S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 29, 2004
v	No. 238786 Wayne Circuit Court
CLARENCE DARRYL GARDNER, Defendant-Appellant.	LC No. 00-005389-01

Before: Owens, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of first-degree felony murder, MCL 750.316(1)(b); first-degree premeditated murder, MCL 750.316(1)(a); arson over $20,000, MCL 750.74(1)(d)(1); and felony firearm, MCL 750.227b(1). Defendant was sentenced to life imprisonment for each of the first-degree murder convictions, and was sentenced to 14 to 60 months' imprisonment for the arson conviction as well as the mandatory, consecutive two-year term for felony-firearm. We affirm, but remand for correction of the judgment of sentence.

Defendant's convictions stemmed from his actions in beating the victim, wrapping her in a rug, putting her in the trunk of her car, driving her to a secluded alley, dousing the rug with gasoline, shooting his handgun into the rug, and then setting the rug on fire, resulting in the victim's death.

Defendant first argues that the trial court erred when it permitted the prosecution to introduce a statement that defendant made to police forty-eight hours after his arrest and before his arraignment. We disagree. We review de novo the entire record when considering a trial court's decision regarding a defendant's motion to suppress his inculpatory statement. *People v Cheatham,* 453 Mich 1, 30; 551 NW2d 355 (1996). A trial court's underlying factual findings, however, are reviewed for clear error. *Id*. Despite defendant's claims to the contrary, a pre-statement delay of more than forty-eight hours does not require automatic exclusion. *People v Manning,* 243 Mich App 615, 620; 624 NW2d 746 (2000).

The trial court reviewed the non-exclusive list of factors set forth by our Supreme Court in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), to determine that defendant's statement was voluntary. The interview lasted about two hours. Defendant was informed of, acknowledged, and waived his rights. He had a past felony criminal history, so he was not a stranger to incarceration or to police procedure. Defendant was thirty-six years old and a high

school graduate. Defendant appeared healthy and declined any food. It does not appear that he suffered any mental disabilities. Defendant did not appear intoxicated, and, given that he was held just over forty-eight hours before the interrogation occurred, it is highly unlikely that he could have been intoxicated. According to the police, he was not abused or threatened during the interview. The *Cipriano* factors therefore weighed in favor of a finding that the statement was voluntarily made.

At the hearing on defendant's motion to suppress, defendant testified intelligently and revealed his extensive knowledge of his criminal rights. The interviewing officer convincingly testified that, without coercion, defendant provided the statement while clear-minded and healthy and after having been informed of – and waiving – his constitutional rights. Defendant's story of threats and deprivation, by comparison, lacked verification and credibility. The determination concerning which witness's testimony to believe was a matter consigned to the trial court, which was in a better position than this Court to evaluate the credibility of the witnesses. *Cheatham, supra* at 30; People *v Givans,* 227 Mich App 113, 123-124; 575 NW2d 84 (1997). Therefore, the trial court did not clearly err when it found that defendant voluntarily provided his statement to the police.

Defendant next argues that his trial counsel failed to provide effective assistance when he told the jury that defendant's state of mind at the time of the killing suggested that he was guilty of manslaughter. We review de novo whether trial counsel provided a defendant with effective assistance. *People v Kevorkian,* 248 Mich App 373, 410-411; 639 NW2d 291 (2001). Defendant bears the burden of showing that his "counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced [him] as to deprive him of a fair trial." *People v Pickens,* 446 Mich 298, 303; 521 NW2d 797 (1994). Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving that defense counsel's conduct was not sound trial strategy. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Despite defendant's arguments to the contrary, when a defendant confesses to the charged offense, his counsel's statements admitting the defendant's responsibility for a lesser offense are a "permissible trial tactic" to alleviate the evidence's shock and suggest a more lenient compromise verdict. *Cf., People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1984); *People v Walker,* 167 Mich App 377, 382; 422 NW2d 8 (1988), overruled on other grounds *People v Mitchell,* 456 Mich 693, 698; 575 NW2d 283 (1998); *People v Emerson (After Remand),* 203 Mich App 345, 349; 512 NW2d 3 (1994). Furthermore, the record reflects that defense counsel reviewed this tactic with defendant before he implemented it. *Wise, supra* at 98-99.

Although not raised by the parties, the sentence in this case violates the double jeopardy ban on multiple punishments. US Const, Am V; Const 1963, art 1, § 15. There was only one murder victim, but defendant was charged, convicted, and sentenced of two counts of first-degree murder under two different theories. "Multiple murder convictions arising from the death of a single victim violate double jeopardy." *People v Clark,* 243 Mich App 424, 429; 622 NW2d 344 (2000). "The proper remedy is to modify the judgment of conviction and sentence to specify a single conviction of first-degree murder supported by two theories: premeditated murder and felony murder." *People v Long,* 246 Mich App 582, 588; 633 NW2d 843 (2001). We accordingly remand to the trial court for the ministerial act of correcting the judgment of

sentence to reflect defendant's conviction of one count of first-degree murder pursuant to two theories.

Affirmed, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Bill Schuette
/s/ Stephen L. Borrello