STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 28, 2010
v	No. 292825 Oakland Circuit Court
BRYAN VALENTIN, Defendant-Appellant.	LC No. 2008-223666-FC

Before: WILDER, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316(1)(a), second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was acquitted of first-degree home invasion, MCL 750.110a(2), and an accompanying charge of felony-firearm. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to life imprisonment for the first-degree murder conviction, 60 to 90 years' imprisonment for the second-degree murder conviction, 10 to 20 years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for each felony-firearm conviction. We affirm defendant's convictions and sentences for first-degree murder, felon in possession of a firearm, and two counts of felony-firearm, and we vacate defendant's convictions for second-degree murder and the accompanying felony-firearm conviction.

Defendant's convictions stem from the shooting death of Laval Crawford outside of Crawford's home on September 13, 2008. Defendant was tried along with codefendants, Jean Carlos Cintron, Diego Galvan and Raul Galvan, but had a separate jury. Defendant, Cintron and Diego Galvan were convicted of Crawford's murder, while Raul Galvan was acquitted of the murder, but convicted of a charge of carrying a concealed weapon, stemming from his arrest.

Defendant first claims that there was insufficient evidence to convict him of first-degree murder. We disagree. When reviewing a claim of insufficient evidence, this Court reviews the record de novo. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

The elements of first-degree premeditated murder are an intentional killing of a human being with premeditation and deliberation. *People v Gayheart*, 285 Mich App 202, 210; 776 NW2d 330 (2009). Premeditation and deliberation require sufficient time between the initial

homicidal intent and the actual killing for the defendant to take a second look. *People v Unger*, 278 Mich App 210, 229; 749 NW2d 272 (2008). Circumstantial evidence and reasonable inferences drawn from the evidence may constitute satisfactory proof of premeditation and deliberation. *Id*. To convict a defendant of aiding and abetting a crime, "a prosecutor must establish that (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement." *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999).

Crawford died as a result of sustaining multiple gunshot wounds, and the manner of his death was a homicide. The prosecutor sought to prove the first-degree murder charge under two theories: (1) defendant actually shot Crawford, and/or (2) defendant aided and abetted Crawford's killing. Just before the killing, an armed defendant and his codefendants went to Antoine Hurner's house looking for Crawford's home because Crawford had allegedly robbed defendant's younger brother, Cintron. Defendant told Hurner that Crawford owed him money. Defendant angrily left Hurner's home when Hurner would not provide him with Crawford's contact information.

A short time later, defendant and his codefendants, all armed, forced their way into Crawford's home. According to Beatrice McCray, Crawford's girlfriend, defendant was the one who approached the home first and led the other men into the home. McCray further testified that defendant directed her to call Crawford and advise him to come home. Once Crawford arrived outside, the men went out through the front door and began firing their guns. Defendant was ultimately shot twice. It is not clear who fired the first shot that hit Crawford, but, according to eyewitness Teisha Johnson, codefendant Diego fired the second shot. Diego approached Crawford as he was crawling on the grass after having been shot, and shot Crawford, once more, at close range. Defendant stood nearby.

Even assuming that defendant himself was not responsible for either gunshot that hit Crawford, there is sufficient evidence to convict him based on an aiding and abetting theory. Defendant was one of the armed men who forced his way into Crawford's home. Defendant and the group then came out of Crawford's home firing their guns in Crawford's vicinity. Several rounds of ammunition were recovered from the scene, some of which came from the type of gun that defendant was seen carrying. The fact that defendant led the shooter(s) inside Crawford's home, and he charged out of the home toward Crawford with a gun constitutes the performance of an act and/or the giving of encouragement that assisted the commission of the killing.

Further, a rational jury could infer that defendant participated in the crime with knowledge of the shooter's intent to kill.[1] Again, defendant led the group of armed men who forced their way into Crawford's home. The evidence suggested that defendant was intent on

[1] The jury was free to infer the shooter's malice from his use of a deadly weapon. *People v Jones*, 95 Mich App 390, 395; 290 NW2d 154 (1980).

finding Crawford because Crawford had robbed defendant's brother of approximately $5,000. Shewana Hopkins, who was inside Crawford's home at the time of the shooting, told the investigating officer that the men in the house "made a comment that they were – they were going to kill and they used a racial slur." Once Crawford arrived outside, defendant accompanied the other men as they ran out of Crawford's home, toward Crawford, shooting their guns. One could reasonably deduce that defendant, at a minimum, knew of the shooter's intent to kill Crawford. A rational trier of fact could thus find that the elements of first-degree murder were proven under an aiding and abetting theory. Accordingly, defendant's sufficiency of the evidence claim fails.

Next, defendant argues that his counsel was ineffective for advising him not to testify. We disagree. The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). 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.*

Defendant argues that, had he testified, there would have been a reasonable probability that he would have been acquitted. Had he taken the stand, defendant would have testified that he and the others went to Crawford's home to retrieve the money that Crawford had stolen from Cintron. They had no intention of hurting Crawford, and it was Crawford and his men who opened fire first. According to defendant, he did not fire any shots.

To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "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). "[C]ounsel's performance must be measured against an objective standard of reasonableness" and without the "benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

During trial, the trial court discussed with defendant his right to testify. While under oath, defendant informed the court that he did not wish to testify. He answered in the affirmative when asked whether he understood that he had an absolute right to testify, and he could exercise that right regardless of what his attorney had advised. Defendant also answered in the affirmative when asked whether his decision was made of his own free will.

Considering the pitfalls of testifying, advising defendant not to testify did not, in and of itself, constitute ineffective assistance of counsel. Defendant presents no supporting authority to the contrary. Furthermore, defendant expressed to the trial court that he fully understood that it was his decision not to testify, and he was making that decision willingly. Defendant presents no evidence that he was misled in some way or coerced into accepting counsel's advice to not testify. If a defendant decides not to testify or acquiesces in his attorney's decision that he not testify, his right to testify in his own defense will be deemed waived. *People v Simmons*, 140

Mich App 681, 685; 364 NW2d 783 (1985). Here, defendant waived his right to testify, and his ineffective assistance claim cannot be sustained.

Next, defendant contends that his convictions for first-degree murder and second-degree murder violate the double jeopardy clause. We agree. A double jeopardy issue constitutes a question of law that this Court reviews de novo. *People v Artman*, 218 Mich App 236, 244; 553 NW2d 673 (1996).

Both federal and Michigan double jeopardy provisions afford protection against multiple punishments for the same offense. *People v Ford*, 262 Mich App 443, 447; 687 NW2d 119 (2004). The purpose of the double jeopardy protection against multiple punishments for the same offense is to protect the defendant from having more punishment imposed than the Legislature intended. *Id.* at 447-448. The *Blockburger*[2] "same elements" test sets forth the proper test to determine when multiple punishments are barred on double jeopardy grounds. *People v Smith*, 478 Mich 292, 296; 733 NW2d 351 (2007). Pursuant to the "same elements" test, offenses are not the "same offense" if each requires proof of an element that the other does not. *Id*. at 300.

Defendant contends that his convictions for first-degree murder and second-degree murder violate the double jeopardy clause. He is correct. Both pre- and post-*Smith* case law provide that multiple murder convictions arising from the death of a single victim violate double jeopardy principles. See *People v McCauley*, 287 Mich App 158, 167 n 3; 782 NW2d 520 (2010); *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000). The remedy for such a double jeopardy violation is to vacate the defendant's second-degree murder conviction. *Id*. at 429-430. Consequently, we vacate defendant's second-degree murder conviction. We also vacate the accompanying felony-firearm conviction.

Finally, in his Standard 4 brief on appeal, defendant asserts that the trial court's jury instruction which supplemented the standard deadlock jury instruction served to coerce the jury into reaching a verdict. Defense counsel did not object to the challenged instruction, but rather, affirmatively expressed approval of the instruction. Defendant's expressed approval of the challenged instruction waives review on appeal. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004) (one who waives his rights may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error).

Affirmed in part, vacated in part, and remanded to the trial court for correction of the presentence report and the sentencing information report to reflect this Court's decision vacating the convictions set forth above. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro

[2] *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).