

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW ROBERTS,

Defendant-Appellant.

UNPUBLISHED
October 30, 1998

No. 198508
Recorder's Court
LC No. 95-004923

Before: Wahls, P.J., and Holbrook, Jr. and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for two counts of first-degree felony murder. MCL 750.316(b); MSA 28.548(b). Defendant was sentenced to life imprisonment without parole for each conviction. The trial court ordered defendant to serve the sentences consecutively. We affirm defendant's convictions, but remand for correction of his judgment of sentence.

Defendant first argues that he was denied effective assistance of counsel. He alleges that his attorney (1) failed to adequately question a police officer, (2) failed to investigate defendant's history of substance abuse, and (3) failed to obtain defendant's school records to corroborate his claim that he could not read or write. After reviewing the record, we conclude that defendant failed to overcome the presumption that he was provided effective assistance of counsel. *People v Eloby*, 215 Mich App 472, 476; 547 NW2d 48 (1996). Defendant has failed to show that the actions of his trial attorney were not sound trial strategy and has failed to establish the requisite prejudice.¹ *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994).

Defendant next argues that the trial court erred in finding that his statement to the police was voluntary. We disagree.

In reviewing a trial court's findings regarding the voluntariness of a defendant's confession, this Court must examine the entire record and make an independent determination on the issue of voluntariness. *People v DeLisle*, 183 Mich App 713, 719; 455 NW2d 401 (1990). However, the trial court's factual findings will not be reversed unless they are clearly erroneous. *Id.* A finding is

clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *Id.* Because the trial court is in a superior position to evaluate the credibility of witnesses and weigh the evidence, we will ordinarily defer to the trial court's resolution of disputed factual issues. *People v Marshall*, 204 Mich App 584, 587; 517 NW2d 554 (1994).

The Court, in *People v Cipriano*, 431 Mich 315, 319; 429 NW2d 781 (1988), delineated an extensive list of factors for the trial court to consider when determining whether a statement is voluntary:

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.]

Where testimony conflicts regarding whether a defendant was suffering from substance withdrawal at the time he gave a statement to police or whether the withdrawal had an impact on a defendant's ability to voluntarily provide the statement, the issue is one of credibility, and this Court will not disturb a trial court's findings of fact in this regard. *People v Smith*, 80 Mich App 106, 111-112; 263 NW2d 306 (1977).

Here, there was conflicting testimony regarding defendant's condition during questioning. One of the police officers who participated in the questioning testified that defendant: (1) did not appear to be in any physical or mental distress during the time that the officer was interviewing him; (2) did not complain of any pain, and did not request any medication; (3) was not incarcerated for a prolonged period of time prior to the interrogation; (4) was not threatened with harm or promised anything in exchange for his statement; (5) was fed twice during the interview and was escorted to the restroom on an as-needed basis; (6) was able to participate coherently in the conversation with the officer, was read his rights, and initialed a notice of rights form; (7) agreed to correct the typographical errors in his statement. The trial court found the officer's testimony credible and defendant's contrary testimony not credible. The trial court's findings were not clearly erroneous, and we conclude that defendant's statement was made voluntarily. Under these circumstances, the trial court properly admitted defendant's statement.

Defendant next argues that the trial court erred in overruling his objection to testimony regarding the seizure of guns, money and cocaine from an apartment building owned by a third party. We disagree.

The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). An abuse of discretion is found only if an unprejudiced person, considering

the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

Here, the prosecution introduced defendant's confession, in which defendant admitted that he had been hired to get one of the victims "out of the way." According to defendant's statement, a drug dealer hired him to firebomb the victim's house because the victim caused trouble for drug dealers in the neighborhood. The prosecution then introduced testimony regarding the drug dealer who allegedly hired defendant. This testimony essentially served to corroborate defendant's confession. Defendant argues that this evidence was irrelevant, and that it was "more prejudicial than probative." However, because the truth of defendant's confession was a crucial issue at trial, evidence corroborating the confession was obviously relevant. Relevant evidence is not rendered inadmissible simply because it is "more prejudicial than probative." Instead, relevant evidence may be excluded where "its probative value is *substantially outweighed* by the danger of unfair prejudice." MRE 403 (emphasis added). The evidence regarding the drug dealer who hired defendant was not especially probative, but neither did it present a significant danger of unfair prejudice.² Under these circumstances, the trial court's decision to admit this evidence was not an abuse of discretion.³

Finally, defendant argues that the trial court erred when it sentenced him to consecutive life terms without parole. The prosecution concedes this point, and we find no reason to disagree.

In the absence of statutory authority, the imposition of consecutive sentences is forbidden. *People v Sawyer*, 410 Mich 531, 534; 302 NW2d 534 (1981). We conclude that the statutes authorizing consecutive sentences, MCL 768.7a; MSA 28.1030(1), and MCL 768.7b; MSA 28.1030(2), do not apply here. Thus, the imposition of consecutive sentences was improper, and we must reverse for correction of defendant's judgment of sentence.

Defendant's convictions are affirmed. We remand for correction of defendant's judgment of sentence. On remand, the trial court should simply enter an amended judgment of sentence changing the word "consecutively" to "concurrently." We do not retain jurisdiction.

/s/ Myron H. Wahls

/s/ Donald E. Holbrook, Jr.

/s/ E. Thomas Fitzgerald

¹ Indeed, the record reveals that defense counsel addressed each of the issues that defendant argues he should have raised. Defense counsel's decision not to delve further into these areas is clearly a matter of trial strategy, and we will not second guess it. See *People v Bass (On Rehearing)*, 223 Mich App 241, 253; 565 NW2d 897 (1997) ("Decisions concerning which witnesses to call, what evidence to present, or the questioning of witnesses are considered part of trial strategy."), modified on other grounds 457 Mich 865-866 (1998).

² Because the evidence concerned a third party, rather than defendant, it did not present a risk that the jury would use it improperly as character evidence.

³ Even were admission of this evidence improper, we would conclude that the error was harmless.