STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAKARRA SANDERS,

Defendant-Appellant.

UNPUBLISHED
October 14, 2008

No. 278740
Wayne Circuit Court
LC No. 06-009547-02

Before: Schuette, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant was charged with premeditated murder, MCL 750.316, felony murder, MCL 750.316,[1] assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Following a bench trial, the court convicted defendant of second-degree murder, MCL 750.317, assault with intent to rob while armed, and felony-firearm. The court sentenced defendant to concurrent prison terms of 18 to 40 years for the second-degree murder and assault with intent to rob while armed convictions, and to a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that he was denied the effective assistance of counsel. Because defendant failed to file a motion for new trial regarding the issue of counsel's effectiveness, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To prevail on a claim of ineffective assistance of counsel, defendant must show that counsel's performance was defective, and that the deficient performance was prejudicial and deprived defendant of a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Lloyd*, 459 Mich 433, 446; 590 NW2d 738 (1999). To show prejudice, the defendant must show that, but for counsel's error, there is a reasonable likelihood that the result would have been different. *People v Shively*, 230 Mich App 626, 628; 584 NW2d 740 (1998).

[1] The predicate felony is identified in the information as larceny.

During pretrial negotiations defendant was offered a sentence agreement of 18 to 40 years if he would plead to second-degree murder and felony-firearm. He would also plead to armed robbery and carjacking in an unrelated case and would be sentenced to 10 to 20 years for those offenses, to be served concurrently with the other sentence.[2] Defense counsel stated that he had had "lengthy discussions" with defendant, and "even made the unusual step of actually recommending that he take this." Defendant rejected the deal and indicated his intent to go to trial. On the first day of trial, the prosecutor stated that she offered "the same offer that was extended before" and that "The only difference is that there's no requirement that [defendant] testify." Defendant confirmed that defense counsel relayed the offer to him and indicated that he did not want to accept the deal.

Defendant argues that defense counsel was ineffective because counsel recommended that defendant "take the deal before the prosecution offered him the better deal." We disagree. Defendant had the opportunity before trial commenced to accept what he considered to be the better deal, but chose not to do so.[3] Defendant has not shown any error, let alone a serious error required under *Strickland* to show ineffectiveness.

Defendant also asserts that defense counsel was ineffective for not receiving the investigative subpoena transcript earlier in the proceedings. Again, we disagree. Upon learning of the transcript's existence, defense counsel asked for a copy and offered to review it that night and cross-examine the witness in the morning.[4] The witness was brought back the next day and cross-examined thoroughly. The defense theory was that the witness was unreliable and none of the crimes were proven, or at least that defendant was guilty only of second-degree murder. No salient points from the investigative subpoena transcript were brought up, either during cross-examination of the witness or closing arguments. Hence, it is unlikely that the transcript contained any material helpful to the defense. Based on the record before us, counsel's performance does not appear deficient by constitutional standards. Accordingly, defendant was not denied the effective assistance of counsel.

II

Defendant next argues that because the trial court found defendant not guilty of felony-murder, the court should have implicitly found defendant not guilty of assault with intent to rob since this was the felony that would have resulted in a guilty verdict for the felony murder. He also contends that his convictions and sentences for second-degree murder and assault with intent to rob while armed violate his protection against being twice punished for the same offense and the same act. We disagree.

Under both the Federal and Michigan Constitutions, a criminal defendant may not be placed twice in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15. The

[2] Defendant would also testify in both cases.

[3] Further, defendant was found not guilty of one murder count and guilty of a lesser offense on the other, and received the same sentence that was offered.

[4] It is not clear whether the prosecutor gave the defense a copy earlier.

Double Jeopardy clauses protect a defendant's interest in not enduring more punishment than was intended by the Legislature. *People v Calloway*, 469 Mich 448, 451; 671 NW2d 733 (2003). The validity of multiple punishments under the Fifth Amendment is determined under the federal "same elements" standard, or *Blockburger*[5] test. *People v Ream*, 481 Mich 223, 227; 750 NW2d 536 (2008). Where it is clear that the Legislature intended to impose multiple punishments, the imposition of multiple sentences is proper, regardless of whether the crimes consist of the same elements; and where the Legislature has not clearly expressed that intent, multiple offenses are separately punishable if each contains an element that the other does not. *People v Smith*, 478 Mich 292, 316; 733 NW2d 351 (2007).

First, the fact that the trial court did not find defendant guilty of felony-murder does not require a finding of not guilty of assault with intent to rob while armed. The predicate felony for the felony-murder charge was larceny, not assault with intent to rob while armed. The trial court likely reasoned that the homicide did not occur during the commission of a larceny because the evidence was not sufficient to support a finding that any property was taken from the victim.[6]

Second, with respect to the crime of assault with intent to rob while armed, the elements are (1) an assault with force and violence, (2) an intent to rob or steal, (3) while the defendant is armed with a weapon. *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). The elements of second-degree murder are (1) a death, (2) caused by the defendant's act, (3) with malice, and (4) without justification. *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003). Malice is defined as the intent to kill, the intent to cause great bodily harm, or the wanton and willful disregard of the likelihood that the natural tendency of the defendant's behavior is to cause death or great bodily harm. *People v Kelly*, 423 Mich 261, 273; 378 NW2d 365 (1985).

There is no double jeopardy violation in allowing the second-degree murder and assault with intent to rob while armed convictions to stand. Distinct societal interests are addressed in the relevant statutes in that the second-degree murder statute clearly reflects the Legislature's intent to protect life and prohibit unjustifiable killings, while the assault with intent to rob while armed statute reflects the Legislature's intent to prohibit robberies or theft through the use of assaultive behavior and weaponry. Although, in general, both crimes seek to prohibit assaultive behavior, the focus differs as to the intent of the perpetrator in committing the crimes; i.e., an intent to kill or cause great bodily harm and an intent to rob.

Affirmed.

/s/ Bill Schuette
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald

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[5] *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 2d 306 (1932).

[6] Evidence was presented that defendant and his codefendant went to the victim's house to rob the victim of drugs, and that the codefendant shot the victim after the victim stated that he did not have any drugs.