# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>January 29, 2008 |
| v<br><br>REGINALD WILLIAMS,<br><br>Defendant-Appellant. | No. 273054<br>Wayne Circuit Court<br>LC No. 05-011358-01 |

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | |
| v<br><br>THOMAS H.C. COLEMAN,<br><br>Defendant-Appellant. | No. 273057<br>Wayne Circuit Court<br>LC No. 05-010644-01 |

Before: Saad, P.J., and Owens and Kelly, JJ.

PER CURIAM.

In Docket No. 273054, defendant, Reginald Williams, appeals his jury trial convictions of felony murder, MCL 750.316(1)(b), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.277b.[1] The trial court sentenced Williams to natural life in prison for his felony murder conviction and two years in prison for his felony-firearm conviction.

In Docket No. 273057, defendant, Thomas H.C. Coleman, appeals his jury trial conviction of felony murder, MCL 750.316(1)(b).[2] The trial court sentenced Coleman to natural

[1] The jury also convicted Williams of assault with intent to rob while armed, MCL 750.89, but the trial court dismissed the conviction at sentencing, apparently on double jeopardy grounds.

[2] The trial court dismissed Coleman's conviction of assault with intent to rob while armed, MCL 750.89.

life in prison for this conviction. For the reasons set forth below, we affirm the convictions of both defendants.

## I. Docket No. 273054 – Reginald Williams

### A. Admission of Preliminary Examination Testimony

Williams argues that the admission of David Banks's testimony from Coleman's preliminary examination violated the Confrontation Clause and MRE 804(b)(1) because he did not cross-examine Banks on this testimony. The Sixth Amendment guarantees a criminal defendant the "right . . . to be confronted with the witnesses against him." US Const, Am VI. Under the Confrontation Clause, testimonial statements are admissible against a defendant only if the declarant was unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Prior testimony at a preliminary examination constitutes a testimonial statement. *Id*. at 68. Generally, such testimony is inadmissible under the Confrontation Clause regardless of its admissibility under the rules of evidence. *Id*. at 61. However, testimony does not violate the Confrontation Clause if the witness is unavailable to testify at trial and the opposing party had the opportunity to cross-examine the witness during the prior proceeding. MRE 804(b)(1); *People v Meredith*, 459 Mich 62, 70; 586 NW2d 538 (1998).

MRE 804(b)(1) governs the admission of former testimony if a witness is unavailable for trial. It is undisputed that Banks's testimony was offered at another hearing. Further, Banks died before trial thereby making him unavailable. See MRE 804(a)(4). The rule permits admission of a declarant's "[t]estimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." MRE 804(b)(1); see also *People v Farquharson*, 274 Mich App 268, 272, 275; 731 NW2d 797 (2007). In determining whether there was a similar motive to develop testimony, we must evaluate the following non-exhaustive list of factors:

> (1) whether the party opposing the testimony "had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue"; (2) the nature of the two proceedings – both what is at stake and the applicable burdens of proof; and (3) whether the party opposing the testimony in fact undertook to cross-examine the witness (both the employed and the available but forgone opportunities). [*Id*. at 278, quoting *United States v DiNapoli*, 8 F3d 909 (CA 2, 1993) (en banc).]

We note that, while Banks's testimony at both preliminary examinations was substantially similar, Banks claimed at Coleman's preliminary examination that he could identify the shooter "if he were dressed like he was before." In contrast, Banks testified at Williams's preliminary examination that he was able to identify the shooter in a lineup "[n]ot because of a

dark shirt [that Williams wore in the lineup] but because of an ID of his face, even though he did have a dark shirt on." [3]

We hold that Williams had an opportunity and similar motive to develop Banks's testimony. Notwithstanding that Williams's counsel did not have access to Coleman's preliminary examination transcript before Williams's preliminary examination, Williams's counsel did have the opportunity to cross-examine Banks and raise the issue of the credibility of his identification of Williams. Specifically, in response to defense counsel's questioning, Banks admitted that the shooter wore a dark shirt and that two of the individuals in Williams's lineup, including Williams, wore dark shirts. Thus, Williams had the opportunity to cross-examine Banks with respect to the issue of identity.

Further, though the nature of a preliminary examination is different from that of a trial, the credibility of Banks's identification was the crux of Williams's defense. Indeed, as Williams admits, his defense rested solely on the issue of identification. In light of this, Williams had "an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue[,]" i.e., the issue of Banks's credibility concerning his identification of Williams. *Farquharson*, *supra* at 278. Therefore, this testimony was admissible under both MRE 804(1)(b) and the Confrontation Clause.

In any event, were we to find error in the admission of the testimony, any alleged error is harmless. As the prosecution argues, even if Williams had impeached Banks with the testimony, the district court would have nonetheless bound Williams over for trial because conflicting evidence is not sufficient to preclude a bind over. *People v Yost*, 468 Mich 122, 128; 659 NW2d 604 (2003). Further, as noted above, Banks's testimony from Coleman's preliminary examination contradicted his testimony from Williams's preliminary examination with respect to his ability to accurately identify the shooter (i.e., whether or not the identification of Williams was dependent on the color shirt he was wearing in the lineup). Williams's counsel raised this contradiction in his closing argument. Thus, the admission of the testimony at issue actually benefited Williams because it called into question Banks's credibility. Accordingly, the admission of this testimony was harmless.[4]

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[3] Banks identified Williams in a lineup on October 20, 2005 – the day after he testified at Coleman's preliminary examination. Williams's preliminary examination was conducted on November 8, 2005.

[4] Moreover, we note that Williams's defense at trial was one of mistaken identity. However, not only did Coleman's counsel admit that Coleman was present during the shooting and was shot, but jeans containing DNA consistent with Williams's DNA were found at a location near Williams's home with a shirt containing DNA from blood stains consistent with Coleman's DNA. Thus, again, any alleged error was harmless.

Williams also argues that defense counsel's failure to object to the admission of Banks's testimony from Coleman's preliminary examination denied him the effective assistance of counsel. Claims of ineffective assistance of counsel involve a question of law, which this Court reviews de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because this

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B. Lineup Identification

Williams maintains that the trial court erred when it admitted Banks's lineup identification because the lineup was unduly suggestive.[5] "In order to sustain a due process challenge [based on a pretrial identification procedure], a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *People v Kurylczyk*, 443 Mich 289, 302 (Griffin, J.); 505 NW2d 528 (1993), citing *Neil v Biggers*, 409 US 188, 196; 93 S Ct 375; 34 L Ed 2d 401 (1972). Because an attorney was present at the lineup, "[t]he burden rests with the defendant to factually support a claim that a line-up was impermissibly suggestive[.]" *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996). Relevant factors to determine the likelihood of misidentification include:

> "[T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." [*Kurylczyk, supra* at 306 (Griffin, J.), 318 (Boyle, J.), quoting *Neil, supra* at 199-200.]

Williams claims that the lineup was unduly suggestive because Banks testified that he could identify the shooter if he were dressed like he was at the shooting (i.e., wearing a dark shirt), and two lineup participants, including Williams, wore dark clothing at the lineup, and the other participant was taller than Williams. However, "[p]hysical differences among the lineup participants do not necessarily render the [identification] procedure defective and are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant

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issue is unpreserved, this Court limits its review to mistakes apparent on the existing record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). The United States and Michigan Constitutions guarantee a defendant the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. To establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that a reasonable probability exists that, but for counsel's errors, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

To succeed in his claim, "defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). As noted , the admission of the testimony at issue actually benefited, rather than prejudiced Williams. Williams's counsel argued to the jury inconsistencies revealed in Banks's testimony from both defendants' preliminary examinations. Consequently, counsel's failure to object constituted sound trial strategy, and defendant's claim is without merit.

[5] We review a trial court's decision to admit identification evidence for clear error. *People v Kurylczyk*, 443 Mich 289, 303 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993). "A trial court's finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake has been made." *People v Williams*, 244 Mich App 533, 537; 624 NW2d 575 (2001). To the extent this issue involves a question of law, review is de novo. *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004).

from the other lineup participants." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

There is no basis to conclude that physical differences rendered the lineup impermissibly suggestive. Williams was not the only lineup participant wearing a dark shirt. Further, after he identified Williams, Banks testified that he identified Williams at the lineup "[n]ot because of a dark shirt but because of an ID [sic] of his face, even though he did have a dark shirt on." In light of the fact that Banks gave this explanation after the lineup occurred, it does not appear that Banks "singled out defendant because of the fact that his physical characteristics differed markedly from those of the other participants." *Id*.

Moreover, Banks readily identified Williams as the perpetrator within seconds of viewing the lineup, which was conducted only 15 days after the incident. Though the other lineup participant wearing a dark shirt was several inches taller than defendant, Banks made no reference to Williams's height as a contributing factor in the identification process. Rather, Banks recalled that he was able to get a good look at the shooter because he briefly glanced at Banks during the incident. Though "[p]hysical differences generally relate only to the weight of an identification and not to its admissibility," *id*., we note that, shortly after the incident, Banks provided a description of the shooter that was within two inches of Williams's height. In light of these circumstances, the lineup was not "so impermissibly suggestive that it led to a substantial likelihood of misidentification." *Id*.

Were we to find that the trial court erred when it admitted this evidence, we would nonetheless hold that any error was harmless. Banks positively identified Williams as the shooter at Williams's preliminary examination. Moreover, DNA evidence linked Williams to the shooting. Therefore, Williams was not prejudiced by the admission of the lineup identification. *People v Rodriguez* (*On Remand*), 216 Mich App 329, 332; 549 NW2d 359 (1996) ("[t]he erroneous admission of evidence is harmless if it did not prejudice the defendant").

C. Reliability of Eyewitness Testimony

Williams claims that his counsel should have presented an expert witness to testify about the reliability of eyewitness testimony. We presume that defense counsel's decisions regarding what evidence to present or whether to call and question witnesses constitute trial strategy, which this Court will not review with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A defense counsel's failure to call witnesses or present other evidence may amount to ineffective assistance of counsel "only when it deprives the defendant of a substantial defense." *Id*. "A substantial defense is one which might have made a difference in the outcome of the trial." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vac'd in part on other grounds 453 Mich 902 (1996).

At the preliminary examination, defense counsel thoroughly cross-examined Banks regarding his ability to perceive events the night of the incident. Banks admitted that he was petrified, that he did not stare at Williams during the incident, and that he did not see Williams leave because he was on the floor. The transcript of this proceeding was read to the jury at trial. In addition, the transcript of Coleman's preliminary examination was read to the jury. As noted, Banks's testimony at Coleman's preliminary examination was inconsistent with his testimony at Williams's preliminary examination regarding his ability to identify Williams. During closing

argument, defense counsel exploited this inconsistency by arguing to the jury that Banks was predisposed to identify the shooter as an individual wearing a dark shirt.

In light of this, defense counsel may have reasonably concluded that "the jury would react negatively to perhaps lengthy expert testimony that it may have regarded as only stating the obvious: memories and perceptions are sometimes inaccurate." *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). Consequently, defense counsel's failure to call an expert witness constituted sound trial strategy that did not deprive defendant of a substantial defense. Regardless, the identification procedure was not impermissibly suggestive, and Banks positively identified Williams at the preliminary examination. Contrary to Williams's argument, Banks's identification was not the only evidence linking Williams to this incident. On the contrary, DNA and video evidence was presented linking Williams to the scene of the crime. In light of this, defendant has failed to establish that counsel's failure to call an expert witness fell below an objective standard of reasonableness or was outcome determinative. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

D. Confrontation Clause

Williams asserts that the admission of testimony that the police sought his arrest after speaking to Coleman violated the Confrontation Clause.[6] In *United State v Cromer*, 389 F3d 662, 665-666, 675-676 (CA 6, 2004), information provided by a confidential informant led to the charges against the defendant. The United States Court of Appeals for the Sixth Circuit held that this evidence did not violate the Confrontation Clause because the jury was not presented with an actual statement made by the declarant. *Id.* Similarly, here, no statement from the declarant (i.e., Coleman)[7] was presented to the jury. Rather, the police officer testified that they sought Williams's arrest after the officer had talked with Coleman. Because the prosecutor never presented a statement from Coleman's interrogation to the jury, the Confrontation Clause is not implicated here.

Further, if the evidence were considered a testimonial statement, its admission did not violate the Confrontation Clause. "[T]he Confrontation 'Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'" *People v McPherson*, 263 Mich App 124, 133; 687 NW2d 370 (2004), quoting *Crawford*, *supra* at 59 n 9. As such, "a statement offered to show the effect of the out-of-court statement on the hearer does not violate the Confrontation Clause." *People v Chambers*, 277 Mich App 1; 742 NW2d 610 (2007). The disputed testimony merely explained why the police sought Williams's arrest. Indeed, the substance of Coleman's confession actually implicating Williams in the shooting was not revealed to the jury. Consequently, Williams's right to confrontation was not violated.

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[6] This Court reviews a trial court's decision regarding the admissibility of evidence for abuse of discretion. *Matuszak*, *supra* at 47. This Court reviews preliminary questions of law pertaining to this issue de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

[7] Coleman was unavailable as he asserted his Fifth Amendment right not to testify. See MRE 804(a)(1).

In any event, the admission of this evidence was harmless. Banks positively identified Williams as the shooter in a lineup and at Williams's preliminary examination and DNA and video evidence linked Williams to the scene of the crime. Thus, Williams's claim fails. *McPherson, supra* at 135 n 10 (the admission of evidence violating the Confrontation Clause does not warrant reversal where such admission was harmless beyond a reasonable doubt).

E. Assault With Intent to Rob Conviction

The prosecution claims that Williams's assault with intent to rob while armed conviction should be reinstated in light of our Supreme Court's recent holding in *People v Smith*, 478 Mich 292; 733 NW2d 351 (2007). However, *Smith* is distinguishable.

In *Smith*, a jury convicted the defendant of two counts of felony murder, with larceny as the predicate felony, two counts of armed robbery, and four counts of felony-firearm. *Id*. at 295. In finding that multiple punishments for armed robbery and felony murder did not violate double jeopardy, the Supreme Court explained that the larceny offense was not subsumed into the greater offense of armed robbery because the facts were such that sufficient evidence existed for the jury to find beyond a reasonable doubt that the defendant separately committed armed robbery and larceny by taking separate property from separate victims. *Id*. at 317 n 15. Therefore, separate sentences for the armed robbery and felony murder convictions were appropriate because armed robbery did not become the predicate felony. *Id*. at 296.

Here, in contrast, evidence showed that the attempted larceny and assault with intent to rob while armed were part of the same transaction against the same victim. As such, unlike *Smith*, the predicate felony here (i.e., attempted larceny) was subsumed into the greater offense (i.e., assault with intent to rob while armed). Because "[c]onvictions of felony murder and the predicate felony violate the prohibition against double jeopardy[,] *People v Bulls*, 262 Mich App 618, 628; 687 NW2d 159 (2004), the trial court properly vacated Williams's assault with intent to rob while armed conviction. Therefore, we reject the prosecution's argument.

II. Docket No. 273057 – Thomas H.C. Coleman

A. Sufficiency of the Evidence

Coleman claims that the prosecution presented insufficient evidence to support his felony firearm conviction. Due process requires the evidence to show guilt beyond a reasonable doubt to sustain a conviction. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In determining the sufficiency of the evidence, this Court reviews the evidence de novo in the light most favorable to the prosecution. *People v Odom*, 276 Mich App 407, 418; 740 NW2d 557 (2007). The Court does not consider whether any evidence existed that could support a conviction, but rather, must determine whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748, amended 441 Mich 1201 (1992), citing *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979).

Sufficient evidence supported Coleman's felony murder conviction under an aiding and abetting theory.

> To prove felony murder on an aiding and abetting theory, the prosecution must show that the defendant (1) performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of the predicate felony. [*People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003).]

Here, the predicate felony is larceny or attempted larceny. "The elements of larceny are: (1) actual or constructive taking of goods or property; (2) carrying away or asportation; (3) carrying away must be with felonious intent; (4) subject matter must be goods or personal property of another; (5) and taking must be without consent of and against will of owner." *People v Ainsworth*, 197 Mich App 321, 324; 495 NW2d 177 (1992), citing MCL 750.357. "An 'attempt' consists of (1) an attempt to commit an offense prohibited by law, and (2) any act towards the commission of the intended offense." *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001).

Evidence showed that Williams entered the video store with Coleman and that Coleman stood in the entryway while Williams demanded cash from Shaba at gunpoint. Williams then shot Shaba and fatally wounded him. Williams and Coleman exited the entryway door together and ran in the same direction. Witness Rubia Hayes explained that in order to leave the store without proceeding to a different exit door around the cashier's counter, the entryway door must be held open. Because Coleman was standing in the entryway and Hayes noticed that the entryway door remained ajar throughout the incident before Coleman and Williams ran out, it is reasonable to infer that Coleman was holding the entryway door open in order to facilitate Williams and his escape. " 'Aiding and abetting describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime[.]'" *Bulls*, *supra* at 627, quoting *Carines*, *supra* at 757. Additionally, Coleman admitted to police that, before the night of the shooting, he had talked to Williams about robbing the store. In light of these facts, a reasonable juror could conclude that Coleman performed an act that assisted in the killing of Shaba while assisting in the attempted commission of a larceny.

Regarding whether Coleman acted with the requisite intent, we noted that, contrary to defendant's argument, a jury may "infer defendant's malice independent of his knowledge of [his co-defendant's] intent." *Bulls*, *supra* at 627. Given the above analysis, a reasonable juror could "conclude that defendant 'intended to do an act in obvious disregard of life endangering consequences[.]'" *Id.*, quoting *People v Goecke*, 457 Mich 442, 466; 579 NW2d 868 (1998). "The intent to do an act in obvious disregard of life-endangering consequences is a malicious intent." *Goecke*, *supra* at 466. Consequently, the intent required to convict Coleman of felony murder under an aiding and abetting theory is satisfied. Therefore, sufficient evidence exists to support Coleman's felony murder conviction.

B. Jury Instruction

Coleman contends that the trial court improperly instructed the jury with respect to the intent element of aiding and abetting a felony murder. However, Coleman expressed his satisfaction with the instructions, and has therefore waived this issue. *People v Carter*, 462 Mich

206, 215-216; 612 NW2d 144 (2000). Regardless, Coleman's claim fails.[8] "In order to convict a defendant as an aider and abetter, the prosecution must show that the crime was committed by the defendant or another, that the defendant performed acts or gave encouragement that aided or assisted the commission of the crime, and that the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time the defendant gave the aid or assistance." *People v Jones*, 201 Mich App 449, 451; 506 NW2d 542 (1993). Regarding aiding and abetting a felony murder, the jury must be instructed that the defendant acted with malice, which includes a defendant's participation in a crime "with knowledge of the principal's intent to kill or cause great bodily harm." *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985).

Here, the trial court provided the standard jury instruction on aiding and abetting, CJI2d 8.1, regarding intent. Specifically, the court instructed, "[T]he defendant must have intended the commission of the crime alleged or must have known that the other person intended its commission at the time of giving the assistance." This instruction is "a clear and proper statement of the law." *People v Champion*, 97 Mich App 25, 32; 293 NW2d 715 (1980), rev'd on other grounds 411 Mich 468 (1981). Further, in response to a question from the jury, the court elaborated that to convict defendant as an aider and abetter, defendant, while participating in the crime, "would have to know that the other person intended to create a very high risk of death or great bodily harm knowing that death or great bodily harm would be the likely result." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Although these instructions were somewhat imperfect, they fairly presented the element of specific intent to convict defendant of aiding and abetting a felony murder. *Id.*; *Kelly, supra* at 278. Therefore, Coleman's claim fails.[9]

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[8] A trial court is required to clearly present a case and instruct the jury on the applicable law. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001), aff'd 468 Mich 272 (2003). Accordingly, "jury instructions must include all the elements of the charged offense and not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Even somewhat imperfect instructions do not create error if they "fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

[9] Regardless, Coleman has failed to show how these instructions affected his substantial rights. Coleman admitted to police that he had discussed robbing the video store with Williams and that he accompanied Williams into the video store when Williams shot Shaba. Thus, Coleman was not truly innocent. Moreover, though Coleman argues that trial counsel's failure to object to the instructions constituted a "serious mistake," "[d]efense counsel is not required to make a meritless motion or a futile objection." *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Thus, this failure can hardly be called a mistake. Therefore, Coleman's argument fails.

Affirmed.

/s/ Henry William Saad
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly