

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEANDRO MATA,

Defendant-Appellant.

UNPUBLISHED

June 6, 1997

No. 189221

Isabella Circuit Court

95-007230-FH

Before: Smolenski, P.J., and Kelly and Gribbs, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carrying a concealed weapon (CCW) on his person, MCL 750.227; MSA 28.424, and felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), supplemented by habitual offender third offense, MCL 769.11; MSA 28.1083. Defendant was sentenced to 60 to 120 months' imprisonment for each conviction, the time to be served concurrently. Defendant appeals as of right. We affirm defendant's convictions and sentences but remand for clerical correction of errors in the presentence investigation report.

In the early morning hours of January 31, 1995, defendant and his wife were stopped at a gas station by police officers responding to a suspected shoplifting complaint. The complaint was called in to the police by a grocery store manager, who identified defendant and his wife as the suspected shoplifters. A handgun was discovered during a search of the gas station men's restroom, and defendant was subsequently arrested for CCW.

Defendant first argues that his constitutionally protected right of confrontation was denied when the trial court heard testimony about a statement defendant's wife made while watching one of the arresting officers carry the handgun out of the restroom. Because "appellate courts will consider claims of constitutional error for the first time on appeal when the alleged error could have been decisive of the outcome," *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994), we will review the trial court's decision to admit the statement at issue. For defendant to prevail, he must show that the admission of the statement into evidence was in error, and that this error was decisive of the outcome. *Id.*; *People v Maryland*, 135 Mich App 297, 302; 355 NW2d 378 (1984). In *White v Illinois*, 502

US 346; 112 S Ct 736; 116 L Ed 2d 848 (1992), the United States Supreme Court found that “where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied.” *Id.* at 356. Upon seeing the officer carrying the gun, defendant’s wife blurted out that the gun belonged to her. This statement falls within the excited utterance exception to the hearsay rule, MRE 801(2), because the time between her seeing the gun and her spontaneous remark did not allow for any contrivance or misrepresentation. Thus, it was properly admitted into evidence. MRE 802. Therefore, under the rule of *White v Illinois*, the admission of the statement into evidence did not violate defendant’s constitutionally protected right of confrontation.

Second, defendant argues that the admission into evidence of testimony regarding his uttering to his wife “nada” in response to his wife’s statement about ownership of the gun violated his Fifth Amendment right to remain silent. The assumption underlying defendant’s argument is that because he was in custody at the time, his utterance is the result of a custodial interrogation. Given that five officers were present at the gas station, and that one officer was directed by his superior to either “secure” or “apprehend” defendant after the gun was discovered, it is clear that defendant was in custody at the time. However, not “all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation.” *Rhode Island v Innis*, 446 US 291, 299; 100 S Ct 1682; 64 L Ed 2d 297 (1980). “Any statement given freely and voluntarily without any compelling influences is, of course, admissible as evidence.” *Miranda v Arizona*, 384 US 436, 478; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Defendant’s utterance, directed at his wife and overheard by the police, was voluntarily made. Therefore, admission of testimony regarding the utterance did not violate defendant’s rights under the Fifth Amendment. *Id.*

Third, defendant argues that his right to a fair trial was violated when he was forced to appear at trial in his prison clothing. Contrary to defendant’s contention, the record clearly indicates that defendant chose to appear at trial in his prison clothing. Further, because defendant did not object to the wearing of prison clothing before the jury was impaneled, his right to wear civilian clothing was waived. *People v Turner*, 144 Mich App 107, 109; 373 NW2d 255 (1985). Defendant cannot waive an objection at trial to the wearing of the prison clothing, only to reassert the issue on appeal. *People v Schuller*, 188 Mich App 548, 552; 470 NW2d 492 (1991).

Fourth, defendant argues that his sentence was disproportionate because the trial court improperly considered defendant’s alleged shoplifting when imposing sentence. An appellate court’s “review of sentencing is limited to determining whether the trial court abused its discretion.” *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993). “[A] given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the circumstances surrounding the offense and the offender.” *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The trial judge’s articulated reasoning underlying the sentence imposed indicates that he focused on the uncharged shoplifting because of how it impacted the circumstances surrounding the CCW offense. Given that the jury convicted defendant of CCW on his person, it is not unreasonable to assume that defendant had the gun on his person when he was in the grocery store shortly before his arrest. Further, the Michigan Supreme Court has noted that

the sentencing judge should not be precluded from basing a sentence on facts underlying . . . uncharged offenses . . . where those facts have been developed through sworn testimony before that very judge. In the case of . . . uncharged offenses, . . . the defendant must be afforded an opportunity to test the accuracy of those facts. [*People v Ewing*, 435 Mich 443, 455; 458 NW2d 880 (1990) (opinion of Brickley, J.)]

The uncharged shoplifting offense was dealt with at length by both parties during the trial. Both sides questioned the grocery store employees and the police concerning the incident. Therefore, because the issue was sufficiently examined during trial, and because the court's focus on the alleged shoplifting was limited to how it impacted the circumstances surrounding the CCW offense, the trial court did not abuse its discretion when considering the uncharged offense during sentencing.

Fifth, defendant correctly argues that the case should be remanded so that the trial court can correct the presentence investigation report, and then forward the corrected report on to the Department of Corrections. The errors defendant identifies were properly brought to the attention of the trial judge, who ruled that the report would be changed to reflect defendant's corrections. Apparently, however, the uncorrected report was sent along to the Department of Corrections. As we observed in *People v Norman*, 148 Mich App 273, 275; 384 NW2d 147 (1986), "the presentence investigation report should accurately reflect any determination the sentencing judge has made concerning the accuracy or relevancy of the information contained in the report." Accordingly, the case should be remanded so that a corrected presentence investigation report can be prepared and sent to the Department of Corrections.

Finally, although he does not raise it as a separate issue, within his first two issues defendant argues that he received ineffective assistance of counsel. Although defendant did not move for either a new trial or an evidentiary hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), appellate review of a claim of ineffective assistance of counsel may be appropriate where the details of the claimed deficiencies are apparent in the record. *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987). In both instances in which defendant raises the argument, he fails to establish that his counsel's performance was below an objective standard of reasonableness, and that the result of the trial was adversely affected by alleged deficiencies. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). As noted, the admission of the statement of defendant's wife and the admission of his utterance of the word "nada" were not in error. Additionally, because the admission of testimony about these two statements was essential to defendant's trial strategy, defendant has failed to overcome the "strong presumption that counsel's assistance constituted sound trial strategy." *Id.* at 687.

Defendant's convictions are affirmed, but we remand for the trial court to make the appropriate corrections to the presentence investigation report, and to forward the corrected report on to the Department of Corrections. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Michael J. Kelly

/s/ Roman S. Gribbs

