STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 11, 2010
v	No. 289463 Kalamazoo Circuit Court
ANGELA RENEE MCCONNELL, Defendant-Appellant.	LC No. 2007-000605-FC

Before: Talbot, P.J. and Whitbeck and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant Angela Renee McConnell was convicted of three counts of first-degree felony murder, MCL 750.316(b); first-degree home invasion, MCL 750.110a(2); and perjury with respect to a prosecutor's investigative subpoena, MCL 767A.9(1)(b). Defendant was sentenced to life imprisonment without parole for each of her felony murder convictions, 7 to 20 years' imprisonment for her home invasion conviction and four to seven years' imprisonment for her perjury conviction. She appeals as of right. We affirm.

I. MRE 410

Defendant argues that statements about her withdrawn guilty plea and her post-plea agreement interview were admitted at trial in violation of MRE 410. Additionally, defendant alleges the admission of this evidence violated defendant's due process right to a fair trial. We conclude that defendant has not established that any error affected her substantial rights .

A. Standard of Review

Because this issue was unpreserved, the standard of review is plain error. *People v Houston*, 261 Mich App 463, 466; 683 NW2d 192 (2004). To avoid forfeiture under the plain error rule, three requirements must be met: "1) an error must have occurred, 2) the error must be plain, and 3) the error must have affected defendant's substantial rights, which generally requires defendant to show that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

B. Analysis

Pursuant to MRE 410, evidence of a plea of guilty, which was later withdrawn, is not admissible in any criminal proceeding. *People v Oliver*, 111 Mich App 734, 754; 314 NW2d 740 (1981), rejected in part on other grounds *People v Williams*, 422 Mich 381, 387; 373 NW2d 567 (1985). At trial, the prosecutor made numerous references to defendant's withdrawn guilty plea and her sentencing agreement. Additionally, in response to questioning by the prosecutor and defense counsel, both defendant and a police detective testified that defendant pled guilty and then later withdrew that plea. All of this evidence regarding defendant's withdrawn plea was introduced in violation of the plain language of MRE 410. *Id*. Though the plain language of MRE 410 barred the references to defendant's withdrawn guilty plea, defendant's post-plea interview with police was admissible. This statement was required by the plea agreement, but it was not made "in the course of any proceedings under MCR 6.302" pursuant to MCR 410(3) nor was the statement "made in the course of plea discussions" as required by MRE 410(4). At the time the statement was given, defendant had entered her guilty plea before the trial court and the plea discussions had terminated. Consequently, there is nothing in the language of MRE 410 that barred the admission of this statement.

Even though the evidence of defendant's withdrawn guilty plea was inadmissible and a plain error was established, reversal is not required unless defendant establishes that this error affected her substantial rights, "which generally requires defendant to show that the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763-764. Defendant argues that she was unfairly prejudiced and was denied a fair trial as a result of the pervasive references to her withdrawn guilty plea. "Due process does not require perfect trials, but it does mandate fair ones." *People v Rosales*, 160 Mich App 304, 312; 408 NW2d 140 (1987). "However, mere prejudice is insufficient to justify reversal. Defendant must demonstrate that the admission of the evidence unfairly prejudiced her right to a fair trial." *People v Albers*, 258 Mich App 578, 591; 672 NW2d 336 (2003).

After reviewing the record, we acknowledge that defendant's withdrawn guilty plea was referenced numerous times during the proceedings. However, the references were not such as to render the trial unfair. A review of the record reveals that both parties elicited information about the withdrawn plea for their own purposes and that these references were overshadowed by the significant inculpatory evidence presented at trial that was unrelated to the guilty plea. This evidence included testimony from a codefendant that established defendant was present at the time of the murders and participated by hitting one of the victims with a pipe. This testimony was supported by defendant's former cellmate's testimony that defendant admitted to her involvement in these crimes and another codefendent's admission to his cellmate that defendant was involved in the murders. Further, defendant made two statements to police in March of 2007, another inculpatory statement in July of 2007, and testified on three occasions against her codefendants about her involvement in the home invasion and murders. In light of this overwhelming evidence, defendant has failed to establish the evidence regarding her withdrawn guilty plea was unfairly prejudiced.

II. Ineffective Assistance of Counsel

Defendant next raises two claims of ineffective assistance of counsel. To prevail on such a claim, defendant must prove two components: 1) deficient performance, and 2) prejudice. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Dendel*, 481 Mich 114, 125; 748 NW2d 859 (2008), amended 481 Mich 1201 (2008). To satisfy the first component, defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 US at 687. In other words, defendant must show that his counsel's conduct fell below an objective standard of reasonableness. *Id.* at 688. To prevail on this component, defendant also "must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). The second component requires the defendant to show "the existence of a reasonable probability that, but for the counsel's error, the result of the proceeding would have been different." *Id.* "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *Id.* at 600.

