STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v DAVID PERIN, Defendant-Appellant.	UNPUBLISHED July 6, 2006 Nos. 260305; 260306 Wayne Circuit Court LC Nos. 92-013144-01; 04-009309-01
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v WILLIE HUNTER, Defendant-Appellant.	No. 260307 Wayne Circuit Court LC No. 04-009309-02

Before: Bandstra, P.J., and Saad and Owens, JJ.

PER CURIAM.

Following a joint trial before separate juries, defendant Perin was convicted of first-degree premeditated murder, MCL 750.316(1)(a); felony murder, MCL 750.316(1)(b); assault with intent to murder, MCL 750.83; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. In a separate case, Perin was convicted of violating his sentence of lifetime probation for a 1993 conviction of possession with intent to deliver a controlled substance and was sentenced to 10 to 20 years in prison, to run concurrently with the sentences imposed in the murder case. Hunter was convicted of second-degree murder, MCL 750.317; felony murder, MCL 750.316(1)(b); assault with intent to murder, MCL 750.83; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b.

Defendant Perin

Defendant Perin argues that the trial court abused its discretion in imposing a 10 to 20 year sentence for violating his probation for the 1993 conviction. Offenses committed before January 1, 1999, are generally subject to the judicial sentencing guidelines. MCL 769.34(1);

People v Reynolds, 240 Mich App 250, 254; 611 NW2d 316 (2000). However, the judicial sentencing guidelines do not apply to probation violations, *People v Cotton*, 209 Mich App 82, 83-84; 530 NW2d 495 (1995), and those guidelines are not to be considered when imposing a sentence after a conviction of a probation violation. *People v Williams*, 223 Mich App 409, 412-413; 566 NW2d 649 (1997).

Where no guidelines apply, we review sentences for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id*. A trial court is "at liberty to consider defendant's actions and the seriousness and severity of the facts and circumstances surrounding the probation violation in arriving at the sentence to be given." *Williams*, *supra* at 411, quoting *People v Peters*, 191 Mich App 159, 167; 477 NW2d 479 (1991).

Perin was sentenced to lifetime probation for his 1993 drug conviction, and thereafter violated his probation on numerous occasions without consequence. The trial court described the murder in this case as an "execution," and noted that the surviving witness was only alive because the bullet ricocheted off his hand. Although the trial court employed an incorrect standard in arriving at Perin's sentence—by stating reasons to exceed the inapplicable statutory sentencing guidelines range, MCL 769.34—the trial court did not abuse its discretion in sentencing Perin to 10 to 20 years in prison for his probation violation because the sentence was proportionate to the seriousness of the circumstances surrounding the instant offenses.

Perin argues that there was insufficient evidence to support his first-degree murder convictions. We review the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). We draw all reasonable inferences and resolve credibility choices in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

In order to convict a defendant of first-degree premeditated murder, the prosecutor must prove that the defendant killed the victim and that the killing was willful, deliberate, and premeditated. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002); MCL 750.316(1)(a). Here, the prosecutor presented direct evidence that Perin willfully shot Izat Bashsa: Martin Algageta identified Perin as the shooter.

Premeditation means thinking about the act beforehand, and deliberation means measuring and evaluating the major facets of a choice. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Factors that may be considered to prove premeditation include: (1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the choice of weapon and the location of the wounds inflicted. *Id*.

The prosecutor presented ample evidence of premeditation and deliberation. The evidence adduced at trial established that Perin had a relationship with the owner and employees of the store where the crimes at issue occurred, including Bashsa and Algageta. Through that relationship, Perin earned their trust and was occasionally allowed into the store's secured area to use the restroom. The store's money and more valuable items were kept in the secured area. After gaining access to the secured area under the guise that he needed to use the restroom, Perin

let Hunter into that area. They held Algageta and Bashsa at gunpoint. Perin threatened to kill the two men several times and forced Bashsa to open the store safe. He became angry upon finding a gun in the safe, and ordered Algageta and Bashsa to the back room. Later, he made them enter a cooler. He forced them to lay face down in the cooler's walkway. At this point in time, Algageta and Bashsa had pleaded for their lives at least three times. Perin had the opportunity to consider their pleas and spare their lives. However, he proceeded to shoot Bashsa five times, once from close range into his back and once into the left side of his head, killing him. He then shot Algageta, whose hands were placed to either side of his head. The shot hit Algageta in the wrist. Some time passed between Perin's initial threats and when he shot and killed Bashsa. This window of time was sufficient to have afforded Perin time to take a "second look" at his actions before proceeding to shoot and kill Bashsa. *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979). Viewing the evidence in a light most favorable to the prosecutor, sufficient evidence of premeditation and deliberation was presented at trial to sustain Perin's first-degree murder conviction.

