STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAJAHAAN FARUQ CLARK,

Defendant-Appellant.

UNPUBLISHED
November 5, 1999

No. 198394
Eaton Circuit Court
LC No. 95-000312 FC

Before: Hoekstra, P.J., McDonald and Meter, JJ.

PER CURIAM.

Defendant appeals of right from his jury conviction of four counts of possession of a bomb with unlawful intent, MCL 750.210; MSA 28.407, four counts of carrying a concealed weapon, MCL 750.227; MSA 28.424, two counts of possession of a short-barreled shotgun, MCL 750.224b; MSA 28.421(2), two counts of possession of a firearm in the commission of a felony, MCL 750.227b; MSA 28.424(2), one count of aiding and abetting or conspiring to place explosives with intent to destroy property, MCL 750.208; MSA 28.405, and one count of conspiracy to commit great bodily harm less than murder, MCL 750.84; MSA 28.279 and MCL 750.157a; MSA 28.354(1). Defendant pleaded guilty to one count of felon in possession of a firearm, MCL 750.224f; MSA 28.421(6). Defendant was also subject to sentence enhancement under the habitual offender statute as a second offender, MCL 769.10; MSA 28.1082.

Defendant was sentenced as a second habitual offender to terms of 4 to 7½ years' imprisonment for each possession of a bomb conviction, the CCW convictions, the possession of a short-barreled shotgun convictions, and the felon in possession conviction, 8 to 22½ years' imprisonment for the aiding and abetting or conspiring to place an explosive device conviction, 8 to 15 years' imprisonment for the conspiracy to commit great bodily harm less than murder conviction, and the mandatory 2-year consecutive sentence for the felony-firearm convictions. We affirm defendant's convictions but remand for correction of the judgment of sentence.

Defendant first contends that there was insufficient evidence to sustain his convictions. This Court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a

reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Application of this standard requires the appellate court to show deference to factual determinations rendered by the trier of fact. *Id*. at 514-515. Furthermore, in determining whether there was sufficient evidence, this Court must reject defendant's "innocent explanations" (since they were rejected by the jury); his convictions must be sustained if "finding [the evidence] where we may, and putting what was most favorable to the prosecution together, and discarding all other [evidence], [this Court can] say it fairly tended to establish the charge made." *Wolfe, supra* at 515, quoting *People v Howard*, 50 Mich 239, 242; 15 NW 101 (1883).

The prosecutor alleged that the Guy family (including defendant) conspired to arm themselves and drive to Lansing in a minivan with the express intent to shoot and set off explosives at the houses of two individuals who were linked to an earlier altercation that had led to the shooting of two young men related to defendant. Thus, plaintiff had to establish defendant's knowledge of the agreement to commit this unlawful act and his intent to participate in that act. That knowledge and intent could be shown by circumstantial evidence and reasonable inferences. *People v Justice*, 454 Mich 334, 345-348; 562 NW2d 652 (1997).

When troopers stopped the minivan, defendant was seated directly above a cache of loaded weapons. In common with the other occupants of the minivan, he was dressed in dark clothing. The interior light was taped over to prevent the interior from being illuminated when the doors were opened. There were sufficient masks, latex gloves, and weapons to disguise and arm each of the occupants. Defendant was found in the possession of a flameless lighter that could have been used to light the fuses on the two pipe bombs that were found in the van. Defendant and the other occupants of the van were members of a close-knit family, and two members of this family were wounded in a drive-by shooting two days earlier. According to one witness, defendant had accompanied other members of the family when they made what can fairly be described as a surveillance videotape of the houses associated with the suspected shooters on the afternoon of the shooting. These facts, considered in a light most favorable to the prosecution, sufficiently established defendant's guilt on the charged offenses.

Defendant also maintains that there was insufficient evidence that he possessed the firearms or the explosives. Possession may be either actual or constructive. *Wolfe, supra* at 520. Constructive possession means that the defendant had the right to exercise control of the firearms or explosives and knew that they were present. *People v Germaine*, 234 Mich 623, 627; 208 NW2d 705 (1926). Constructive possession may not be shown by presence alone, but it may be shown by presence in combination with other factors. *Wolfe, supra* at 520-521. As noted, defendant was found seated directly above a cache of loaded weapons, dressed in dark clothing, in possession of a flameless lighter, and riding in a van that was apparently prepared for a surreptitious early morning attack. These facts support the conclusion that defendant constructively possessed the firearms and bombs.

Defendant next claims that the trial court erred by permitting the prosecutor to introduce irrelevant and prejudicial evidence concerning his involvement with the Guy family, the family's practices, and his father's marital background. Although defendant objected on a number of grounds, he failed to raise any objection under MRE 404(b). This Court will not consider an issue if an objection at trial was based on a different ground than is urged on appeal. *People v Kilbourn*, 454 Mich 677,

684-685; 563 NW2d 669 (1997). In the absence of an objection, review will only be for plain error, which requires a finding that there was error, that the error was obvious, and that it affected the defendant's substantial rights – that is, that it was decisive of the outcome of the case. *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994).

In this case, the evidence of the structure and relationships of the Guy family was inextricably blended with the crimes of which defendant was accused. The prosecutor's theory of the evidence was that defendant and his codefendants took the weapons and explosives to Lansing because they were seeking revenge for the shooting of two of Guy's sons. The relationship between defendant, his father (Guy), the other defendants, and the victims was thus of great significance. The prosecutor is permitted to present "the full story" to the jury even if that results in the revelation of other uncharged misconduct evidence. *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). When the charged offense is connected with an antecedent event involving the commission of another crime, the jury is entitled to hear the complete story, even though that story will alert them to the other, uncharged crime. *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). The evidence was relevant to defendant's motive and intent as well as his knowledge of the presence of the weapons in the van and the group's plan in committing the charged crimes; this was not mere propensity evidence. Defendant's motive, intent, and knowledge of the existence of the weaponry were in issue, since defendant disclaimed any knowledge of the weapons or any intent to use them against anyone. The evidence regarding how the family was organized and how it operated thus had some tendency to help establish defendant's motive and intent, as well as his knowledge of the weaponry and the plan of attack. The balancing test of MRE 403 was not specifically utilized, but only because defendant failed to object. Nevertheless, for the above reasons the danger of unfair prejudice did not substantially outweigh the probative value of this evidence and defendant failed to request a specific curative instruction. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Furthermore, cross-examination by defendants brought out an abundance of information about Guy's espousal of Afro-centrist teachings and culture, and Guy also added more information on the background of the "Black Law Rules and Rights." Since most of the information would have been admitted even if defendant had objected, defendant has failed to demonstrate plain error that was decisive of the outcome of his cases. *People v Figgures*, 451 Mich 390, 406; 547 NW2d 673 (1996).

Next, defendant contends that his waiver of counsel was equivocal because he also asked for standby counsel to be appointed. This claim is not preserved for appellate review because defendant requested that he be allowed to proceed in propria persona with standby counsel, he subsequently requested that his initial standby counsel be replaced with the counsel who was representing a codefendant, and he did not raise this objection in the trial court. *People v Davis*, 216 Mich App 47, 55; 549 NW2d 1 (1996). Our Supreme Court held in *People v Lane*, 453 Mich 132, 140; 551 NW2d 382 (1996), that failure to comply with MCR 6.005(E) "is to be treated as any other trial error" and concluded that where no objection was lodged, the review was for plain error under *Grant*, *supra*. Even preserved claims regarding waivers of counsel are reviewed for an abuse of discretion. *People v Adkins (After Remand)*, 452 Mich 702, 721 n 16; 551 NW2d 108 (1996). We find neither an abuse of discretion nor plain error.

Pursuant to *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976), the trial court must determine that (1) the defendant's request is unequivocal; (2) the defendant is asserting his right knowingly, intelligently, and voluntarily; and (3) the defendant's self-representation will not disrupt, unduly inconvenience or burden the court. Additionally, a trial court must comply with MCR 6.005 by (1) advising the defendant of the charge and the possible sentence; (2) explaining the risks of self-representation; and (3) offering the defendant an opportunity to consult with an attorney. There need only be substantial compliance with the requirements of *Anderson* and MCR 6.005; substantial compliance requires that "the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures." *Adkins, supra* at 726-727.

Our examination of the entire record indicates that the trial court substantially complied with the requirements of the case law and court rule. Defendant was informed of the charge and possible sentence, as well as the risks of self-representation, and he was given the opportunity to consult with an attorney. Furthermore, defendant, on several occasions, re-affirmed his desire to represent himself, and throughout the pre-trial and early trial proceedings, defendant exercised his right of self-representation. That defendant chose to rely more and more on his standby counsel as the trial progressed does not demonstrate that his initial waiver decision was equivocal or involuntary.

Defendant also claims that the multiple representation of himself and his codefendants by the same standby counsel was improper because it created a conflict of interest that precluded his counsel from arguing that there was substantially less evidence implicating defendant. Defendant has failed to demonstrate an actual conflict of interest, as required by *Cuyler v Sullivan*, 446 US 335, 348; 100 S Ct 1708; 64 L Ed 2d 333 (1980), and *People v Larry Donnell Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Furthermore, he failed to seek a *Ginther*[1] hearing as required by *Smith*. Defendant's only claim of a conflict was that his counsel was precluded from arguing that far less evidence implicated defendant; however, defendant delivered his *own* closing argument and that argument essentially attacked the absence of any substantial evidence of defendant's guilt. The trial court complied with MCR 6.005(F), and defendant has failed to demonstrate an actual conflict of interest.

Defendant next argues that the trial court erred in denying his motion to suppress evidence found in the minivan. Defendant claims that, contrary to the trial court's ruling, he has standing to raise this claim because the prosecutor treated the Guy family as a group. Whether a defendant has standing to challenge a search or seizure is a legal question that is reviewed de novo on appeal. Cf., *People v Lombardo*, 216 Mich App 500, 505; 549 NW2d 596 (1996). Our Supreme Court, in *People v Lee Brady Smith*, 420 Mich 1, 28; 360 NW2d 841 (1984), stated that in deciding a standing issue, a trial court must consider the totality of the circumstances and determine "whether the defendant had an expectation of privacy in the object of the search and seizure and whether that expectation is one that society is prepared to recognize as reasonable." A defendant challenging a search "bears the burden of proving standing as a result of a personal expectation of privacy." *Lombardo, supra* at 505.

The trial court noted that the passengers had not asserted any "proprietary or possessory interest in the automobile [or] the 'bundle' on its floor." The failure to assert such an interest precluded

any of them from claiming standing because they did not establish an expectation of privacy in the object of the search. Furthermore, even if defendant had a subjective expectation of privacy in the van or bundle, it was not one that society would be prepared to recognize as reasonable. *People v Lee Brady Smith*, *supra* at 28. The search of the bundle in the van disclosed an arsenal of loaded weapons. Society would not recognize as reasonable a passenger's expectation of privacy in the transportation of illegal weapons and explosives in a third party's van driven by someone else. *Lombardo*, *supra* at 509.

We reject defendant's novel claim of "group standing" because he did not advance this argument in the trial court, *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996). Furthermore, this Court held in *People v Armendarez*, 188 Mich App 61, 71; 468 NW2d 893 (1991), that a passenger who could assert no proprietary or possessory interest in an automobile, and who could not show any legitimate expectation of privacy in the interior, lacked standing. Moreover, even if this Court considered the underlying search issue despite defendant's lack of standing, we would agree with the trial court that the search was a proper protective "frisk" under *Michigan v Long*, 463 US 1032; 103 S Ct 3469; 77 L Ed 2d 1201 (1983).

Defendant next contends that his due process right to a fair trial was impaired where he was observed by the jurors during voir dire while he was dressed in jail clothing. Defendant did not object to his clothing until the second day of trial and therefore failed to preserve this claim. *People v Shaw*, 381 Mich 467, 474-475; 164 NW2d 7 (1969). The plain error rule applies to unpreserved claims of constitutional error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

Defendant was incarcerated for ten months prior to his trial and he was aware of his trial date for at least two months. Nevertheless, he made no effort to obtain civilian clothing in a timely fashion or to request a continuance for that purpose before the trial commenced. Additionally, defendant himself informed the jury during his closing argument that he had been in jail for eleven months prior to trial. Defendant cannot claim error from circumstances that he caused and took no steps to remedy, *People v Porter*, 117 Mich App 422, 424-426; 324 NW2d 35 (1982), and he cannot establish prejudice where he informed the jury of his incarceration. See *Estelle v Williams*, 425 US 501, 506; 96 S Ct 1691; 48 L Ed 2d 126 (1976), quoting *United States ex rel Stahl v Henderson*, 472 F2d 556, 557 (CA 5, 1973). This Court therefore concludes that defendant has forfeited this issue because even if error occurred, it did not affect the outcome of the case. *Carines*, *supra* at 763; *Grant*, *supra* at 553.

Defendant finally argues that the trial court should have made the felony-firearm sentences consecutive only to the sentences for the two felony convictions of possession of a bomb with unlawful intent, which had been specifically alleged by the prosecution as the underlying felonies. This claim involves interpretation of the language of the felony-firearm statute, MCL 750.227b; MSA 28.424(2), and this Court reviews de novo questions of law regarding statutory interpretation. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997).

The primary goal of statutory interpretation is to effectuate the intent of the Legislature and the first means of determining that intent is the language of the statute since the Legislature is presumed to

have intended the meaning it plainly expressed. *People v Pitts*, 222 Mich App 260, 265-266; 564 NW2d 93 (1997). MCL 750.227b; MSA 28.424(2) provides:

> (1) A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit *a felony*, except a violation of section 223, section 227, 227a or 230, is guilty of a felony, and shall be imprisoned for 2 years . . . .
>
> (2) A term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of *the felony* or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony. [Emphasis supplied.]

The felony-firearm statute is intended to deter individuals who are committing felonies from arming themselves with firearms and thereby increasing the danger that someone will be injured or killed as a result of their felonious conduct. *People v Elowe*, 85 Mich App 744, 748-749; 272 NW2d 596 (1978). The language of the felony-firearm statute is plain and unambiguous. The statute is meant to apply whenever an individual is convicted of possessing a firearm during the commission of any felony other than a specifically excepted felony. *People v Guiles*, 199 Mich App 54, 59; 500 NW2d 757 (1993). Thus, subsection (1) states that anyone committing "a" felony (other than one of the enumerated felonies) is guilty of the offense. If the Legislature had meant this provision to apply only to the specific felony charged in the information, it could easily have said so. In the instant case, defendant possessed the firearms with respect to all the underlying offenses (albeit that he may not statutorily be convicted of felony-firearm with respect to the CCW convictions). The legislative intent is therefore effectuated by making the felony-firearm sentences in the instant case consecutive to all the felony counts. The Legislature's use of "the" felony in subsection (2) refers to the felony of which a defendant is *convicted* pursuant to the first subparagraph – whatever that felony might be. Reading the words "the felony" to refer to a specifically charged felony creates an unnecessary conflict between the language of the first subparagraph and that of the second.

Both parties agree, however, that the judgment of sentence incorrectly indicates that the felony firearm sentence is consecutive to the CCW sentences. We therefore remand this case to the trial court for the ministerial act of issuing an amended judgment of sentence that makes the felony firearm sentences consecutive to all of the felony sentences except the four CCW sentences. *People v Maxson*, 163 Mich App 467, 471; 415 NW2d 247 (1987).

Affirmed but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Joel E. Hoekstra
/s/ Gary R. McDonald
/s/ Patrick M. Meter

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).