

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
October 25, 2011

v

FERANDAL SHABAZZ REED,
Defendant-Appellant.

No. 297053
Wayne Circuit Court
LC No. 91-002558-FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

FERANDAL S. REED,
Defendant-Appellant.

No. 298427
Wayne Circuit Court
LC No. 91-002558-FC

Before: WILDER, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

In Docket No. 297053, defendant appeals as of right the July 21, 2009 judgment of sentence, sentencing him to life imprisonment for his 1991 first-degree felony murder conviction, MCL 750.316(1)(b), and resentencing him to 8 to 15 years' imprisonment for his 1991 assault with intent to rob while armed conviction, MCL 750.89. In Docket No. 298427, defendant appeals by delayed leave granted the partial denial of his motion for relief from judgment. We affirm in both appeals.

Defendant's convictions stem from the fatal shooting of Isaac Robbins, Jr., at the home of defendant's parents in 1991. Defendant, who was 16 years old at the time of the shooting, was prosecuted as an adult pursuant to the "automatic waiver" provisions of MCL 600.606 and MCL

725.10a(1)(c).¹ He was tried jointly with his adult codefendant, Willie O. Servant. In defendant's direct appeal, this Court reversed his convictions on the basis that defense counsel rendered ineffective assistance by failing to request a jury instruction regarding accomplice testimony. This Court also determined that the trial court erred by failing to give the instruction sua sponte. *People v Reed*, unpublished opinion per curiam of the Court of Appeals, issued January 11, 1995 (Docket No. 145406). Our Supreme Court reversed and remanded this case for consideration of the issues properly raised before, but not addressed, by this Court. *People v Reed*, 453 Mich 685; 556 NW2d 858 (1996). On remand, this Court affirmed defendant's convictions. *People v Reed*, unpublished opinion per curiam of the Court of Appeals, issued June 13, 1997 (Docket No. 202109). These appeals involve issues raised in defendant's motion for relief from judgment pursuant to MCR 6.500 *et seq.*

I. RESENTENCING

In Docket No. 297053, defendant argues that the circuit court, having determined that defendant was entitled to resentencing on his assault with intent to rob while armed conviction, was required to review the case to determine whether to resentence defendant as a juvenile with respect to his felony murder conviction. We disagree. We review for an abuse of discretion a trial court's decision whether to sentence a defendant as a juvenile or an adult. *People v McSwain*, 259 Mich App 654, 681-682; 676 NW2d 236 (2003). An abuse of discretion occurs when the outcome falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008).

Initially, we address the prosecutor's argument that this Court does not have jurisdiction to decide this issue. MCR 7.203(A)(1) provides this Court with jurisdiction over an appeal of right from a final judgment as defined in MCR 7.202(6)(b)(iii), which includes a sentence imposed following the grant of a motion for resentencing. Here, the circuit court granted resentencing on defendant's assault with intent to rob while armed conviction, and in conjunction with that resentencing, defendant unsuccessfully asserted the issue that he now asserts on appeal. Therefore, we have jurisdiction to decide this issue.

Defendant argues that he was entitled to a hearing pursuant to MCL 769.1(3) to determine whether to sentence him as an adult or a juvenile on his felony murder conviction. He contends that the circuit court's decision to resentence him on his assault with intent to rob while armed conviction placed his case in a "presentence posture," which allowed him to object to any part of the new sentence. Because resentencing on defendant's assault with intent to rob while armed conviction did not require the circuit court to reexamine defendant's felony murder sentence, which was valid and unchallenged, defendant's argument lacks merit.

¹ Effective October 1, 1997, the Legislature enacted 1996 PA 374, § 4, which repealed MCL 725.10a(1)(c).

The Legislature amended MCL 769.1 after defendant committed the offenses at issue in this appeal. At the time that defendant committed the offenses, MCL 769.1(3) required the trial court to conduct a hearing at defendant's sentencing to determine whether to sentence him as a juvenile or an adult. Subsequently, the Legislature enacted 1996 PA 247, § 1, effective January 1, 1997, which amended MCL 769.1 to require that juveniles convicted of certain offenses, including first-degree felony murder, MCL 750.316(1)(b), be sentenced as adults. MCL 769.1 currently reads, in relevant part:

(1) A judge of a court having jurisdiction may pronounce judgment against and pass sentence upon a person convicted of an offense in that court. The sentence shall not exceed the sentence prescribed by law. The court shall sentence a juvenile convicted of any of the following crimes in the same manner as an adult:

* * *

(g) First degree murder in violation of section 316 of the Michigan penal code, 1931 PA 328, MCL 750.316.

* * *

(3) Unless a juvenile is required to be sentenced in the same manner as an adult under subsection (1), a judge of a court having jurisdiction over a juvenile shall conduct a hearing at the juvenile's sentencing to determine if the best interests of the public would be served by placing the juvenile on probation and committing the juvenile to an institution or agency described in the youth rehabilitation services act . . . or by imposing any other sentence provided by law for an adult offender.

Statutory amendments concerning criminal sentences or punishment are not retroactive, and applying the current version of MCL 769.1 to defendant would violate his protections against ex post facto laws. *People v Milton*, 186 Mich App 574, 582; 465 NW2d 371 (1990), remanded in part on other grounds 438 Mich 852 (1991); see, also, *People v Slocum*, 213 Mich App 239, 243-244; 539 NW2d 572 (1995). Thus, if the circuit court was obliged to reexamine defendant's felony murder sentence, as defendant contends, it would have been required to apply the version of MCL 769.1 in effect at the time that defendant committed the offense.

Defendant's argument that the circuit court was required to reexamine his felony murder sentence, specifically whether to sentence him as a juvenile or as an adult, lacks merit. A "court may not modify a valid sentence after it has been imposed except as provided by law." MCR 6.429(A); *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). Here, defendant does not contend that the life sentence imposed pursuant to his felony murder conviction is invalid. Rather, he argues that resentencing on his assault with intent to rob while armed conviction placed his case in a "presentence posture" such that he could properly object to all aspects of his new sentence.

Defendant relies on *People v Rosenberg*, 477 Mich 1076; 729 NW2d 222 (2007), in which the defendant was sentenced to imprisonment and fined \$25,000 for his delivery of less than 50 grams of a controlled substance, MCL 333.7401(2)(a)(iv). This Court vacated the defendant's sentence, which was a departure from the sentencing guidelines, and remanded for resentencing. *People v Rosenberg*, unpublished opinion per curiam of the Court of Appeals, issued November 21, 2006 (Docket No. 262673), unpub op at 1. When the defendant attempted to challenge the amount of his fine after resentencing, this Court determined that he had waived his objection regarding the fine by failing to raise it in his first appeal by right. *Rosenberg*, unpub op at 2. Our Supreme Court, however, reversed, holding that once this Court vacated the defendant's sentence and remanded for resentencing, "the case was before the trial court in a presentence posture, allowing for objection to any part of the new sentence." *Rosenberg*, 477 Mich at 1076.

This case differs significantly from *Rosenberg* in that it involves two convictions for two separate offenses rather than one conviction regarding which both a sentence of imprisonment and a fine were imposed. Because a fine is part of a sentence, vacating the defendant's sentence in *Rosenberg* necessarily implicated the fine. See MCL 769.34(6) (allowing a court to impose a fine "[a]s part of the sentence[.]") As such, defendant's reliance on *Rosenberg* is misplaced. Resentencing on defendant's assault with intent to rob while armed conviction did not implicate his felony murder conviction or sentence such that the circuit court was required to revisit the life sentence imposed with respect to that conviction.

II. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

In Docket No. 298427, defendant argues that his appellate counsel in his direct appeal rendered ineffective assistance by failing to timely challenge the admission of Servant's out-of-court statement to the police. Counsel belatedly raised this issue in a motion to file a supplemental brief after she filed defendant's brief on appeal.² Because defendant cannot establish that he was prejudiced by the error, the circuit court properly denied his motion for relief from judgment in this regard.

We review a trial court's decision on a motion for relief from judgment for an abuse of discretion and its findings of fact supporting its decision for clear error. *People v Swain*, 288 Mich App 609, 628; 794 NW2d 92 (2010). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews a trial court's factual findings for clear error and questions of constitutional law de novo. *Id.*

² Although the prosecutor contends that the failure to raise an issue on appeal may be a legitimate strategic decision, the procedural history in this case suggests that counsel did not intend to forfeit the issue.

MCR 6.500 *et seq.* governs motions for relief from judgment in criminal cases. *Swain*, 288 Mich App at 629. Under MCR 6.508(D), “[t]he defendant has the burden of establishing entitlement to the relief requested.” MCR 6.508(D) further provides, in relevant part:

The court may not grant relief to the defendant if the motion

* * *

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, “actual prejudice” means that,

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

* * *

(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;

* * *

The court may waive the “good cause” requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

Ineffective assistance of counsel may establish the “good cause” requirement of MCR 6.508(D)(3)(a). *People v Reed*, 449 Mich 375, 378-379, 382; 535 NW2d 496 (1995).

“[T]he test for ineffective assistance of appellate counsel is the same as that applicable to a claim of ineffective assistance of trial counsel.” *People v Uphaus*, 278 Mich App 174, 186; 748 NW2d 899 (2008). To establish ineffective assistance of counsel, a defendant must demonstrate that (1) counsel’s performance fell below an objective standard of reasonableness, and (2) but for counsel’s errors, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). “Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise.” *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). A “defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy.” *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant argues that counsel's failure to timely challenge the admission of Servant's out-of-court statement to the police resulted in forfeiture of the issue in his direct appeal. Assuming that such failure satisfied the first prong of the *Strickland* test and the "good cause" requirement of MCR 6.508(D)(3)(a), defendant has failed to establish prejudice resulting from the alleged trial errors involving Servant's police statement.

Defendant argues that Servant's statement to Detroit Police Sergeant Ronald Sanders was erroneously admitted during trial because it constituted inadmissible hearsay.³ Under MRE 802, hearsay is not admissible except as provided by the Michigan Rules of Evidence. See, also, *People v Watkins*, 438 Mich 627, 632; 475 NW2d 727 (1991). "Hearsay" is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." MRE 801(c). Servant's statement to Sanders implicating defendant was clearly offered for its truth considering that the prosecutor asserted during her closing argument that Servant's police statement, rather than his trial testimony, was the true version of events.⁴ The prosecutor also extensively cross-examined Servant regarding the truth of his statement to Sanders. Further, the statement was not admissible as a statement against interest under MRE 804(b)(3) because that hearsay exception applies only when the declarant is unavailable as a witness. MRE 804(b)(3); *People v Taylor*, 482 Mich 368, 378-379; 759 NW2d 361 (2008). Here, Servant was available and testified during trial. Therefore, Servant's statement to Sanders was hearsay regarding which no exception applied, and, as such, it was inadmissible as substantive evidence against defendant.

Despite the erroneous admission of Servant's statement against defendant, defendant was not prejudiced because he admitted his participation in the plan to rob Robbins, and Servant testified regarding defendant's intent during trial. In a statement to Detroit Police Officer Gregory Edwards, defendant admitted that he and Servant had planned to rob Robbins of his cocaine at gunpoint. Defendant claimed that when he heard gunshots, he turned around and saw Servant firing at Robbins. Thereafter, he asked Servant, "what the f___ you do that for[?]" Thus, according to defendant's police statement, he did not know or intend for Servant to shoot Robbins.

³ Contrary to the prosecutor's contention, defendant preserved this argument for appellate review by asserting it in his brief in support of his motion for relief from judgment. Thus, it was raised and addressed below. *People v Bauder*, 269 Mich App 174, 177; 712 NW2d 506 (2005).

⁴ Servant testified during trial that he and defendant planned the robbery but that he abandoned the plan because he did not want to shoot anyone. Thereafter, he heard a gunshot and saw a wounded man come out of the house. A man named Roy Johnson then came out of the house and told Servant that if he said anything about the shooting, Johnson would kill him. During trial, Servant denied shooting Robbins or being inside the house during the shooting.

In order to convict a defendant of felony murder, the prosecution must show that the defendant acted “with intent to kill or to inflict great bodily harm or with a wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm.” *People v Aaron*, 409 Mich 672, 733; 299 NW2d 304 (1980). In Servant’s statement to Sanders, Servant claimed that defendant urged him to kill Robbins. As previously discussed, Servant’s statement was not properly admissible as substantive evidence against defendant. Servant’s trial testimony, however, was properly admitted and clearly demonstrated defendant’s intent to kill Robbins.

Servant testified that, while at defendant’s house, he and defendant discussed how they could obtain money to buy clothes. According to Servant, defendant told him that he “knew two guys that [they] could knock off.” Defendant said that he would arrange a drug deal and told Servant to shoot the person who walked in. Servant replied that he did not want to shoot anyone and told defendant to do it. Defendant responded, “[I] hooked it up, you do it.” When Servant refused, defendant called Servant a “punk.” Servant testified that defendant agreed to do the shooting himself because Servant did not want to do it. Servant further testified that he did not want to take part in the plan and left defendant’s house. Later, as he was walking back toward the house, he heard a gunshot and saw a man run out of the house, followed by defendant and Roy Johnson. Johnson pointed a gun at Servant and told him to go inside the house. Thereafter, Johnson told Servant that if he told anyone about the shooting, Johnson would kill him. Johnson and defendant then started arguing about why they did not get the “dope” from Robbins. Servant claimed that defendant had asked Johnson why Johnson did not shoot Robbins as soon as Robbins walked into the house.

Servant’s testimony clearly showed that defendant intended to kill Robbins. Because it was properly admitted and defendant’s intent as described in Servant’s police statement was merely cumulative of Servant’s trial testimony, the erroneous admission of Servant’s police statement as substantive evidence against defendant was harmless. See *People v Gursky*, 486 Mich 596, 620; 786 NW2d 579 (2010) (“[T]he admission of a hearsay statement that is cumulative to in-court testimony by the declarant can be harmless error, particularly when corroborated by other evidence.”)

Defendant also argues that Servant’s statement to Sanders required severance of the trials because it was inadmissible against him and no other evidence established the necessary intent for felony murder. Defendant’s argument lacks merit. Servant’s trial testimony established the requisite intent to prove felony murder and was properly admitted.

Finally, defendant argues that the trial court erred by denying his request for a jury instruction in accordance with CJI2d 4.2, indicating that Servant’s statement may be used only against Servant and not as substantive evidence against him.⁵ Because Servant’s trial testimony established the necessary intent for felony murder and Servant’s statement was merely cumulative of his testimony in that regard, any error was harmless.

⁵ Contrary to the prosecutor’s argument, defendant preserved this argument for our review by asserting it in his brief in support of his motion for relief from judgment.

Therefore, defendant's asserted trial errors involving the admission of Servant's police statement did not prejudice defendant. As such, he cannot show that he had a reasonably likely chance of acquittal but for the errors, or that but for his appellate attorney's failure to timely raise the issue, the outcome of his appeal would have been different. MCR 6.508(D)(3)(b)(1); *Strickland*, 466 US at 694. Thus, the circuit court did not abuse its discretion by denying defendant's motion for relief from judgment in this regard.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio