STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 12, 2008
v	No. 269917 Wayne Circuit Court
DESHON L. STOKES, Defendant-Appellant.	LC No. 05-012448-01

Before: Whitbeck, C.J., and White and Zahra, JJ.

PER CURIAM.

A jury convicted defendant Deshon Stokes of first-degree premeditated murder,[1] first-degree felony murder,[2] arson of a dwelling house,[3] first-degree home invasion,[4] and assault with intent to commit murder.[5] The trial court sentenced Stokes to concurrent terms of life imprisonment for each murder conviction, 225 to 600 months for the assault conviction, and 160 to 240 months each for the arson and home invasion convictions. Stokes appeals as of right. We remand for modification of the judgment of sentence to reflect a single conviction of first-degree murder supported by two different theories, and to vacate either the arson or home invasion conviction and sentence, but affirm in all other respects.

I. Basic Facts And Procedural History

Stokes' convictions arise from an incident on December 13, 2001, in which he and other men allegedly forced their way into Lornette Lee's house in Detroit. Lillie Triggs, who was visiting Lee, saw Stokes enter the house, and she was able to hide in the basement. From the basement, Triggs heard Stokes' voice demanding to know where Lee kept her money. Triggs also heard the men beat Lee after Lee denied having any money. The next thing Triggs knew,

[1] MCL 750.316(1)(a).

[2] MCL 750.316(1)(b).

[3] MCL 750.72a.

[4] MCL 750.110a(2).

[5] MCL 750.83.

the basement was full of smoke and the ceiling was in flames. A firefighter helped Triggs escape from the burning house. Triggs suffered extensive burns on her hands, fingers, legs, and face.

Firefighters found Lee on the front lawn; her head and hands were wrapped with duct tape, and she smelled of gasoline. Lee later died from second- and third-degree burns, which covered 90 percent of her body. Arson investigators determined that the fire was caused by an accelerant that was poured on the floor throughout the house and ignited.

II. Prosecutorial Misconduct

A. Standard Of Review

Stokes argues that the prosecutor's improper conduct denied him a fair trial. Specifically, Stokes contends that it was improper for the prosecutor to ask him on cross-examination whether he told Triggs' cousin, Terry Lockhart, that he did not know that Triggs was in the basement and that he was sorry that Triggs was burned. Stokes denied making the statement, and the prosecutor did not call Lockhart as a witness[6] or present other evidence tending to show that Stokes actually made the statement attributed to him.

Because Stokes did not object to the prosecutor's cross-examination, this issue is not preserved. Accordingly, we review this unpreserved claim for plain error.[7] To avoid forfeiture under the plain error rule, a defendant must demonstrate that: (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected the defendant's substantial rights, i.e., that the error affected the outcome of the lower court proceedings.[8]

> [O]nce a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error '"seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings" independent of the defendant's innocence.'"[9]

B. The Key Issue

Stokes argues that the prosecutor improperly used cross-examination as a device for introducing evidence that could not have been introduced through any proper means. The prosecutor argues that she had a good-faith basis for believing that there was a factual basis for

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[6] At a post trial evidentiary hearing on Stokes' ineffective assistance of counsel claim, the prosecutor stated that she did not list Lockhart as a witness because she did not believe she would be able to locate him given that, although he agreed to testify at trial, he failed to provide her with his contact information.

[7] *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

[8] *Id.*

[9] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (internal citations omitted).

the question and that this good-faith belief was sufficient to justify the question notwithstanding Lockhart's unavailability. Thus, the key question here is whether a suggestive question is permissible where the prosecutor has a good-faith belief in its factual basis, but no admissible evidence in support. Our review of the current case law reveals that the courts have not yet squarely settled the issue.

C. Legal Standards

In *United States v Brown*,[10] the Sixth Circuit reversed the defendant's conviction where the prosecutor repeatedly asked a witness whether he had given certain incriminating testimony in previous proceedings. The prosecutor knew that there was no factual basis for the questions.[11] The court held that this was "highly prejudicial conduct" and cautioned that "'[t]he courts should be alert to prevent abuse of the prior inconsistent statement rule by the prosecution's use of extra-judicial statements in the guise of impeaching witnesses, when the true purpose is to get before the jury substantive evidence which is not otherwise available.'"[12]

In *United States v Felsen*,[13] the Tenth Circuit distinguished *Brown*, stating, "This is not a case in which the Government was unprepared to prove the facts underlying its cross-examination." The prosecutor in *Felsen* based her cross-examination on a sworn witness statement and a customs agent's written report of his interview with the witness, and although the trial court ruled that the written statements were inadmissible, the Tenth Circuit held that the prosecutor's questions were permissible where she "had what she believed to be admissible evidence" as factual support for the questioning.[14]

Similarly, in *Hawkins v United States*,[15] the D.C. Circuit distinguished *Brown* in a case where the prosecutor asked a question that suggested that a witness had implicated the defendant in his grand jury testimony. The court held that the question was not improper because the witness's grand jury testimony gave the prosecutor an adequate factual basis for believing that the witness knew that the defendant shot the victim, although he did not explicitly say so.[16]

But, in *United States v Silverstein*,[17] a case similar to this one, the Tenth Circuit found error requiring reversal where the prosecutor based the prosecutor's questions on statements the defendant allegedly made to a fugitive escaped prisoner who was not available to testify.

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[10] *United States v Brown*, 519 F2d 1368, 1369-1370 (CA 6, 1975).

[11] *Id*.

[12] *Id.* at 1370, quoting *United States v Dye*, 508 F2d 1226, 1234 (CA 6, 1974) (citations omitted).

[13] *United States v Felsen*, 648 F2d 681, 687-688 (CA 10, 1981).

[14] *Id*.

[15] *Hawkins v United States*, 606 A2d 753, 756-758 (DC, 1992).

[16] *Id*. at 758, citing *Scull v United States*, 564 A2d 1161, 1164 (DC, 1989) (counsel must have sufficient good-faith basis or well-reasoned suspicion for proposed cross-examination).

[17] *United States v Silverstein*, 737 F2d 864, 868 (CA 10, 1984).

According to the court, "a prosecutor who asks the accused a question that implies the existence of a prejudicial fact must be prepared to prove that fact."[18] The court distinguished *Felsen*, noting that the prosecutor in *Silverstein* knew that he was not prepared to prove by independent evidence the substance of the alleged conversation because the escaped prisoner was not available to testify, whereas in *Felsen* the prosecutor believed that she had admissible evidence supporting the existence of the fact implied in the question.[19]

According to these authorities, a prosecutor may not ask questions using extra-judicial statements without some factual basis for the questions. The critical question remains, however, whether that factual basis must be rooted in admissible evidence, or whether the prosecutor's good-faith reliance on unavailable or inadmissible evidence is sufficient. If admissible evidence is necessary, then, as in *Silverstein* and *Brown*, the prosecutor's questions about Stokes' alleged statements to Lockhart were improper. In *Felsen*, however, the court held that the prosecutor's good faith, but ultimately mistaken, belief that the evidence on which she relied would be admissible was sufficient to support her questioning. And in *Hawkins*, the court held that the prosecutor's good-faith belief that his questioning had a factual basis was sufficient even though the belief was based on inference drawn from evidence of limited admissibility.[20]

The prosecutor relies on *People v Taylor*.[21] In that case, the defendant was convicted of murdering his wife. On cross-examination, the prosecutor questioned the defendant about his extramarital involvement with two women, which the defendant denied.[22] The prosecutor failed to rebut the defendant's denials, but argued that he had a good-faith belief[23] that the defendant was involved with the women.[24] This Court held that there was no error requiring reversal, explaining:

> We observe that defendant has not established that the prosecutor's questions were made in bad faith and that the line of inquiry was brief and was halted when defendant responded in the negative. Accordingly, we find no error in the circumstances of this case. Moreover, any danger of prejudice was dispelled when the court instructed the jury to disregard any reference to the women.[25]

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[18] *Id*.

[19] *Id*. at 868 n 3.

[20] The *Hawkins* Court ruled that the trial court did not abuse its discretion by allowing certain portions of the grand jury testimony to be read to the witness for the purposes of impeachment. *Hawkins*, *supra* at 761 n 8.

[21] *People v Taylor*, 110 Mich App 823; 314 NW2d 498 (1981).

[22] *Id*. at 834.

[23] Unfortunately, the Court failed to disclose in its opinion the alleged basis for the prosecutor's good-faith belief.

[24] *Id*.

[25] *Id*. at 834-835 (citations omitted).

Taylor lends some support to the prosecutor's argument that a good-faith belief of factual basis is sufficient to justify a suggestive question; however, *Taylor* is distinguishable from the instant case because the challenged questions pertained to a collateral matter not directly related to the defendant's guilt.

D. Applying The Standards

Michigan law apparently recognizes a good-faith exception for questions pertaining to *collateral* matters.[26] Further, it is well established that "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence."[27] We decline, however, to extend *Taylor* to material matters that bear directly on the defendant's guilt.

Clearly, the prosecutor had a good-faith belief that Stokes made the alleged statements to Lockhart. Indeed, at a post-trial evidentiary hearing on Stokes' ineffective assistance of counsel claim, the prosecutor testified that Triggs had told her before trial about Stokes' alleged confession to Lockhart and that Triggs arranged for the prosecutor to talk to Lockhart on the telephone. The prosecutor testified that during that phone conversation Lockhart himself told her that Stokes made the statements in question. However, we believe that due process requires that the prosecution must be prepared to prove the facts underlying its cross-examination and not merely seek a conviction based on the prosecutor's personal knowledge of those facts.[28]

Accordingly, we conclude that a prosecutor cannot question a defendant about alleged extra-judicial statements pertaining directly to the defendant's guilt unless the prosecutor is prepared to establish a factual basis for the statements with admissible evidence.

Even though we conclude that the prosecutor's questioning was improper, we conclude that the error was harmless and does not warrant reversal in this case.[29] Any prejudice to Stokes could have been eliminated by a curative instruction striking the improper question.[30]

III. Prior Bad Acts Testimony

A. Standard Of Review

Stokes argues that the trial court erred in allowing Kisha Davenport to testify regarding a separate incident in which Stokes doused her and another woman with gasoline and set them on fire in retaliation for a robbery of his drug house. The trial court admitted this testimony under MRE 404(b)(1) to prove Stokes' identity or to show that Stokes used a scheme or plan in committing the charged offenses. Stokes argues that this evidence was not admissible for a proper purpose under MRE 404(b)(1) and was more prejudicial than probative.

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[26] See *Taylor*, *supra*.

[27] *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

[28] See *People v Jesse Ray Smith*, 158 Mich 220, 231; 405 NW2d 156 (1987).

[29] See *Carines*, *supra* at 763.

[30] See *Brown*, *supra* at 1370; *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

We review this evidentiary issue for an abuse of discretion.[31] A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes.[32]

B. MRE 404(b)

MRE 404(b) excludes evidence of other bad acts to prove a person's character, but permits such evidence for other purposes, such as proof of identity or scheme, plan, or system in doing an act. The evidence must be offered for something other than a character or propensity theory, it must be relevant under MRE 402, and the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice under MRE 403.[33] If the evidence is offered to prove the defendant's identity, it must also satisfy the four-part test enunciated in *People v Golochowicz*.[34]

C. Identity Testimony

The *Golochowicz* four-part test for identity testimony is as follows:

> (1) there must be substantial evidence that the defendant actually perpetrated the bad act sought to be introduced; (2) there must be some special quality or circumstance of the bad act tending to prove the defendant's identity or the motive, intent, absence of mistake or accident, scheme, plan or system in doing the act and, in light of the slightly different language of MRE 404(b) we add, opportunity, preparation and knowledge; (3) one or more of these factors must be material to the determination of the defendant's guilt of the charged offense; and (4) the probative value of the evidence sought to be introduced must not be substantially outweighed by the danger of unfair prejudice.[35]

Stokes argues that evidence of the incident involving Davenport was not sufficiently similar to prove identity pursuant to these requirements. We disagree.

We conclude that Davenport's testimony that Stokes assaulted and burned her and another woman satisfies the first part of the *Golochowicz* test. We also conclude that there was sufficient evidence of a special quality or circumstance to prove Stokes' identity with respect to the charged incident. In both incidents, Stokes used gasoline as a device to threaten and torture his victims to gain information. Both incidents involved Stokes and other male accomplices

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[31] *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

[32] *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

[33] *People v Knox*, 469 Mich 502, 509-510; 674 NW2d 366 (2004); *People v VanderVliet*, 444 Mich 52, 55, 74-75; 508 NW2d 114 (1993).

[34] *People v Golochowicz*, 413 Mich 298, 308-309; 319 NW2d 518 (1982). See also *People v Steven Smith*, 243 Mich App 657, 671; 625 NW2d 46 (2000), remanded on other grounds 465 Mich 931 (2001).

[35] *Golochowicz*, *supra* at 309.

assaulting victims inside a house, beating them, interrogating them, and setting them on fire. Further, in both incidents, Stokes' motive was retaliation against persons he believed had undermined his drug-dealing activities. These similarities establish a modus operandi that logically links Stokes to both offenses.

We therefore disagree with Stokes' claim that the charged incident is dissimilar for purposes of MRE 404(b) because it involved only the burning of a house, whereas the victims themselves were set on fire in the uncharged incident. Here, a paramedic testified that there was a strong smell of gasoline on Lee's body, thus supporting an inference that gasoline was poured directly onto her in addition to the flooring of the house. Although Stokes also argues that there were other differences between the charged and uncharged offenses—that is, that the latter took place over a longer period of time and involved sexual degradation of the victims—these differences do not materially detract from the overall similarity of the two incidents. Accordingly, we conclude that the second requirement of the *Golochowicz* test was satisfied.

With respect to the third requirement, Stokes' identity is material to the determination of his guilt of the charged offense. Although Triggs identified Stokes as one of the intruders in Lee's house, she did not see who started the fire or the circumstances under which it was set. Evidence that Stokes had a modus operandi of burning victims with gasoline in connection with confrontations over interference in Stokes' drug dealing activities establishes the inference that he was the person who set the fire.

Stokes also argues that the prejudicial effect of the other acts evidence outweighed its probative value. We agree that the exceptionally egregious nature of the conduct associated with the uncharged incident tended to make the evidence highly prejudicial. But the charged conduct was also particularly egregious. Because both incidents were similarly shocking, we conclude that the prejudicial effect of the uncharged conduct did not substantially outweigh its probative value. Accordingly, we conclude that the trial court did not abuse its discretion in admitting the other acts evidence to prove identity.

D. Scheme, Plan, Or System Testimony

The prosecutor argues that the evidence was admissible to prove Stokes' scheme, plan, or system, even if it was not admissible to prove identity. The trial court instructed the jury that it could consider the evidence to determine whether it "tends to show that the defendant used a planned system or characteristic scheme that has been used before or since or for identification."

In *People v Sabin* (*After Remand*),[36] the Michigan Supreme Court reviewed the use of other acts evidence for the purpose of showing a scheme, plan, or system. The Court held that "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system."[37] The Court

[36] *People v Sabin* (*After Remand*), 463 Mich 43; 614 NW2d 888 (2000).

[37] *Id*. at 63.

emphasized that it is not sufficient to show a similarity between the charged and uncharged acts. There must not merely be a similarity in the results, "but *such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.*"[38] "'To establish the existence of a common design or plan, the common features must indicate *the existence of a plan rather than a series of similar spontaneous acts*, but the plan thus revealed need not be distinctive or unusual."'[39]

Here, Stokes' actions reveal a plan and scheme to dominate, control, terrorize, and punish those who undermine the success of his drug business, using fire as his weapon. The two incidents also include the common elements of persecuting his victims in an isolated setting and relying on accomplices to help intimidate and control the victims. Accordingly, we conclude that the trial court properly admitted this evidence to prove a common plan and scheme in addition to proving identity.

IV. Sentencing

A. Standard Of Review

Stokes argues that the trial court erred in scoring offense variables ("OV") 3 and 13 of the sentencing guidelines. Because Stokes did not object to these scoring decisions at sentencing, our review is limited to plain error affecting Stokes' substantial rights.[40] Indeed, Stokes expressly approved the trial court's scoring decisions, which generally constitutes a waiver of any error.[41] Because Stokes raises a separate claim of ineffective assistance of counsel, however, we will address the merits of the trial court's scoring decisions.

B. Scoring Decisions

A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.[42] This Court will uphold a scoring decision if there is any evidence in support of the trial court's score.[43]

Under OV 3, 100 points should be scored if "death results from the commission of a crime" and "*a* victim" was killed.[44] Contrary to Stokes' argument, the trial court properly could consider the death of Lornette Lee when scoring OV 3 in connection with Stokes' assault with

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[38] *Id*. at 64-65, quoting 2 Wigmore, Evidence (Chadbourn rev), § 304, p 249 (emphasis in Wigmore).

[39] *Id.* at 65-66, quoting *People v Ewoldt*, 7 Cal 4th 380, 402; 867 P2d 757 (1994) (emphasis added).

[40] *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004).

[41] See *People v Riley*, 465 Mich 442, 448-450; 636 NW2d 514 (2001).

[42] *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

[43] *Id*.

[44] MCL 777.33(1)(a) and (2)(b) (emphasis added).

intent to commit murder conviction involving Lillie Triggs.[45] Thus, the trial court properly scored 100 points for OV 3.

Stokes also challenges the trial court's score of 25 points for OV 13. MCL 777.43(1)(b) provides that the trial court must score 25 points for OV 13 where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." The trial court shall count "all crimes within a 5-year period, including the sentencing offense . . . regardless of whether the offense resulted in a conviction."[46] Stokes argues that all counts for which the jury convicted him arose from a single incident, and therefore cannot be counted as more than one crime committed against a person. In *People v Harmon*,[47] this Court upheld a score of 25 points for OV 13 where the defendant's four convictions of making child sexually abusive material were based on four separate photographs of his two victims, even though they were all taken on the same day. Here, there was evidence that Stokes physically assaulted Lee and then set her and her house on fire, and on a separate occasion similarly assaulted and set Davenport and another woman afire. This evidence supports the trial court's finding of a pattern of felonious criminal activity involving three or more crimes against a person. Thus, the trial court did not err in scoring 25 points for OV 13.

V. Sixth Amendment Rights

Relying on *United States v Booker*,[48] *Blakely v Washington*,[49] and *Apprendi v New Jersey*,[50] Stokes argues that his Sixth Amendment right to a jury trial was violated when the trial court relied on facts not found by the jury to score the sentencing guidelines. In those cases, the United States Supreme Court held that it is a violation of the Sixth Amendment for a sentencing court to increase a defendant's *maximum* sentence based on facts not found by a jury. However, the Michigan Supreme Court has held that these decisions do not apply to Michigan's indeterminate sentencing scheme, in which a defendant's maximum sentence is fixed by statute, and the sentencing guidelines affect only the minimum sentence.[51] We therefore reject this claim of error.

VI. Double Jeopardy

A. Standard Of Review

Stokes argues that he could not properly be convicted and sentenced for both felony murder and the underlying predicate felony. A double jeopardy challenge presents a

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[45] *People v Albers*, 258 Mich App 578, 591-592; 672 NW2d 336 (2003).

[46] MCL 777.43(2)(a).

[47] *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001).

[48] *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005).

[49] *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

[50] *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000).

[51] *People v Drohan*, 475 Mich 140, 159-160; 715 NW2d 778 (2006).

constitutional issue that we review de novo on appeal.[52] However, because Stokes failed to preserve this issue, we review for plain error affecting his substantial rights.[53]

B. Legal Standards

The Double Jeopardy Clauses of the United States and Michigan Constitutions[54] protect against multiple punishments for the same offense.[55] In *People v Wilder*,[56] the Michigan Supreme Court held that convictions of both first-degree felony murder and the underlying felony violates a defendant's state constitutional right against double jeopardy. Although the Court recently revisited this issue in *People v Bobby Smith*,[57] it declined to disturb its decision in *Wilder*. Thus, *Wilder* remains good law, and we are bound to follow it.

C. Applying The Standards

Here, the felony-murder charge listed both arson and home invasion as alternative predicate felonies. The jury convicted Stokes of both of these offenses. Under *Wilder*, Stokes is entitled to have one of these convictions vacated. Accordingly, we remand this case to the trial court and direct it to vacate either the home invasion or arson conviction and the accompanying sentence.

We also agree with Stokes that his separate convictions and sentences for first-degree premeditated murder and first-degree felony murder arising from the death of one victim are improper. On remand, the trial court shall modify the judgment of sentence to reflect a single conviction and sentence of first-degree murder, supported by two different theories.[58]

VII. Ineffective Assistance Of Counsel

A. Standard Of Review

Stokes argues that he was denied the effective assistance of counsel. The trial court considered this issue at a posttrial evidentiary hearing and concluded that Stokes was not denied the effective assistance of counsel.

A claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law.[59] The trial court must first find the facts and then decide whether those facts

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[52] *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

[53] *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

[54] US Const, Am V; Const 1963, art 1, § 15.

[55] *Nutt*, *supra* at 574.

[56] *People v Wilder*, 411 Mich 328, 352; 308 NW2d 112 (1981).

[57] *People v Bobby Smith*, 478 Mich 292, 318 n 16; 733 NW2d 351 (2007).

[58] See *People v Joezell Williams*, 475 Mich 101, 103; 715 NW2d 24 (2006).

[59] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

constitute a violation of the defendant's constitutional rights.[60] We review for clear error the trial court's findings of fact and review de novo questions of constitutional law.[61]

B. Legal Standards

To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted.[62] A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial.[63] The defendant must overcome the strong presumption that the attorney was exercising sound strategy.[64]

C. Applying The Standards

Stokes argues that trial counsel was ineffective for failing to object to the prosecutor's cross-examination concerning Lockhart. We disagree. Defense counsel explained at the evidentiary hearing that he decided not to object for strategy reasons, because without independent factual support for the questions asked, it enabled him to argue that the prosecutor was relying on a smokescreen. Defense counsel's decision to seize an opportunity to cast aspersions on the strength of the prosecutor's case was a matter of trial strategy that this Court will not second-guess with the benefit of hindsight.[65] Accordingly, we conclude that Stokes has not established that counsel was ineffective for failing to object to the prosecutor's cross-examination.

Stokes also argues that defense counsel was ineffective for failing to object to the trial court's scoring of OV 3 and OV 13. We previously concluded that the trial court did not err in its scoring of these offense variables. Accordingly, we conclude that defense counsel was not ineffective for failing to object.[66]

VIII. Conclusion

We remand this case to the trial court and direct the trial court to vacate either the arson or home invasion conviction and sentence and to modify the judgment of sentence to reflect a single conviction and sentence of first-degree murder supported by two different theories. We affirm in all other respects.

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[60] *Id*.

[61] *Id*.

[62] *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *Harmon, supra* at 531.

[63] *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002).

[64] *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

[65] *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

[66] *Knapp*, *supra* at 386.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Helene N. White
/s/ Brian K. Zahra