

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 14, 2012

v

DEWAYNE DERICK SAINÉ,
Defendant-Appellant.

No. 290836
Wayne Circuit Court
LC No. 06-003169-FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

DEWAYNE DERICK SAINÉ,
Defendant-Appellee.

No. 300685
Wayne Circuit Court
LC No. 06-003169-FC

Before: JANSEN, P.J., and WILDER and K. F. KELLY, JJ.

PER CURIAM.

These cases have been consolidated on appeal. In Docket No. 290836, defendant appeals by right his jury-trial convictions of first-degree felony murder, MCL 750.316(1)(b), and accessory after the fact, MCL 750.505. In Docket No. 300685, the prosecution appeals by leave granted the circuit court's decision to grant defendant's motion for a new trial on the ground of ineffective assistance of counsel. We affirm the circuit court's grant of defendant's motion for a new trial in Docket No. 300685, and dismiss as moot defendant's appeal of right in Docket No. 290836.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant's convictions arise from the shooting death of Mohamed Makki (the victim), an alleged drug dealer, during a robbery at the victim's Dearborn home in November 2005. Michael McGinnis, who was present in the home during the robbery, testified that two men entered the house. While McGinnis was lying on the floor, he heard at least one man go to the

basement. McGinnis heard two gunshots and heard one of the men state that he had been shot. Money and a cell phone were taken from McGinnis. After the men left the house, McGinnis discovered that the victim had been shot in the back.

Shortly after the offense, a police vehicle pulled alongside a white Ford Taurus, which then sped away. The police pursued the Taurus until it stopped at a dead-end street. Rashad Moore, a passenger in the vehicle, and Siante Liggins, the driver of the vehicle, were eventually arrested. McGinnis's cellular phone and a black mask were found inside the Taurus, and keys to the victim's house were found in Moore's possession.

The prosecution's theory at trial was that Corey Donald and Rashad Moore had actually committed the robbery and shot the victim, that Donald was accidentally shot during the offense, and that defendant drove Donald to a hospital after the offense for treatment of his gunshot wound. The prosecution also theorized that Donald and Moore were assisted by Liggins, who had been driving the Taurus. The prosecution contended (1) that defendant had assisted in planning the robbery with Donald, Moore, and others, (2) that defendant had provided the gun that Donald used to commit the murder, (3) that defendant took an active role in overseeing the robbery from outside the victim's house, and (4) that defendant had assisted after the fact by driving Donald to an area hospital.¹ The prosecution supported its theory with the testimony of Liggins, who pleaded guilty to second-degree murder and agreed to testify against the other individuals who were allegedly involved in the offense. The prosecution also presented telephone records that showed a series of calls on the day and evening of the offense, both between defendant and Moore and between defendant and Fawzi Zaya, the individual who allegedly formulated the robbery plan.

Defendant was tried jointly with codefendants Donald and Moore. Moore was tried before one jury, and defendant and Donald were tried together before a separate jury. Defendant, Donald, and Moore were each convicted of first-degree felony murder, MCL 750.316(1)(b).² Defendant was also convicted of accessory after the fact, MCL 750.505. At the scheduled sentencing hearing, the circuit court granted defendant's motion for a new trial on the ground that the prosecution had failed to charge him with armed robbery as the predicate offense for the felony-murder charge. The circuit court also ruled sua sponte that the jury's verdict was against the great weight of the evidence.

¹ The prosecution presented evidence to establish that Donald was treated at an area hospital for a gunshot wound on the night of the offense, and that he was driven to the hospital by defendant.

² Specifically, defendant was convicted of first-degree felony murder on an aiding-and-abetting theory. In addition, Donald and Moore were each convicted of two counts of armed robbery, MCL 750.529, but the circuit court vacated one armed robbery conviction for each of them. Moore was also convicted of carrying a concealed weapon, MCL 750.227, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. This Court affirmed Donald's and Moore's convictions in April 2008. *People v Donald*, unpublished opinion per curiam of the Court of Appeals, issued April 10, 2008 (Docket Nos. 275688 & 275691).

The prosecution sought interlocutory review of the circuit court's order granting defendant a new trial. This Court peremptorily vacated the circuit court's order because neither defendant nor the court had cited legal authority to establish that the prosecution had been required to charge defendant with a predicate felony. *People v Saine*, unpublished order of the Court of Appeals, entered November 30, 2006 (Docket No. 274647). In addition, this Court determined that it had been improper for the circuit court to sua sponte address whether the jury's verdict was against the great weight of the evidence. *Id.* This Court vacated the circuit court's order without prejudice to "defendant raising the same issue, with citation to supportive authority, in a new motion before the trial court, or in an appeal of right in this Court." *Id.*

On remand, the circuit court again granted defendant a new trial for the same reasons and the prosecution again sought interlocutory review. This Court reversed and remanded the matter for sentencing. *People v Saine*, unpublished opinion per curiam of the Court of Appeals, issued October 21, 2008 (Docket No. 278882). In November 2008, the circuit court sentenced defendant to concurrent terms of life in prison for the felony-murder conviction and 2 to 5 years in prison for the conviction of accessory after the fact.

Defendant subsequently filed his claim of appeal in Docket No. 290836, challenging his convictions of first-degree felony murder and accessory after the fact. Thereafter, defendant moved for a new trial on the ground of ineffective assistance of counsel. Following a *Ginther*³ hearing, the circuit court granted defendant's motion, ruling that defendant had received ineffective assistance of counsel at trial and that he was entitled to a new trial for this reason. As explained earlier, the prosecution challenges the circuit court's order granting defendant's motion for a new trial in Docket No. 300685.

II. DOCKET NO. 300685

The prosecution argues that the circuit court made erroneous findings of fact following the *Ginther* hearing and ultimately abused its discretion by granting defendant's motion for a new trial on the ground of ineffective assistance of counsel. We disagree.

The circuit court "may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B). To establish ineffective assistance of counsel "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). A claim of ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court "first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* We review de novo questions of constitutional law, but review for clear error the circuit court's findings of fact following a *Ginther* hearing. *LeBlanc*, 465 Mich at 579; *People v McCauley*, 287 Mich App 158, 162; 782 NW2d 520 (2010). We review for an abuse of

³ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

discretion the circuit court's ultimate decision to grant a defendant's motion for a new trial. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008).

A. MOTION TO SEVER

The circuit court's finding that defense counsel committed a mistake of fact when moving to sever defendant's trial was not clearly erroneous. Defense counsel explained at the *Ginther* hearing that he had been confused about Donald's status when moving for a separate trial. Defense counsel initially believed that Donald was a mere informant rather than one of the two principals who were accused of actually robbing and shooting the victim. As such, defense counsel explained, he did not believe that it would be unduly prejudicial for defendant and Donald to be tried jointly. The circuit court determined that counsel's mistake of fact in this regard resulted in prejudice to defendant. The circuit court observed that, had defense counsel presented the correct facts along with the motion to sever, the motion likely would have been granted. As the circuit court explained, "[o]bviously, a joint trial can have a significant impact where the joinder is with defendants who are the primary actors and are far more culpable."

We fully acknowledge that the circuit court, itself, could have clarified the facts and inquired into the role allegedly played by Donald before ruling on defendant's motion to sever. But this does not obviate the fact that defense counsel presented a motion on an important issue—i.e., the severance of defendant's trial—without conducting a proper investigation into the circumstances of the case and without confirming which of the codefendants were accused as principals and which were accused as aiders and abettors. We perceive no clear error in the circuit court's finding that defense counsel "bas[ed] the motion to sever on incorrect facts that could defeat the motion . . ." It was undisputed that defense counsel did not conduct an adequate investigation of the circumstances of this case before preparing and filing defendant's pretrial motion to sever. Counsel has a duty to make an independent examination of the facts, circumstances, pleadings, and laws involved in the case. *People v Grant*, 470 Mich 477, 486-487 (KELLY, J.), 498-499 (TAYLOR, J.); 684 NW2d 686 (2004); see also *Von Moltke v Gillies*, 332 US 708, 721; 68 S Ct 316; 92 L Ed 309 (1948). This includes "counsel's duty to investigate all leads relevant to the merits of the case." *Blackburn v Foltz*, 828 F2d 1177, 1183 (CA 6, 1987). The failure to conduct a reasonable investigation can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). The circuit court noted that, had it been presented with all the facts of the case, and specifically those pertaining to the relationship between defendant and codefendant Donald, it very likely would have granted defendant's pretrial motion to sever. In other words, defense counsel's failure to investigate the facts and properly present the motion to sever likely resulted in prejudice to defendant.

