STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 17, 2011
v	No. 294687 Jackson Circuit Court
CURTIS MICHAEL LEWIS, Defendant-Appellant.	LC No. 09-005687-FH

Before: MURPHY, C.J., and WHITBECK and MURRAY, JJ.

PER CURIAM.

Defendant was found guilty by a jury of armed robbery, MCL 750.529, and was thereafter sentenced to 15 to 20 years' imprisonment, with credit for 155 days served. He appeals as of right. We affirm defendant's conviction, but vacate his sentence and remand for resentencing.

I. FACTS AND PROCEEDINGS

Defendant was convicted of robbing a payday advance store, the Check 'N Go, in the City of Jackson. Check 'N Go employee Ashley Sanders testified that she was working at the store on April 13, 2009. At approximately 5:00 p.m., a man entered the store, pulled a bandana over his face, walked behind the counter, stated that it was a hold-up, and demanded that Sanders and a coworker get down on the ground. Sanders believed that the robber had a gun because as he came behind the counter he stated, '"[t]his is not a f****** joke, this is a . . . hold up . . . I will pull my pistol out."' She further testified that the robber "kind of had his hand in his pocket and he—it was kind of like, you know, I'm not sure if it was a finger or if it was a gun, but it looked like a gun." The robber was wearing a grey hooded sweatshirt and white tennis shoes.

There were three cash drawers behind the counter. After unsuccessfully attempting to open another drawer, defendant went to the case drawer of Sanders's coworker, Wendy Alexander. According to Sanders, Alexander advised defendant that her drawer had to be opened in a different manner, and Alexander offered to open the drawer for defendant. The robber responded by stating, "[y]ou have three seconds to open the f****** drawer or else I'm going to blow your head off, bitch."

Sanders testified that the robber demanded to know where the rest of the money was, and she and Alexander told him it was in the safe. The robber took the safe bag, and then began walking out while telling the women to stay down for thirty seconds '"or else I'm going to blow this bitch up if you

guys get up."' Sanders took this statement to mean that the robber was going to shoot the place up, not blow it up with a bomb.

Sanders testified that a young man had come into the store earlier in the day that looked similar to the robber, i.e., "same body type, same build, everything." He was with a new female customer, who listed defendant as one of the references for her loan application. Sanders stated that the man, who was wearing a grey hooded sweatshirt with a jersey over it and white tennis shoes, seemed to be watching everything that she and her coworkers were doing.[1]

Brenda Wyman, Alexander's mother, approached the store just as Alexander and Sanders were standing up to call 9-1-1. Wyman testified that as she approached the Check 'N Go, she saw a man attempting to run as he left the store, but that he "was being slowed down by something heavy or awkward in his right side pockets." The man was wearing a light-colored, possibly light grey, hooded sweatshirt.

Jackson Police Department Detective Ed Smith testified that he went to defendant's residence and, after conducting a search, seized a grey hooded sweatshirt, khaki pants, white tennis shoes and a jersey with the same number as the robber was seen wearing in the surveillance video from the Check 'N Go. Sanders and Alexander identified the sweatshirt and shoes as consistent with those worn by the robber, and also identified the jersey as the one the young male customer had been wearing earlier in the day. Wyman testified that the sweatshirt admitted into evidence had the same basic style and color as the one worn by the man she saw leaving the store.[2]

Smith testified that defendant willingly came to the police station for an interview. Before the interview, which was held approximately ten days after the robbery, Smith advised defendant that he was not under arrest. According to Smith, he and another officer, Detective Serg Garcia, decided to minimize the crime when speaking with defendant. At first, defendant denied knowing anything about the robbery although he admitted being at the Check 'N Go earlier in the day. Smith pressed defendant about his activities on the day in question, and then began trying to get defendant to express some sympathy or empathy for the robber by suggesting that, given the troubled economy, somebody might understandably resort to robbery in order to take care of their family. Smith also pressed defendant on some inconsistencies between his story and the story of some of the people he had gone with to the Check 'N Go. Smith also suggested to defendant that the two of them needed "to work together to minimize this" and that he did not want defendant to be locked up. Smith stated, "[T]hey're trying to charge you with armed robbery with a gun, okay? I don't think that's what happened, okay." Smith

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[1] Alexander gave a similar account of the robbery and added that after the robbery she and the district manager for Check 'N Go were able to determine that approximately $3,100 was taken by the robber.

[2] Sanders, Alexander and Wyman each testified that defendant looked like the young man who came into the store before the robbery, while Alexander and Sanders said that defendant also had the same size, build, and complexion as the robber.

also stated that if defendant confessed, he could make the case go away, but defendant still denied involvement.[3]

As the interview continued, Smith told defendant that Check 'N Go simply wanted its money back and asked defendant if he would be willing to pay restitution, to which defendant stated that he would. Detective Garcia then joined Detective Smith in the interview room. Garcia continued to try to minimize the crime, saying that no one was trying to convict defendant of robbery, and also stated that he did not want the "girls" that defendant had gone with to the store earlier in the day to get locked up. Garcia continued to press the restitution issue, asking defendant how much restitution might be owed. Defendant told Garcia "eight hundred," a number that Smith had tossed out earlier in the interview when trying to elicit how much restitution defendant could afford to pay. Garcia proceeded to ask whether this was going to happen again, whether defendant had robbed anyplace else, whether defendant had a gun, and whether defendant had gotten physical with the store employees—all of which defendant denied. When asked "you stole their money at best," defendant answered "[t]hat's it." From that point on in the interview, defendant continued to answer questions premised on the fact that he had admitted to the robbery. As the interview continued, defendant indicated that the women at the store may have believed he had a gun because of how he was holding his hand, and he told the detectives the robbery was not planned.

Following the conclusion of the recorded interview, Smith spoke with the prosecutor's office and formally arrested defendant. Defendant was then advised of his *Miranda*[4] rights and re-interviewed, whereupon defendant fully admitted to the robbery. However, this second interview was not recorded because, according to Smith's testimony, the batteries for his recording device had died, which Smith did not realize at the time.

During voir dire, both defense counsel and the prosecutor questioned the jurors as to how it might affect their decision-making if they learned the police had lied to someone while interrogating a suspect. While the prosecutor was pursuing this line of questions, the trial court intervened:

> THE COURT: Mr. Mehalco [the prosecutor], wait. I think Mr. Gaecke's [defense counsel] referenced it, now Mr. Mehalco is, and I guess I would instruct the jury that—that there are certain levels of permissible deception that the police can use when they're interviewing a suspect in a crime. Ultimately, if an admission comes in the court has to be satisfied that it was made knowingly, intelligently and voluntarily, so you know, I just wanted to instruct the jury of that.

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[3] Smith admitted lying to defendant about the evidence he had against him, and about his ability to make the case go away. Smith also admitted that defendant told him that he (defendant) had only had a couple of hours of sleep the night before the interview. At trial, defense counsel argued that defendant had falsely confessed because of the coercive environment during the interrogation, but never actually attempted to have the confession suppressed.

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

I mean, there could—(undecipherable)—a situation that there's so much over-reaching police misconduct that as a matter of law the court wouldn't even let the admission and/or confession in, so I just wanted to make sure that—that all of you understand that a certain amount of that is allowed.

Now, what—what significance you want to attach to that is up to the jury. Do all of you understand that? All right, so okay.

As noted, the jury found defendant guilty of armed robbery.

II. ANALYSIS

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant's first argument is that he was denied the effective assistance of counsel. In this regard, defendant argues that his trial counsel made several critical errors that affected the outcome of the proceedings. Before addressing the merits, we note that defendant did not argue his claims of ineffective assistance below in a motion for a new trial or an evidentiary hearing.[5] Therefore, they are not properly preserved for appeal and review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

Additionally, the determination whether defendant has been denied the effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the trial court's factual findings for clear error, while its constitutional determinations are reviewed de novo. *Id.*

As to the merits, it is well settled that to establish ineffective assistance of counsel, defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that but for counsel's error the result of the proceedings would have been different, and (3) that the attendant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Here, defendant first complains that his attorney should have moved to suppress his statements to the police because they were coerced. When analyzing whether a statement was made voluntarily, a trial court must consider the totality of the circumstances, "including the duration of detention and questioning, the defendant's age, intelligence, education and experience, his physical and mental state, and the diverse pressures which sap or sustain his powers of resistance and self-control." *People v*

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[5] On appeal, defendant did move to have this case remanded for a *Ginther* hearing concerning the claims of ineffective assistance raised in his Standard 4 brief. *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). However, this Court denied the motion. *People v Lewis*, unpublished order of the Court of Appeals, entered August 2, 2010 (Docket No. 294687).

Seymour, 188 Mich App 480, 483; 470 NW2d 428 (1991). In this case, defendant complains that he had little sleep before being questioned, and that the police deceived him into believing the case was minor and could be easily resolved if he confessed.

Certainly, the fact that the police minimized the crime led to defendant's confession. That, after all, was the point of the tactic. However, a statement induced by a promise of leniency is not, per se, inadmissible. "Rather a promise of leniency is merely one factor to be considered in the evaluation of the voluntariness of a defendant's statements." *People v Givans*, 227 Mich App 113, 119-120; 575 NW2d 84 (1997).

Looking to the other factors surrounding the interview, defendant was there voluntarily, it was not a particularly lengthy interview, the officers were not abusive, and defendant's answers did not suggest that he was confused because he was tired. While the officers' deception led to defendant's confession, and arguably undermined its credibility, we cannot say the deception rendered it involuntary. The authority cited by defendant in which statements were deemed involuntary involved facts more egregious, e.g., *People v Richter*, 54 Mich App 598; 221 NW2d 429 (1974) (involving a threat of loss of parental rights). Looking at the totality of the circumstances here, including defendant's limited sleep and the officers' deception, we conclude that there is no reasonable chance that had defense counsel requested a *Walker*[6] hearing defendant's statements would have been suppressed. Because a motion to suppress defendant's statements would have likely failed, defense counsel was not ineffective for failing to make such a motion. Rather, defense counsel made a reasonable decision to simply argue to the jury that the officers' deception undermined the credibility of the confession.

Defense counsel's failure to object to the trial court's sua sponte suggestion that it had reviewed the voluntariness of the confession is more troubling. This Court has previously held that a court should not "inform the jury of the existence, nature, and results of a *Walker* hearing . . . ." *People v Gilbert*, 55 Mich App 168, 173; 222 NW2d 305 (1974). This Court reasoned that doing so would make it difficult for a jury to find that the confession had not been made, and that it would "unfairly discount the credibility of defendant's impeaching evidence, especially that properly admitted evidence that relates to voluntariness. The trial court thus would improperly impinge upon the province of the jury." *Id*.

Here, the court seemed concerned that the attorneys' questions during voir dire regarding deception by the police might confuse the jury, so he wanted to instruct the jurors that some deception was permissible. Under *People v Dudgeon*, 229 Mich 26, 29; 201 NW 255 (1924), such an instruction would have been permissible. However, the court went further when it additionally stated that "if an admission comes in the court has to be satisfied that it was made knowingly, intelligently, and voluntarily." This instruction improperly impinged on the province of the jury to determine the voluntariness of defendant's confession. *Gilbert*, 55 Mich App at 173.

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

We disagree with the prosecutor that defense counsel might reasonably have decided not to object to the court's statement. The court clearly interrupted voir dire to impart the instruction. It was not a comment that might have slipped by the jury. Further, the court had not actually ruled on the admissibility of the statements, so the court's instruction was actually misleading. Objecting would have given defense counsel a chance to clarify for the jury that the court had not actually made a ruling on the voluntariness of the statement. This was an important point in a case that rested on whether the jury believed defense counsel's argument that defendant falsely confessed because of the police deception.

Thus, the question becomes whether there is a reasonable probability that but for defense counsel's failure to object to the court's instruction, the result of the proceedings would have been different. *Rodgers*, 248 Mich App at 714. We cannot conclude that it would have been, as the evidence against defendant was strong. Defendant was in the Check 'N Go the day of the robbery and seemed to be scrutinizing the clerks' actions. Defendant was wearing a similar sweatshirt and shoes to the robber's. Defendant also matched the build and complexion of the robber. Given this supporting evidence, it seems likely the jury would have believed the confessional statements made by defendant to the police even if the judge had not suggested that he had already concluded that they were voluntarily made. Accordingly, defendant has failed to establish ineffective assistance of counsel on this basis.

In his Standard 4 brief on appeal, defendant also argues that his trial counsel was ineffective for failing to pursue an alibi defense. Defendant contends his roommates would have testified that he was at home during the time of the robbery. However, defendant failed to offer any supporting evidence for this argument. As noted by the prosecutor, defendant has not even supplied an affidavit or other offer of proof necessary to obtain a remand for an evidentiary hearing on this matter.[7] MCR 7.211(C)(1). Given this dearth of supporting evidence, defendant has not shown that his counsel was ineffective for failing to pursue an alibi defense.

Finally, defendant argues his trial counsel was ineffective for failing to obtain an expert to review the store surveillance video. This argument is without merit. Throughout the trial there seemed to be general acknowledgement that the quality of the video was extremely poor, and a still shot from the video confirms its poor quality. Defendant argues an expert could have testified that, given the poor quality of the video, defendant could not be identified. However, no one argued during trial that defendant was identifiable in the video. Thus, defendant has not shown that expert testimony on this point would have been beneficial to his defense.

In light of these conclusions, defendant is not entitled to any relief on the basis of ineffective assistance of counsel.

B. SENTENCING ISSUE

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[7] In a response to the prosecutor's answer to defendant's motion to remand, defendant did attach his own affidavit, but the improper pleading was returned to defendant.

Relying upon *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972) and MCL 769.34(2)(b), defendant next argues that the court improperly imposed a minimum sentence that exceeds two-thirds of the maximum. Like the prior issue, this issue was not raised before, addressed, or decided by the trial court. Thus, it is not preserved for review.[8]

This issue involves questions of law, including statutory interpretation, that are subject to review de novo. *People v Idziak*, 484 Mich 549, 554; 773 NW2d 616 (2009). Because the issue is unpreserved, defendant must show that the error was plain, and that he is actually innocent or that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

In *Tanner*, 387 Mich at 683, our Supreme Court held that a court may not impose a sentence where the minimum exceeds two-thirds of the maximum because such a sentence would undermine the intent of the indeterminate sentencing act. The Court explained that "[o]f course this holding has no application to sentencing under statutes by which the *only* punishment prescribed is imprisonment for life, or those providing for a mandatory minimum." *Id*. at 690 (emphasis added). In *People v Shegog*, 44 Mich App 230, 235; 205 NW2d 278 (1972), this Court looked to that last sentence and held that it "clearly indicat[ed] that the principle enunciated in *Tanner* would apply not only to offenses where the Legislature establishes a statutory maximum number of years but also to offenses such as this where the *maximum* is 'life' or 'any number of years.'" (Emphasis in original.)

The Michigan Legislature eventually codified the *Tanner* rule in MCL 769.34(2)(b). That statute simply states, "[t]he court shall not impose a minimum sentence, including a departure that exceeds 2/3 of the statutory maximum sentence." After this statute was added, in a brief order, our Supreme Court addressed whether the statutory version of the *Tanner* rule applied to sentences for which the maximum sentence is "life or any term of years." *People v Powe*, 469 Mich 1032; 679 NW2d 67 (2004). Contrary to this Court's earlier holding in *Shegog*, the *Powe* Court held that the rule as codified was inapplicable when the maximum statutory sentence is "life or any term of years." Hence, under *Powe*, where the trial judge had the option of entering a life sentence, but instead chooses to sentence defendant to a term of years, the minimum term of that sentence may exceed two-thirds of the maximum. See also *People v Drohan*, 475 Mich 140, 162 n 14; 715 NW2d 778 (2006); *People v Harper*, 479 Mich 599, 617 n 31; 739 NW2d 523 (2007).

However, as the parties note, this issue rose again in both *People v Floyd*, 481 Mich 938; 751 NW2d 34 (2008) and *People v Johnson*, 483 Mich 1032; 765 NW2d 617 (2009), both of which were

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[8] Defendant did file a motion to remand on this basis, but this Court denied the motion. *People v Lewis*, unpublished order of the Court of Appeals, entered May 28, 2010 (Docket No. 294687).

decided by orders.[9] In *Floyd*, the Court appears to have stated that the *Tanner* rule does apply to a sentence for a crime in which the punishment is either a term of years or life:

> we vacate the sentence of the Macomb Circuit Court, and we remand this case to the trial court for resentencing. The 62-year minimum sentences imposed for first-degree criminal sexual conduct, second-degree criminal sexual conduct, breaking and entering a building with intent to commit larceny, first-degree home invasion, assault with intent to do great bodily harm, and kidnapping exceed two-thirds of the 80-year maximum sentences imposed, in violation of MCL 769.34(2)(b) and *People v Tanner*, 387 Mich 683, 199 NW2d 202 (1972). On remand, the trial court shall resentence the defendant on these counts in accordance with *People v Thomas*, 447 Mich 390, 523 NW2d 215 (1994), which provides that the proper remedy for a *Tanner* violation is a reduction in the minimum sentence. [*Floyd*, 481 Mich at 938.]

The order in *Floyd* is detailed enough to provide an understanding of the Court's ruling, and so we must apply it as the most recent precedent from the Court. See *People v Crall*, 444 Mich 463, 464 n 8; 510 NW2d 182 (1993) and *Ward v Michigan State Univ (On Remand)*, 287 Mich App 76, 78; 782 NW2d 514 (2010).

As a result, because kidnapping, MCL 750.349(3), is punishable by a maximum sentence of life or any term of years, defendant's minimum term that exceeded two-thirds of the maximum violated MCL 769.3412(b) as applied by *Floyd*. Consequently, the sentence must be vacated and the matter remanded for resentencing.

Defendant's final argument is that at sentencing the prosecutor agreed to dismiss the notice of intent to seek sentencing enhancement for a second habitual offender, but the judgment of sentence indicates that defendant was sentenced as a second habitual offender. However, this error was corrected in an amended judgment of sentence, so the issue is moot.

Defendant's conviction is affirmed, but his sentence is vacated and the matter is remanded for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ William C. Whitbeck
/s/ Christopher M. Murray

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[9] The prosecution raises an argument based upon *Johnson*, a case in which the Supreme Court merely denied leave to appeal without any detailed explanation. *Johnson*, 483 Mich at 1032. Although the prosecution argues that the Court must have approved this Court's analysis in the underlying unpublished opinion, a decision which was consistent with *Drohan*, the order denying leave contains no suggestion of approval or disapproval, and so we cannot glean anything from the order denying leave.