STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 30, 2009
v	No. 282605 Wayne Circuit Court
LAKARI KAREEM BERRY, Defendant-Appellant.	LC No. 07-011878-FC

Before: Beckering, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of second-degree murder of Clarence Cherry, MCL 750.317, first-degree premeditated murder of Gaudrielle Webster, MCL 750.316(1)(a), assault with intent to murder Karsia Rice, MCL 750.83, first-degree felony murder of Webster, MCL 750.316(1)(b), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant, as a third habitual offender, MCL 769.11, to 60 to 90 years in prison for each of the second-degree murder convictions, life in prison for the first-degree premeditated murder conviction, 60 to 90 years in prison for the assault with intent to murder conviction, life in prison for the first-degree felony murder conviction, five to ten years in prison for the felon in possession of a firearm conviction,[1] and two years in prison for the felony-firearm conviction. We vacate one of the convictions and sentences for second-degree murder. We remand for a correction of the judgment of sentence reflecting one conviction and sentence for first-degree murder supported by two theories and the consecutive sentence for felon in possession of a firearm to a concurrent sentence. In all other respects, we affirm.

Defendant's first argument on appeal is that his right to the protection against double jeopardy was violated by his convictions and sentences for two counts of second-degree murder of Cherry. The prosecutor concurs and we agree. This Court reviews defendant's unpreserved claim for plain error. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005).

[1] In the sentencing transcript, the trial court sentenced defendant to ten years in prison for the felon in possession of a firearm conviction. In the judgment of sentence, however, the trial court recorded the sentence for this conviction as five to ten years. A trial court speaks through its written orders. *People v Davie*, 225 Mich App 592, 600; 571 NW2d 229 (1997).

"No person shall be subject for the same offense to be twice put in jeopardy." Const 1963, art 1, § 15; *People v Smith*, 478 Mich 292, 298; 733 NW2d 351 (2007). The purpose of the double jeopardy protection against multiple punishments for the same offense is to protect the 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). Under the "same-elements" test, each offense must contain an element not contained in the other. *United States v Dixon*, 509 US 688, 696; 113 S Ct 2849; 125 L Ed 2d 556 (1993). Otherwise, they are the same offense and double jeopardy bars additional punishment. *Id*.

In this case, defendant was charged with two counts of first-degree murder of Cherry based on alternative theories: premeditated murder and felony-murder. The jury convicted defendant of the lesser offense of second-degree murder on both counts. For each conviction, the trial court sentenced defendant to 60 to 90 years in prison. These convictions are the same offense because they share the same elements. *Id*. Consequently, we vacate one of defendant's second-degree murder convictions and sentences. *Id.*

In a related claim, defendant argues that his right to the protection against double jeopardy was violated by his convictions and sentences for first-degree premeditated murder and first-degree felony murder of Webster. We agree.

Defendant was charged with two counts of first-degree murder of Webster based on alternative theories: premeditated murder and felony-murder. The jury convicted him accordingly and the trial court sentenced him to life in prison for both offenses. Dual convictions and sentences for these offenses, arising from the death of a single victim, violate double jeopardy. *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744 (1998). Consequently, we remand to the trial court for a correction of the judgment of sentence reflecting one conviction and one sentence of first-degree murder supported by both theories. *Id.*

Next, defendant argues that his five to ten-year sentence for the felon in possession of a firearm conviction improperly exceeded the five-year statutory maximum sentence provided in MCL 750.224f(3). We disagree. Again, this Court reviews defendant's unpreserved claim for plain error. *Meshell*, *supra* at 628.

Pursuant to MCL 750.224f(3), a conviction for felon in possession of a firearm has a maximum penalty of five years in prison. *People v Phillips*, 219 Mich App 159, 163; 555 NW2d 742 (1996). However, where a defendant is convicted for an offense as a third habitual offender and that offense is statutorily punishable for a term less than life, the trial court may impose a maximum sentence of up to twice the statutory maximum. *People v Harper*, 479 Mich 599, 612 n 21; 739 NW2d 523 (2007). Defendant does not challenge his third habitual offender status on appeal. Thus, the trial court did not err in imposing a maximum sentence of ten years, twice the five-year statutory maximum, for the felon in possession of a firearm conviction. *Id*.; *Phillips*, *supra* at 163.

Nevertheless, the prosecutor urges this Court to remand to the trial court for correction of the judgment of sentence with respect to the felon in possession of a firearm sentence. Specifically the prosecutor argues that defendant should serve his felon in possession of a firearm sentence concurrently with the sentences for Counts I through V and consecutively to the felony-firearm sentence. The trial court ordered defendant to serve his sentences for the first-

degree murder, second-degree murder, and assault with intent to murder convictions consecutively to the sentence for the felon in possession of a firearm conviction. "A consecutive sentence may be imposed only if specifically authorized by statute." *People v Alexander*, 234 Mich App 665, 675; 599 NW2d 749 (1999); *People v Hunter*, 202 Mich App 23, 25; 507 NW2d 768 (1993). The Legislature did not specifically authorize a consecutive sentence for a felon in possession of a firearm conviction. MCL 750.224f. Therefore, we vacate this portion of the judgment of sentence. On remand, the trial court should enter a judgment of sentence ordering defendant's first-degree murder, second-degree murder, assault with intent to murder, and felon in possession of a firearm sentences to be served concurrently.[2]

Defendant makes several additional arguments regarding the drafting of the judgment of sentence on appeal. However, the trial court corrected these clerical errors in an amended judgment of sentence. Therefore, these arguments are moot. *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004) ("An issue is moot when an event occurs that renders it impossible for the reviewing court to fashion a remedy to the controversy.").

Defendant's next argument on appeal is that he was denied the effective assistance of counsel on a number of grounds. We disagree. This Court's review of defendant's unpreserved claim of ineffective assistance of counsel is limited to the facts contained in the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). The Court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id*. at 484-485.

Effective assistance is strongly presumed and the reviewing court should not evaluate an attorney's decision with the benefit of hindsight. *Id*. at 485; *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To demonstrate ineffective assistance, a defendant must show: (1) that his attorney's performance fell below an objective standard of reasonableness, and (2) that this performance so prejudiced him that he was deprived of a fair trial. *Grant*, *supra* at 485-486. Prejudice exists if a defendant shows a reasonable probability that the outcome would have been different but for the attorney's errors. *Id.* at 486.

Defendant claims that defense counsel was ineffective for failing to request a court appointed investigator within a more suitable time in advance of trial. Defense counsel requested the investigator seven weeks before trial and the investigator was appointed four weeks later. With three days before trial, defense counsel had yet to confer with the investigator due to an illness. The trial court delayed the presentation of evidence for one week. There is no indication in the lower court record that defense counsel was unable to confer with the

[2] Because MCL 750.227b specifically authorizes the sentence for felony-firearm to be served consecutively to and preceding these felony convictions, the trial court need not correct its order with respect to defendant's felony-firearm conviction.

investigator during that week. Furthermore, defendant does not argue that had the investigator been appointed earlier, he would have uncovered evidence that would have changed the outcome of the trial. Therefore, defendant was not prejudiced by the timeliness of defense counsel's request for the investigator and defense counsel was not ineffective on this ground. *Id*. at 485-486.

Because defense counsel was ill and unable to confer with the investigator or prepare for trial, he sought an adjournment three days before trial. Defendant claims that defense counsel was ineffective for failing to file the motion earlier. However, it is unclear whether defense counsel was able to file the motion earlier due to his illness. Furthermore, even if the timeliness of this motion fell below an objective standard of reasonableness, defendant was not prejudiced. *Id*. at 485-486. As we noted above, the trial court delayed the parties' presentation of evidence for one week. Following this extra preparation time, defense counsel informed the court that he was ready to proceed. Defense counsel was not ineffective on this ground. *Id*.

Next, defendant claims that an effective attorney would have filed the defense witness list in advance of trial. Defendant correctly notes that defense counsel failed to file his witness list until the first day that the parties presented evidence, but this delay did not prejudice defendant. Defense counsel called four witnesses and there is no evidence that any witnesses were excluded due to the timeliness of the witness list. Thus, defense counsel was not ineffective on this ground. *Id*.

Defendant also claims that defense counsel was ineffective for pausing between questions. He notes that the trial court admonished defense counsel for this pace, which he claims prejudiced the jury. Defense counsel's pauses could be characterized as trial tactic. They may have provided the jury more time to ponder the elicited evidence and enabled defense counsel to organize his strategy. This Court will not second-guess defense counsel's tactic. *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003). Furthermore, the trial court instructed the jury that its comments did not constitute evidence. The trial court also instructed the jury that it should ignore any opinions it perceived the trial court to have. Because the jury is presumed to follow the trial court's instructions, the trial court's admonishments did not prejudice defendant. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Defense counsel was not ineffective on this ground. *Grant*, *supra* at 485-486.

Defendant further claims that defense counsel was ineffective for pursuing a line of questioning with Sergeant Matt Fulks[3] that the trial court found irrelevant. Defense counsel's questions regarding the preservation of evidence constituted trial tactic. At trial, one bystander testified that she removed items and a child from the crime scene. Another bystander photographed the crime scene. In light of this evidence that bystanders disrupted the crime scene, questions regarding the preservation of evidence may have been relevant, despite the trial court's ruling. This Court will not second-guess defense counsel's tactic. *Gonzalez*, *supra* at 644-645. He was not ineffective on this ground. *Grant*, *supra* at 485-486.

[3] Defendant incorrectly refers to Sergeant Fulks as Officer David Andrews.

Defendant next claims that defense counsel was ineffective for pursuing questions regarding evidence collection that the trial court deemed to be a "theoretical discussion." Once again, defense counsel's questions regarding evidence collection constituted trial tactic to educate the jury and this Court will not second-guess defense counsel's strategy. *Gonzalez*, *supra* at 644-645. Defense counsel was not ineffective on this ground. *Grant*, *supra* at 485-486.

Defendant claims that defense counsel was ineffective for expressing uncertainty as to whether he wanted the jury to hear information from Sergeant Gary Diaz regarding how he came to place defendant's picture in the photographic lineup. While defense counsel was pursuing questions obviously designed to question the quality of the police investigation and identification of defendant, the trial court dismissed the jury before Sergeant Diaz finished responding as to how he matched an anonymous tip with the name "Kari" to defendant and his photograph for the photographic array. After a discussion on the record outside the presence of the jury, defense counsel stated that he was unsure whether he wanted the jury to hear Sergeant Diaz's proposed response that defendant's name matched "Kari" in a police database. Essentially, defense counsel had to make a choice between the potential benefit of calling into question the quality of the investigation leading to a selection of defendant's photograph for the pictorial array and the potential harm caused by the jury hearing that defendant's name was in the police database. Defense counsel did not pursue the matter any further. Defense counsel's choice not to pursue the topic further was reasonable because there was ample evidence presented at trial establishing defendant's identity as the shooter. Rice remembered defendant from an earlier party, observed him during the alleged incident, and identified defendant in the photographic lineup and at trial. Michael Cleland, Stephen Francis, and Ardell Pope saw a man with defendant's features hurrying from the crime scene. In addition, defendant admitted his participation in the shooting to Marquietta Murray. Even if the sergeant's testimony had been admitted, however, it would not have prejudiced defendant. The parties stipulated that defendant had a prior felony conviction and was ineligible to carry a firearm, and thus, the information about his name in a police computer system would have been cumulative. Absent prejudice, defense counsel's uncertainty did not constitute ineffective assistance of counsel. *Id*. at 485-486.

In addition, defendant claims that defense counsel was ineffective for attempting to introduce inadmissible evidence of a victim's background check, which the trial court excluded on hearsay grounds. Defense counsel's effort constituted trial tactic. Specifically, if the evidence had been allowed, it could have cast a shadow on the victim or framed defendant in a more positive light. This Court will not second-guess defense counsel's tactic. *Gonzalez*, *supra* at 644-645. Defense counsel was not ineffective on this ground. *Grant*, *supra* at 485-486.

Defendant claims that defense counsel was ineffective for making a hearsay objection to the admission of Murray's statements to police and her investigative subpoena testimony. Shortly after the shooting, Murray gave two statements to police. Thereafter, Murray provided testimony about the shooting under an investigative subpoena. At the preliminary examination, Murray testified about the shooting, as well as her prior statements and testimony. Both the prosecution and defense questioned Murray about inconsistencies in her story. At trial, the prosecution attempted to call Murray as a witness, but she did not appear, despite the issuance of a subpoena and bench warrant. The court permitted Murray's preliminary examination testimony to be read into the record. Following the reading of the testimony, the prosecution moved to admit Murray's statements to police and investigative subpoena testimony into

evidence. At that point, defense counsel made no objection and the court admitted the evidence. The next day, defense counsel raised a late objection, arguing that Murray's prior statements and investigative subpoena testimony were hearsay. The court admitted the evidence over the objection.

On appeal, defendant argues that defense counsel's hearsay objection was meritless because Murray was subjected to cross-examination about her statements to police and investigative subpoena testimony at the preliminary examination. Given that defense counsel's hearsay objection was made outside the presence of the jury, it could not have prejudiced the jury. Further, due to the multiple layers of evidentiary analysis regarding whether the evidence was admissible, defense counsel was not unreasonable in seeking to exclude evidence that was harmful to his client's case. Therefore, we cannot conclude that defense counsel's hearsay objection fell below an objective standard of reasonableness. Regardless, in light of all the evidence presented at trial, including Murray's properly admitted preliminary examination testimony, defendant cannot establish that he was prejudiced by defense counsel's objection. *Grant*, *supra* at 485-486.

Defendant's next ineffective assistance of counsel claim is that defense counsel failed to object to Officer Eugene Fitzhugh's expertise regarding the use of scales to measure narcotics. If defense counsel had objected, it is likely that the prosecutor could have subsequently elicited evidence that Officer Fitzhugh had knowledge, skill, experience, training, or education in narcotics, given Officer Fitzhugh's 18 years of experience with the police. Such facts would have added credence to Officer Fitzhugh's testimony regarding the scales. In the alternative, defense counsel discredited the testimony in his cross-examination of Rice. She testified that she had never seen scales in the apartment used for narcotics. This Court will not second-guess defense counsel's alternative strategy. *Gonzalez*, *supra* at 644-645. Defense counsel was not ineffective on this ground. *Grant*, *supra* at 485-486.

Defendant also claims that defense counsel was ineffective for failing, in advance of trial, to challenge Rice's identification of defendant in the photographic lineup. The decision to move for suppression of an identification is a matter of strategy. *People v Carr*, 141 Mich App 442, 452; 367 NW2d 407 (1985). In this case, defense counsel objected to Rice's identification at trial, asserting that defendant had a darker complexion than the other men pictured in the lineup. "A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). But, discrepancies as to physical characteristics among lineup participants do not necessarily render the procedure defective, *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002), if the participants approximate the culprit's description, *People v Holmes*, 132 Mich App 730, 746; 349 NW2d 230 (1984). Rather, differences generally pertain to the weight of an identification and not its admissibility. *Hornsby*, *supra* at 466. Here, the trial court examined the pictures in the lineup and found them to be proper. Thus, it is unlikely that the complexion differences between defendant and the other participants would have served as a basis to suppress Rice's identification even if defense counsel had challenged it before trial. Defense counsel appropriately challenged the weight of the identification by cross-examining Rice about the physical differences among the lineup participants.

Moreover, even if defense counsel had successfully challenged the identification procedure before trial, Rice's in-court identification would have been allowed given "a sufficiently independent basis to purge the taint of the illegal identification." *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). Rice observed defendant for over ten minutes during the commission of the crime and expressed a high degree of certainty during her in-court identification. She recognized defendant from an earlier party and testified that she would never forget his face. Given this independent support for Rice's in-court identification, there is no reasonable probability that a successful challenge to the photographic lineup would have changed the outcome of the trial. Defense counsel was not ineffective on this ground. *Grant*, *supra* at 485-486.

Defendant's next ineffective assistance of counsel claim is that defense counsel failed to object to the trial court's sentencing errors. Although several of defendant's appellate arguments regarding sentencing errors have merit, *supra*, defendant has not demonstrated that they deprived him of a fair trial. Instead, these errors can be corrected with an amendment to the judgment of sentence and the vacation of one conviction and sentence for second-degree murder. A new trial is not warranted based on defense counsel's failure to object to the sentencing errors.

Finally, defendant contends that the cumulative effect of his counsel's ineffective assistance denied him a fair trial. However, to determine if a defendant received a fair trial, only actual errors are aggregated for their cumulative effect. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). Because we concluded that defense counsel was not ineffective, no actual errors cumulatively affected his right to a fair trial.

We affirm defendant's convictions for assault with intent to murder, felon in possession of a firearm, and felony-firearm. We also affirm one of defendant's second-degree murder convictions and sentences, but vacate the other. We remand to the trial court for a correction of the judgment of sentence reflecting one conviction and one sentence of first-degree murder supported by two theories. The trial court shall also correct its judgment of sentence regarding the consecutive sentence for felon in possession of a firearm to a concurrent sentence with respect to defendant's first-degree murder, second-degree murder, assault with intent to murder, and felon in possession of a firearm sentences. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Pat M. Donofrio