STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 27, 2009
v	No. 279975 Lapeer Circuit Court
DAVID DUDLEY TAYLOR, Defendant-Appellant.	LC No. 06-009059-FH

Before: Owens, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his convictions following a jury trial of three counts of armed robbery, MCL 750.529, two counts of torture, MCL 750.85, safe breaking, MCL 750.531, first-degree home invasion, MCL 750.110a(2), two counts of animal torture, MCL 750.50b, impersonating a peace officer, MCL 750.215(3), felon in possession of a firearm, MCL 750.224f, larceny in a building, MCL 750.360, and carrying a firearm during the commission of a felony, MCL 750.227b. We affirm.

Defendant's convictions arose out of a robbery at a home in Lapeer. Two men forced their way into the house and announced themselves as police officers. They shot two of the residents' dogs, tasered the residents, and took cash and other valuables from the home. Defendant later told his employer and two of the victims that he was one of the robbers and that his ex-wife's brother-in-law was the other.

Defendant first argues that the constitutional double jeopardy provisions preclude his convictions for larceny in a building and armed robbery. "This Court reviews unpreserved claims that a defendant's double jeopardy rights have been violated for plain error" affecting substantial rights. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). Our Supreme Court has explained that Michigan's double jeopardy provision, Const 1963, art 1, § 15, protects against multiple punishments for the same offense. *People v Smith*, 478 Mich 292, 299; 733 NW2d 351 (2007). To determine whether two offenses are the same for purposes of double jeopardy, the Court examines whether the offenses have separate elements. A defendant may be convicted of two offenses without running afoul of the double jeopardy provisions so long as each offense has at least one element that is not an element of the other. *People v Ream*, 481 Mich 223, 240; 750 NW2d 536 (2008).

Here, each of the challenged offenses has an element that the other does not. The elements of larceny in a building are: "1) an actual or constructive taking, 2) an asportation, 3) with a felonious intent, 4) of someone else's property, 5) without that person's consent, 6) in a building." *People v Cavanaugh*, 127 Mich App 632, 636; 339 NW2d 509 (1983). In contrast, the elements of armed robbery are:

> (1) the defendant, in the course of committing a larceny . . . used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).]

Larceny in a building has an element not required for armed robbery, i.e., that the crime occurred in a building. Armed robbery has two elements not required for larceny in a building, i.e., that the defendant used force or violence, and that the defendant used a weapon. Given the distinction between the elements of the two crimes, defendant's conviction and sentence on both crimes does not violate his double jeopardy protections.

Defendant next argues that his counsel was ineffective for failing to exclude the evidence of the confession he made to two of the robbery victims. According to defendant, the confession was coerced and thus should have been excluded from evidence. We review defendant's claim for mistakes that are apparent from the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

Our Supreme Court has held that the Michigan Constitution guarantees a defendant the same right to counsel as the United States Constitution, and Michigan has adopted the standard for evaluating the effectiveness of counsel set out by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Pickens*, 446 Mich 298, 319-320; 521 NW2d 797 (1994). *Strickland* set forth a two-part test to determine whether defense counsel was effective in a particular case. First, a defendant must show that counsel's "representation fell below an objective standard of reasonableness." *Strickland*, *supra* at 688. Second, defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

We find that defendant's claim fails on both prongs of the *Strickland* test. Counsel made a strategic decision to allow both confessions into evidence, then to challenge the validity of the confessions through cross-examination. During closing argument, counsel highlighted the inconsistencies in the witnesses' testimony concerning the confessions, and attempted to cast the victims as liars. Given the two separate confessions, this was a reasonable trial strategy. Counsel is not deemed ineffective simply for pursuing a strategy that ultimately failed. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Moreover, defendant has not demonstrated a reasonable probability that exclusion of the confession to the victims would have altered the result of the trial. The jury heard inculpatory circumstantial evidence, as well as evidence of defendant's confession to his employer. The jury could readily have convicted

defendant based upon that evidence, regardless of the evidence of the second confession to two of the victims.

Lastly, defendant argues that the trial court erred by denying his request to remove his concealed leg restraints during closing argument so that he could display his gait to the jury. We review this claim for abuse of discretion. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). We find that the trial court was within its discretion to require defendant to remain in the leg restraints during closing argument. Defendant presented no evidence that the jury saw or could have seen the leg restraints, *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008), and defendant never sought to introduce his gait as demonstrative evidence during his case in chief. Accordingly, his argument fails. See *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994); *People v Finley*, 161 Mich App 1, 9; 410 NW2d 282 (1987).

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Jane E. Markey