

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN XAVIE COCHRANE,

Defendant-Appellant.

UNPUBLISHED

July 12, 2005

No. 251043

Saginaw Circuit Court

LC No. 02-021253-FC

Before: Murphy, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, and carrying a dangerous weapon with unlawful intent, MCL 750.226. Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to concurrent sentences of life without parole for first-degree felony murder, 300 to 600 months' imprisonment for armed robbery, and 60 to 90 months' imprisonment for carrying a weapon with unlawful intent. Defendant moved for a new trial on essentially the same grounds that he now raises on appeal. In that motion, defendant argued, *inter alia*, that his convictions for both felony murder and armed robbery violated his right to be free from double jeopardy. The prosecution agreed. Accordingly, the court ordered the armed robbery conviction and sentence vacated. But the remainder of the motion was denied. We affirm.

Defendant first argues on appeal that the method of jury selection employed in this case was violative of MCR 2.511(F) and that his trial counsel was ineffective for failing to object to this violation. Defendant raised both challenges in his motion for new trial. We find that reversal is unwarranted.

Because defense counsel exercised only nine of his twelve peremptory challenges, MCR 6.412(E), and stated his satisfaction with the jury, appellate consideration of the propriety of the jury selection method has been waived. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *People v Russell*, 434 Mich 922; 456 NW2d 83 (1990). Moreover, while the jury selection process was flawed to an extent because of the existence of some predictability and a lack of randomness, we cannot conclude that the process was unfair or that defendant was deprived of having an impartial jury hear his case. MCR 6.412(A); MCR 2.511(A)(4) ("Prospective jurors may be selected by any other fair and impartial method directed by the court or agreed to by the parties."); *People v Green (On Remand)*, 241 Mich App 40, 48; 613 NW2d 744 (2000). The *Green* panel noted that "[t]he element of predictability, however

slight, should be eliminated from the selection process to ensure that randomness is preserved and protected to the fullest degree.” *Id.* In light of this principle, we instruct the trial court, as did this Court in *Green*, “not to employ this system in the future.” *Id.*, citing MCR 7.216(A)(7).

With respect to the claim of ineffective assistance of counsel, defendant fails to overcome the strong presumption that counsel’s decision not to challenge the selection process was sound trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). Understandably and reasonably, defense counsel may have preferred the predictability of the method used. Indeed, his support of the method was demonstrated by the fact that he chose not to exercise three of his peremptory challenges.

Defendant next argues several additional reasons that defense counsel was ineffective. However, defendant provides no argument or explanation regarding the significance of these contentions. A bald assertion without supporting authority precludes examination of this issue. It is insufficient for an appellant to simply announce a position or assert an error and then leave it up to this Court to rationalize and discover the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998)(citation omitted); *People v Federico*, 146 Mich App 776, 797; 381 NW2d 819 (1985). Moreover, defendant’s allegations and arguments are without substantive merit.

Acknowledging that his armed robbery conviction was vacated below, defendant further argues that his constitutional right to be free from being placed in double jeopardy was violated when he was convicted of first-degree felony murder and carrying a dangerous weapon with unlawful intent. We disagree. A double jeopardy challenge presents a question of law that we review de novo. *People v Ford*, 262 Mich App 443, 446; 687 NW2d 119 (2004).

With respect to the constitutional protections against multiple punishments, judicial examination is confined to a determination of legislative intent. *People v Calloway*, 469 Mich 448, 451; 671 NW2d 733 (2003), quoting *People v Sturgis*, 427 Mich 392, 400; 397 NW2d 783 (1986). Because the power to fix punishment and define crime is wholly legislative, the Double Jeopardy Clause is not a limitation on the Legislature. *Calloway, supra* at 451. Even if the crimes are essentially the same, if it is evident that the Legislature intended to authorize cumulative punishments, a court’s inquiry is at an end. *Id.* “The question is, then, whether the ‘state legislature intended to authorize cumulative punishments.’” *Id.* (citation omitted). The subject, language, and history of the statutes can be utilized to ascertain intent. *People v Robideau*, 419 Mich 458, 486; 355 NW2d 592 (1984). “Statutes prohibiting conduct that is violative of distinct social norms can generally be viewed as separate and amenable to permitting multiple punishments.” *Id.* at 487. Another source of legislative intent can be found in the amount of the punishment expressly authorized by the Legislature. *Id.* “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.” *Id.*

We conclude that the Legislature did not intend to preclude punishment for both the offense of carrying a dangerous weapon with unlawful intent and felony murder. Carrying a dangerous weapon with unlawful intent, MCL 750.226, is not an enumerated underlying felony for purposes of felony murder, and thus MCL 750.226 is not a base statute incorporated by

MCL 750.316 in order to increase penalties. Additionally, the offenses do not serve to protect against violations of the same social norm. Defendant claims that they both serve to protect against unlawful use of a weapon. However, the purpose of the felony-murder statute is to punish persons who commit murder during the commission of a felony, regardless of whether they used a weapon to commit the killing. The focus of MCL 750.226 is on weaponry. There is no double jeopardy violation.

In a supplemental brief, defendant argues that insufficient evidence was presented to convict him of armed robbery as the predicate offense of felony murder because he merely intended to search the victim's wallet for his own personal property. He also argues that insufficient evidence was presented to convict him of murder because he was acting in self-defense. We disagree with both claims.

A claim of insufficiency of the evidence invokes a defendant's constitutional right to due process of law, which is reviewed de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). "This Court reviews a challenge to the sufficiency of the evidence by viewing the evidence in a light most favorable to the prosecution and determining whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

"The essential elements of an armed robbery are (1) an assault, and (2) a felonious taking of property from the victim's person or presence, while (3) the defendant is armed with a weapon described in the statute." *Id.* "Armed robbery is a specific intent crime for which the prosecutor must establish that the defendant intended to permanently deprive the owner of property." *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). Where the defendant had no such intent, the crime cannot have been committed. *People v Comstock*, 115 Mich 305; 73 NW 245 (1897); *People v Walker*, 38 Mich 156 (1878). Felony murder requires: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result (malice), (3) while committing, attempting to commit, or assisting in the commission of any of the enumerated felonies in the statute. *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999).

Drawing all reasonable inferences and making credibility choices in support of the jury verdict leads us to the conclusion that there was sufficient evidence to justify the jury in reasonably finding that defendant was guilty beyond a reasonable doubt of both armed robbery and murder. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000); *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). Despite defendant's testimony that he stabbed the victim in self-defense and, in searching the victim, his intent was only to retrieve his own belongings from the victim's person, the jury's verdict demonstrates that they did not find his testimony credible. Their verdict reflects that they instead looked to the testimony of the prosecutor's witnesses, which testimony reflected that defendant was the aggressor in the altercation and that he intended to permanently deprive the victim of his money. There was also evidence that defendant forcibly removed the victim's wallet and a key.

Several witnesses testified to hearing defendant demanding money from the victim. Further, although defendant claimed that the reason he looked in the wallet was to retrieve his Bridge Card,¹ the evidence shows that the Bridge Card was still in the wallet when it was collected by police. However, no money was found in the wallet. It can be inferred that defendant, therefore, disregarded the Bridge Card and was looking for something else in the wallet, like money. One witness testified that the victim stated, “See, you killed me over my own money[,]” or words to that effect. And despite the testimony supporting defendant’s claimed injuries, it would have been reasonable for the jury to infer that they were merely sustained during the undisputed struggle and did not lend significant credibility to defendant’s claim of self-defense.

Defendant also raises additional claims, including instructional error, several claims of prosecutorial misconduct, and ineffective assistance of counsel for failure to object to the alleged prosecutorial misconduct. In addition to being unpreserved, these issues have not been properly presented because defendant failed to identify them as issues in his question presented. Therefore, these claims are waived. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Nevertheless, we note that review of the issues reveals they are collectively without merit.

Last, defendant argues that he was denied the effective assistance of appellate counsel, where counsel failed to procure a transcript of a competency hearing at which defendant allegedly did not appear. The standards that apply to ineffective assistance of trial counsel apply equally to a claim of ineffective assistance of appellate counsel. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

The lower court docketing statement indicates that a competency hearing was held on January 23, 2003. While the docketing statement also indicates that defendant himself was present at the competency hearing along with the presence of counsel, defendant argues that he was not present. Defendant fails to submit an affidavit to that effect, and the parties stipulated to the introduction of a forensic psychiatric report to allow the trial court to determine whether defendant was competent to stand trial. Defendant’s argument is speculative and not worthy of reversal or remand.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Pat M. Donofrio

¹ A Bridge Card is a debit card that takes the place of paper food stamps and checks, and it can be used to purchase food products and access cash benefits.