STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2009
v	No. 284844 Wayne Circuit Court
NATHAN WARD, Defendant-Appellant.	LC No. 07-020872-FC

Before: Hoekstra, P.J., and Murray and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of first-degree murder. See MCL 750.316. The trial court sentenced defendant to serve life in prison without parole. Because we conclude that there were no errors warranting relief, we affirm.

Defendant first argues that he was denied the effective assistance of counsel by his trial counsel's failure to request that the jury be instructed on second-degree murder as a lesser included offense of felony murder. Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the trial court's factual findings for clear error and reviews de novo the constitutional question. *Id.*

To establish ineffective assistance of counsel, a defendant must show that trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008).

A necessarily included lesser offense is an offense in which the elements of the lesser offense are completely subsumed in the greater offense. *People v Nickens*, 470 Mich 622, 626; 685 NW2d 657 (2004). Second-degree murder is always a lesser included offense of first-degree murder. *People v Clark*, 274 Mich App 248, 257; 732 NW2d 605 (2007). "'[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense

and a rational view of the evidence would support it.'" *People v Smith*, 478 Mich 64, 69; 731 NW2d 411 (2007) (citation omitted).

A rational view of the evidence did not support an instruction on the lesser included offense in this case. The parties did not dispute whether the underlying felony of larceny occurred or whether the victim's murder occurred during the commission of that felony. Rather, defendant's trial counsel argued that someone else must have committed the robbery and murder and emphasized this in his closing argument. Accordingly, an instruction on second-degree murder would have been improper. *Smith*, *supra* at 69. And counsel is not ineffective for failing to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant also argues that the trial court erred by ordering him to reimburse the county for the expenses of his court appointed counsel without first considering his ability to pay. In the past, before ordering a defendant to reimburse the county for the cost of his or her court appointed attorney, the trial court was required to "provide some indication of consideration, such as . . . a statement that it considered the defendant's ability to pay." *People v Dunbar*, 264 Mich App 240, 254-255; 690 NW2d 476 (2004). However, our Supreme Court recently overruled *Dunbar* on this issue:

> *Dunbar* was incorrect to the extent that it held that criminal defendants have a constitutional right to an assessment of their ability to pay before the imposition of a fee for a court appointed attorney. With no constitutional mandate, *Dunbar*'s presentence ability-to-pay rule must yield to the Legislature's contrary intent that no such analysis is required at sentencing. [*People v Jackson*, 483 Mich 271, 290; 769 NW2d 630 (2009).]

The ability to pay assessment is only necessary "when that imposition is enforced and the defendant contests his ability to pay." *Id.* at 298. Therefore, defendant's claim is without merit.

There were no errors warranting relief.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly