

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CURTIS MARION,

Defendant-Appellant.

UNPUBLISHED

June 25, 2002

No. 232240

Wayne Circuit Court

LC No. 99-002356

Before: Zahra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of felony murder, MCL 750.316, one count of arson, MCL 750.72, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was given concurrent sentences of two terms of life imprisonment for the felony murder convictions and five to twenty years' imprisonment for the arson conviction. Defendant received a consecutive sentence of two years' imprisonment for the felony firearm conviction. Defendant appeals as of right. We vacate defendant's conviction and sentence for arson, but affirm in all other respects.

Defendant first argues that statements he gave to the police were erroneously admitted at trial because the statements were given after defendant invoked his right to remain silent. This issue was not raised and addressed below and, therefore, was not properly preserved for appeal. *People v Krause*, 206 Mich App 421, 424; 522 NW2d 667 (1994).¹ We review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Criminal defendants have the right to silence, and a police interrogation must cease where a defendant "indicates in any manner, at any time prior to or during questioning, that he wishes

¹ A *Walker* hearing, see *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965), was held below on whether defendant's statements to the police were voluntarily and knowingly given. However, defendant did not seek suppression on the ground that the statements were given after defendant invoked his right to remain silent. See *People v Catey*, 135 Mich App 714, 719-723; 356 NW2d 241 (1984).

to remain silent” *Miranda v Arizona*, 384 US 436, 473-474; 86 S Ct 1602; 16 L Ed 2d 694 (1966). However, a defendant must unequivocally invoke his right to silence. *People v Adams*, 245 Mich App 226, 234-235; 627 NW2d 623 (2001).

In the present case, Police Officer Gregory Jones testified at the *Walker* hearing that he questioned defendant on two occasions after defendant’s arrest. According to Jones, on both occasions, defendant read aloud a constitutional rights form, stated that he understood his rights, and initialed and signed the forms. Jones’ testimony includes:

Q. When you first started talking to him he was reluctant to talk to you; is that right?

A. At first, yes.

Q. What did he say?

A. He just told me he didn’t know what was going on and he didn’t have anything to say.

Q. Was there any other things that he said about why he gave you the impression he was reluctant to talk to you?

A. No, that’s when I told him what I had.

* * *

Q. What did you tell him exactly?

A. I told him I had some items of his I had found at the scene that links him to the crime.²

Q. After you said that to him what was his response?

A. I believe he began trying to guess what items that I had, he said what to do you have my phone or something to that effect, I said it doesn’t matter I just have something that belongs to you.

Q. Anything else you remember about that conversation?

A. Then he decided he would go ahead and talk to me.

* * *

² Upon investigating the area surrounding the crime scene, Jones had discovered court documents laying in a vacant lot. Those documents referenced defendant.

We talked and he told me, he began to give me his side of the story or what happened, and I began to reduce it to writing.

In his first statement to the police, defendant admitted that he and two accomplices went to a house on Omira to exact revenge on a resident of the house for an earlier shooting of one of defendant's accomplices. Defendant stated that he fired five gunshots into the house while his accomplices threw Molotov cocktails and fired shots at the house.

According to Jones, after finishing that first statement, defendant was returned to a holding cell. However, defendant later sent word to Jones that he wished to give another statement. The next morning, after being advised of his constitutional rights, defendant told Jones that the guns used during the incident were hidden at a girlfriend's house. Based on that information, Jones secured a search warrant and recovered two guns from the premises described by defendant.³

On appeal, defendant claims that his statement during his first interview that "he didn't have anything to say" constituted an invocation of his right to remain silent. We conclude that the challenged statement, when considered in context, was not an unequivocal invocation by defendant of his right to remain silent. *Adams, supra*. Defendant made the statement that "he didn't have anything to say" immediately after he was advised of his constitutional rights and waived his right to remain silent. Defendant's claim that he "didn't know what was going on" and "didn't have anything to say" indicates defendant did not wish to be forthcoming about his involvement, not that he desired to cease any further questioning. This is evident given the context in which the comments were made and given that defendant freely continued his conversation with Officer Jones after Jones claimed to possess an article of property belonging to defendant.

Defendant further argues that his statements to the police should have been suppressed because he was illegally arrested without a warrant at a third-party's residence. We disagree. A suspect may be arrested without a warrant where a police officer has probable cause to believe that the suspect committed a felony. MCL 764.15(1)(c); *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1988). In determining whether probable cause existed for an arrest, an appellate court must determine whether the facts available to the arresting officer at the time of arrest would justify a fair-minded person of average intelligence in believing that the suspected

³ Defendant also testified at the *Walker* hearing. He denied telling Officer Jones that he was involved in the crimes and claimed he signed the statements without reading them in their entirety. To the extent that Jones' and defendant's accounts of the events surrounding the interrogation differ, we note that the trial court specifically found at the *Walker* hearing "that the credibility of Officer Jones was impeccable, it was believable, and convinced me that he in no way did anything to abrogate or to violate Mr. Marion's Constitutional Rights." We give regard to a trial court's superior ability to observe witness demeanor and to make credibility determinations. MCR 2.613(C). We will not disturb a trial court's findings of fact absent clear error. *Id.* Here, defendant does not specifically challenge the trial court's credibility determination and we find no reason to conclude that the court clearly erred in finding Jones' account of the events most credible.

individual had committed the felony. *Id.* Here, the evidence found in a muddy lot near the crime scene included unsoiled court papers identifying defendant, five spent shell casings and footprints leading to and from the house where the murders occurred. Based on that evidence, the police had probable cause to justify defendant's warrantless arrest. Furthermore, a defendant must have a reasonable expectation of privacy in the place searched for a Fourth Amendment violation to have occurred. *People v Smith*, 420 Mich 1, 28; 360 NW2d 841 (1984). Nothing in the record indicates that defendant had a reasonable expectation of privacy at the third-party dwelling where he was arrested. See *People v Dalton*, 155 Mich App 591, 596-597; 400 NW2d 689 (1986).

Defendant next argues that his trial counsel rendered ineffective assistance. To establish a claim of ineffective assistance of counsel, a defendant must show both that his counsel's performance fell below an objective standard of professional reasonableness and that there is a reasonable probability that without counsel's error the result would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must overcome the strong presumption that he was afforded effective assistance. *People v Hopson*, 178 Mich App 406, 412; 444 NW2d 167 (1989). Ineffective assistance cannot be premised on the failure to make futile or frivolous objections. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998); *People v Chinn*, 141 Mich App 92, 98; 366 NW2d 83 (1985).

Given our determination that defendant's arguments on appeal regarding suppression of his statements lack merit, any objection on those grounds below would have been futile. *Fike, supra; Chinn, supra.* Therefore, defendant has not shown that his counsel's conduct fell below an objective standard of reasonableness or that his counsel's failure to raise objections resulted in prejudice. *Stanaway, supra.*

Last, defendant argues that his conviction and sentence for felony murder and the underlying felony of arson violated his constitutional right to be free from multiple punishment for the same crime. We agree. A conviction and sentence for both felony murder and the underlying felony violates the constitutional principle of double jeopardy. *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2001). Accordingly, defendant's conviction and sentence for arson must be vacated.

We affirm defendant's convictions and sentences for first-degree felony murder and felony firearm, but vacate defendant's conviction and sentence for arson.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Helene N. White