It is true that a criminal defendant does not have the right to a separate trial, *People v Hurst*, 396 Mich 1, 6; 238 NW2d 6 (1976), and that the decision to hold separate trials is within the discretion of the court, MCL 768.5; *People v Etheridge*, 196 Mich App 43, 53; 492 NW2d 490 (1992). But our Supreme Court has certainly recognized that a joint trial can result in prejudice in certain circumstances. See, e.g., *Hurst*, 396 Mich at 4; *People v Duplissey*, 380 Mich 100, 104; 155 NW2d 850 (1968). "Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *People v Hana*, 447

Mich 325, 346; 524 NW2d 682 (1994). Turning to the present case, defense counsel surely could have submitted a supporting affidavit or made an offer of proof in an attempt to establish that defendant's rights would be prejudiced by a joint trial with the principal offenders. Yet he failed to do so. Indeed, defendant's motion to sever was not accompanied by any supporting affidavit or any other documentation.

Moreover, short of moving to completely sever defendant's trial, we note that defense counsel could have requested a separate jury for defendant. Nevertheless, even after defense counsel realized that Donald was accused as one of the two principals in this case, he still failed to pursue the possibility of separate juries for defendant and Donald. We acknowledge that "[t]he use of separate juries is a partial form of severance to be evaluated under the standard . . . applicable to motions for separate trials." *Id.* at 351. But our Supreme Court has also observed that the use of separate juries, which is less burdensome than holding entirely separate trials, may alone be sufficient to dispel the risk of prejudice inherent in a multiple-defendant situation. *Id.* Given that the circuit court was persuaded to empanel a separate jury for codefendant Moore, one of the charged principals, it strikes us as objectively unreasonable that defense counsel did not request a separate jury for defendant as well. The circuit court correctly determined that defense counsel rendered ineffective assistance by failing to properly investigate the relationships between the codefendants and by failing to properly present and support his motion to sever defendant's trial.

B. MISUNDERSTANDING OF THE LAW

Nor did the circuit court err by determining that defense counsel seriously misunderstood the law of felony murder and aiding and abetting, thereby rendering constitutionally deficient representation to defendant. Defendant was not charged as one of the principals in this case. Indeed, it was made clear at trial that he was not one of the actual shooters. Instead, it was the prosecution's theory that defendant was guilty of first-degree felony murder as an aider and abettor only. Yet at trial there appeared to be a fundamental disconnect between the prosecution's theory and defense counsel's understanding of the case. Defense counsel repeatedly stressed during his closing argument that the jurors could not convict defendant of felony murder because defendant was "not charged with aiding and abetting." Counsel went so far as to tell the jurors that because defendant was "not charged with aiding and abetting" they did not "have to even address" the felony murder charge. Counsel also repeatedly argued that because defendant had not been charged with a predicate felony, the jury could not convict him of felony murder. For the reasons that follow, we conclude that the circuit court properly determined that counsel's misunderstanding of the law prejudiced defendant in this case.

Defense counsel's understanding of the law was seriously flawed in two critical respects. First, defense counsel was incorrect in arguing that because defendant had not been charged with a predicate felony, he could not be convicted of felony murder. As this Court explained in the previous appeal, the prosecution "was not required as a matter of law to separately charge defendant with the predicate offense [of robbery] in order to convict him of felony murder." *Saine*, slip op at 3. Defense counsel was also incorrect in arguing that because defendant had not been "charged with aiding and abetting," and because the prosecution did not seek to amend the information to include a charge of "aiding and abetting," the jury was legally precluded from convicting defendant of felony murder as an aider and abettor. The aiding and abetting statute,

MCL 767.39, did not create a distinct crime. *People v Greaux*, 461 Mich 339, 344; 604 NW2d 327 (2000). Instead, MCL 767.39 merely abolished the common-law distinction between an accessory before the fact and a principal. *People v Smielewski*, 235 Mich App 196, 202-203; 596 NW2d 636 (1999). Aiding and abetting is simply one theory of liability, and is not a separate, substantive offense. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006); *People v Perry*, 460 Mich 55, 63 n 20; 594 NW2d 477 (1999). There was no requirement that the prosecution separately charge defendant as an aider and abettor in order to secure a conviction of first-degree felony murder.

We have thoroughly reviewed defense counsel's testimony at the *Ginther* hearing. At the hearing, counsel still did not appear to understand the law of felony murder or aiding and abetting. Counsel continued to believe that it had been a valid "strategy" for him to tell the jurors that they could not legally convict defendant of aiding and abetting felony murder because defendant had not been charged with aiding and abetting as a separate offense. Curiously, defense counsel went on to explain that even though he had been aware that the circuit judge would be instructing the jury on aiding and abetting, he nonetheless believed that the jurors would not have to consider whether defendant had aided and abetted the commission of felony murder. Specifically, counsel explained that his argument to the jury was designed to "separate [defendant] from the acts that had taken place":

Q. So, do you think it was a mistake to argue to the jury that [defendant was] not charged as an aider and abettor?

A. No, I don't think it was a mistake.

Q. Okay. Do you think that—

A. It was my strategy to separate [defendant] as being a coconspirator, because in my opinion, a coconspirator is similar to an aider and abettor.

Q. But you knew when you argued that Judge Jackson had already provided you with a booklet of instructions he was going to give the jurors, correct?

A. Yes.

Q. You knew at the time you made this argument that the Judge had already decided to give the jury an instruction on aiding and abetting, correct?

A. I knew he had to.

Q. So, did you think that your argument was going to be questioned by the jury in light of the Judge's instruction?

A. No.

Q. You didn't feel that way?

A. I didn't feel that way, no.

Q. Did you anticipate that the prosecutor would respond by saying that aiding and abetting is a theory in this case that you as members of the jury have to consider?

A. I had, again, attempted to separate [defendant] from the robbery. And I think I was successful

Q. Okay. But . . . you told the jury that they did not have to consider aiding and abetting because [defendant was] not charged with it?

* * *

A. Okay.

Q. Basically what you were saying there, to summarize it, is that the jury didn't have to consider aiding and abetting . . . right?

A. Yes.

Q. But you knew that Judge Jackson was going to tell them that they had to consider aiding and abetting, right?

A. Yes, I knew that. But, again, that was my attempt to separate [defendant] from the acts that had taken place. So, I wanted them to—my goal was to get them to concentrate on [defendant] and what [defendant] did and that's it. . . .

Q. And that was your strategy behind your argument?

A. That was my strategy because I didn't want them to associate the murder with [defendant].

It is clear from this testimony that, even at the time of the *Ginther* hearing, defense counsel did not understand the law as it applied to defendant's case. We realize that counsel testified that his argument to the jury was part of his "strategy" to separate defendant from the other codefendants. However, no reasonable person could believe that counsel actually made the strategic decision to misinform the jurors concerning the nature of the charges against defendant. Instead, it appears that counsel merely labeled his actions as "strategy" in an effort to deflect unwanted attention away from his deficient performance at trial. "[M]erely labeling a decision as 'strategic' will not remove it from an inquiry of reasonableness." *United States v McCoy*, 410 F3d 124, 135 (CA 3, 2005); see also *Kellogg v Scurr*, 741 F2d 1099, 1102 (CA 8, 1984) (observing that "the label 'trial strategy' does not automatically immunize an attorney's performance from sixth amendment challenges"); *Quartararo v Fogg*, 679 F Supp 212, 247 (ED NY, 1988) (noting that "not all strategic choices are sacrosanct" and that "[m]erely labeling [counsel's] errors 'strategy' does not shield his trial performance from Sixth Amendment scrutiny"). To the contrary, certain actions labeled as "strategic" may be so wrong or so ill-

