STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL MARCUS CARTER,

Defendant-Appellant.

UNPUBLISHED
June 12, 1998

No. 197319
Kent Circuit Court
LC No. 95-003319 FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUAN JOE CANTU,

Defendant-Appellant.

No. 197320
Kent Circuit Court
LC No. 95-003319 FC

Before: Gage, P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Following a joint trial before separate juries, defendants Paul Marcus Carter and Juan Joe Cantu were each convicted of felony murder, MCL 750.316; MSA 28.548, assault with intent to murder, MCL 750.83; MSA 28.278, armed robbery, MCL 750.529; MSA 28.797, two counts of kidnapping, MCL 750.349; MSA 28.581, and five counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendants were each sentenced as adults to five concurrent terms of two years' imprisonment for the felony-firearm convictions, such sentences to be followed consecutively by concurrent terms of life in prison without parole for the felony murder conviction, life in prison for the assault with intent to murder conviction, twenty to forty years' imprisonment for the armed robbery conviction and fifty to eighty years' imprisonment for the kidnapping convictions. Defendants appeal as of right. We vacate each defendant's conviction and

sentence for the kidnapping of Daniel VanTatenhove and order that defendants receive sentence credit toward their statutory felony murder punishment for the time served for the VanTatenhove kidnapping conviction. We also vacate each defendant's felony-firearm conviction associated with the VanTatenhove kidnapping conviction and order that defendants receive sentence credit toward their remaining felony-firearm punishments for the time served for the vacated felony-firearm conviction. In all other respects, we affirm defendants' convictions and sentences.

I

Defendants kidnapped VanTatenhove and Arthur Zima, Jr., in Grand Rapids and, after robbing Zima, drove north to the Howard City area. Defendant Carter shot VanTatenhove four times and shot at, but missed, Zima. During the drive back to Grand Rapids, VanTatenhove, who had been placed in the vehicle's trunk, could be heard moaning. Once in Grand Rapids, defendants left Zima bound and gagged in a garage. Defendants continued driving around Grand Rapids, during which time VanTatenhove continued to moan. Zima eventually escaped from the garage, defendants were apprehended by the police, and VanTatenhove was discovered deceased in the vehicle's trunk.

II

We first consider the issues raised by defendant Carter.

A

Defendant Carter points out that the trial court instructed the jury that "either one of two kidnappings or the armed robbery, or any combination thereof" could form the predicate felony for the felony murder charge. Defendant Carter also notes that the verdict form did not specify which of these felonies constituted the predicate felony for his felony murder conviction. Defendant Carter argues that therefore his kidnapping and armed robbery convictions violate principles of double jeopardy and must be vacated. Plaintiff agrees with defendant's argument.

Felony murder occurs when a person kills a human being with malice while committing, attempting to commit, or assisting in the commission of any one of the felonies specifically enumerated in the felony murder statute, including kidnapping and robbery. MCL 750.316; MSA 28.548; *People v Warren*, ___ Mich App ___; ___ NW2d ___ (Docket No. 190133, issued 2/27/98), slip op p 5. The predicate felony is most accurately classified as an element of the crime of felony murder. *People v Sanders (On Remand)*, 190 Mich App 389, 392; 476 NW2d 157 (1991); see also *Warren, supra*. In a criminal prosecution, the elements of the crime must be proven beyond a reasonable doubt. *Warren, supra* at 3.

The constitutional protection against double jeopardy protects a defendant from being subject to multiple punishments for the same offense. *People v Harding*, 443 Mich 693, 705 (Brickley J., with Griffin and Mallett, JJ.), 735 (Cavanagh, C.J., with Levin, J.); 506 NW2d 482 (1993). Legislative intent determines claims of multiple punishment-double jeopardy violations. *Id*. at 712 (Brickley J., with

Griffin and Mallett, JJ.), 735 (Cavanagh, C.J., with Levin, J.). In *Harding*, *supra*, a majority of our Supreme Court held as follows:

> Because statutory felony murder based on the predicate crime of armed robbery carries with it a greater penalty than the predicate crime, we hold that the Legislature did not intend to impose punishments for both crimes . . . and thus, it is a violation of the Double Jeopardy Clauses of the United States and Michigan Constitutions to sentence the defendants for both crimes.

Because armed robbery and kidnapping carry the same penalty, we conclude that it would likewise violate double jeopardy protections to sentence a defendant for both felony murder and the predicate felony of kidnapping.

In this case, the jury found beyond a reasonable doubt that defendant Carter committed armed robbery and two counts of kidnapping. From the facts of this case it is beyond dispute that defendant Carter killed VanTatenhove while committing, attempting to commit, or assisting in the commission of these three felonies. Thus, any of these three felonies could constitute the predicate felony for defendant Carter's felony murder conviction. The legislature did not intend to impose punishments for both the crimes of felony murder and the predicate felony. Thus, we conclude that we must vacate one of the three felonies that could constitute the predicate felony for defendant Carter's felony murder conviction. To do so complies with the Legislature's intent. However, defendant Carter has cited no authority to support his argument that we must vacate the other two felony convictions. Where the felony murder statute is satisfied when it is proven beyond a reasonable doubt that a killing occurs during any *one* of the enumerated felonies, we conclude that to vacate the other two felony convictions would violate legislative intent by subjecting defendant Carter to less punishment than intended by the Legislature. Thus, we vacate defendant Carter's conviction and sentence for the kidnapping of VanTatenhove. We likewise vacate the felony-firearm conviction and sentence accompanying this kidnapping conviction. *Id*. at 716 (Brickley J., with Griffin and Mallett, JJ.), 735 (Cavanagh, C.J., with Levin, J.). We order that defendant Carter receive sentence credit toward his statutory felony murder punishment for the time served for the VanTatenhove kidnapping conviction. *Id*. at 715, n 25, 720 (Brickley J., with Griffin and Mallett, JJ.), 735 (Cavanagh, C.J., with Levin, J.). We also order that defendant Carter receive sentence credit toward his remaining felony-firearm punishments for the time served for the vacated felony-firearm conviction. *Id*. at 717, 720 (Brickley J., with Griffin and Mallett, JJ.), 735 (Cavanagh, C.J., with Levin, J.).

B

Next, defendant Carter contends that certain remarks by the prosecutor during opening statement were so inflammatory and improper as to require reversal. However, defendant Carter failed to object to any of the prosecutor's alleged improper remarks. Appellate review of improper prosecutorial remarks is generally precluded absent an objection because it deprives the trial court of an opportunity to cure the error. *People v Green*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 194995 & 195607, issued 3/20/98), slip op p 4. We will review in such instances only if a curative instruction could not have eliminated the prejudicial effect of the improper remarks or our failure to

review would result in a miscarriage of justice. *Id*. In this case, the prosecutor's remarks simply reflected the prosecutor's theory of the case. Accordingly, we find no error.

C

Finally, defendant Carter contends that the trial court abused its discretion in sentencing him as an adult. We disagree. In this case, the trial court held the hearing and considered all of the criteria required by MCR 6.931 in determining whether to sentence defendant Carter as an adult or a juvenile. The trial court's findings made pursuant to this criteria were not clearly erroneous. *People v Dilling*, 222 Mich App 44, 52; 564 NW2d 66 (1997). Although the seriousness and circumstances of defendant Carter's offenses were certainly, and appropriately we believe, factors of great weight to the trial court, our review does not reveal that the trial court gave undue or preemptive weight to these factors. In light of the trial court's findings, we conclude that the trial court did not abuse its discretion in sentencing defendant Carter as an adult. *Id*.

III

Next, we consider the issues raised by defendant Cantu.

A

Defendant Cantu first argues that error requiring reversal occurred where the jury was not present when the jury verdict form was read by the trial court. However, defendant Cantu's counsel specifically approved of the verdict procedure utilized by the trial court. A defendant may not assign error on appeal to something his own counsel deemed proper at trial. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

B

Next, defendant Cantu contends that error requiring reversal occurred because the prosecutor failed to inform the jury that Quentin Webb, who was with defendants and the victims during the drive to and from Howard City, had been granted immunity from prosecution in exchange for his testimony against defendant Cantu. Defendant Cantu also contends that defense counsel was ineffective in failing to request the disclosure of Webb's immunity agreement.

Because of the relevance of a witness' motivation for testifying, the prosecution must, upon the request of defense counsel, disclose to the jury the fact that immunity or a plea to a reduced charge has been granted to the testifying accomplice or coconspirator. *People v Mumford*, 183 Mich App 149, 152; 455 NW2d 51 (1990). However, in this case, defendant Cantu has presented no facts of record, either by way of a motion for new trial or otherwise, indicating that an agreement for Webb's testimony existed at the time of trial. Our review of the record reveals that during Webb's testimony the trial court became concerned with whether it should alert Webb to any "potential Fifth Amendment problems." However, the trial court found it unnecessary to appoint an attorney for Webb after the prosecutor informed the court that no criminal charges would be brought against Webb. Although Webb acknowledged during his testimony that he had not been charged in this case, there is no indication that

Webb knew he was not being charged in exchange for his testimony. We simply cannot infer on this record that an undisclosed immunity agreement existed.

Moreover, the record reveals that Webb's testimony tended to minimize defendant Cantu's culpability and defense counsel relied on Webb's testimony to bolster defendant Cantu's defense theory. Thus, defense counsel might have considered the disclosure of an immunity agreement irrelevant or even counterproductive to defendant Cantu's case. Accordingly, even assuming that an immunity agreement existed, we conclude that defense counsel's failure to request disclosure was either trial strategy or not prejudicial to defendant Cantu. *People v Reed*, 453 Mich 685, 694-695; 556 NW2d 858 (1996). Moreover, again assuming that an agreement existed, we find no error on the prosecutor's part where defense counsel failed to request disclosure of the agreement. *Mumford, supra*.

C

Next, defendant Cantu argues that the trial court erred in failing to give a cautionary instruction sua sponte with respect to the testimony of Webb, whom defendant Cantu attempts to characterize on appeal as an accomplice. Defendant Cantu also contends that defense counsel was ineffective in failing to request a cautionary instruction with respect to Webb's testimony.

A trial court should give a cautionary instruction on accomplice testimony sua sponte when potential problems with an accomplice's credibility have not been plainly presented to the jury. *Reed, supra* at 693. In this case, the record indicates that Webb was not defendants' accomplice, but rather was simply present during the drive to and from Howard City. Moreover, Webb was not considered or referred to as an accomplice by any of the parties below. Because Webb was not an accomplice, we conclude that the trial court did not err in failing to give a cautionary instruction sua sponte with respect to Webb's testimony. We likewise conclude that defense counsel did not err in failing to request such an instruction.

Alternatively, assuming that Webb could be considered an accomplice, we nevertheless find that the trial court did not err in failing to give a cautionary instruction sua sponte where any potential problems with Webb's testimony were plainly presented to the jury during the prosecutor's rebuttal argument. Moreover, as indicated previously, defense counsel used Webb's testimony to bolster defendant Cantu's defense theory. A cautionary instruction with respect to Webb's testimony could thus have undermined defendant Cantu's defense. *Id*. at 695. Therefore, we conclude that defense counsel's failure to request a cautionary instruction with respect to Webb's testimony was a matter of trial strategy. *Id*. at 695, n 12.

D

Next, defendant Cantu argues that the trial court abused its discretion in sentencing him as an adult. We disagree. In this case, the trial court held the hearing and considered all of the criteria required by MCR 6.931 in determining whether to sentence defendant Cantu as an adult or a juvenile. The trial court's findings made pursuant to this criteria were not clearly erroneous. *Dilling, supra*. Although the seriousness and circumstances of defendant Cantu's offenses were certainly, and

appropriately we believe, factors of great weight to the trial court, our review does not reveal that the trial court gave undue or preemptive weight to these factors. In light of the findings, we conclude that the trial court did not abuse its discretion in sentencing defendant Cantu as an adult. *Id*.

E

Next, defendant Cantu contends that in light of the facts that he was sixteen, that he had an eighth-grade education level, and that his confession was obtained at approximately 4:25 a.m., a question was raised concerning whether his confession was voluntary, knowing and understanding. Defendant Cantu contends that his counsel was therefore ineffective in failing to raise this issue below. However, our review of the record reveals that there is no evidence that defendant Cantu did not understand his right to remain silent, his right to obtain an attorney, or the fact that his statements may not be used against him at trial. *People v Fike*, ___ Mich App ___; ___ NW2d ___ (Docket No. 199564, issued 2/20/98), slip op p 2. Moreover, the record does not suggest that the police took advantage of defendant Cantu's youth and education level or subjected him to coercion or improper police conduct. *Id*. Accordingly, we conclude that defendant Cantu's confession was properly admitted at trial. *Id*. Thus, defense counsel cannot be faulted for failing to bring a motion that would have been futile. *Id*. In addition, the record indicates that counsel's actions may well have been a matter of trial strategy. *Id*. This Court will not substitute its judgment for that of counsel. *Id*.

F

Next, defendant Cantu raises the same double jeopardy argument raised by defendant Carter. For the reasons stated in part II.A of this opinion, we vacate defendant Cantu's conviction and sentence for the kidnapping of VanTatenhove. We also vacate the accompanying felony-firearm conviction and sentence. We order that defendant Cantu receive the same sentence credit as defendant Carter.

G

Next, defendant Cantu contends that there was insufficient evidence that he possessed the malice necessary for a conviction of felony murder or that he possessed the intent to kill necessary for a conviction of assault with intent to murder. We disagree. Viewing all of the evidence, including the evidence of defendants' conduct and statements, in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found beyond a reasonable doubt that at the time he assisted defendant Carter in kidnapping and shooting VanTatenhove defendant Cantu had the intent to kill, the intent to do great bodily harm or wantonly and willfully disregarded the likelihood of the natural tendency of his behavior to cause death or great bodily harm. *People v Barrera*, 451 Mich 261, 294-295; 547 NW2d 280 (1996); *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). We likewise conclude that a rational trier of fact could have found beyond a reasonable doubt that at the time he assisted defendant Carter in assaulting Zima defendant Cantu actually intended to kill Zima. *Barrera, supra* at 295; *Hoffman, supra*.

Vacated in part and affirmed in part.

/s/ Hilda R. Gage
/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski