

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH CHARLES DODGE,

Defendant-Appellant.

UNPUBLISHED

September 16, 2003

No. 238114

Macomb Circuit Court

LC No. 00-003304-FC

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

PER CURIAM.

After a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b); first-degree home invasion, MCL 750.110a(2)(b); armed robbery, MCL 750.529; and unlawfully driving away an automobile (UDAA), MCL 750.413. He was sentenced to concurrent terms of life imprisonment without parole for the murder conviction; 160 to 240 months' imprisonment for the home invasion conviction; 300 to 600 months' imprisonment for the armed robbery conviction; and 29 to 60 months' imprisonment for the UDAA conviction. He appeals as of right. We vacate defendant's conviction and sentence for first-degree home invasion. We affirm defendant's convictions and sentences for first-degree felony murder, armed robbery, and unlawfully driving away an automobile.

Defendant contends that he was deprived of his constitutional right to effective assistance of counsel because his first trial counsel failed to move to suppress his statement to the police on the basis that, at the time the statement was given, defendant was taking psychotropic medication that rendered the statement involuntary. Because defendant did not request a new trial or an evidentiary hearing on this issue, our review is limited to the facts on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). A successful claim of ineffective assistance of counsel requires a defendant to "show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant." *Id.* at 423-424. Here, defendant fails to demonstrate, much less direct our attention to facts in the record indicating, that his first trial counsel was aware that defendant was taking psychotropic medications at the time of the statement. In fact, defendant does not even explain on appeal what medications he was taking or how they impacted his statement. Accordingly, we are not persuaded that defendant has demonstrated that trial counsel was somehow deficient in failing to raise this issue below.

In a related claim, defendant argues that the trial court erred by denying his request for another hearing with respect to the voluntariness of his statement. Defendant's first trial counsel had moved to suppress defendant's statement, contending without explanation that it was involuntary. During the *Walker*¹ hearing, the only witnesses were the interrogating officers. The interrogating officers testified that defendant appeared rested, fed, and coherent. One of the officers testified that he asked defendant whether he was under the influence of any drugs or alcohol, and that this was part of his normal interrogating routine. The officer testified that defendant denied that he was under the influence of anything. The trial court denied defendant's motion to suppress, briefly noting that defendant's statements were voluntary.

After defendant's first trial counsel was replaced, his new counsel moved for another *Walker* hearing. Defense counsel explained that he was "subpoenaing his [defendant's] medical records from the Oakland County Jail where he was interviewed where he gave the alleged confession as well as the Macomb County Jail to show that his mental state may have been altered at the time." Defense counsel contended that defendant was under the influence of prescription drugs and medication. Defendant even stated on his own behalf that he was "heav[il]ly medicated during my stay in Oakland County." Defendant explained that he was on antidepressant and antipsychotic medications because of his bipolar disease, and that he did not even remember the first *Walker* hearing.

In denying defendant's motion, the trial court noted that defendant already had a *Walker* hearing. The trial court also expressed concern that defendant was attempting to keep having *Walker* hearings until he received a favorable decision.

We note that defendant was unable to substantiate his claim that he was under the influence of medication at the time of his statement. Instead, defense counsel only indicated that he was in the process of obtaining those records. The only other "evidence" that would have arguably supported another *Walker* hearing was defendant's self-serving statement that he was heavily medicated and could not remember the hearing. In contrast, during the *Walker* hearing, both interrogating officers testified that defendant appeared coherent, rested, fed, and not under the influence of drugs. Given that the trial court was not presented with any verifiable evidence to rebut the officers' testimony, we are not persuaded that the trial court erred in denying defendant's request for another *Walker* hearing.

Next, defendant contends that his convictions for both first-degree home invasion and first-degree felony murder, which was predicated on the felony of first-degree home invasion, violated double jeopardy principles. We note that the prosecutor concedes that there is merit to defendant's contention of error. Indeed, defendant's conviction for both felony murder and the predicate offense of home invasion violated his right against double jeopardy. See *People v Coomer*, 245 Mich 206, 224; 627 NW2d 612 (2001). Accordingly, the proper remedy is to vacate defendant's conviction and sentence for first-degree home invasion. See *id.*

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

Defendant further contends that his armed robbery conviction should also be vacated because it violated double jeopardy principles. We review de novo a double jeopardy issue.² *People v Colon*, 250 Mich App 59, 63; 644 NW2d 790 (2002). Specifically, defendant contends that his armed robbery conviction should be vacated because armed robbery is an enumerated predicate offense for felony murder.³ Indeed, “robbery” is one of several felony offenses can elevate a murder to first-degree murder. MCL 750.316(1)(b). As defendant concedes, however, the predicate offense for his felony-murder conviction was the home invasion conviction and not the armed robbery conviction. Accordingly, defendant’s contention of error is plainly without merit.

Finally, defendant contends that there was insufficient evidence supporting his convictions based on the evidence identifying him as the person who committed the crimes. A challenge to the sufficiency of the evidence requires us to determine “whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt.” *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

Our review of the record reveals ample evidence from which the jury could have found beyond a reasonable doubt that defendant committed the offenses. Defendant’s girlfriend testified that, within two days after the assault and robbery of the victim, defendant advised her of his involvement in a breaking and entering that had “gone bad,” during which defendant used a cast iron skillet to strike a man who had surprised him. The testimony of the investigating officers reflected their discovery that a man fitting defendant’s description had sold the victim’s cell phone for crack cocaine. The police investigation yielded an interview with defendant, during which he confessed in a specific, detailed fashion, which was corroborated by the crime scene, to breaking into the victim’s house after having run out of money for crack cocaine, beating the victim repeatedly with a skillet, and stealing the victim’s car, watch, gold ring with a red stone, cash from the victim’s pants, and his cell phone. Further investigation by the police confirmed defendant’s account that he entered the victim’s house through a rear basement window, defendant’s statements of his whereabouts at area motels before and after the offenses (including one motel within two blocks of the location where the police found the victim’s car),

² Because of its constitutional importance, we review a double jeopardy issue notwithstanding a defendant’s failure to raise the issue below. *Colon, supra* at 63.

³ In support of defendant’s contention of error, he argues, without citing any authority, that the “armed robbery arose out of the same transaction or occurrence as the home invasion and murder.” In *People v Dillard*, 246 Mich App 163, 165; 631 NW2d 755 (2001), we recognized that the United States Constitution, US Const, Am V, and the Michigan Constitution, Const 1963, art 1, § 15, “prohibit placing a defendant twice in jeopardy for a single offense.” Where, as here, a defendant contends a double jeopardy violation in a “multiple punishment” context, “the clauses seek to ensure that the defendant's total punishment will not exceed the scope of punishment provided by the Legislature.” *Dillard, supra* at 165. The determining factor under both constitutions is whether the Legislature intended for multiple punishments for the same offense. *Id.* In this context, whether the convictions arose out of the same transaction or occurrence is irrelevant. Accordingly, defendant’s supporting argument is misplaced.

and defendant's description that he wiped down the interior of the victim's car before abandoning it. This evidence was sufficient to enable the jury to reasonably conclude beyond a reasonable doubt that defendant committed the charged crimes. *Nowack, supra* at 399.

We vacate defendant's conviction and sentence for first-degree home invasion. We affirm defendant's convictions and sentences for first-degree felony murder, armed robbery, and unlawfully driving away an automobile.

/s/ Donald S. Owens
/s/ Richard Allen Griffin
/s/ Bill Schuette