

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JULIAN TIMOTHY BROOKS,

Defendant-Appellant.

UNPUBLISHED

April 17, 2007

No. 266082

Wayne Circuit Court

LC No. 05-001206-01

Before: Donofrio, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree felony murder, MCL 750.316(1)(b), assault with intent to rob while armed, MCL 750.89, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b as a result of the attempted robbery of Eric “Sean” Clark in which Clark was shot and killed in a Detroit alley.¹ The trial court sentenced defendant as a third-felony habitual offender, MCL 769.11, to life imprisonment for the murder conviction, 210 months to 70 years for the assault conviction, and 2-1/2 to 10 years for the felon-in-possession conviction, those sentences to be served concurrently, but consecutive to a two-year term of imprisonment for the felony-firearm conviction. Because defendant’s dual convictions violated his double jeopardy protections, we vacate defendant’s conviction and sentence for assault with intent to rob while armed, but because no other error occurred, we affirm his remaining convictions and sentences.

At the outset, the prosecutor concedes, and we agree, that defendant’s dual convictions for both felony murder and the predicate felony, assault with intent to rob while armed, violate his double jeopardy protections. We vacate defendant’s conviction and sentence for assault with intent to rob while armed. *People v Bulls*, 262 Mich App 618, 628; 687 NW2d 159 (2004).

Defendant next argues that evidence of his prior guilty plea and evidence of his prior criminal history denied him a fair trial. Defendant did not object to the plea evidence at trial and in fact was the first party to elicit such evidence. He also failed to object to the evidence of his prior criminal history. Therefore, these issues are not preserved, *People v Aldrich*, 246 Mich

¹ Codefendants Morris Dajuan Howard and David Anthony Edwards were also charged and convicted in the matter.

App 101, 113; 631 NW2d 67 (2001), and our review is limited to plain error affecting defendant's substantial rights, *People v Ackerman*, 257 Mich App 434, 446; 669 NW2d 818 (2003). Defendant specifically argues that the plea evidence was inadmissible under MRE 410(1). But that rule only prohibits admission of evidence of a plea of guilty that is later withdrawn. In this case, defendant did not withdraw his plea. The prosecution revoked the plea because defendant violated the terms of the plea agreement. Further, reversal is not warranted because defendant first referred to this evidence. As such, fairness entitled the prosecutor to introduce other statements defendant made at the plea proceeding. And, "error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003).

Defendant further argues that defense counsel was ineffective for allowing the plea evidence to be introduced. Because defendant did not raise this issue in a motion for a new trial or request for an evidentiary hearing, our review is limited to mistakes apparent from the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). To establish ineffective assistance of counsel, defendant must show that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment, and must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Defendant must also demonstrate that he was prejudiced by counsel's deficient performance. *Id.*

Our review of the record reveals that the plea evidence was largely consistent with defendant's police statement and trial testimony, in which defendant admitted being part of a plan to rob the victim at gunpoint. Counsel reasonably could have believed that the plea evidence was favorable to defendant's case because it was consistent with defendant's trial testimony and tended to portray defendant as a credible person who was willing to admit his involvement in the offense and, as such, his trial testimony that he attempted to stop codefendant Morris Dajuan Howard from shooting the victim and did not intend for anyone to get hurt should likewise be believed. Defendant has not overcome the presumption of sound trial strategy. *Carbin, supra*.

Defendant further argues that evidence of his criminal history was inadmissible under MRE 404(b) and MRE 609. Viewed in context, the challenged line of questioning was not intended to show defendant's bad character, contrary to MRE 404(b), or to attack his credibility under MRE 609. Rather, the prosecutor was attempting to rebut defendant's suggestion that he came forward with information about the charged offense as a concerned citizen. The prosecutor sought to show that defendant was instead attempting to "cut a deal" with the police, as he had done in the past. The prosecutor also sought to show that defendant was a streetwise person and it was not reasonable for him to believe that a gun would not be used to commit the planned offense. Thus, defendant has not shown plain error. Further, because defendant has not shown a plain evidentiary violation, he has not established that defense counsel was ineffective for failing to object to this evidence. Counsel is not required to make a meritless objection. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Finally, in a pro se supplemental brief, defendant argues that the police lacked probable cause to arrest him for this offense and, therefore, his police statement should have been suppressed because it resulted from an illegal arrest. See *People v Richardson*, 204 Mich App 71, 78; 54 NW2d 503 (1994). The prosecution asserts that defendant properly was arrested on

some outstanding warrants. Because defendant did not challenge the validity of his arrest in the trial court, this issue is not preserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Because defendant did not challenge the validity of his arrest in the trial court, the trial court never fully explored the circumstances surrounding defendant's detainment and did not develop the lower court record in that regard. Defendant specifically argues that "his arrest was not in connection with the Homicide that occurred December 30, 2004 but because defendant had outstanding warrants." Given defendant's acknowledgment that he was arrested, not for this offense, but because he had outstanding warrants, he has not established a plain error arising from his alleged arrest. Furthermore, a review of the trial testimony provides no basis for concluding that defendant was subject to an illegal arrest.

We vacate defendant's conviction and sentence for assault with intent to rob while armed, but affirm his remaining convictions and sentences.

Vacated in part, and affirmed in part.

/s/ Pat M. Donofrio
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey