

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

CARL JONES BENNETT,

Defendant-Appellant.

UNPUBLISHED

March 7, 2013

No. 307452

Wayne Circuit Court

LC No. 11-007039-FC

Before: GLEICHER, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

Following a bench trial, the court convicted defendant of first-degree felony murder, MCL 750.316(1)(b), first-degree premeditated murder, MCL 750.316(1)(a), assault with intent to murder, MCL 750.83, assault with intent to commit great bodily harm less than murder, MCL 750.84, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant's convictions stem from an incident in which he lured a friend away from his home, leaving the women and child inside more vulnerable. Defendant and two accomplices then robbed the home, fatally shot his friend's sister, shot and severely injured his friend's 18-year-old niece, and chased and physically assaulted his friend's 10-year-old son. The prize sought by defendant was a winning lottery ticket worth \$2,700.

Because any motion by defense counsel to disqualify the trial judge for bias would have been futile, defendant cannot establish that counsel was ineffective in failing to raise such a motion. We therefore affirm, in part, defendant's convictions. However, as conceded by the prosecution, defendant should have been convicted and sentenced for a single first-degree murder charge supported by two theories—felony murder and premeditated murder arising from the fatal shooting of Lenora Nails. As such, we vacate defendant's convictions for first-degree murder and one of his sentences. We remand for modification of defendant's judgment of sentence as prescribed by *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998) and *People v Williams*, 475 Mich 101, 103; 715 NW2d 24 (2006).

I. ASSISTANCE OF COUNSEL

Defendant challenges trial counsel's failure to move for the disqualification of the trial judge. Before trial, defendant expressed his willingness on the record to plead guilty to second-degree murder but only if the prosecution could offer a reduced minimum sentence of 25 years. The prosecution later withdrew the plea offer based on the victims' concerns. Defendant claims

that the trial judge was thereafter predisposed to believe that defendant was guilty based on defendant's earlier apparent concession of culpability.

Defendant failed to preserve his challenge by requesting a new trial or an evidentiary hearing and our review is therefore limited to errors apparent on the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To demonstrate ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and this performance caused him prejudice. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). To demonstrate prejudice, a defendant must show the probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* This Court is required to presume that defendant received effective assistance of counsel, and defendant bears a heavy burden to prove otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

MCR 2.003(C)(1) requires that a judge be disqualified from hearing a case in which he or she cannot act impartially or is biased against a party. To establish the need to disqualify a judge, a party must show actual bias or prejudice. *In re Contempt of Henry*, 282 Mich App 656, 679; 765 NW2d 44 (2009). Judicial impartiality, like the effectiveness of counsel, is presumed and defendant bears another heavy burden to overcome this hurdle. *Id.* at 680.

In the matter before us, any motion to disqualify the trial judge would have been futile, and defense counsel cannot be deemed ineffective for failing to raise it. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Our Supreme Court found no grounds to disqualify the trial judge in the factually similar case of *People v Cocuzza*, 413 Mich 78; 318 NW2d 465 (1982). In *Cocuzza*, the defendant appeared before the trial judge to plead guilty and the court even "elicited a factual basis for the charge." *Id.* at 80. The defendant changed his mind, however, before the plea was accepted. The defendant thereafter waived his right to a jury trial and proceeded to a bench trial before the same judge who ultimately convicted the defendant as charged. On appeal, the defendant challenged the trial judge's failure to recuse himself or to inform the defendant that he could request another judge. *Id.*

In *Cocuzza*, 413 Mich at 83-84, the Supreme Court held:

We perceive no evidence of bias on the part of the trial judge in the instant case. It is true that the trial judge had previously heard the defendant proffer a factual basis for the charge of which he was ultimately convicted. However, we decline to impose upon a trial judge the duty to *sua sponte* raise the question of his disqualification in such circumstances. With full knowledge of the trial judge's prior involvement in this matter, defendant, who was represented by counsel, elected to proceed with a bench trial before that judge. We will not reward the failure to move for disqualification, with assertion of the basis reserved for appellate purposes, by sanctioning a reversal of the defendant's conviction.

Here, defendant was also well-aware that the trial judge had presided over the pretrial plea negotiations. The current trial judge did not hear defendant's factual basis for the potential plea as the proceedings never reached that point. As such, the current defendant has even less

support for a finding of judicial impartiality than the defendant in *Cocuzza*. As in *Cocuzza*, defendant was also represented by counsel and made the decision to waive his right to a jury trial after the plea negotiations fell apart. However, defendant has presented no evidence of the trial judge's actual bias to support that his counsel should have advised him against proceeding to a bench trial before the trial judge. In fact, defendant has presented no evidence of the advice counsel gave him to overcome the strong presumption that counsel acted in a reasonably objective professional manner. We therefore decline defendant's invitation to find his counsel's performance constitutionally ineffective.

II. DOUBLE JEOPARDY

As conceded by the prosecution, however, we must remand this matter for amendment of the judgment of sentence because it improperly reflects two convictions and sentences for first-degree murder—one based on an underlying felony and the other on premeditation. A criminal defendant is protected from being twice put in jeopardy for the same offense under both the federal and state constitutions. US Const, Am V; Const 1963, art 1, § 5; *People v Williams*, 294 Mich App 461, 468-469; 811 NW2d 88 (2011). Dual convictions for first-degree premeditated murder and felony murder arising from a single death violate double jeopardy principles. *Bigelow*, 229 Mich App at 220. When a defendant is convicted of both charges, the proper remedy is to modify the judgment of sentence to reflect a single conviction and sentence for first-degree murder, supported by the two underlying theories. *Id.*; see also *Williams*, 475 Mich at 103.

The trial court failed to modify the judgment of sentence as required. We therefore vacate defendant's convictions for first-degree murder and one of his sentences. We remand to the trial court to amend the judgment of sentence to reflect a single first-degree murder conviction, supported by two theories, and a single first-degree murder sentence.

Affirmed in part, vacated in part, and remanded for amendment of the judgment of sentence. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher

/s/ David H. Sawyer

/s/ Karen M. Fort Hood