STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2010
v	No. 292877 Oakland Circuit Court
DIEGO MANUEL GALVAN, Defendant-Appellant.	LC No. 2008-223665-FC

Before: WILDER, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), second-degree murder, MCL 750.317, first-degree home invasion, MCL 750.110a(2), and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced, as a second habitual offender, MCL 769.10, to life imprisonment for the felony murder conviction, 40 to 60 years' imprisonment for the second-degree murder conviction, 10 to 30 years' imprisonment for the first-degree home invasion conviction, and two years' imprisonment for each felony-firearm conviction. Defendant appeals as of right. We affirm in part, vacate in part and remand.

Defendant first argues that his trial counsel was ineffective for failing to request a separate trial from codefendants, failing to conduct a pretrial investigation, and failing to file certain pretrial motions. We disagree.

The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide "whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id*. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving

otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "[C]ounsel's performance must be measured against an objective standard of reasonableness" and without "benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant's convictions stem from the shooting death of Laval Crawford outside of Crawford's home on September 13, 2008. Defendant was tried along with codefendants, Jean Carlos Cintron, Bryan Valentin and Raul Galvan. Valentin had a separate jury. Defendant, Cintron and Valentin were convicted of Crawford's murder, while Raul Galvan was acquitted of the murder, but convicted of a charge of carrying a concealed weapon stemming from his arrest. Trial testimony was adduced that, just before the shooting, defendant and his codefendants went to Antoine Hurner's house looking for Crawford, because Crawford had allegedly robbed Cintron. Hurner would not provide the group with Crawford's contact information, and the group eventually left. A short time later, the group, all armed, forced their way into Crawford's home. One of the men directed Beatrice McCray, Crawford's girlfriend, to call Crawford and advise him to come home. Once Crawford arrived outside, the men went out the front door of the home and began firing their guns. Defendant was shot twice. It is not clear who fired the first shot that hit Crawford, but, according to eyewitness Teisha Johnson, defendant fired the second shot that hit Crawford.

As a general rule, a defendant does not have a right to a trial separate from codefendants. *People v Hana*, 447 Mich 325, 347-348; 524 NW2d 682 (1994), mod in part *People v Gallina*, 447 Mich 1203 (1994). On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant. MCR 6.121(C). A potential for prejudice exists where evidence that the jury should not consider against a defendant, and that would not be admissible if a defendant were tried alone, is admitted against a codefendant. *Hana*, 447 Mich at 347 n 7. Prejudice may also be shown where antagonistic defenses are present. *Id*. at 348-349. Inconsistency of defenses is not, however, enough to mandate severance; rather, the defenses must be "mutually exclusive" or "irreconcilable." *Id.* at 349.

Defendant first suggests that there was evidence admitted against a codefendant, and therefore heard by defendant's jury, which would not otherwise have been admissible if defendant were tried alone. The challenged testimony consists of the following: Hurner's testimony that Valentin questioned him about Crawford's whereabouts; Hurner's testimony that Cintron informed him that he (Cintron) had been robbed of $5,000; and, law enforcement testimony concerning weapons found in the codefendants' possession. None of the challenged testimony directly implicated defendant. The challenged evidence was nonetheless relevant against defendant in that the evidence adduced at trial showed that defendant acted in concert with his codefendants. Defendant and his codefendants jointly participated in the criminal transaction, and therefore, it is reasonable that testimony concerning codefendants would be presented at the joint trial. Even if defendant could demonstrate that the challenged evidence was inadmissible against him, he cannot establish prejudice in light of the untainted evidence against him. Multiple witnesses identified defendant as one of the armed men at Crawford's home. Johnson testified that she observed defendant run toward Crawford, who was crawling in the grass, and fire a shot at him from close range. This testimony was sufficient to sustain defendant's convictions.

Furthermore, defendant's codefendants did not present defense theories that were irreconcilable with defendant's defense. Defendant's defense was that he and his codefendants went to Crawford's home merely to retrieve the money that Crawford had stolen from Cintron. Defense counsel relied on the argument that the prosecution simply could not prove that defendant shot Crawford or aided and abetting in the shooting. Codefendants did not forward a defense to the contrary. Because defendant's defense was not irreconcilable with that of his codefendants, counsel was not ineffective for failing to move for a separate trial on the basis of mutually exclusive defenses.

As for the claim raised in defendant's standard 4 brief, that defense counsel failed to engage in pretrial investigation, it is unsubstantiated. Beyond asserting a bald claim of attorney unpreparedness, defendant does not identify what specific pretrial investigation counsel allegedly neglected. The same is true for defendant's contention that counsel erred in failing to file pretrial motions. Consequently, defendant cannot sustain an ineffective assistance of counsel claim.

Next, in his Standard 4 brief on appeal, defendant contends that the prosecution committed misconduct by permitting one of its witnesses to commit perjury. We disagree. This Court reviews a defendant's unpreserved claim for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, a defendant must establish that: (1) an error occurred, (2) the error was plain, (3) and the plain error affected the defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *Id.* at 763.

At trial, Johnson testified that she witnessed defendant run up to Crawford, who was crawling on the ground after having been shot, and shoot him. Johnson also selected defendant's photograph from a lineup. Defendant claims that the prosecutor committed misconduct by permitting Johnson's perjured testimony. Defendant bases his claim on the fact that Detective Jeff Buchmann testified that he interviewed Johnson on the day of the shooting and she did not indicate that she saw Crawford get shot and did not state that defendant committed the shooting.

A prosecutor's duty is to correct perjured testimony; he may not knowingly use false testimony to obtain a conviction. See *People v Lester*, 232 Mich App 262, 276-277; 591 NW2d 267 (1998). Defendant presents no evidence suggesting that the prosecutor knowingly elicited perjured testimony. To the extent that Johnson's testimony can be seen as inconsistent with Detective Buchmann's, this, in and of itself, does not demonstrate that the prosecutor knowingly presented perjured testimony. Without additional corroboration, defendant's prosecutorial misconduct claim cannot be sustained. Additionally, even if defendant demonstrated that the prosecutor knowingly presented perjured testimony, defendant cannot show outcome determinative error in light of the untainted evidence against him, which is discussed above.

Next, defendant contends that his convictions for felony murder and second-degree murder violate the double jeopardy clause, as do his convictions for felony murder and the underlying felony. We agree that his convictions for felony murder and second-degree murder violate the double jeopardy clause, but conclude that his convictions for felony murder and the underlying felony do not. A double jeopardy issue constitutes a question of law that this Court reviews de novo. *People v Artman*, 218 Mich App 236, 244; 553 NW2d 673 (1996).

Both federal and Michigan double jeopardy provisions afford protection against multiple punishments for the same offense. *People v Ford*, 262 Mich App 443, 447; 687 NW2d 119 (2004). The purpose of the double jeopardy protection against multiple punishments for the same offense is to protect the defendant from having more punishment imposed than the Legislature intended. *Id.* at 447-448. The "same elements" test sets forth the proper test to determine when multiple punishments are barred on double jeopardy grounds. *People v Smith*, 478 Mich 292, 296; 733 NW2d 351 (2007). Pursuant to the "same elements" test, offenses are not the "same offense" if each requires proof of an element that the other does not. *Id*. at 300.

Defendant contends that his convictions for felony murder and second-degree murder violate the double jeopardy clause. He is correct. Both pre- and post-*Smith* case law provide that multiple murder convictions arising from the death of a single victim violate double jeopardy principles. See *People v McCauley*, 287 Mich App 158, 167 n 3; 782 NW2d 520 (2010); *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000). The remedy for such a double jeopardy violation is to vacate the defendant's second-degree murder conviction. *Id*. at 429-430. Consequently, we vacate defendant's second-degree murder conviction, and also the accompanying felony-firearm conviction.

Defendant also argues that his convictions for felony murder and the predicate home invasion conviction violate double jeopardy. Convicting and sentencing a defendant for both felony murder and the predicate felony does not violate double jeopardy if each offense has an element that the other does not. *People v Ream*, 481 Mich 223, 225-226; 750 NW2d 536 (2008). Home invasion contains an element not contained in felony murder, namely, the breaking and entering of a dwelling. See MCL 750.110a(2).[1] Felony murder contains an element not contained in home invasion, namely, the killing of a human. See *Smith*, 478 Mich at 318-319.[2] Accordingly, this combination of convictions does not constitute a double jeopardy violation.

Finally, defendant contends that the trial court erred in assessing him ten points for Offense Variable (OV) 14. We agree. Defendant's unpreserved claim of error is reviewed for plain error affecting his substantial rights. *Carines*, 460 Mich at 762-763.

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[1] A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first-degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists: (a) the person is armed with a dangerous weapon or (b) another person is lawfully present in the dwelling. MCL 750.110a(2).

[2] *Smith* provides that the elements of first-degree felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b).

OV 14 is scored for the offender's role in the criminal transaction. MCL 777.44. Defendant was assessed ten points for OV 14. Ten points are appropriate where the offender was a leader in a multiple offender situation. MCL 777.44(1)(a). We are not persuaded that defendant played a leadership role in the criminal transaction. It was Valentin who acted as the leader both at Hurner's home and at Crawford's home. The fact that defendant was alleged to have shot Crawford does not compel a finding that defendant acted as a leader. By the time that defendant allegedly shot Crawford, the group of armed men had already run out of Crawford's home toward Crawford shooting their guns. Crawford had already been shot by the time that defendant fired a shot at him. Though there was abundant evidence that defendant was a participant in the criminal transaction, the evidence is lacking that he was actually a leader. OV 14 should thus have been scored at zero points. Because MCL 769.34 requires resentencing when there is an error in scoring the sentencing guidelines, defendant is entitled to resentencing *People v Jackson*, 487 Mich 783; ___NW2d ___ (2010).

Even if OV 14 was not misscored, defendant is still entitled to resentencing. The guidelines were scored based on defendant's second-degree murder conviction. As noted above, however, defendant's second-degree murder conviction is vacated as violative of the double jeopardy clause. Accordingly, it is defendant's first-degree home invasion conviction that should be used to determine the guidelines range. An OV total score premised on the second-degree murder conviction would not necessarily be the same as an OV total score premised on the first-degree home invasion conviction. This is so because of our Supreme Court's recent decision in *People v McGraw*, 484 Mich 120, 133; 771 NW2d 655 (2009), which provides that "[o]ffense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." Accordingly, we remand to the trial court with a directive that it resentence defendant with a guidelines calculation that is premised upon first-degree home invasion as the sentencing offense and with an assessment of zero points for OV 14.

Affirmed in part, vacated in part, and remanded. On remand, the trial court is directed to correct defendant's presentence report and sentencing information report, to resentence defendant and complete a judgment of sentence in accordance with this Court's decision. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro