STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 18, 2010
v	No. 290493 Oakland Circuit Court
LEONARD BERTRUM CARTER, Defendant-Appellant.	LC No. 2008-218993-FC

Before: METER, P.J., and MURRAY and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for two counts of first-degree premeditated murder, MCL 750.316(1)(a), and two counts of first-degree felony murder, MCL 750.316(1)(b). Defendant was sentenced to natural life in prison without parole for each of the four convictions. We affirm, but remand for amendment of the Judgment of Sentence.

Defendant first argues on appeal that he received ineffective assistance of counsel. "The determination whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009) (internal citation omitted). "[B]ecause the trial court did not hold an evidentiary hearing . . . review is limited to the facts on the record." *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

"An accused's right to counsel encompasses the right to the 'effective' assistance of counsel." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007), citing US Const Am VI, Const 1963, art 1, § 20, and *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Generally, to establish ineffective assistance of counsel, a defendant must show that: "(1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "[T]his Court neither substitutes its judgment for that of trial 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). That a chosen strategy "ultimately

failed does not constitute ineffective assistance of counsel." *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant argues that trial counsel erred by failing to object to the admission of prejudicial photographs of the crime scene. He asserts that, although he had always maintained his innocence, there was never any dispute that victims, Raymond Moore ("Ray") and Anthony Moore ("Tony"), were brutally murdered by *someone*. Thus, defendant concludes that the bloody photographs had no relevant purpose and were offered only to elicit an emotional reaction from the jurors, which deprived defendant of a fair trial and the effective assistance of counsel.

"Photographic evidence is generally admissible as long as it is relevant, MRE 401, and not unduly prejudicial, MRE 403. Photographs may . . . be used to corroborate a witness' testimony, and gruesomeness alone need not cause exclusion." *People v Gayheart*, 285 Mich App 202, 227; 776 NW2d 330 (2009) (quotation marks and internal citations). Nor are photographs "excludable simply because they are cumulative of a witness's oral testimony." *Id.*

In this case, both crime scene and autopsy photographs were introduced into evidence. Although defendant argues that the photographs were not necessary because the manner of death was not disputed at trial, "the prosecution is required to prove each element of a charged offense regardless of whether the defendant specifically disputes or offers to stipulate any of the elements." *People v Mesik* (*On Reconsideration*), 285 Mich App 535, 544; 775 NW2d 857 (2009). Thus, "the prosecution was not relieved of its duty to prove all the elements of first-degree murder, including intent" and the photographs, as described above, were helpful to meet this burden. *Id*. Moreover, "defendant's intent was directly in issue because it was an essential element of premeditated murder and felony murder." *Gayheart*, 285 Mich App at 227.

The autopsy and crime scene photos helped corroborate the doctor's testimony regarding the nature, location, extent–and sheer number–of the wounds. The wounds indicated defendant's intent to kill by their placement in vital areas of the body such as the chest and neck of both victims, and further corroborated the medical examiner's conclusion that Tony had defensive wounds to his hands. "The jury is not required to depend solely on the testimony of experts, but is entitled to view the severity and vastness of the injuries for itself." *Id.* The photographs were also not unduly gruesome. Therefore, the photographs were relevant, MRE 401, were not unduly prejudicial to defendant, MRE 403, and "[d]efense counsel was not ineffective for failing to make a futile objection to the admission of the photographs." *People v Unger*, 278 Mich App 210, 257; 749 NW2d 272 (2008).

Defendant also argues that, to counter his theory that defendant was the third victim of the attack that killed the victims, the prosecution offered testimony of witnesses, including drug dealer Robert Jones, who saw defendant with bloodstained money. However, Jones first told the police that someone else had obtained the bloody money from defendant. Defendant concludes that defense counsel's failure to impeach Jones with his prior inconsistent statement constituted ineffective assistance of counsel.

"The questioning of witnesses is presumed to be a matter of trial strategy," *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008), which this Court "will not second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Whether to impeach Jones on this issue was a tactical decision that we will not second-guess on appeal. And, even if the failure to impeach was error, as argued by the prosecutor, had defense counsel impeached Jones, it would not have been a stretch for the jury to believe that Jones, in an effort to avoid admitting that he obtained the money when he sold crack to defendant, initially told police that someone else first obtained the blood-stained money from defendant. Further, the fact still remains that LaDonna Johnson, the woman who accompanied defendant to the LaRenaissance Motel in Detroit, Anelo Josevski, the motel manager, and Kleva Mix, Jones's girlfriend, all testified that they saw defendant with bloodstained money. Therefore, defendant cannot show that Jones's testimony was prejudicial, and thus cannot show that he received ineffective assistance of counsel.

Defendant next argues that the trial court violated his right to a fair trial by impermissibly shifting the burden of proof. This issue arises when, following the attorneys' questioning of Heather Vitta, a forensic scientist at the Michigan State Police Crime Lab in Northville, the jury indicated that it had an additional question. The judge had both attorneys approach the bench, and then stated, "I have a question which counsel and the court agree is appropriate, and I will ask the question."[1] Thus, this issue has been waived on appeal. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) ("Waiver has been defined as the intentional relinquishment or abandonment of a known right. . . . 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.")

We do, however, agree with defendant (and the prosecutor) that, because there were four convictions but only two victims, his double jeopardy rights have been violated, necessitating an amendment of the Judgment of Sentence. As in the case at bar,

> [w]here dual convictions of first-degree premeditated murder and first-degree felony murder arise out of the death of a single victim, the dual convictions violate double jeopardy. The proper remedy is to modify the judgment of conviction and sentence to specify that defendant's conviction is for one count and one sentence of first-degree murder supported by two theories: premeditated murder and felony murder. [*People v Adams*, 245 Mich App 226, 241-242; 627 NW2d 623 (2001), citing *People v Bigelow*, 229 Mich App 218, 220-222; 581 NW2d 744 (1998).]

Therefore, the Judgment of Sentence should be amended to read that defendant is guilty of two counts (with two sentences) of first-degree murder, each supported by two theories: premeditated murder, MCL 750.316(1)(a), and felony murder, MCL 750.316(1)(b).

[1] The question was, "can the defense request samples to be examined?" Vitta answered, "Yes. The defense could request that samples be examined through the prosecution." The prosecution then asked, "was that done in this case?" and defense counsel answered, "no."

In defendant's standard 4 brief on appeal, he argues that there was insufficient evidence for a reasonable jury to find him guilty beyond a reasonable doubt of first-degree premeditated murder and first-degree felony murder.

A challenge to the sufficiency of the evidence is reviewed de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). "[A] court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Nevertheless,

> [t]his Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of the witnesses. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. All conflicts in the evidence must be resolved in favor of the prosecution. [*People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007) (citations omitted).]

First-degree murder is murder that "'is perpetrated by means of poison, lying in wait, or other wilful, deliberate, and premeditated killing, or which is committed in the perpetration, or attempt to perpetrate'" an enumerated felony. *People v Garcia* (*After Remand*), 203 Mich App 420, 424; 513 NW2d 425 (1994), aff'd 448 Mich 442; 531 NW2d 683 (1995), quoting MCL 750.316. The prosecution must prove "that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999). "Some time span between the initial homicidal intent and the ultimate killing is necessary to establish premeditation and deliberation. However, the time required need only be long enough to allow the defendant to take a second look." *Unger*, 278 Mich App at 229 (citations omitted).

Defendant argues that the evidence at trial was insufficient to show premeditated murder because testimony indicated that the murders were committed in "hot blood" as shown by the wounds to the victims, the crime scene, and the frenzy of the act itself. Defendant further contends that when he stated that was going to "f*** them up," referring to Ray and Tony, it was a week before the killings, and therefore, does not demonstrate an intent to kill or premeditation. Defendant's reasoning is unpersuasive.

Premeditation and deliberation "may be established by evidence of (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide. Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. Proof of motive is not essential." *Abraham*, 234 Mich App at 656-657 (quotation marks and citations omitted). In considering the third factor, the circumstances of the killing, the trier of fact may consider "the type of weapon used and the location of the wounds inflicted." *People v Berry* (*On Remand*), 198 Mich App 123, 128; 497 NW2d 202 (1993).

In this case the evidence of defendant's guilt of first-degree premeditated murder was more than sufficient. Regarding the first two factors, Ray and defendant were brothers and Tony was their uncle; and, the three were all housemates. Pamela Carter, defendant's estranged wife,

testified that flooding problems in the basement of the home where the men lived were causing stress. In fact, defendant indicated to Carter and Brenda Lee Boothe, his coworker and ex-girlfriend, that he was upset that Tony and Ray were not paying the bills or helping out around the house. Boothe also testified that she had a telephone conversation with defendant on January 15, 2007, two days before the murders, wherein he stated that he was "pissed off," and, referring to Tony and Ray, further stated (as he appears to concede on appeal), "I'm about to f*** them two up [sic]." Veda James, defendant's girlfriend at the time of the murders, similarly stated that defendant indicated that he did not like living with Ray and Tony because they were lazy, and that was especially true with respect to Tony. This testimony was sufficient to establish that defendant had a motive to kill Tony and Ray, and that he had thought about causing them harm before the killings.

Regarding the third factor, the circumstances of the killing, testimony showed that the victims had been wearing casual clothing or sleepwear when they were killed. That evidence suggested that the victims were either sleeping or relaxing at the time of the murder, and thus, caught off guard. Furthermore, there were no signs of forced entry into the home, or other disturbance, which could indicate that the victims knew their killer.

Dr. Bernardino Pacris, the Deputy Medical Examiner, testified that the cause of both victims' deaths was multiple stab wounds and the manner of death homicide. In fact, one victim received 45 separate wounds, including 14 to the head and neck area. The wounds that inflicted the most damage included one on the left side of the chest that perforated the lung and two on the left side of the neck that nicked the jugular vein and carotid artery. The victim also had wounds on his hands that the doctor characterized as defensive injuries. The other victim's body received ten stab wounds, three on the right side of the head and neck and two in the right subclavian area, three stab wounds on the back and one stab wound in the abdomen. According to the doctor, the "most devastating injury" was the one in Ray's left chest, which cut the thoracic aorta. The high number of wounds and their placement in vital areas further indicate that the murderer had the intent to kill and time to deliberate, as he inflicted multiple wounds into two different victims.

Furthermore, not only did defendant live in the house with the victims, but DNA evidence tied defendant to the murder scene. Vitta, the DNA analyst, agreed that, of all the blood that she analyzed from the house, she did not find anyone else's DNA type other than defendant and the two victims. More specifically, DNA from the band-aid, the bathroom sink, and the kitchen floor matched defendant, while the victims were excluded. The blood on the knife handle that was recovered from the garbage can contained DNA from defendant (the major donor) and, although she could determine that there were other contributors, there was not enough material to determine a match. The blood on the knife blade matched two people, one being Ray, but the other contributor, again, could not be determined. However, "*all* of the DNA types that were detected were consistent" with defendant, Tony and Ray. The cutting of blood from the left leg of the gray dress pants, which belonged to defendant, had DNA from Ray.

Finally, regarding defendant's actions after the murders, testimony indicated that, after staying in Detroit for a few days where he spent money on crack and a prostitute, defendant ended up in Syracuse on February 1, 2007, where he remained until he was apprehended by Syracuse police on June 4, 2007. During this time, defendant did not show up for his job, failed to contact Carter, Boothe, James, or Jacqueline Mosely (his mother), and missed Tony's and

Ray's funerals, despite indicating to Detective Randy Collins, of the Syracuse Police Department, that he knew that Tony and Ray had been killed. Evidence of flight supports "an inference of consciousness of guilt and the term flight includes such actions as fleeing the scene of the crime." *Unger*, 278 Mich App at 226 (quotation marks and citations omitted). For all of these reasons, there was sufficient evidence for the jury to find defendant guilty of first-degree premeditated murder.

With respect to felony murder, "[f]irst-degree felony murder is the killing of a human being with malice 'while committing, attempting to commit, or assisting in the commission of *any* of the felonies specifically enumerated in [MCL 750.316(1)(b)],'" including larceny. *People v Ream*, 481 Mich 223, 241; 750 NW2d 536 (2008), quoting *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999) (emphasis in original). The intent required is the malicious intent required for a conviction of second-degree murder: "the intent to kill, the intent to do great bodily harm, or the intent to create a very high risk of death or great bodily harm with the knowledge that death or harm will probably result." *People v Flowers*, 191 Mich App 169, 176; 477 NW2d 473 (1991). "The facts and circumstances of the killing may give rise to an inference of malice." *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000). Regarding the underlying felony, "[i]t is not necessary that the murder be contemporaneous with the enumerated felony. The statute requires only that the defendant intended to commit the underlying felony at the time the homicide occurred." *People v Kelly*, 231 Mich App 627, 643; 588 NW2d 480 (1998) (citations omitted).

Defendant contends that the evidence indicates that the predicate felonies were separate and distinct afterthoughts, yet at the same time, he argues that there was no evidence of larceny during which a murder occurred. Defendant is incorrect on both counts. In this case, the prosecution sought to prove that defendant killed while committing larceny of Tony's money and Ray's car. "The basic elements of larceny are (1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the subject matter must be the goods or personal property of another, (5) the taking must be without the consent and against the will of the owner." *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999).

Testimony indicated that Ray owned a white Ford Crown Victoria, which defendant sold to Jones for $500 on January 18, 2007. In addition, Tony's last known banking transaction was on January 17, 2007, when he cashed a check for $600. Tony also won a bingo jackpot of $500 on the evening of January 17, 2007. When police discovered Tony's body, the pockets of his sweatpants had been turned inside out. According to Jones, he sold defendant crack cocaine, and defendant paid for it with bloody $100 bills. Jones was not entirely sure of the total amount of their multiple drug transactions, but he estimated that it was around $1,000. Therefore, there was sufficient evidence for a rational fact finder to conclude that defendant committed larceny of both Ray's car and Tony's cash, thus constituting the predicate felony for felony murder. For all these reasons, there was sufficient evidence to show that defendant had intent to kill, and therefore, there was sufficient evidence to prove the elements of felony murder.

Defendant's final argument, contained in his supplemental Standard 4 brief, is that the trial court erred in denying a motion to suppress evidence obtained by police prior to the search warrant being issued. We conclude otherwise. Defendant concedes that in light of what the officers' viewed through the window, they were legally present in the house and properly

searched the house for other victims and any perpetrator. See *Michigan v Fisher*, __ US __; 130 S Ct 546, 549; 175 L Ed 2d 410 (2009); *People v Tierney*, 266 Mich App 687, 704-705; 703 NW2d 204 (2005); see also *United States v Richardson*, 208 F3d 626, 629-631 (CA 7, 2000). With that, it is clear to us that the limited search conducted was not unlawful, and even if it were, the search warrant was obtained that same day, and the evidence seized prior to obtaining the search warrant would have inevitably been discovered afterwards. *People v Stevens* (*After Remand*), 460 Mich 626, 637; 597 NW2d 53 (1999).

Affirmed, but remanded for entry of an amended Judgment of Sentence. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Jane M. Beckering