In order to convict a defendant of felony murder, the prosecutor must prove that the defendant: (1) killed 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, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b). *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999). Perin challenges the sufficiency of the third element. "Larceny of any kind" is among the enumerated felonies in MCL 750.316. "Larceny is the taking and carrying away of the property of another, done with felonious intent and without the owner's consent." *People v Gimotty*, 216 Mich App 254, 257-258; 549 NW2d 39 (1996).

The evidence adduced at trial established that Perin committed larceny. Algageta identified Perin as one of the perpetrators. Money had been placed in the cash register drawers the night before the incident, Algageta heard the cash register drawers open while he was on the floor in the secure area of the store, and the drawers were found left open after the crimes were committed. Algageta also heard Perin making Bashsa open the store's safe. An eyewitness saw two African-American men running from the store carrying garbage bags over their shoulders, one of which was stretched and tearing as if it contained something heavy, and garbage bags were found strewn about the floor of the store. There was evidence that the items seized when defendants were ultimately apprehended, including cigarettes, telephone cards, and large quantities of cash, had been taken from the store. The lot and serial numbers on the recovered cigarette cartons matched the lot and serial numbers from the cigarette cartons collected from the store and also contained a state tax stamp, which is only found in Michigan stores and gas stations. Additionally, the lot number of the recovered telephone cards matched the lot numbers of cards collected from the store, and the serial numbers on the cards ran in close succession with each other. Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Viewing the evidence in a light most favorable to the prosecutor, sufficient evidence of the predicate felony of larceny was presented at trial to sustain Perin's felony murder conviction.

Perin argues that the trial court erred in failing to instruct the jury on second-degree murder, because it is a necessarily lesser included offense of first-degree murder. We review unpreserved issues regarding jury instructions for plain error affecting the defendant's substantial rights and will not reverse a conviction if the instructions fairly presented the issues to be tried

and sufficiently protected the defendant's rights. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003).

A trial court has a duty to instruct the jury on the applicable law. MCL 768.29. An instruction on second-degree murder as a necessarily lesser included offense of first-degree murder is proper "if the intent element differentiating the two offenses is disputed and the evidence would support a conviction of second-degree murder." *People v Cornell*, 466 Mich 335, 358 n 13; 646 NW2d 127 (2002). First-degree murder is second-degree murder with the added element of premeditation or the perpetration or attempted perpetration of an enumerated felony. *People v Carter*, 395 Mich 434, 437; 236 NW2d 500 (1975).

The trial court properly decided not to instruct the jury on second-degree murder. The intent element differentiating first- and second-degree murder was not at issue at trial; Perin's defense was that he was simply not involved in the incident. Perin has failed to demonstrate plain error; therefore, he is not entitled to relief on this issue. For the same reason, Perin's claim that his attorney was ineffective for failing to object to the trial court's failure to instruct the jury on second-degree murder is without merit because an attorney is not ineffective for failing to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant Hunter

Defendant Hunter first argues that the trial court erred in denying his motion to suppress his custodial statement to police. On appeal from a ruling on a motion to suppress evidence of a confession, we review the record de novo but will not disturb the trial court's findings unless they are clearly erroneous. *People v Kowalski*, 230 Mich App 464, 471-472; 584 NW2d 613 (1998). A finding is clearly erroneous if, after reviewing the entire record, we are left with a definite and firm conviction that a mistake has been made. *People v Hall*, 249 Mich App 262, 267-268; 643 NW2d 253 (2002).

A statement of an accused made during a custodial interrogation is inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Before a challenged confession may be admitted as evidence, the prosecutor must establish by a preponderance of the evidence that the defendant waived his *Miranda* rights. *People v Daoud*, 462 Mich 621, 632-634; 614 NW2d 152 (2000). Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law that a court must determine under the totality of the circumstances. *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000). Whether a waiver of *Miranda* rights was voluntary and whether an otherwise voluntary waiver was knowing and intelligent are separate inquiries. *Daoud*, *supra* at 635-639. Whether a statement was voluntary is determined by examining police conduct, and whether it was made knowingly and intelligently depends in part upon the defendant's capacity. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005).

At the *Walker*[1] hearing, a police officer and Hunter provided conflicting versions of the events surrounding Hunter's interview. The officer's testimony established that he employed

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

and followed a set procedure while informing Hunter of his constitutional rights, and that Hunter understood those rights. The officer testified that Hunter did not ask him for food or water, nor did he indicate that he needed more sleep. The officer honored Hunter's requests to smoke a cigarette and speak to his mother before making his statement. The officer further testified that, following a delay in the start of the interview, Hunter acknowledged that he still understood his rights. Further, Hunter verified his statement's truth by signing it and initialing corrections that were made.

Hunter testified inconsistently regarding the point in time when he was advised of his constitutional rights during the interview process. He also testified that he was under the influence of alcohol and ecstasy at the time of his arrest. He described a hostile relationship between himself and the police, who he claimed did not honor his request for an attorney and threatened to beat him. He described being slapped, punched, cursed at, and threatened with an assignment to a jail cell of white racist inmates. He stated that he was taken outside for a beating, not to smoke a cigarette. Hunter claimed that two police officers fabricated every answer contained in his statement and threatened physical harm to force him to sign the statement.

The trial court reviewed and considered the testimony, and concluded that the police officer provided credible testimony while Hunter did not. Deference must be given to the trial court's assessment of witness credibility. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). The trial court did not clearly err in its determination that, under the totality of the circumstances, Hunter's statement was knowing, intelligent, and voluntary. Accordingly, we affirm the trial court's denial of Hunter's motion to suppress his statement.

Hunter next argues that the trial court erred in refusing to grant his motion for substitute counsel. We review for an abuse of discretion the trial court's decision regarding substitute counsel. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). Following his rejection of a plea offer during a pretrial hearing, Hunter claimed that he was dissatisfied with his attorney's representation and requested appointment of substitute counsel. Specifically, he complained that his attorney was not conducting an adequate investigation and did not provide him with a new discovery package after Hunter lost the first package. Hunter indicated that he filed a grievance against his attorney because he felt that his attorney was not providing adequate representation. The trial court noted that Hunter's attorney was usually very conscientious, and denied Hunter's request to appoint new counsel on the basis that Hunter's general dissatisfaction did not demonstrate an adequate basis to justify discharging his attorney.

While an indigent defendant is not entitled to choose his lawyer, he may be entitled to have the assigned lawyer replaced for cause. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973). Appointment of substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. *Id.*

Hunter did not demonstrate good cause for the appointment of substitute counsel. With the exception of the alleged discovery package issue, Hunter failed to specify any grounds for his belief that his attorney was not providing adequate assistance. Mere allegations that a defendant lacks confidence in his trial counsel do not constitute good cause for substitute counsel. *Traylor*,

supra at 463. Hunter's generalized statements do not equate to a difference of opinion about a fundamental trial tactic. Further, Hunter's attorney apprised the trial court that he visited Hunter, listened to him, communicated with him, and identified what measures he needed to take to craft a defense. Although Hunter's counsel indicated that he had hard feelings toward Hunter after learning of the grievance, he never indicated that this would compromise his representation or that he was unwilling or unprepared to proceed. Accordingly, the trial court did not abuse its discretion in denying Hunter's request for substitute counsel.

Hunter argues that defense counsel was ineffective for making comments during closing argument that essentially conceded Hunter's participation in the crimes as an aider and abettor. Because Hunter failed to move for a new trial or a *Ginther* hearing, our review is limited to the existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant must further show a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and the attendant proceedings were fundamentally unfair or unreliable. *Id*. Further, defendant must overcome a strong presumption that his counsel's action constituted sound trial strategy. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Viewed in context, it is apparent that defense counsel made the contested comments as a form of trial strategy. Evidence presented at trial, if believed by the jury, established that Hunter was present when the crimes occurred. To counter that evidence, Hunter's counsel suggested that Hunter's participation was not proven beyond a reasonable doubt. Hunter's counsel further argued that, even if the jury concluded that Hunter participated in the crimes, it should find that Hunter's level of participation was not equal to Perin's. Defense counsel advanced this argument by referring to Hunter as a "lackey" or "puppet" for Perin. Defense counsel's strategy was to convince the jury that Hunter was not guilty of the first-degree murder charges, and, if anything, was guilty only of the lesser charges.

It is not ineffective assistance of counsel for defense counsel to concede lesser offenses in the hope of avoiding a guilty verdict on greater ones. *People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1984). Only a complete concession of guilt constitutes ineffective assistance of counsel. *People v Krysztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). Because defense counsel's arguments were advanced with the objective of obtaining a verdict on a lesser offense than first-degree murder, if the jury found that Hunter participated in the crimes at all, Hunter's ineffective assistance of counsel claim is without merit.

We affirm.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Donald S. Owens