Defendant argues that defense counsel's failure to request suppression of defendant's statements to police, failure to challenge the voluntariness of defendant's statements to police and failure to request a *Walker*[1] hearing constituted ineffective assistance of counsel. Because defendant failed to identify in the record which of the numerous statements she was challenging, defendant has failed to establish a factual predicate for her claim and we will not consider the merits of her argument. *Carbin*, 463 Mich at 600; *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) (This Court will not search for a factual basis to sustain or reject defendant's position.).

Defendant also complains that she was denied the effective assistance of counsel because defense counsel failed to object to evidence regarding her withdrawn guilty plea and because defense counsel failed to object to the prosecutor's references to defendant's withdrawn guilty plea. "This Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). At trial, defense counsel argued that defendant pled guilty and testified against her codefendants at three different criminal proceedings because she was scared and was harassed by police. Considering defendant's numerous inculpatory statements to police, the inculpatory testimony at her codefendant's criminal proceedings, and the testimony of others at trial that implicated defendant, it was a reasonable trial strategy to introduce evidence of defendant's withdrawn guilty plea to explain why defendant previously testified on three occasions regarding her involvement in the murders and then to present the defense that defendant was influenced, coerced and badgered into making the inculpatory statements. In light of that trial strategy,

[1] *People v Walker (On Rehearing)*, 374 Mich 331, 337-338; 132 NW2d 87 (1965).

defense counsel's failure to object to the prosecutor's references to the withdrawn guilty plea was reasonable. Defendant has failed to overcome the strong presumption that defense counsel's failure to object to the introduction of this evidence was not sound trial strategy. *Matuszak*, 263 Mich App at 58 ("The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy.").

III. Prosecutorial Misconduct

Defendant further contends that the prosecutor engaged in misconduct when he admitted evidence of and made pervasive references to defendant's withdrawn guilty plea throughout the trial. We conclude that any error in the prosecutor's conduct did not prejudice defendant or deny her a fair trial.

A. Standard of Review

Because defendant failed to "timely and specifically object" to instances of prosecutorial misconduct, our review is limited to plain error affecting defendant's substantial rights. *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005); *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003).

B. Analysis

"The test for prosecutorial misconduct is, viewing the alleged misconduct in context, whether the defendant was denied a fair and impartial trial." *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). A defendant's claim of prosecutorial misconduct is reviewed on a case-by-case basis. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). And, a prosecutor's remarks are reviewed in context to determine whether the defendant was denied a fair trial, including consideration of the remarks in light of defense arguments. *People v Ackerman*, 257 Mich App 434, 452; 669 NW2d 818 (2003). Even assuming the prosecutor engaged in misconduct, in light of defense arguments regarding defendant's guilty plea and the overwhelming evidence of defendant's guilt, there is no basis for defendant's claim that she was prejudiced or denied a fair trial because of the prosecutor's elicitation of and references to this evidence.

IV. Jury Instruction

Defendant next argues the trial court's failure to grant defendant's request for the jury to be instructed regarding second-degree murder was improper. We disagree.

"A criminal defendant has the right to have a properly instructed jury consider the evidence against him." *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000). "[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 Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002), overruled on other grounds *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2002). "Necessarily included lesser offenses are offenses in which the elements of the lesser offense are completely subsumed in the greater offense." *People v Mendoza*, 468 Mich 527, 532; 664 NW2d 685 (2003).

"Felony murder consists of the following elements: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in the felony-murder statute." *People v McCrady*, 244 Mich App 27, 30-31; 624 NW2d 761 (2000). First-degree home invasion is one of the felonies enumerated in MCL 750.316. *Id.* ("MCL 750.316(1)(b) [] provides that murder committed during a first-degree home invasion constitutes felony murder.") "[T]he elements of second-degree murder are as follows: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). "[F]elony murder is essentially second-degree murder, elevated by one of the felonies enumerated in MCL 750.316." *People v Maynor*, 256 Mich App 238, 243-244; 662 NW2d 468 (2003), aff'd on other grounds 470 Mich 289 (2004). Accordingly, "an instruction on second-degree murder, as a necessarily included lesser included offense of first-degree murder ... will be proper if ... [an] element differentiating the two offenses is disputed and the evidence would support a conviction of second-degree murder." *Cornell,* 466 Mich at 357 n 13.

Here, there was no dispute over the element that differentiates felony murder from second-degree murder (i.e. the commission of the home invasion). Rather, defendant contended she was not involved in the home invasion and the murders. Consequently, either defendant was guilty of both crimes or was not guilty at all. Because there was no evidentiary dispute regarding whether a home invasion occurred, but rather the dispute centered on whether defendant committed that home invasion, there was no dispute over the "element that differentiates the lesser second-degree murder offense from the greater first-degree felony murder offense." *Id.* Consequently, the trial court properly denied defendant's motion.

Affirmed.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Donald S. Owens