

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM CHRISTOPHER BROWN,

Defendant-Appellant.

UNPUBLISHED
November 9, 2004

No. 246794
Wayne Circuit Court
LC No. 02-007688

Before: Cavanagh, P.J., and Kelly and H Hood*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree felony murder, MCL 750.316(1)(b), and conspiracy to assault with intent to rob while armed, MCL 750.89. Defendant was sentenced to life in prison without the possibility of parole for the first-degree murder conviction and to twenty to thirty years' imprisonment for the conspiracy to assault with intent to rob while armed conviction. We affirm in part and vacate in part.

Defendant was with Jeffrey Strickland and Tyrone Davenport in Detroit on August 10, 2001. There was a discussion about robbing someone to get money, and Strickland noticed that Davenport had a gun. Davenport saw a taxi, flagged it down, and demanded money from the driver. When the driver refused, Davenport shot him once in the head, killing him. Davenport and Strickland entered into plea agreements with the prosecution.

Defendant first argues that the trial court erred when it allowed testimony of Strickland's plea agreement. Because defense counsel failed to object to this testimony, the issue is unpreserved and will be reviewed for plain error that affected defendant's substantial rights. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). "Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence." *Id.*

In general, "all relevant evidence is admissible[.]" MRE 402. However, it may nevertheless be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" MRE 403. Therefore, we must determine whether the evidence of Strickland's plea is *unfairly* prejudicial. "After all, presumably all the evidence presented by the

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

prosecutor was prejudicial because it attempted to prove that defendant committed the crime charged.” *People v Pickens*, 446 Mich 298, 336; 521 NW2d 797 (1994). Unfairly prejudicial evidence is not evidence that is merely damaging, but rather evidence that is likely to be given disproportionate weight by the jury or evidence that cannot be equitably used by its proponent. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995).

The Michigan Supreme Court has ruled that evidence of an accomplice’s conviction by trial is unfairly prejudicial. *People v Lytal*, 415 Mich 603, 612; 329 NW2d 738 (1982). This Court, however, has adopted the reasoning of the plurality in *People v Standifer*, 425 Mich 543; 390 NW2d 632 (1986), and held that a prosecutor may question an accomplice about a guilty plea and a plea agreement, but not a guilty conviction by trial. *People v Dowdy*, 211 Mich App 562, 571; 536 NW2d 794 (1995). In *Dowdy*, the defendant did not object to the admission of the evidence of the plea agreement, and defense counsel used the plea agreement during cross-examination to question the accomplice’s credibility. *Id.* at 571-572. This Court reasoned that “[w]e will not allow a defendant to use the plea information to undermine the accomplice’s credibility at trial, and then allow him to argue on appeal that introduction of the evidence of the plea was prejudicial.” *Id.* Similarly, defense counsel in the instant case failed to object to admission of the evidence of Strickland’s plea agreement, and, indeed, defense counsel used it to attack Strickland’s credibility during his closing argument. As we held in *Dowdy*, defendant may not make use of the evidence and then claim that he was prejudiced thereby.

Defendant next argues that his conviction for felony murder and for the underlying felony of conspiracy violated his right against double jeopardy. We review de novo a potential violation of the Double Jeopardy Clause. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

Both the United States and Michigan constitutions contain a Double Jeopardy Clause. US Const, Am V; Const 1963, art 1, § 15. Among other protections is a right “against multiple punishments for the same offense.” *Nutt, supra* at 574. A sentence for both felony murder and for the underlying predicate crime violates this protection. *People v Harding*, 443 Mich 693, 712; 506 NW2d 482 (1993). The prosecution concedes that conspiracy to assault with intent to rob while armed is the predicate crime of defendant’s felony-murder charge. Because defendant received a sentence for both, his sentence for the conspiracy conviction, which was the predicate felony, must be vacated. *People v Bigelow*, 229 Mich App 218, 221-222; 581 NW2d 744 (1998).

Defendant finally argues that the trial court erred when it refused to allow the jury to review certain testimony. Because defendant failed to object to the trial court’s decision regarding the reviewing of testimony, this issue is unpreserved and will be reviewed for plain error that affected defendant’s substantial rights. *Jones, supra* at 355.

Pursuant to MCR 6.414(H), a trial court may refuse an unreasonable request to review testimony, but it may not refuse a reasonable request. A trial court may order a jury to continue deliberating without reviewing requested testimony if the possibility of reviewing the testimony later is not foreclosed. *People v Howe*, 392 Mich 670, 677-678; 221 NW2d 350 (1974). Defendant argues that this case is similar to *People v Carter*, 462 Mich 206; 612 NW2d 144 (2000), in which our Supreme Court found a violation of the court rule when the trial court told the jury that transcripts would not be available until “some weeks and months way into the

future,” and that they must rely on their collective memories. *Id.* at 213. In the instant case, the trial court stated: “Ladies and Gentlemen, you will [have] to rely upon your recollection. While they’re making a record that has not been prepared, I’ll probably get it to you by next Wednesday or Thursday of next week. But right now, you will have to rely on your recollection. Just remind me.” Because the trial court did not foreclose future review of the testimony, it did not err. Furthermore, defendant has not articulated how he may have been prejudiced.

Accordingly, we affirm defendant’s conviction and sentence for first-degree felony murder and vacate his conviction and sentence for conspiracy to assault with intent to rob while being armed.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ Harold Hood