STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 3, 2000
v	No. 207816 Recorder's Court
SINDORA PARKER, Defendant-Appellant.	LC No. 96-005126

Before: Collins, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316; MSA 28.548, second-degree murder, MCL 750.317; MSA 28.549, armed robbery, MCL 750.529; MSA 28.797, assault with intent to murder, MCL 750.83; MSA 28.278, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent prison terms of mandatory life for the first-degree felony murder conviction, life imprisonment for the second-degree murder conviction,[1] twenty to forty years for the armed robbery conviction, 80 to 120 years for the assault with intent to murder conviction, six to ten years for the assault with intent to do great bodily harm conviction, and a consecutive two-year term for the felony-firearm conviction. We vacate defendant's conviction and sentence for armed robbery, but affirm in all other respects.

First, we agree that defendant's dual convictions of first-degree felony murder and the predicate felony of armed robbery violate the double jeopardy protections of the United States and Michigan Constitutions and, therefore, vacate defendant's conviction and sentence for armed robbery. *People v Harding*, 443 Mich 693, 712; 506 NW2d 482 (1993).

Next, defendant argues that it was error to pursue before the jury the question whether due diligence was exercised to locate a particular witness.[2] However, we find that this issue has been

[1] The second-degree murder conviction and sentence were both subsequently vacated.

[2] Contrary to what defendant asserts, the trial court decided the due diligence question, resolving that (continued…)

waived by defendant's acquiescence to the procedure used below. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Further, defendant did not object to the challenged testimony elicited by the trial court and any resulting prejudice did not affect defendant's substantial rights. *People v Grant*, 445 Mich 535, 548-550, 552-553; 520 NW2d 123 (1994). Therefore, appellate relief is not warranted.

Next, defendant argues that he was denied a fair trial because the trial court disparaged defense counsel in front of the jury. However, defendant did not object to the challenged remarks and it is not apparent that the challenged remarks amounted to plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, to the extent the trial court's brief remarks could be viewed as inappropriate, there is no reasonable probability that they affected the outcome of the trial. *Id.*, p 772. Therefore, defendant is not entitled to appellate relief on the basis of this unpreserved issue.

Defendant next argues that defense counsel was ineffective for not moving to suppress defendant's confession as the fruit of an illegal arrest. The available record does not factually support defendant's claim that his arrest was unlawful. Therefore, defendant has not shown that defense counsel was ineffective because he has not shown prejudice. *People v Pickens*, 446 Mich 298, 302-303, 312, 314; 521 NW2d 797 (1994); *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant also argues that the trial court erred in finding that his statements to the police were voluntarily made. However, after reviewing the record in light of the relevant factors for evaluating voluntariness, and affording deference to the trial court's evaluation of credibility, we are satisfied that defendant's statements were voluntarily made. *People v Sexton (After Remand)*, 461 Mich 746, 752-753; 609 NW2d 822 (2000).

Defendant next argues that defense counsel was ineffective in failing to move to suppress the victims' in-court identifications. However, we find that there is no basis for concluding that the victims' in-court identifications were tainted by an unduly suggestive pretrial procedure, *People v Gray*, 457 Mich 107, 111, 114-117; 577 NW2d 92 (1998); *People v Kachar*, 400 Mich 78, 88-97; 252 NW2d 807 (1977), inasmuch as no pretrial identification procedure was conducted in this case. Accordingly, defense counsel was not ineffective for failing to file a motion to suppress the victims' in-court identifications. Rather, under the circumstances, the weight and credibility of the in-court identifications was a question of fact for the jury. *People v Barclay*, 208 Mich App 670, 676; 528 NW2d 842 (1995).

Next, defendant argues that the trial court erred when it informed the jury that it was required to instruct on second-degree murder. Defendant further argues that the trial court erred in failing to give a moral certainty instruction when discussing reasonable doubt, and in failing to give a cautionary instruction concerning eyewitness testimony. However, because defendant did not object to any of these alleged instructional errors at trial, appellate relief is precluded absent a showing of plain error affecting defendant's substantial rights. *Carines, supra,* pp 763-764.

(…continued)

issue in defendant's favor. The question was not left to the jury to decide.

Here, defendant has not established plain error with respect to his first two claims, inasmuch as the law requires a court to instruct a jury on second-degree murder when a defendant is tried for first-degree murder, *People v Jenkins*, 395 Mich 440, 442; 236 NW2d 503 (1975), and an instruction on moral certainty is no longer required, *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Further, the trial court was not required to give a cautionary instruction on identification testimony absent a request. MCL 768.29; MSA 28.1052. Thus, defendant is not entitled to appellate relief.

Defendant also argues that he is entitled to a new trial because the jury was selected using a variant of the unlawful "struck jury" method. The record indicates that, on at least three occasions, the trial court allowed the parties to exercise multiple peremptory challenges without replacing an excused juror after the first peremptory challenge was exercised, contrary to MCR 2.511(E)(3)(a) and (F).[3] See *People v Miller*, 411 Mich 321, 323, 326; 307 NW2d 335 (1981). However, this procedure was neither required nor sanctioned by the trial court and, having participated in this process without objection, defendant cannot now be allowed predicate error on this technical violation of the court rule. *Carter, supra,* pp 214-216; *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991) (a defendant may not harbor error as an appellate parachute). Further, defendant did not exercise all of his peremptory challenges and, for that reason, is deemed to have waived any error. *People v Russell*, 434 Mich 922; 456 NW2d 83 (1990), adopting Judge Sawyer's dissent in *People v Russell*, 182 Mich App 314, 322-326; 451 NW2d 625 (1990).

Defendant next argues that the cumulative effect of the several alleged errors discussed above deprived him of a fair trial, even if no single error requires reversal. However, in view of our resolution of the foregoing issues, we reject defendant's claim that he was deprived of a fair trial because of the cumulative effect of several errors. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998); *People v Morris*, 139 Mich App 550, 563; 362 NW2d 830 (1984).

Defendant next argues that his sentence of 80 to 120 years for assault with intent to murder is cruel or unusual, and disproportionately severe, because it is unreasonable to expect that he will live long enough to serve out his minimum term before being eligible for parole.

Our Supreme Court has held that, where a sentence is otherwise valid, the fact that the defendant may not live long enough to be eligible for parole is not a legitimate basis to overturn it. *People v Lemons*, 454 Mich 234, 258-259, 259 n 32; 562 NW2d 447 (1997). In *Lemons*, *supra,* pp 257, 260, the Court reinstated a sentence of 60 to 120 years imposed on a forty-five year old defendant. Further, considering the circumstances surrounding this offense, which led to the shooting death of one victim and the paralysis of another, we conclude that defendant's sentence is not grossly disproportionate to the crime committed. *People v Bullock*, 440 Mich 15, 33-35, 37; 485 NW2d 866 (1992); *People v Watkins (After Remand)*, 209 Mich App 1, 6; 530 NW2d 111 (1995).

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[3] On the first two occasions, the prosecution and the defense respectively peremptorily excused two jurors at once. On the third occasion, each party peremptorily excused one juror, without another juror being replaced in between.

Finally, defendant's mandatory life sentence for first-degree felony murder is not unconstitutional. *People v Hall*, 396 Mich 650, 657-658; 242 NW2d 377 (1976); *People v Snider*, 239 Mich App 393, 426-428; 608 NW2d 502 (2000); *People v Cooper*, 236 Mich App 643, 661-662; 601 NW2d 409 (1999).

We vacate defendant's conviction and sentence for armed robbery. The remaining convictions and sentences are affirmed.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ Brian K. Zahra