15(e); MCL 764.18. Further, a police officer may arrest a person without a warrant if a felony has been committed and the officer has reasonable cause to believe that the person committed it. MCL 764.15(c). Because it is uncontested that defendant was arrested on an INS warrant, and defendant failed to offer any evidence to the contrary, defendant's argument is without merit.

Defendant also argues that subject matter jurisdiction was never established because he was arrested for the purpose of a homicide investigation. Defendant contends his arrest for that purpose was prohibited by the United States and Michigan Constitutions. Defendant offers no support for his cursory argument, and this Court is not required to search for authority to support his position. *People v Lynn*, 223 Mich App 364, 368; 566 NW2d 45 (1997).

Reversed and remanded for further proceedings in accordance with this opinion.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello