STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED December 20, 2005
v	No. 262310 Wayne Circuit Court
LINDSEY PEARSON, Defendant-Appellee.	LC No. 73-006302

Before: Whitbeck, C.J., and Talbot and Murray, JJ.

PER CURIAM.

I. Introduction

The prosecution appeals by right the circuit court's order granting defendant, Lindsey Pearson,[1] relief under MCR 6.508 from his 1974 first-degree felony murder conviction, MCL 750.316. The court vacated the conviction, imposed a conviction for second-degree murder, MCL 750.317, and sentenced Pearson to 20 to 30 years with credit for over 31 years served. Pearson was not released because the trial court granted the prosecution's motion for a stay pending the outcome of this appeal. We now reverse.

II. Background

Pearson was tried along with his brother, Willie, for the August 19, 1973 murder of James Kidd at the Airport Motel in Detroit. Witnesses agreed that Pearson, his brother, and a third man[2] came to Kidd's room to confront him in front of others about stealing property from Willie. Witnesses differed on whether none, some, or all of the three men were armed. They also differed on whether they robbed Kidd of money and whether Pearson took jewelry from a woman who was present. Some witnesses claimed that Kidd admitted the robbery, returned property, and said that he had more of it at another location. The three men led Kidd and a few others outside the room to get the property. They descended the stairs into the lobby, where two or more shots rang out. Kidd was shot twice and was dead. No witnesses saw the shooting

[1] Unless otherwise noted, "Pearson" will refer to defendant, Lindsey Pearson.

[2] The third man was never properly identified.

directly or were able to identify which man or men fired shots. Pearson and another witness claimed that a bearded stranger entered the lobby and shot Kidd. Pearson and Willie's trial counsel, whom they also shared on appeal, also argued that the robbery and shooting were separate transactions such that conviction for first-degree felony murder was inappropriate because the shooting was not in furtherance of the alleged robbery.

The trial court, consistent with Pearson's request, instructed the jury to decide between first-degree murder and not guilty. Pearson objected to the prosecution's request for an instruction on second-degree murder, arguing that the prosecution must prove the crime that it charged and not hedge its bets.[3] The jury convicted Pearson and his brother and they were each given the statutory mandatory sentence of life in prison. They appealed by right and their convictions were affirmed in *People v Pearson*, 61 Mich App 366; 232 NW2d 408 (1975) ("*Pearson I*"), and *People v Pearson*, 404 Mich 698; 273 NW2d 856 (1979) ("*Pearson II*"), a landmark case on rules governing res gestae witnesses. Though Pearson's claims of error were different then, they included a challenge to the jury instructions. Our Court, after reviewing and rejecting the six claims of error raised by defendant, concluded that defendant was represented vigorously by competent counsel, and clearly received a fair jury trial:

> This case was most vigorously and competently tried by the defense and by the people. The trial judge literally went overboard in giving each counsel every opportunity to state his position, make objections and argue his theory of the case. By all the established requisites of our system the parties had a fair trial. The jury spoke. We cannot disturb its verdicts. [*Pearson I*, *supra* at 375.]

Fast forward some 30 years later, and Pearson brings the instant motion for relief from judgment. The grounds Pearson presented in his post-conviction motion for relief from judgment were instructional error and ineffective assistance of counsel. In particular, he argued that the court erred when it did not sua sponte instruct the jury on his claim of right defense. His theory was that, because he was retrieving property, there was no robbery, and therefore, no underlying felony for first-degree murder. Pearson also claimed that his counsel was ineffective due to the fact that he had the same attorney for his appeal and that he could not be expected to argue that he was personally ineffective for not requesting a claim of right instruction.

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[3] According to the controlling case at the time Pearson was tried, *People v Bufkin (On Rehearing)*, 48 Mich App 290; 210 NW2d 390 (1973), aff'd *People v Carter*, 395 Mich 434 (1975), the murder statute is clear and to avoid "incongruous and compromise verdicts," *id.* at 293, juries should only have to choose between guilty of first-degree murder and not guilty. *Id.* at 294. See, also, *People v Bufkin*, 43 Mich App 585; 204 NW2d 762 (1972). Our Supreme Court in 1975 announced a new rule of instruction requiring trial courts in first-degree murder cases tried after January 1, 1976, to also instruct on the lesser offense of second-degree murder. *People v Jenkins*, 395 Mich 440, 443; 236 NW2d 503 (1975). Our Supreme Court in turn overturned *Jenkins* with limited retroactive effect in *People v Cornell*, 466 Mich 335, 367; 646 NW2d 127 (2002). Because Pearson's trial occurred in 1974, the rule of *Bufkin* applied and the court could not instruct the jury on second-degree murder.

The trial court granted Pearson's motion, concluding that good cause existed to review the grounds raised in the motion based on the perceived conflict in Pearson's trial counsel also serving as his appellate counsel. The court then concluded that a reasonable claim of acquittal existed because trial counsel was ineffective in not seeking a claim of right instruction or an instruction on lesser included offenses, and that these errors related to the validity of the armed robbery conviction (the predicate offense for the felony-murder conviction). The court then reduced defendant's conviction to second-degree murder, and sentenced defendant to 20-30 years, with credit for 31 years of time served.

III. Analysis

This Court reviews a grant of relief from judgment for an abuse of discretion. *People v Ulman*, 244 Mich App 500, 508; 625 NW2d 429 (2001). To the extent resolution of the case depends on the interpretation of a court rule, the standard of review is de novo. *People v Kimble*, 470 Mich 305, 308-309; 684 NW2d 669 (2004).

MCR 6.508(D) governs the post-conviction relief that Pearson was granted. In relevant part, it reads as follows:

> The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
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> * * *
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> (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
>
> (b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,
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> (i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal . . . . [MCR 6.508.]

Because Pearson could have raised in his appeal by right the grounds he now asserts for relief, he must demonstrate good cause and actual prejudice to obtain that relief. The court may, in its discretion, hold an evidentiary hearing, but it is not required to do so. MCR 6.508(B). The court in this case did not conduct such a hearing, although it did allow thorough legal arguments by counsel.

The prosecution's first claim of error alleges that the court misconstrued the court rule because, to demonstrate actual prejudice, Pearson had to show that but for the alleged error he

would have been acquitted.[4] The prosecution contends that Pearson's claims of instructional error and ineffective assistance of counsel, if meritorious, merely mean that the jury would have also been instructed on second-degree murder. Therefore, Pearson would only demonstrate a reasonably likely chance of conviction of a lesser offense, and not a reasonably likely chance of acquittal.

We reject the prosecution's argument that acquittal entails only wholesale acquittal of all charges. Rather, a conviction of second-degree murder includes acquittal on the first-degree murder and on the armed robbery charges. The conviction for the lesser offense necessarily requires the jury to acquit for the more grave offense and its underlying felony of robbery. See, e.g., *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982). The prosecution's construction of the court rule is therefore too strained.[5]

Turning to the main issue, the trial court held that Pearson had good cause for not raising this issue in his appeal by right because his trial counsel was also representing him on appeal. Our Supreme Court characterized as anomalous a case in which an attorney on appeal challenged his client's plea when the same attorney represented the client at the plea hearing. *People v Jaworski*, 387 Mich 21, 32; 194 NW2d 868 (1972). Case law suggests that in most cases a court cannot expect trial counsel to claim ineffective assistance of counsel when representing the same client on appeal. *Whiting v Burt*, 266 F Supp 2d 640, 644-646 (ED Mich, 2003), vacated and remanded 395 F3d 602 (CA 6, 2005). The rule is by no means per se, however, and we are not satisfied that any reasons exist to demonstrate the ineffective assistance of counsel, beyond the fact that Pearson had the same trial and appellate counsel.

The record reflects competent representation for Pearson, if not top-notch and anything but ineffective. For Pearson to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). As for deficient performance, he must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). As for prejudice, he must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . ."

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[4] Pearson contends that the prosecution is presenting an argument about interpretation of a court rule that it did not make below and therefore may not present on appeal. We disagree. The issue of whether the trial court erred in granting relief is preserved. Moreover, review may be granted in spite of preservation problems if consideration of the issue is necessary to a proper determination of the case or if the question is one of law concerning which the necessary facts have been presented. *People v Lumsden*, 168 Mich App 286, 292-293; 423 NW2d 645 (1988).

[5] Moreover, there is reason to disbelieve the prosecution's contention that only an instruction on second-degree murder would have resulted. Given Pearson's claims of error, it is also possible that the same guilty of first-degree murder or not guilty instruction would have resulted, except with added language about Pearson's alleged claim of right defense.

Id. at 167. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland, supra* at 694.

Pearson conceded to the court below that in his counsel he had a renowned criminal defense attorney. While no one is perfect, perfection is not the standard by which courts declare counsel ineffective. As previously noted, in Pearson's appeal by right we stated that his "case was most vigorously and competently tried by the defense and by the people." *Pearson I, supra* at 375.[6] His counsel secured review from our Supreme Court, which decided his appellate issues in a landmark case. The Court in its opinion also complimented the attorney, calling him "experienced and able." *Pearson II, supra* at 752. While neither appellate court was deciding whether Pearson's counsel was ineffective, the positive assessment of his performance belies Pearson's instant claim that he was ineffective.

Moreover, the decision of Pearson's counsel to oppose an instruction on the lesser offense of second-degree murder was consistent with the law at the time and with the trial strategy and theory of the case that he presented on behalf of Pearson. *People v Bufkin* (*On Rehearing*), 48 Mich App 290, 293-294; 210 NW2d 390 (1973), aff'd *People v Carter*, 395 Mich 434; 236 NW2d 500 (1975). This Court is not persuaded that there was deficient performance because Pearson has not overcome the strong presumption that his counsel's actions were sound trial strategy under the circumstances. *Mitchell, supra* at 156. Furthermore, given the weight of the evidence against Pearson and the jury's credibility determinations, there is no reasonable probability that the outcome of Pearson's trial would have been different. *Id.* at 167. Therefore Pearson's claim of ineffective assistance of counsel lacks merit.

Pearson's trial strategy and theory of the case were different from the claim of right attack he now presents. His objection to the instructions, which he also pursued on appeal,[7] was that the evidence showed that the shooting was separate and distinct from what happened in the motel room, where the prosecution alleged the robbery took place. His other defense was denying that he was part of a robbery and that a stranger was the shooter. Both theories called only for an instruction of guilty of first-degree murder or not guilty. Pearson's new theory in retrospect perhaps reflects a buyer's remorse of the trial strategy he did adopt and a hope for the next best shot at acquittal a second time around. A fair reading of the record suggests that his actual trial strategy was considered and deliberately chosen. Even assuming he and his counsel disagreed on strategy, if such a disagreement is not good cause to substitute counsel, *People v Traylor*, 245 Mich App 460; 628 NW2d 120 (2001), then surely it cannot be good cause for post-conviction relief.

Even if Pearson had good cause, he has not demonstrated a reasonable chance of acquittal. The instructions the court gave necessarily encompassed a claim of right defense. Specifically, the court instructed the jury on the requirement of proof beyond a reasonable doubt that Pearson had the specific intent to rob. It presented to the jury Pearson's theory of claim of right and allegation that a stranger was the shooter. The court stressed to them the importance of

[6] It also credited "alert defense counsel" with an objection made at trial. *Pearson I, supra* at 374.

[7] *Pearson II, supra* at 751-752.

first finding that there was a robbery, stating that the "crux" of the case was whether "Kidd met his death as a result of an attempt to perpetrate an armed robbery or an armed robbery was actually perpetrated." Moreover, Pearson himself testified that he and Willie had asked Kidd to return the property he had taken from Willie's room.

Additionally, the jury had sufficient evidence upon which it could rest its guilty verdict. It apparently disbelieved Pearson's denial of the robbery and the testimony of him and another witness claiming that a stranger was the shooter. Instead, the jury must have believed the witnesses who claimed that Pearson was armed, that he helped his brother rob currency and personally took jewelry, and that one or more of the robbers in the course of the robbery shot and killed the victim. Pearson has not demonstrated that it is reasonably likely that the jury, if instructed on claim of right, would have acquitted Pearson of first-degree murder. The weight of the evidence against Pearson indicates the contrary. The jury simply did not believe Pearson's defense. This Court must not interfere in the jury's determination regarding the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). To the extent that the trial court invaded the province of the jury, it abused its discretion.

To the extent that the court below granted relief because the jury was not sua sponte instructed on second-degree murder, it erred.[8] As already noted, such an instruction would have been improper under *Bufkin*, *supra*, where this Court held that juries must be charged with only first-degree murder or not guilty. *Id.* at 294. Although in *Jenkins* our Supreme Court made an exception for first-degree murder and required trial courts to sua sponte instruct juries on second-degree murder as well. *Jenkins*, *supra* at 440, the rule only applied to cases tried after January 1, 1976. *Id.* at 443. Pearson, whose trial was in 1974, did not fall under this rule.[9] Nor does his case fall under case law deciding appeals of trials in which the defendant requested an instruction for a lesser offense. See *People v Kamin*, 405 Mich 482, 492-493; 275 NW2d 777 (1979), overruled in part on other grounds, *People v Beach*, 429 Mich 450, 484; 418 NW2d 861 (1988); *People v Ora Jones*, 395 Mich 379, 385-386; 236 NW2d 461 (1975), overruled by *Cornell*, *supra*. Pearson affirmatively opposed such an instruction. The trial court therefore erred to the extent it found instructional error, and would have required the first trial court to override binding case law and Pearson's opposition to an instruction to the jury on second-degree murder.

Even if the claim had merit, as we have already concluded, there is no actual prejudice under MCR 6.508, because Pearson has not shown that absent his alleged ineffective counsel he

[8] The court indicated that it found "instructional error" and was relying on Pearson's authority. At oral argument before the trial court, Pearson referred to *People v Kamin*, 405 Mich 482; 275 NW2d 777 (1979). *Jenkins*, *supra* at 440 and *People v Ora Jones*, 395 Mich 379; 236 NW2d 461 (1975), overruled by *Cornell*, *supra* at 335.

[9] Our Supreme Court overruled *Jenkins* in *Cornell*, *supra* at 358. It held that jury instructions for necessarily-included lesser offenses required support by a rational view of the evidence and limited relief on appeal to lesser offenses actually requested by one of the parties and supported by substantial evidence. *Id.* at 356-358, 365. It limited the retroactive effect of its decision to case that were pending on appeal in which the issue was raised and preserved. *Id.* at 367.

had a reasonably likely chance of acquittal for first-degree felony murder. The weight of the evidence against him precludes any other resolution.

Reversed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Christopher M. Murray