conceived that they render counsel's overall representation constitutionally defective. See, e.g., *Willis v Newsome*, 771 F2d 1445, 1447 (CA 11, 1985); *United States v Tucker*, 716 F2d 576, 586 (CA 9, 1983). In this case, we perceive "no possible strategy" that would have justified defense counsel's decision to inform the jurors that they could not consider the charge of felony murder against defendant because defendant had not been charged with aiding and abetting as a separate offense. See *Henry v Scully*, 918 F Supp 693, 715 (SD NY, 1995). After reviewing the trial transcripts, as well as the *Ginther* hearing testimony, we conclude that defense counsel most likely tried defendant's case from beginning to end while laboring under this fundamental misapprehension of the nature of the charges against his client. We cannot say that the circuit court clearly erred by finding "a likely probability that the jury may have had a different outcome had counsel presented a defense consistent with knowledge of the basic law." Nor did the court clearly err when it determined that "[c]ounsel's belief that the jury could not find the defendant guilty on a theory of aiding and abetting was fundamentally flawed" and that counsel most likely "tried this case with that fundamental flaw in mind." Quite simply, there is a reasonable probability that if counsel had understood the law as it related to this case, he would have presented a more coherent and effective defense. The circuit court properly determined that defense counsel rendered constitutionally deficient representation to defendant in this regard.

C. NEW TRIAL

As explained earlier, the circuit court "may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B). We perceive no clear error in the circuit court's finding that counsel's failure to properly present and support the motion to sever defendant's trial, as well as counsel's serious misunderstanding of the law of felony murder and aiding and abetting, constituted unprofessional errors rather than reasonable strategic choices. Nor do we disagree with the circuit court's determination that, absent these serious errors by counsel, the result of defendant's trial likely would have been different. See *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Given the weakness of the evidence against defendant in this case, we cannot conclude that the circuit court erred by finding that counsel's deficient performance probably resulted in actual prejudice to defendant. See *People v Launsburry*, 217 Mich App 358, 362; 551 NW2d 460 (1996). As the court correctly pointed out, defense counsel effectively "placed all the eggs in the prosecution's basket" by choosing to rely on his mistaken belief that the jurors were not entitled to convict defendant of felony murder rather than to raise a more substantial defense on defendant's behalf. In light of the serious, outcome-determinative errors committed by defendant's attorney at trial, we cannot conclude that the circuit court's decision to grant defendant's motion for a new trial on the ground of ineffective assistance of counsel fell outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). We perceive no abuse of discretion, *Miller*, 482 Mich at 544, and therefore affirm the circuit court's order granting defendant a new trial on this ground.

II. DOCKET NO. 290836

Because we affirm the circuit court's grant of defendant's motion for a new trial in Docket No. 300685, defendant's appeal of right in Docket No. 290836 is moot. *People v Orlewicz*, ___ Mich App ___; ___ NW2d ___ (Docket No. 285672; issued June 14, 2011), slip

op at 2. We therefore dismiss defendant's claims of error in Docket No. 290836. See *People v Richmond*, 486 Mich 29, 37; 782 NW2d 187 (2010) (stating that "[w]hen the issues raised by a party on appeal are clearly moot, an appellate court should ordinarily decline to address the substantive issues raised in the appeal").

IV. CONCLUSION

In Docket No. 300685, we affirm the circuit court's grant of defendant's motion for a new trial on the ground of ineffective assistance of counsel. In Docket No. 290836, we dismiss defendant's claims of error as moot.

Affirmed in part and dismissed in part.

/s/ Kathleen Jansen
/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly