STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 16, 2012
v	No. 305016 St. Clair Circuit Court
JORGE DIAZ, JR., Defendant-Appellant.	LC No. 10-002269-FC

Before: GLEICHER, P.J., and OWENS and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals his convictions, following jury trial, of two counts of first-degree murder, MCL 750.316, two counts of assault with intent to commit murder, MCL 750.83, one count of arson of a dwelling house, MCL 750.72, and one count of assault with intent to rob while armed, MCL 750.89. These crimes arose from the brutal attack of four persons with a machete inside an apartment. Two of the victims died of the severe wounds inflicted. Defendant was sentenced to serve life in prison for his murder convictions, 30 to 50 years in prison on the two counts of assault with intent to commit murder, as well as for his conviction of assault with intent to rob while armed, and 13 to 20 years for his conviction of arson of a dwelling house, with all sentences to run concurrently. We affirm.

Defendant argues that he is entitled to a new trial because the court allowed the jury to consider two theories of guilt in determining whether defendant should be convicted of first-degree murder. At trial, the court informed the jury that the prosecutor had advanced two theories of open murder: first-degree premeditated murder and first-degree felony murder. Defendant raised an objection to the instruction, which was rejected by the court, thereby preserving it for appeal. *People v Toma*, 462 Mich 281, 323; 613 NW2d 694 (2000). This Court reviews claims of instructional error de novo. *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003).

The court instructed the jury that "[t]he Defendant has been changed [sic] with open murder. The Prosecutor has advanced two theories of this crime, first-degree premeditated murder, and first-degree felony murder." The court instructed the jury on the elements for both offenses, and then instructed as follows:

> The Defendant is charged with open murder and the Prosecutor claims that the alleged criminal act was accomplished by one or more aggravating

> circumstances. Murder with premeditation and/or murder during the commission of home invasion of the first degree, as I explained to you earlier in these instructions.
>
> If you all agree that the Defendant committed first-degree murder, it [is] not necessary that you all agree on which of these aggravating circumstances accompanied the act as long as you all agree that the Prosecutor has proven at least one of the circumstances. That is, either murder with premeditation or murder during the commission of a home invasion in the first degree, beyond a reasonable doubt.

Defendant claims that this instruction was error, because it allowed the possibility that the jury would convict him of murder without agreeing unanimously on a basis for his guilt. Defendant cites *People v Cooks*, 446 Mich 503; 521 NW2d 275 (1994) in support.

In *Cooks*, the complainant testified regarding three instances of sexual penetration, although the defendant was only charged with one count of criminal sexual conduct (CSC). *Cooks*, 446 Mich at 505. On appeal, this Court vacated the defendant's conviction for second-degree CSC because the trial court had refused to instruct the jury that "unanimous agreement about a specific act of penetration is required for conviction." *Id.* at 506. Our Supreme Court reversed, holding that "[b]ecause materially identical evidence was offered with respect to each of the alleged acts of penetration and there is no reason to believe the jury was confused or disagreed about the basis of defendant's guilt," the trial court did not err in refusing to instruct the jury on specific unanimity. *Id.* In *Cooks*, our Supreme Court was asked to "determine whether a general unanimity instruction to the jury was adequate in light of the *pattern of conduct* offered as evidence of a *single charged offense*." *Id.* at 511 (emphasis added). Here, however, defendant's argument is based on the prosecutor's offer of two theories of a single crime (murder), not on the use of evidence of two or more distinct factual scenarios.

In *Schad v Arizona*, 501 US 624, 639; 111 S Ct 2491; 115 L Ed 2d 555 (1991), the Court wrote that "under Arizona law neither premeditation nor the commission of a felony is formally an independent element of first-degree murder; they are treated as mere means of satisfying a *mens rea* element of high culpability." The Court further stated:

> Arizona's equation of the mental states of premeditated murder and felony murder as species of the blameworthy state of mind required to prove a single offense of first-degree murder finds substantial historical and contemporary echoes. At common law, murder was defined as the unlawful killing of another human being with "malice aforethought." The intent to kill and the intent to commit a felony were alternative aspects of the single concept of "malice aforethought."
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> * * *
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> Such historical and contemporary acceptance of Arizona's definition of the offense and verdict practice is a strong indication that they do not offend some principle of justice so rooted in the traditions and conscience of our people as to

> be ranked as fundamental, for we recognize the high probability that legal definitions, and the practices comporting with them, are unlikely to endure for long, or to retain wide acceptance, if they are at odds with notions of fairness and rationality sufficiently fundamental to be comprehended in due process. [*Id.* at 640, 642 (internal quotation marks and citations omitted).]

Additionally, the Court stated that the underlying felony in a felony murder charge may be "treated as the equivalent of murder by deliberation" because

> the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents [such] a highly culpable mental state . . . that [it] may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though not inevitable, lethal result. . . . Whether or not everyone would agree that the mental state that precipitates death in the course of robbery [the underlying felony in *Schad*] is the moral equivalent of premeditation, it is clear that such equivalence could reasonably be found, which is enough to rule out the argument that this moral disparity bars treating them as alternative means to satisfy the mental element of a single offense. [*Id.* at 644 (internal quotation marks and citations omitted).]

The Court ultimately found that while jury instructions requiring verdict specificity might be desirable, the United States Constitution did not compel a jury instruction on specific unanimity based on the facts. *Id.* at 645. Because the facts of *Schad* are directly applicable to the offenses at issue in the instant case, we find that defendant was not deprived of due process by the court's instruction to the jury that it could find that defendant was guilty of first-degree murder based on a theory of either premeditation or felony murder. Moreover, MCL 750.316 specifically provides alternative ways of committing first-degree murder. These alternative means are not set forth as separate elements of the crime.

Additionally, defendant argues that there was insufficient evidence to convict him of first-degree murder based on a theory of felony murder, because the evidence did not establish that he committed the underlying felony of first-degree home invasion. We review challenges to the sufficiency of evidence in criminal trials de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). We must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* We conclude that this standard is satisfied here.

MCL 750.110a(2) defines felony home invasion, and provides in pertinent part as follows:

> (2) A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree

> if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling.

Under the statute, "'[w]ithout permission' means without having obtained permission to enter from the owner or lessee of the dwelling or from any other person lawfully in possession or control of the dwelling." MCL 750.110a(1)(c).

The two victims of the attack who survived testified that visitors to the apartment knocked before they were admitted. There was ample evidence presented at trial, including from defendant's own admissions to the police, that he entered the apartment while the victims were present and without their permission, while armed with a machete, and with the intent to steal either drugs or money from the residents. Defendant specifically told one police officer that he entered the apartment "as quiet[ly] as possible," hoping to go unnoticed until he inadvertently alerted the occupants to his presence. Based, therefore, on defendant's own admissions, as well as the testimony of the two surviving witnesses that visitors to the apartment knocked before they were admitted, there was ample evidence of first-degree home invasion.

In his Standard 4 brief, defendant raises a multi-pronged challenge to his trial counsel's representation, and a challenge to the court's handling of a jury request to read portions of transcript.

Both the United States and the Michigan Constitutions guarantee a defendant the right to counsel. US Const, Am VI; Const 1963, art 1, § 20. This right to counsel includes the right to effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Our Supreme Court has held that the Michigan Constitution guarantees a defendant the same right to counsel as the United States Constitution, and Michigan has adopted the standard for evaluating the effectiveness of counsel set out by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Pickens*, 446 Mich 298, 318; 521 NW2d 797 (1994).

Strickland sets forth a two-part test to determine whether defense counsel was effective. First, the defendant must show that counsel's "representation fell below an objective standard of reasonableness." *Strickland*, 466 US at 688. Second, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. Proof of both prongs is needed to show that a conviction "'resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable.'" *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002), quoting *Strickland*, 466 US at 687. The relevant inquiry "is not whether a defendant's case might conceivably have been advanced by alternate means," but whether defense counsel's errors were so serious that they deprived the defendant of a fair trial. *People v LeBlanc*, 465 Mich 575, 582; 640 NW2d 246 (2002). The defendant must also show that counsel's decisions did not constitute sound trial strategy. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). The

defendant bears the heavy burden of showing that counsel was not effective, as effectiveness of counsel is presumed. *Id*. at 714.

Defendant argues that his trial counsel was ineffective for failing to impeach six witnesses with their prior criminal records. These witnesses all testified that while waiting in the jail assessment area for their cases to be processed by the jail officials, they either made conversation with defendant, who was in a holding cell following his arrest, or overheard defendant's conversation with one of the witnesses, during which he admitted to killing two people and stabbing two people. Defendant claims that all of these witnesses have prior criminal records, but offers no proof of this assertion. Similarly, defendant does not support his assertion that the alleged prior crimes of the witnesses were admissible for impeachment purposes. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

MRE 607 governs impeachment of witnesses by evidence of conviction of a crime, and provides, in pertinent part, as follows:

> (a) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and
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> (1) the crime contained an element of dishonesty or false statement, or
>
> (2) the crime contained an element of theft, and
>
> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
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> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

Defendant offers no proof that the above requirements were satisfied such that trial counsel could have impeached these witnesses with their prior criminal acts if such acts existed.

Moreover, defense counsel questioned each of the witnesses about the reasons they were in jail, so that the jury heard multiple times that these witnesses had all been arrested in connection with a drug raid. This line of questioning was sufficient to attack the credibility of the witnesses as permitted by MRE 607, and within the limits allowed under MRE 608. Defense counsel was not ineffective for failing to reach beyond the limits of impeachment allowed by the court rules.

Defendant also argues that defense counsel was ineffective for failing to investigate claims that potential DNA evidence was discovered on a knife and a pair of scissors that were

allegedly found at the crime scene. There is no mention of a knife or scissors collected from the crime scene in the record, nor does defendant cite to any evidence within or without the record of such evidence being found. Therefore, this Court need not consider this issue.

Next, defendant claims that defense counsel was ineffective for failing to present expert witnesses to support a defense of incapacitation due to substance abuse or mental illness. This argument is entirely speculative with respect to whether defendant suffered from an identifiable mental illness. Defendant also premises much of his argument regarding an intoxication defense on a case which has been reversed on just the point argued. See *People v Lavearn*, 201 Mich App 679; 506 NW 2d 909 (1993), rev'd 448 Mich 207 (1995).[1]

Finally, defendant argues that defense counsel failed to appear at defendant's competency evaluation, causing defendant "not to participate." Here again, defendant cites no evidence from the record to support his claims. Moreover, his argument lacks merit. Defendant argues that the competency evaluation was a critical stage of the proceedings requiring counsel's presence. See *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Although it is certainly would be critical to a defendant to be shown to be incompetent at a forensic examination, the examination is not a judicial proceeding where "meaningful adversarial testing" occurs. *Id.* at 656. "Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Id.* at 658.

Finally, defendant argues that the trial court abused its discretion by failing to grant the jury's request to view "certain evidence and/or critical testimony." However, defendant does not specify what he is referring to in a manner that makes it possible for this Court to accurately or effectively analyze his argument. See *Kelly*, 231 Mich App 627, 640-641.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Donald S. Owens
/s/ Mark T. Boonstra

[1] Dismissal of habeas corpus aff'd *Lavearn v Jones*, ___ Fed Appx ___; 229 F3d 1152 (CA 6, 2000), cert den 532 US 962; 121 S Ct 1496; 149 L Ed 2d 382 (2001).