

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOMMIE LEE COLEMAN,

Defendant-Appellant.

UNPUBLISHED

April 20, 2010

No. 290162

Calhoun Circuit Court

LC No. 2008-002619-FC

Before: DAVIS, P.J., AND DONOFRIO AND STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of one count of first-degree premeditated murder, MCL 750.316(1)(a), and one count of first-degree felony murder, MCL 750.316(1)(b). Because defendant has not shown that he was prejudiced by the jury instructions, and because he has not shown that his trial counsel was ineffective, we affirm. But, we remand for correction of the judgment of sentence in accordance with this opinion.

Defendant's convictions arose from the robbery and shooting death of the victim, Darrius Phillips, in Battle Creek, Michigan on April 7, 1994.¹ On that date, Phillips and Eugene Jarrett were selling drugs, namely crack cocaine, out of a house located at 11 Hanover Street. Their normal practice was to sell drugs from the interior of the house with one of them armed with a shotgun. But on the date in question they were selling drugs outside in the backyard of the house and were unarmed. Phillips and Jarrett stashed the drugs somewhere on the ground and stood close together conducting drug transactions.

According to Anthony Watson,² he was at another drug house in Battle Creek that night when defendant and another man, Keith Cork, came into the house. Watson testified that

¹ This homicide, classified as a "cold case" remained unsolved and sat dormant in the Battle Creek police department until late September or early October 2006 when police received a letter titled the "guardian letter." According to police, the "guardian letter" contained significant details about Phillips' homicide, including who was involved, and thus, police were able to reopen their investigation.

² After being approached and questioned by police, Watson confessed to his involvement in the
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defendant propositioned him to “go hit a lick,” meaning participate in a robbery at another drug house, specifically, 11 Hanover Street. Watson testified that defendant explained that people were selling drugs out of a backyard and that they did not have weapons. Watson thought it would be “easy” to rob the unarmed drug dealers and agreed to participate to get “quick money.” Watson stated that they hatched a plan to approach the dealers, pretend to buy drugs, pull out money, and then commit the robbery. Watson testified that it was his understanding that they were only bringing weapons as “intimidation tools” and there was no plan to kill anyone during the robbery. Watson had a .357 revolver and defendant had a small caliber pistol. Watson testified that he left the drug house in a truck with defendant, Cork, and the driver of the truck, Willie Edwards. They parked in a parking lot near 11 Hanover Street. According to Watson, Edwards did not leave the truck. Watson stated that he, defendant, and Cork left the truck and walked toward the backyard area of the target house, and though it was dark outside they could see two men in the backyard.

There is confusion in the record regarding whether two or three men approached Phillips and Jarrett. According to Watson, the three of them, Watson, defendant, and Cork, approached the two men in the backyard and indicated they wanted to buy drugs. According to Jarrett, only two men approached himself and Phillips with the intent to purchase drugs. Jarrett did not recognize either of the men. Both Jarrett and Watson testified that defendant walked toward Phillips. It was Phillips’ and Jarrett’s routine only to sell to people they recognized as known customers. Watson testified that defendant briefly spoke to Phillips. Jarrett testified that Phillips approved the transaction by nodding to Jarrett. Watson stated that he and Cork pretended to pull money out to give to Jarrett. At the same time, Jarrett bent over to retrieve the crack cocaine from the bushes. At this point, both Watson and Jarrett heard the sound of a gunshot. Watson looked up and saw defendant with his gun in his hand. Jarrett immediately tried to run away, but tripped.

Watson testified that he was surprised to hear the gunshot and pulled out his own gun and went after Jarrett. Watson grabbed Jarrett and threw him to the ground, yelling at him, and demanding the drugs and money. Jarrett told him that the money was in his coat and then Watson grabbed the coat. Jarrett testified that when Watson threatened to shoot him with the revolver, he got up and ran away, jumped a few fences, and then hid from the police. Watson testified that Cork was present during the robbery, but after the gunshot he ran away. According to Watson, the last time he saw defendant, defendant was standing behind Phillips, “almost directly behind him. Kind of like at an angle, slight angle.” Watson also testified that after the shooting, defendant left by walking around the side of the house. Watson then ran back to the parking lot and got into the truck with Edwards and Cork. They left the parking lot and eventually caught up with defendant a few streets over. The four of them returned to the drug house they were at when they had initially concocted the robbery plan. They split up the robbery

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murder of Phillips on the date in question. Prosecutors initially charged Watson with felony murder, but in exchange for his testimony against defendant he pleaded guilty to second degree murder with a 15 year prison term recommendation from the prosecutor’s office.

proceeds amounting to about \$200 in cash and 12 rocks of crack cocaine valued at approximately \$300. None of them mentioned the shooting at that time and all kept silent.³

On the date of the shooting, Kurt Dittmer was employed by the Battle Creek Police Department as the night shift patrol officer. He received a report that there had been a shooting at 11 Hanover Street and he was the first to report to the scene. Dittmer saw Phillips' body laying face down in the backyard of the house with blood coming out of his mouth. At the time of the shooting, Michael Van Stratton was also employed by the Battle Creek Police Department and was working as the supervisor of the crime laboratory. While collecting evidence at the site, Van Stratton recovered a spent .25 caliber cartridge near Phillips' body. The bullet that was recovered from the head of the victim was a .25 caliber bullet. Dr. Karl Loomis, a forensic pathologist, performed the autopsy of Phillips. He discovered a bullet entrance wound in the back of Phillips' head located behind the right ear. Apparently, Phillips had been wearing a hooded sweatshirt with the hood on his head at the time he was shot because there was a hole in the sweatshirt with indications that he was shot either at a very short range, or right up against the hood material. The bullet entered from the back of Phillips' head, traveled through the base of his brain from right to left, and then remained lodged in his skull.

Jarrett testified at trial that he spoke with police about a month after the crime but did not provide his real name. He stated that he has lived a crime-free life since the incident and years later when approached by the Battle Creek cold case squad he provided his real name as well as a full statement. While he did not testify at trial, police interviewed defendant at various times during their investigation. Defendant denied all involvement in the crime and stated that he had been in Detroit at the time of Phillips' murder. He also stated that he did not know who committed the crime. The jury found defendant guilty of both first degree premeditated murder and felony murder. Defendant now appeals as of right.

Defendant first argues that the trial turned on the testimony of prosecution witness Watson who was an undisputed accomplice, and as such, defendant's due process rights were violated by the trial court's delivery of contradictory jury instructions regarding the assessment of Watson's testimony. "This Court reviews de novo a defendant's claim of instructional error." *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003). Further,

The determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court. This Court reviews jury instructions in their entirety to determine "if error requiring reversal occurred." There is no error requiring reversal if, on balance, the instructions fairly present the issues to be tried and sufficiently protect the defendant's rights. [*People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002) (citations omitted).]

³ There is no mention in the record of prosecution of Cork or Edwards and defendant's brief on appeal intimates that neither of the men were prosecuted for their alleged involvement in the offense.

In cases where a party expressly approves the trial court's jury instructions when the trial court asks if there are any objections to the instructions and in response to that direct question by the trial court, the party denies any objections to the jury instructions, the party waives any challenges to jury instructions on appeal. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Here, after instructing the jury, the trial court asked defense counsel the following question: "You're agreeable with the instructions as given?" Defense counsel responded in the affirmative. "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Accordingly, we conclude that this issue is waived on appeal, and we decline to discuss it further. *Id.*

But, defendant revives his argument by asserting that defense counsel was ineffective for failing to object to allegedly contradictory jury instructions. This Court's review of an unpreserved ineffective assistance of counsel claim is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). An ineffective assistance of counsel claim is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed by this Court de novo. *Id.*

An ineffective assistance of counsel claim is established only where a defendant is able to demonstrate that trial counsel's performance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A defendant is required to overcome a strong presumption that sound trial strategy motivated trial counsel's conduct. *Id.* Additionally, a defendant must demonstrate a reasonable probability that the result of the proceedings would have been different but for the counsel's errors in order to show prejudice. *Id.*

Counsel's performance is "measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Moreover, "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). Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant asserts in particular that the trial court's reading of the following two instructions were "completely contradictory" and as a result constitute reversible error. The first challenged instruction is as follows:

Now you've heard that certain witnesses, William Finnie, Bruce Bryant, and Anthony Watson have been convicted of a crime in their past. You should judge the witnesses – these witnesses' testimony the same way you judge the testimony of any other witness. You may consider their past criminal convictions along with all other evidence when you decide whether you believe their testimony and how important you think it is.

The second challenged instruction is as follows:

Now, Anthony Watson, one of the witnesses, says he took part in the crime that the defendant is charged with committing. Anthony Watson has already been convicted of charges arising out of the commission of that crime. Anthony Watson has been promised that he will not be prosecuted for the crime the defendant is charged with committing. Such a witness is called an accomplice. You should examine an accomplice's testimony closely and be very careful about accepting it. You may think about whether the accomplice's testimony is supported by other evidence because then it may be more reliable. However, there's nothing wrong with the prosecutor's using an accomplice as a witness. You may convict the defendant based only on an accomplice's testimony if you believe the testimony and it proves the defendant's guilt beyond a reasonable doubt. When you decide whether you believe an accomplice consider the following.

First, was the accomplice's testimony falsely slanted to make the defendant seem guilty because of the accomplice's own interest, biases or for some other reason.

Two, has the accomplice been offered a reward or been promised anything that might lead him to give false testimony.

And three, has the accomplice been promised that he will not be prosecuted or promised a lighter sentence or allowed to plead guilty to a less serious charge, if so could this have influenced his testimony.

Four, does the accomplice have a criminal record.

In general, you should consider an accomplice's testimony more cautiously than you would that of an ordinary witness. You should be sure you have examined it closely before you base a conviction on it.

Defendant's argument boils down to the following statement from his brief on appeal, "[i]t was only due to the erroneous jury instructions which confused the jury about how to assess Anthony Watson's testimony that [defendant] was convicted." But defendant does not explain how the jury instructions were contradictory or how they confused the jury. The first challenged jury instruction is based on a standard criminal jury instruction pertaining to witnesses with prior criminal convictions. See CJI2d 5.1.⁴ Clearly, Watson acknowledged his criminal background

⁴ CJI2d 5.1 is as follows:

(1) You have heard that one witness, _____, has been convicted of a crime in the past.

(2) You should judge this witness's testimony the same way you judge the testimony of any other witness. You may consider [his / her] past criminal

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at trial. The second challenged jury instruction is based on standard jury instructions relating to a witness who is an undisputed accomplice, see CJI2d 5.4,⁵ and providing cautionary instructions regarding accomplice testimony, see CJI2d 5.6.⁶

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convictions, along with all the other evidence, when you decide whether you believe [his / her] testimony and how important you think it is.

⁵ CJI2d 5.4 is as follows:

(1) [Name witness] says [he / she] took part in the crime that the defendant is charged with committing.

[Choose as many of the following as apply:]

[(a) (Name witness) has already been convicted of charges arising out of the commission of that crime.]

[(b) The evidence clearly shows that (name witness) is guilty of the same crime the defendant is charged with.]

[(c) (Name witness) has been promised that (he / she) will not be prosecuted for the crime the defendant is charged with committing.]

(2) Such a witness is called an accomplice.

⁶ CJI2d 5.6 is as follows:

(1) You should examine an accomplice's testimony closely and be very careful about accepting it.

(2) You may think about whether the accomplice's testimony is supported by other evidence, because then it may be more reliable. However, there is nothing wrong with the prosecutor's using an accomplice as a witness. You may convict the defendant based only on an accomplice's testimony if you believe the testimony and it proves the defendant's guilt beyond a reasonable doubt.

(3) When you decide whether you believe an accomplice, consider the following:

(a) Was the accomplice's testimony falsely slanted to make the defendant seem guilty because of the accomplice's own interests, biases, or for some other reason?

(b) Has the accomplice been offered a reward or been promised anything that might lead [him / her] to give false testimony? [State what the evidence has shown. Enumerate or define reward.]

(c) Has the accomplice been promised that [he / she] will not be prosecuted, or promised a lighter sentence or allowed to plead guilty to a less serious charge? If so, could this have influenced [his / her] testimony?

[(d) Does the accomplice have a criminal record?]

(4) In general, you should consider an accomplice's testimony more cautiously than you would that of an ordinary witness. You should be sure you have

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Defendant has not shown how these challenged instructions are in conflict. We agree with the prosecutor's argument that the sections are not mutually exclusive. Plainly both instructions applied to Watson. Watson had a criminal record that he acknowledged at trial. Also, Watson was a witness who was also an undisputed accomplice that provided accomplice testimony at trial. All of the provided instructions were relevant to the factual situation and were in fact given for the benefit of the defendant.⁷

After reviewing the record, we conclude that defense counsel's failure to challenge the jury instructions given by the trial court was not ineffective because, viewing the jury instructions as a whole, "the instructions adequately protected defendant's rights by fairly presenting the issues to the jury to be tried." *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997). Because an ineffective assistance of counsel claim may not be premised on failure to advance a meritless argument, defendant's argument fails. *Snider*, 239 Mich App at 425.

Defendant also contends that his convictions for first-degree premeditated murder and first-degree felony murder for one victim violated double jeopardy. Where, as here, a defendant is convicted of first-degree premeditated murder and first-degree felony murder for a single homicide, in order to avoid double jeopardy implications, the defendant should receive one conviction for first-degree murder supported by two theories. *People v Williams*, 475 Mich 101, 103; 715 NW2d 24 (2006); *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998). We remand for modification of defendant's judgment of sentence. The judgment shall specify that defendant was convicted of and sentenced on one count of first-degree murder supported by the two theories of premeditated murder and felony murder. *Bigelow*, 229 Mich App at 220.

We affirm defendant's convictions, but remand for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Pat M. Donofrio
/s/ Cynthia Diane Stephens

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examined it closely before you base a conviction on it.

⁷ It was only recently, in 2005, that our Supreme Court overturned thirty years of precedent when it held in *People v Young*, 472 Mich 130; 693 NW2d 801 (2005) that it was not automatic error for a trial court to choose not to caution the jury on accomplice testimony. Prior to the decision in *Young*, pursuant to *People v McCoy*, 392 Mich 231; 220 NW2d 456 (1974), it was automatic reversible error when the trial court did *not* caution the jury on accomplice testimony.