STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 22, 2012
v	No. 299753 Oakland Circuit Court
WILLIAM ESTEL HESS, Defendant-Appellant.	LC No. 2008-222353-FC

Before: SAAD, P.J., and STEPHENS and KRAUSE, JJ.

PER CURIAM.

Defendant appeals his jury trial conviction of first-degree premeditated murder, MCL 750.316(A), and first-degree felony murder, MCL 750.316(B). The trial court sentenced defendant to two terms of life imprisonment without parole. For the reasons set forth below, we affirm but remand for correction of defendant's judgment of sentence.

I. FACTS

The jury convicted defendant for the January 27, 1979, murder of Julius Schnoll at the Great Scott supermarket in Farmington. Defendant broke into the store with an accomplice and ordered Schnoll to open a safe. When Schnoll could not unlock the safe, defendant shot Schnoll in the head. Though investigators first received a tip about defendant's potential involvement in the crime in 1980, he was not prosecuted until 2010 after a second accomplice, Tim Richman, received immunity in exchange for his testimony.

II. STATEMENTS TO POLICE

Defendant claims the trial court erred when it ruled that defendant voluntarily made an inculpatory statement to West Virginia State Police Corporal Larry Henry. The trial court conducted a *Walker*[1] hearing on this issue. "When reviewing a trial court's findings in a *Walker* hearing, this Court must examine the entire record and make an independent determination on the issue of voluntariness." *People v Kvam*, 160 Mich App 189, 195-196; 408 NW2d 71 (1987).

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

However, deference is given to the trial court's decision, and we will not reverse unless the trial court's findings are clearly erroneous. *Id*.; *People v Mack*, 190 Mich App 7, 17; 475 NW2d 830 (1991).

The totality of the circumstances determines the voluntariness of a statement, *People v Cipriano*, 431 Mich 315, 333; 429 NW2d 791 (1988), and a court considers the following factors:

> the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id*. at 334.]

No single factor is outcome determinative. *People v Sexton* (*After Remand*), 461 Mich 746, 753; 609 NW2d 822 (2000).

When defendant made the statement to Corporal Henry he was 21 years old and incarcerated in a West Virginia penitentiary for an unrelated offense. Before the two and a half hour interview, Corporal Henry advised defendant of his constitutional rights, defendant signed a waiver, and he agreed to speak. Defendant concedes that he was not injured or deprived of basic necessities. He instead asserts that his age and education level contributed to his subjective belief that he would face retribution when he returned to the general prison population if he did not admit to the crime.

According to defendant, his fear was based on events that occurred after 13 prisoners escaped from the prison and killed a state trooper in November 1979. Defendant claimed that, after the escape, state police "took the prison over while the inmates were asleep, chained off the doors and let five out at a time and severely beat inmates." Corporal Henry testified that the prison was no longer under lockdown when defendant made the statements to him. The record also reflects that the prison escape occurred six months before defendant's interview with Corporal Henry and before defendant was incarcerated at the prison. Further, nothing in the record supports defendant's contention that this prior event overcame his freewill and rendered his confession involuntary. Accordingly, the trial court did not clearly err when it ruled that defendant's statement to Corporal Henry was voluntary.

Nonetheless, defendant also contends that the additional statement he made four days later to Farmington Public Safety Detective Thomas Daniels was also involuntary because defendant remained incarcerated at the West Virginia penitentiary. Defendant attempts to preserve this issue by claiming it would have been futile to challenge the statement after the trial court had already ruled that the statement he gave to Corporal Henry was voluntary. There is no merit to this argument because the court admitted defendant's statement to Detective Daniels

before defendant challenged the voluntariness of the statement he made to Corporal Henry. Thus, this issue has not been properly preserved for appeal and we will review it under the plain error doctrine. *People v Borgne*, 483 Mich 178, 181; 768 NW2d 290, on reh 485 Mich 868; 771 NW2d 745 (2009).

Because we hold that the trial court did not err when it found defendant's statement to Corporal Henry was voluntary, defendant is unable to show that it was plain error to admit the second statement. Furthermore, the second statement was sufficiently attenuated from the first to render it independently voluntary. See *Lyons v Oklahoma*, 322 US 596, 602; 64 S Ct 1208; 88 L Ed 1481 (1944). Four days after the first interview, defendant was re-advised of his constitutional rights and provided the second statement to Detective Daniels, who defendant admitted he liked. It is of no consequence that defendant remained incarcerated for the unrelated offense. Defendant retained his own free will and provided a voluntary statement to Detective Daniels.

III. ALLEGED HEARSAY STATEMENT

Defendant claims he is entitled to a new trial because the trial court did not instruct the jury to disregard prejudicial hearsay testimony. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). A trial court abuses its discretion if the decision "falls outside the range of principled outcomes." *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

"Hearsay is an unsworn, out-of-court statement that is offered to establish the truth of the matter asserted" that is generally inadmissible. *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007). However, a statement is not hearsay if it is offered against a party and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." MRE 801(d)(2)(E). For a statement to be admitted under MRE 801(d)(2)(E), the evidence's proponent must establish by a preponderance of the evidence that: (1) two or more individuals conspired together for a common, illegal objective and this must be done with independent evidence, (2) the statement was made during the course of the conspiracy, and (3) the statement furthered the conspiracy. *People v Martin*, 271 Mich App 280, 317; 721 NW2d 815 (2006). As long as these requirements are met, it is irrelevant whether the defendant has been charged for the underlying conspiracy.

During Richman's testimony, defendant made a hearsay objection to a comment an accomplice made as he and defendant were fleeing the crime scene. Defendant also asked the court to strike the testimony. Despite appearing to agree with defendant's objection, the trial court did not state whether it sustained or overruled the objection and questioning resumed. By failing to strike the statement, the trial court effectively admitted the statement into evidence.

The trial court did not abuse its discretion in admitting the statement because ample evidence established that a conspiracy existed to rob Great Scott the night Schnoll was killed and the statement was made by the accomplice as they were fleeing the scene. "The conspiracy continues until the common enterprise has been fully completed, abandoned, or terminated." *Martin*, 271 Mich App at 317 (internal quotation omitted). Here, the statement was made during the conspiracy and was also made in furtherance of the conspiracy. While, on its face, the

accomplice's comment appears to criticize defendant for his actions during the conspiracy, it also implies that defendant should not shoot anyone else. At the time the statement was made, the accomplice and defendant were in Great Scott's parking lot. At that point, defendant could have shot the surviving employees, as he and the others had earlier discussed. Because of this, the statement was made in furtherance of the conspiracy to rob Great Scott and was admissible under MRE 801(d)(2)(E).

IV. REFERENCE TO POLYGRAPH EXAMINATION

Defendant challenges the trial court's decision to deny his motion for a mistrial after a prosecution witness mentioned defendant's polygraph examinations. We review a trial court's decision to deny a mistrial for an abuse of discretion. *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (2000). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id*. at 513-514.

Michigan has a long history of excluding polygraph evidence because of the concern that the trial will inappropriately focus on the polygraph's reliability instead of the defendant's guilt. *People v Davis*, 343 Mich 348, 373; 72 NW2d 269 (1955). It does not matter whether the polygraph was administered to the defendant or a witness. *People v Goodwin*, 40 Mich App 709, 714; 199 NW2d 552 (1972). In either case, the evidence is inadmissible; however, the mere mention of a polygraph does not justify reversal. *People v Kale*, 277 Mich App 182, 183-184; 744 NW2d 194 (2007). Instead, a number of factors when determining whether reversal is required, including:

> (1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster the witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. [*People v Atom*, 85 Mich App 236, 240; 271 NW2d 184 (1978).]

Here, Detective Daniels referred to one of defendant's polygraph examinations during defense counsel's cross-examination. The court held an immediate bench conference and then instructed the jury to disregard Detective Daniel's statement about the examination. Although defendant timely objected and moved for a mistrial, reversal is not warranted because of the isolated nature of the error to which defense counsel contributed. Detective Daniels merely stated that a polygraph examination had been conducted with regard to defendant's statement to Corporal Henry. He did not attempt to bolster his own credibility and he did not disclose the results. Nor does the record reflect that the results could be implied, particularly in light of the extended lapse of time between the polygraph examination and the prosecution of defendant. Accordingly, the trial court did not abuse its discretion by denying defendant's motion for a mistrial.

V. DOUBLE JEOPARDY

We agree with defendant that his convictions of two counts of first-degree murder violate his constitutional right to be free from double jeopardy. The proper remedy is to modify

defendant's judgment of sentence to clarify that defendant's conviction is for one count of first-degree murder, supported by two theories: premeditated murder and felony murder. *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744.

VI. ASSISTANCE OF COUNSEL

Defendant claims he was denied the effective assistance of counsel because counsel did not present certain evidence at trial. According to defendant, the testimony of certain witnesses would have countered the impression given to the jury that investigators believed defendant's confessions were accurate and that the case remained dormant for 30 years merely because the prosecutor's office refused to issue an arrest warrant. Defendant did not move for a new trial or an evidentiary hearing before the trial court, which is required to preserve this issue.[2] *People v Marji*, 180 Mich App 525, 533; NW2d 835 (1989). Failure to do so forecloses appellate review unless the record contains sufficient detail to support defendant's claims. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

To establish a claim of ineffective assistance of counsel, defendant bears the heavy burden of showing that counsel's performance was deficient and that he was prejudiced by the deficiency. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). There is a presumption that counsel's challenged actions were sound trial strategy, and the deficiency required must be so serious that counsel was not performing as guaranteed by the Sixth Amendment. *Id.* A defendant must show that the error prejudiced them to the point that the outcome would have been different if defense counsel had not committed the error. *Id.*

Counsel is afforded broad discretion in the handling of cases. *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Decisions regarding what evidence to present and whether to call witnesses are presumed to be matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). "The decision whether to call witnesses is a matter of trial strategy which can constitute ineffective assistance of counsel only when the failure to do so deprives the defendant of a substantial defense." *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

Defendant argues that defense counsel was ineffective because he did not present the testimony of two witnesses who conducted polygraph examinations on defendant, Michigan State Police Lieutenant Chester Romatowski and Michigan State Police Trooper Hal Rauch. As discussed, however, polygraph examinations are inadmissible in a criminal prosecution. *Kahley*, 277 Mich App at 183. Defendant has not provided any other basis to admit their testimony, which he must do to support his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

[2] The motion to remand was filed and denied by this Court.

Defendant is also unable to show that defense counsel was ineffective for failing to call as a witness Farmington Public Safety Sergeant Peter Amato. Sergeant Amato unsuccessfully attempted to recover the gun defendant used in the killing. According to the report offered by defendant, Sergeant Amato found records describing a gun that did not match the ballistics' pattern for the slug recovered from the murder scene. The same report also states that defendant was being deceptive and that he deliberately misled police. Because of this, Sergeant Amato's testimony would not have provided defendant a substantial defense. The evidence simply suggests that a different gun was used in the crime, which remains consistent with defendant's statements about his memory problems and his failure to recall the location of the weapon used during the crime. Accordingly, defendant has not overcome the presumption that counsel provided effective assistance at trial.

We affirm defendant's first-degree murder conviction and life sentence, but remand for correction of the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause