# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>March 29, 2002 |
| v | No. 225969<br>Wayne Circuit Court |
| QUENTIN JONES,<br><br>Defendant-Appellant. | Criminal Division<br>LC No. 99-004793 |

Before: Jansen, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree premeditated murder, MCL 750.316(1)(a), two counts of first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a second-offense habitual offender, MCL 769.10, to four terms of life imprisonment for the first-degree murder convictions and a concurrent term of twenty-eight to seventy years' imprisonment for the armed robbery conviction, to be served consecutively to a two-year term for the felony-firearm conviction. He appeals as of right. Because defendant's convictions arise out of the deaths of two victims, we order that defendant's judgment of sentence be modified to specify that defendant's murder convictions and sentences are for two counts of first-degree murder, each supported by two theories: premeditated murder and felony-murder. The underlying conviction and sentence for armed robbery are vacated.

This case arises from a double homicide of a married couple. Evidence at trial indicated that the victims, Samuel and Latesha Trotter, were approaching their home at night when defendant, codefendant Anthony Crawl, and a third party accosted them, threatened them with guns, escorted them inside their home, demanded their money, ransacked the house, stole property, and then killed them. The evidence included a statement that defendant gave to the police in which he admitted that he was the person who shot the victims.

## I. Double Jeopardy and the Judgment of Sentence

Defendant first argues that his separate convictions and sentences on four counts of first-degree murder, where only two murders were in fact alleged, violate his right not to be placed twice in jeopardy for the same criminal offense.

Separate convictions for both premeditated murder and felony murder, both of which are charged in connection with a single instance of criminal conduct, violate the rule against double jeopardy. *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744 (1998). To avoid this double-jeopardy problem, the remedy is to modify the judgment of sentence to reflect a single conviction and a single sentence for first-degree murder, but to reflect also that the conviction and sentence is supported by the two separate theories. *Id.* at 220-221. We therefore remand this case to the trial court with instructions to issue an amended judgment of sentence reflecting two convictions and life sentences for first-degree murder, each supported by two theories: premeditated murder and felony-murder. *Id.*

Further, although not raised by the parties, inhering within defendant's judgment of sentence is a second double-jeopardy issue. Defendant was, in effect, convicted and sentenced for both felony murder and the predicate felony.[1]

Conviction and sentence for both felony murder and the underlying felony constitutes multiple convictions for the same crime, in violation of double jeopardy principles. *People v Harding*, 443 Mich 693, 714; 506 NW2d 482 (1993) (opinion by Brickley, J.); *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995). Where a defendant is convicted of both felony murder and the predicate felony, the remedy on appeal is to vacate the conviction for the predicate felony. *Id.* at 690, citing *Harding*, *supra* at 714. Accordingly, we vacate defendant's conviction of, and sentence for, armed robbery.

We note one further error in the judgment of sentence. The document reflects defendant's sentencing as a second habitual offender, but gives the statutory citation as MCL 769.13. The latter provision sets forth the protocol attendant to proceeding against a defendant as an habitual offender. The substantive sentencing authorization for second offenders is set forth in MCL 769.10. On remand, if the trial court retains the habitual offender designation in the new judgment of sentence, it should ensure that the amended document reflects the correct statutory citation.

## II. Defendant's Confession

Defendant argues that the trial court erred in admitting his confession. Defense counsel moved to suppress defendant's confession on grounds that it was obtained from defendant

---

[1] In fact, defendant was convicted of armed robbery, but his felony-murder convictions were predicated on a lesser form of larceny. However, the facts in evidence indisputably indicate that only a single course of criminal conduct was alleged. Double-jeopardy principles prohibit conviction of, and sentence for, both a specific crime and a cognate lesser offense stemming from the same conduct. *People v Wilder*, 411 Mich 328, 343-344; 308 NW2d 112 (1981). Thus, for purposes of analysis of the felony-murder convictions under double-jeopardy principles, we regard the armed robbery for which defendant was separately convicted and sentenced, and the lesser larceny on which his felony-murder convictions were predicated, as one and the same crime.

neither voluntarily nor otherwise in conformance with his *Miranda*[2] rights. The trial court decided the issue following a *Walker*[3] hearing, and ruled that the statement was voluntary.

This Court undertakes an independent review of the record when determining the issue of voluntariness; however, the trial court's decision will be affirmed unless we are left with a definite and firm conviction that a mistake has been made. *People v Sexton (After Remand),* 461 Mich 746, 752; 609 NW2d 822 (2000). If resolution of a disputed factual question turns on the credibility of the witnesses or the weight of the evidence, we will defer to the trial court, which had the superior opportunity to evaluate these questions. *Id.* The totality of the circumstances surrounding the making of the statement will be reviewed to determine whether the statement was voluntarily made and therefore admissible. *Id.*

Defendant's assertion on appeal is that there was only the testimony of the interrogating officer and defendant at the hearing, with no other extrinsic evidence. Defendant claims that, under these circumstances, the trial court will always opt to accept the testimony of the police officer as being credible. First, we reject defendant's unfounded assertion that a trial court will always place confidence in the credibility of a police officer, and defendant's claim that there was no other extrinsic evidence in this case is wrong as a matter of fact. Here, there is a standard *Miranda* rights waiver form initialed and signed by defendant that was admitted into evidence. Defendant points to no other evidence from the hearing that his statement was involuntary. We note that the trial court gave careful consideration to the factors listed in *People v Cipriano,* 431 Mich 315, 324; 429 NW2d 781 (1988), to find that the statement was voluntary.

Upon review of the record and the trial court's decision, we are not left with a definite and firm conviction that a mistake was made and defendant has set forth no other reason why his statement was involuntary. Consequently, we affirm the trial court's ruling that defendant's police statement was admissible.

III. Jury Instructions

Defendant also argues that the jury should have been instructed to decide anew the question whether defendant's confession was offered voluntarily, or otherwise pursuant to a valid waiver of his *Miranda* rights. Defendant additionally argues that the jury should have been advised of some specific evidentiary standard to apply to the question whether he in fact made the confession attributed to him. These issues were not raised below, thus appellate review is forfeited except as needed to avoid manifest injustice. MCL 769.26; see also *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999) (unpreserved claims of error are reviewed for plain error affecting substantial rights).

In *Walker, supra* at 338, our Supreme Court definitively decided that trial courts, and not juries, would decide the issue of the voluntariness of a confession. Thus, there can be no error, much less plain error, where the jury was not instructed to decide whether defendant's statement was voluntary.

---

[2] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

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

We likewise reject defendant's argument that the trial court should have prescribed a specific evidentiary standard for the jury's consideration of defendant's confession. Here, the trial court instructed the jury that it must make the threshold determination whether defendant actually made the statement to the police before giving it substantive consideration. The trial court further instructed the jury regarding the concept of reasonable doubt and that it must find each and every element of the charged crimes were proven beyond a reasonable doubt. The trial court's instructions were entirely in accord with the law and defendant has not shown plain error.

Accordingly, the trial court did not err in its instructions to the jury.

Defendant further asserts that trial counsel was ineffective for failing to raise these instructional arguments below. Because defendant has not shown plain error with regard to the jury instructions, he cannot show that trial counsel's actions were either deficient or prejudicial. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

## IV. Failure to Transcribe 911 Calls

Defendant argues that the failure of the court reporter to transcribe the contents of a tape of 911 calls played for the jury leaves the record deficient in that particular, frustrating defendant's right to vindicate his rights on appeal. A trial court's general conduct of a trial is reviewed on appeal for an abuse of discretion. See *People v Cole*, 349 Mich 175, 200; 84 NW2d 711 (1957), and *People v Wigfall*, 160 Mich App 765, 773; 408 NW2d 551 (1987). Moreover, we note that this issue has been forfeited because there is no indication in the record that defendant requested a transcription of the 911 tape. Unpreserved claims of error are reviewed for plain error affecting substantial rights. *Carines, supra* at 774.

Where there is no objection below, and where on appeal a defendant does not allege any specific prejudice in the matter, the failure of a court reporter to transcribe an audio exhibit presented at trial is not grounds for reversal. *People v Perry*, 115 Mich App 533, 538; 321 NW2d 719 (1982), remanded on other grounds 417 Mich 908 (1983). Because defendant fails to allege any specific prejudice that may have resulted from the playing for the jury of the 911 tape in question, defendant fails to show plain error affecting substantial rights. *Carines, supra* at 774. Appellate relief is not warranted.

## V. Prosecutorial Misconduct

Lastly, we address defendant's argument that the prosecutor engaged in misconduct during closing argument.

Defendant did not object to the now challenged comments in the trial court. Absent an objection, we review defendant's claim only for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

The defense presented a neighbor of the victims, who stated that, while on his porch smoking a cigarette, he observed two people greeting Sam Trotter at 9:20 p.m. or 9:30 p.m., on the evening of the murders, adding that he could not identify their faces, but remembered their builds in some detail. Defense counsel then asked defendant to stand up, and elicited from the

neighbor that he was certain that neither of the persons he saw greeting Sam Trotter was defendant. Asked if the party went into the house, the neighbor said that at first they stayed outside talking, but then went inside at the suggestion of Sam Trotter's wife. The witness continued that, around 9:45 p.m., he heard two or three gunshots, and that the police appeared within fifteen or twenty minutes. Asked what he observed between the shots and the arrival of the police, the neighbor replied that he saw two people driving away; asked if they were the same two he had seen greeting Sam Trotter, the witness replied, "could have been."

The prosecuting attorney wished to use the recording of calls to the 911 operator that night to rebut the neighbor's testimony, explaining that he wished to show that the witness was speaking of some entirely different occasion. In admitting the tape, the trial court clarified that it was being offered only for rebuttal.

On appeal, defendant makes issue of the following remarks in the prosecuting attorney's closing argument:

> After they got out of their car, me, Dwight [Crawl], and Hop walked up to them. I had a nine millimeter, Dwight had a gauge shotgun, and Hop had a forty-five. We made them go into the house.
>
> Interestingly enough, ladies and gentlemen, the 911 tape is what the lady said—I heard them being told to go into the house.
>
> After we got in the house, we told them to lay on the floor. What did the 911 tape say, ladies and gentlemen, just as the neighbor—I heard them telling them to get on the floor. [Defendant] knew that. [Defendant] said that himself. Somebody else who is impartial, a third person who just happened to be next door says the same thing that [defendant] said. The only way [defendant] could know that is [defendant] was there.

The prosecuting attorney thus did indeed use the rebuttal evidence as substantive evidence. The remarks above had nothing to do with rebutting the neighbor, but instead concerned corroborating or validating defendant's confession. However, this unobjected-to irregularity was harmless error. A curative instruction could have remedied whatever prejudice defendant suffered in the matter, had there been an objection. Further, defendant's confession was the most compelling evidence of defendant's guilt, to which that bit of bolstering from the unseen 911 caller could have added but little weight. There was no manifest injustice in this instance. *Carines, supra* at 774. Moreover, because defendant has failed to show that counsel's failure to object rendered the trial fundamentally unfair or reliable, or that such an objection would have likely brought about a different result, defendant's cursory suggestion that counsel had been ineffective in the matter is unpersuasive. *Toma, supra.*

Defendant also makes issue of the following prosecutorial remarks:

> Defense Counsel wants to say there's [no] corroborating evidence. Ladies and gentlemen, let's go through some of this evidence.

> Where's the neighbor? Where's the neighbor who made the 911 call? Ladies and gentlemen, you heard that neighbor on the tape—I want this to be an anonymous call—I don't want the police to come to my house.

Defendant makes no effort to differentiate between his objections to the latter remarks and the ones discussed just above in the brief on appeal, leaving us to guess how this latter passage could be considered using rebuttal evidence as substantive evidence. There is no dispute that a violent incident took place on the night of April 15, 1999, and a neighbor's desire to be anonymous when reporting it to 911 bears not at all on the question of defendant's guilt.

Except that the defense made issue of the prosecuting attorney's failure to bring to court the person behind the call:

> [The prosecution] should have presented a complete picture. They should have presented the other neighbors. Where is the neighbor on the 911 tape? Where is the other neighbor who called in? . . . Why haven't they produced a single person in this courtroom who was there that night?

As plaintiff points out on appeal, the defense, having made issue of the nonappearance of the 911 caller, opened the door for the prosecuting attorney to point out that the caller had insisted on anonymity. This passage did not constitute prosecutorial misconduct, and the lack of a defense objection did not constitute ineffective assistance.

For these reasons defendant's claims of prosecutorial do not constitute error requiring reversal.

Affirmed in part, vacated in part, and remanded for an amended judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Richard Allen Griffin