STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRILL DEON BOYLES, a/k/a RASHON DEON JOHNSON, a/k/a WILLIE MOORE,

Defendant-Appellant.

UNPUBLISHED
December 14, 2004

No. 249502
Oakland Circuit Court
LC No. 2001-180759-FC

Before: Cavanagh, P.J., and Jansen and Fort Hood, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of one count of first-degree premeditated murder, MCL 750.316(1)(a), one count of first-degree felony murder, MCL 750.316(1)(b), two counts of armed robbery, MCL 750.529, one count of conspiracy to commit armed robbery, MCL 750.157a, one count of assault with intent to commit murder, MCL 750.83, one count of felonious assault, MCL 750.82, and eight counts of possession of a firearm during the commission of a felony, MCL 750.227b. At sentencing, the circuit court announced that it was sentencing defendant as a fourth habitual offender, MCL 769.12, to terms of life imprisonment without parole for each murder conviction, ten to twenty years' imprisonment for the assault with intent to commit murder conviction, ten to twenty years' imprisonment each for the armed robbery and conspiracy convictions, five to fifteen years' imprisonment for the felonious assault conviction, and two years' imprisonment each for the felony-firearm convictions. Defendant appeals as of right. We affirm in part, vacate in part, and remand for correction of the judgment of sentence.

I

Defendant first contends that trial counsel was ineffective in several respects. Defendant has preserved this issue for appellate review to the extent that he has provided affidavits and a police report in support of his unsuccessful motions to remand for an evidentiary hearing. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of

the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *Id*. at 312, 326-327; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The defendant must overcome the strong presumptions that counsel rendered effective assistance and that counsel's actions represented sound trial strategy. *Rodgers*, *supra* at 714-715.

A. Failure to Call Alibi Witnesses

Defendant first insists that trial counsel should have presented the testimony of Cleve Manley, whose affidavit avers that minutes after leaving "Krazy Moes [near downtown Pontiac] at 2:00 a.m." on August 2, 2001, he "ran into [defendant] at the stoplight on Woodward down the street . . . between the hour of 2:05 and 2:10 a.m."[1] According to Manley's affidavit, he and defendant "spoke and exchanged a few words" before defendant "drove off in one direction and [Manley] went in the other."

After reviewing the trial record, we cannot conclude that Manley's testimony would have provided defendant a substantial defense that might have made a difference in the outcome of his trial, given that much trial testimony indicated that the robbery and shooting took place well before 2:05 or 2:10 a.m. on August 2, 2001. See *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995) vacated in part on other grounds 453 Mich 902 (1996). The testimony of surviving victims Kenneth Hayes, Aimee Kendrick, and Jerean Tidwell suggested that a friend named Corey Brown arrived at 624 Kenilworth between midnight and 1:00 a.m.; that Brown spent ten or fifteen minutes inside the house; that defendant arrived when Brown was still present; that defendant left the house around the same time as Brown; that defendant reentered the house a couple of minutes later with codefendant David Daniels; that defendant and Daniels spoke with Kevin Stephens for approximately ten minutes before pulling out their revolvers; that the robbery and shooting took place over the course of ten to fifteen minutes and ended around 1:00 a.m.; and that ten or fifteen minutes passed between the conclusion of the robbery and shooting and Hayes' call to 911. In light of this testimony, the fact that defendant was at a Woodward stop light at 2:05 or 2:10 a.m. does not contradict the possibility that he previously was at 624 Kenilworth at the time of the robbery and shooting. Manley's affidavit thus does not create an alibi for defendant. *People v Gillman*, 66 Mich App 419, 424; 239 NW2d 396 (1976) (defining "alibi testimony" as that offered to prove the defendant was somewhere other than at the scene of the crime when the crime occurred).

The testimony of Brown and his girlfriend Kelli Lee somewhat differently indicated that they arrived at Stephens' house at 1:45 or 1:50 a.m. on August 2, 2001; that defendant arrived alone within the next few minutes, by 1:50 or 1:55 a.m.; that Brown spent ten or fifteen minutes in the house, during which time he observed defendant buy a small amount of marijuana; that defendant walked out of the house at nearly the same time as Brown so that "he could go get his boy out of the car"; that as Brown and Lee drove away between 2:00 and 2:10 a.m., defendant and a man wearing a hooded sweatshirt went inside the house;, and that Lee drove Brown 1 to 1-

[1] For purposes of this analysis, we assume that Manley is the "O.J." to whom defendant referred during his trial testimony.

1/2 miles to his house, then called Brown at 2:17 a.m. to inform him that she had made it home. The testimony of defendant and Daniels also placed defendant at Stephens' house by 2:00 a.m. on August 2, 2001. Defendant averred that he left Stephens' house at 2:10 a.m., and saw "O.J." at a Woodward intersection in Pontiac at 2:15 a.m.[2] Assuming the veracity of Brown's recollection that defendant and Daniels went inside Stephens' house by 2:00 a.m., the estimation by Kendrick that the crime took place over a ten-minute period, and defendant's own belief that he left Stephens' house by 2:10 a.m., Manley's allegation that he saw defendant by 2:10 a.m. still would not have established that defendant was someplace other than at Stephens' house at the time of the robbery and shooting. *Gillman*, *supra* at 424.

Assuming the veracity of Brown's and Lee's alternate estimations that defendant and Daniels did not enter Stephens' house until approximately 2:10 a.m., and the resultant implication that the robbery and shooting on Kenilworth did not occur until after this time, the affidavit of Manley does tend to establish defendant's presence at a Woodward traffic light at the time of the charged offenses. But even assuming that Manley's affidavit would have tended to support defendant's proffered alibi defense, we cannot conclude that the absence of Manley's testimony at trial deprived defendant of a *substantial* defense in light of the facts that (1) all three surviving victims identified defendant at trial as one of the assailants; (2) Brown's testimony, corroborated by Lee, established that just after he left Stephens' house, in which the victims all were present and unharmed, he saw defendant and another man entering the house; (3) defendant and Daniels acknowledged that they went into Stephens' house during the early morning hours of August 2, 2001; and (4) Kenya Campbell testified that (a) Daniels called her shortly after 2:05 a.m. on August 2, 2001, and requested that she pick him up at defendant's house, which was located within a five-minute drive of Stephens' house, (b) on arriving at defendant's house, he came outside, entered the car, and told her to drive him to get Daniels, (c) at the next block, Daniels, who was sweating and appeared crazy, got inside the car, and (d) in response to Campbell's inquiry what Daniels and defendant had done, Daniels replied that her "boyfriend [Hayes] had got whupped down, and his friend was hurt."[3]

With respect to defendant's contention that trial counsel was ineffective for failing to call his cousin, Arthur Moore, as a witness, defendant offers on appeal absolutely no substantiation of his suggestion that Moore would have provided alibi testimony. Although the prosecutor's third amended witness list filed on February 21, 2002, listed Moore as both a known res gestae witness and a witness the prosecutor intended to produce at trial, the prosecution ultimately did not call Moore to testify. In closing argument, defense counsel raised the prosecutor's failure, stating:

[2] Pontiac Police Officer Michael Miller testified that he received a dispatch to Stephens' house at 2:15 a.m. on August 2, 2001.

[3] Moreover, defense counsel did present to the jury an alibi defense in the form of defendant's own testimony that at the time he left Stephens' house to drive around Pontiac, the victims were alive and well. The trial court instructed the jury concerning its consideration of the alibi testimony in accordance with CJI2d 7.4, but the jury ultimately rejected the defense.

> But then [defendant] went on to say that . . . I did go to the house [on Kenilworth]. I did buy marijuana. I did see some people there. I did see Mr. Daniels there, and what-not, but I left. And when I left, all was well. And this is where I went. I went downtown, . . . and I saw this person and I saw that person. I went by my house and I did that. And guess what? Some of the people that he says he saw are on the People's witness list, right there . . . .
>
> *So, if [the prosecutor] didn't believe that or wanted to disprove that in some way, that this was not a valid alibi, that he had not seen these people, that he had not been in those places, some of the witnesses that might have been able to do that are right here on the People's witness list. Did you hear from any of them, saying that, no, I didn't see him? No, he wasn't where he said he was. Not one. . . .* [Emphasis added.]

Defendant has failed to overcome the presumption that counsel pursued a reasonable trial strategy in suggesting to the jury that the prosecutor failed to call Moore because his testimony would have corroborated defendant's own alibi testimony. *Rodgers*, *supra* at 714-715.

B. Inadequate Preparation for Trial

Defendant fails to substantiate his claim that trial counsel neglected to investigate witnesses that defendant proposed or otherwise prepare for trial because he met with defendant only the day before trial began. Although defendant submitted an affidavit in support of this claim, the affidavit points to no specific witnesses or evidence that defense counsel allegedly failed to discover or proffer. Because defendant offers absolutely no suggestion of any specific evidence, witness, or theory that counsel failed to put forth at trial, he has not shown that counsel's conduct in waiting to meet with him until the day before trial qualifies as objectively unreasonable. Similarly, because defendant entirely fails to contend with specificity that the allegedly inadequate trial preparation caused him prejudice, he has not demonstrated a reasonable probability that counsel's conduct affected the outcome of the trial. *Rodgers*, *supra* at 714-715.

C. Failure to Object to Photographic Identification Evidence

Defendant maintains that counsel should have objected to evidence of Kendrick's and Tidwell's participation in photographic lineups that included his likeness, which occurred during the late morning of August 2, 2001, because Hayes already had identified defendant to the police as a primary suspect in the robbery and shooting, and no attorney had protected his interests during the photographic lineups. Generally, "'[i]n the case of photographic identifications, the right of counsel attaches with custody.'" *People v McCray*, 245 Mich App 631, 639; 630 NW2d 633 (2001), quoting *People v Kurylczyk*, 443 Mich 289, 302 (opinion by Griffin, J.); 505 NW2d 528 (1993). This Court has recognized that a right to counsel at the time of a precustodial photographic lineup may exist only in unusual circumstances, such as when (1) a defendant already has been taken into custody and then released shortly before the occurrence of the challenged photographic lineup, or (2) "'the witness has previously made a positive identification and the clear intent of the lineup is to build a case against the defendant.'" *People v Lee*, 243 Mich App 163, 182; 622 NW2d 71 (2000), quoting *People v McKenzie*, 205 Mich App 466, 472; 517 NW2d 791 (1994).

In this case, because (1) defendant, who the police did not arrest until 6:00 p.m. on August 2, 2001, acknowledges that he was not in police custody at the time of the identification procedures in which Kendrick and Tidwell participated, (2) the police never contacted defendant before showing Kendrick and Tidwell the photographic lineups involving him and Daniels; (3) neither Kendrick nor Tidwell previously had identified defendant to the police; and (4) "[t]here is no evidence that the photographic lineup was conducted in an effort to build a case against defendant or to bolster the case against defendant as opposed to simply confirming who defendant was," we conclude that defendant possessed no right to counsel at the time of the precustodial photographic lineups. Consequently, trial counsel was not ineffective for failing to raise a meritless objection to evidence of the photographic lineups. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

D. Failure to Request a Mistrial

Defendant lastly asserts that counsel should have moved for a mistrial on the basis that the prosecutor purposefully left prejudicial documentation concerning him in the jury room for the jurors to see. The transcripts reflect that the prosecutor and defense counsel spent some time in the jury room reviewing the proposed instructions, and that the prosecutor apparently inadvertently left in the jury room a file containing some proposed instructions, the criminal information applicable to defendant and Daniels,[4] and a copy of *People v Kelly*, 423 Mich 261; 378 NW2d 365 (1985). The first juror who arrived for duty on the fifth day of trial discovered the file and returned it to the circuit court clerk immediately thereafter. The court questioned the lone juror who discovered the file, and the juror explained that she saw a document in the file that bore defendant's name and listed "the charges that had been read to [the jury] in the opening statement," "realized that the[documents] were probably not supposed to be in there," and "picked them up and . . . found [the court clerk] and handed them to him." The juror denied examining the top document, or any pages below that document. The juror further denied discussing her discovery of the documents with her fellow jurors. The court cautioned the juror "to disregard anything that you saw relative to those documents and only judge this case solely on the evidence presented in the courtroom and this Court's instructions on the law," and to refrain from discussing the file or the court's inquiries with the other jurors. All counsel expressed satisfaction with the extent of the trial court's inquiries and the fitness of the juror to continue service, and according to defense counsel, defendant also "indicated to [defense counsel] that he ha[d] no problems."

Even assuming that defendant has not waived appellate review of this issue by affirmatively expressing satisfaction with the trial court's handling of the prosecutor's misplaced file, neither his arguments on appeal nor the affidavits he offers in support thereof identify any specific information to which a juror may have been exposed, or explain how any allegedly improper information prejudiced the outcome of his trial. Accordingly, defendant cannot establish the required prejudice element of an ineffective assistance of counsel claim. *Rodgers*, *supra* at 714. Defendant also cannot establish his related claim that the prosecutor engaged in

[4] The information contained the same counts that the jurors were read at the commencement of the case, except for bifurcated charges of felon in possession of a firearm.

misconduct, in this regard, that deprived him of a fair trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

II

Defendant next argues that the circuit court violated his right to be free from double jeopardy by imposing separate first-degree premeditated murder and first-degree felony murder convictions and sentences arising from Stephens' death. This Court has recognized that when a defendant obtains convictions for both first-degree premeditated murder and first-degree felony murder arising from the death of a single victim, "the appropriate remedy to protect defendant's rights against double jeopardy is to modify defendant's judgment of conviction and sentence to specify that defendant's conviction is for one count and one sentence of first-degree murder supported by two theories: premeditated murder and felony murder." *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744 (1998). Because defendant has convictions and sentences for both premeditated and felony murder arising from the death of one victim, we remand to the circuit court for correction of the judgment of sentence to reflect one conviction and sentence for first-degree murder, supported by two theories. We further vacate one of defendant's felony-firearm convictions as he had a felony-firearm conviction for both the premeditated murder and the felony murder.[5]

III

Defendant lastly asserts that insufficient evidence established his identity as one of the assailants. We need not address this issue because defendant failed to present it within his Standard 11 brief's statement of questions presented. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). We nonetheless conclude after reviewing the record that ample evidence of defendant's identity exists in the form of: (1) Hayes', Kendrick's, and Tidwell's unwavering identifications of defendant at trial as one of the gun-wielding participants in the robbery and shooting, whom they had the opportunity to observe in Stephens' house for at least several minutes over the course of the events; (2) defendant's and Daniels' acknowledgments that defendant was present at Stephens' house shortly before the time of the robbery and shooting, and (3) Campbell's account that Daniels directed her to defendant's house, where he entered her car and instructed her to pick up Daniels, who appeared sweaty and crazy, and who replied to Campbell's inquiry regarding what he and defendant had done by advising Campbell that Hayes had been "whupped down" and his friend had been hurt. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003); *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). To the extent that defendant challenges the credibility of Hayes, Kendrick, and Tidwell, the jury had the opportunity to consider their testimony, as well as two defense counsels' extensive efforts to impeach them with prior inconsistent statements. The jury apparently accepted Hayes', Kendrick's, and Tidwell's identifications of defendant, and this Court will not second guess the jury's credibility determination. *Nowack*, *supra* at 400; *People v Elkhoja*, 251 Mich App 417, 442; 651 NW2d 408 (2002) vacated in part on other grounds 467 Mich 916 (2003).

[5] The prosecution conceded at oral argument that one of the felon-firearm convictions should be vacated.

We vacate one felony-firearm conviction, affirm the remainder of defendant's convictions, and remand to the circuit court for modification of his judgment of sentence to reflect a single conviction and sentence for first-degree murder supported by alternate theories of premeditated murder and felony murder and to reflect that a felony-firearm conviction has been vacated.[6] We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood

[6] Although not raised by defendant, the judgment of sentence also erroneously reflects two separate convictions of assault with intent to commit murder. The jury found defendant guilty of only one count of assault with intent to commit murder at trial and, consistent with this verdict, the trial court announced only one sentence for assault with intent to commit murder at the sentencing proceeding. Additionally, the various sentences listed in the judgment of sentence do not accurately correspond to the previously identified conviction offenses listed in the judgment, and some of the listed sentences appear inconsistent with the sentence announced by the trial court at the sentencing proceeding (e.g., whereas the court announced four ten-to-twenty-year sentences at the sentencing hearing, one each for the assault with intent to commit murder, the conspiracy, and the two armed robbery convictions, the judgment of sentence reflects only three ten-to-twenty-year sentences, and the offenses to which those sentences pertain is unclear from the judgment; the court also announced just a single five-to-fifteen-year sentence at the sentencing hearing, that being for the felonious assault conviction, yet the judgment of sentence reflects two five-to-fifteen-year sentences, and the offenses to which those sentences pertain is again unclear. On remand, the trial court shall also modify the judgment of sentence to correct these apparent clerical errors.