STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 26, 2001
v JIMMIE EDWARD JACKSON, Defendant-Appellant.	No. 215002 Oakland Circuit Court LC No. 98-158073-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v JEROME LAMAR WOOD, Defendant-Appellant.	No. 215003 Oakland Circuit Court LC No. 98-158072-FC

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

PER CURIAM.

Following a joint trial before separate juries, defendants were convicted of armed robbery, MCL 750.529; MSA 28.797, and sentenced as habitual offenders, fourth offense, MCL 769.12; MSA 28.1084, to twenty to thirty years' imprisonment. Defendant Wood was also convicted of felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), and was sentenced to a concurrent term of twenty to thirty years' imprisonment. Defendants appeal as of right. We affirm.

Defendants' armed robbery convictions stemmed from evidence that defendant Wood robbed an employee at a Mobil gas station in Southfield, and then departed in a vehicle driven by defendant Jackson. The prosecution introduced evidence of confessions given by defendants, orally and by writing answers to questions, when interrogated by Southfield police detectives and one FBI agent at the Livonia Police Department, before defendants' respective juries to establish their identity as the perpetrators. Both defendants ultimately presented similar defenses, that is,

that they committed an Old Kent Bank robbery in Southfield, as indicated in their respective confessions to the Southfield police detectives and FBI agent, but that they did not commit the gas station robbery and that the evidence on their respective confessions to the gas station robbery should be given no weight. Defendant Jackson testified at trial regarding this theory, while defendant Wood informed the trial court that it was his choice not to testify. Both juries found defendants guilty as charged of the armed robbery count for the gas station robbery. Defendant Wood was also found guilty of being a felon in possession of a firearm.

I

Defendant Jackson raises four issues on appeal, none of which warrant reversal of his armed robbery conviction and sentence.

Defendant Jackson first claims that the trial court committed clear error in denying his motion to suppress his confession because it was made without a knowing, intelligent and voluntary waiver of counsel, contrary to his Fifth and Sixth Amendment rights. We review a trial court's ruling on a motion to suppress for clear error, but will not give a trial court's application of constitutional standards the same deference as its factual findings. *People v Stevens (After Remand)*, 460 Mich 626, 631; 597 NW2d 53 (1999). Questions of law are reviewed de novo. *Id.*

Giving deference to the trial court's finding that the testimony of the FBI agent was credible, and that defendant Jackson's testimony was not credible, we hold that defendant Jackson has not established that his Fifth Amendment right to have counsel present at a custodial interview was violated. Defendant Jackson's conduct of wondering aloud about whether he should have an attorney, as testified to by the FBI agent, was insufficient to invoke the right to counsel. A suspect must unambiguously request counsel. *Davis v United States*, 512 US 452, 459; 114 S Ct 2350; 129 L Ed 2d 362 (1994); *People v Granderson*, 212 Mich App 673, 677; 538 NW2d 471 (1995). Further, giving deference to the trial court's superior opportunity to determine the credibility of the witnesses at the suppression hearing, we hold that defendant Jackson has not established any basis for disturbing the trial court's determination that he made a knowing and intelligent waiver and voluntarily waived the *Miranda*[1] rights. See *People v Daoud*, 462 Mich 621; 614 NW2d 152 (2000); *People v Sexton (After Remand)*, 461 Mich 746, 752-753; 609 NW2d 822 (2000).

We further reject defendant Jackson's claim that his written statement should have been suppressed as a violation of due process because there was no videotape, audiotape, or written confession in his handwriting. Because defendant Jackson has not briefed the due process claim, with citation to authority, we could decline to address it. *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). Further, because defendant Jackson did not move to suppress his statement on this due process ground, this claim has not been preserved for appeal. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). However, even if we were to review this unpreserved claim for a plain due process error, we would not reverse. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Due process does not require an electronically

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

recorded statement. *People v Fike*, 228 Mich App 178, 183; 577 NW2d 903 (1998). No fundamental unfairness is apparent from the record. *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993).

We also note that defendant Jackson has failed to brief his claim that his Sixth Amendment right to counsel was violated. In any event, the Sixth Amendment right to counsel attaches only after adversary judicial proceedings have been initiated and is offense specific. *People v Smielewski*, 214 Mich App 55, 60; 542 NW2d 293 (1995). Because no adversary proceedings had been initiated against defendant Jackson, the Sixth Amendment was not implicated.

Defendant Jackson next claims that he was deprived of the effective assistance of counsel because his attorney opened the door to evidence of other bad acts during his opening statement. We note that this Court previously denied defendant Jackson's motion to remand for an evidentiary hearing on this claim. In any event, the only evidence permitted by the trial court on another crime was defendant Jackson's confession to the Old Kent Bank robbery. Further, the only purpose for which the evidence could be considered, pursuant to the jury instructions, was "whether this evidence tends to show whether the defendant in making statements to law enforcement understood what crime or crimes he was committing." Because the defense strategy presented in the opening statement and continuing throughout the trial and defendant Jackson's own trial testimony was that defendant Jackson did not understand that he was confessing to the gas station robbery, but rather thought that he confessed only to the Old Kent Bank robbery, defendant Jackson cannot establish that his attorney's performance fell below an objective standard of reasonableness. *People v Avant*, 235 Mich App 499, 507-508; 597 NW2d 864 (1999). Defendant Jackson has not overcome the strong presumption that the trial strategy was sound. *Avant, supra*; see also *People v Walker*, 167 Mich App 377, 382; 422 NW2d 8 (1988), overruled in part on other grds *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998) (when evidence obviously points to guilt, it can be a better tactic to admit guilt of some charges, while maintaining innocence of others, since this may actually improve a defendant's credibility). A failed trial strategy does not establish ineffective assistance of counsel. *In re Ayres*, 239 Mich App 8, 22-23; 608 NW2d 132 (1999).

Defendant Jackson next claims that the evidence was insufficient to convict him of armed robbery. We disagree. Viewed most favorably to the prosecution, the evidence, including defendant Jackson's confession, was sufficient to establish defendant Jackson's identity as an aider and abettor to the armed robbery. *Carines, supra* at 757-758; *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified 441 Mich 1201 (1992).

Finally, defendant Jackson seeks resentencing on the ground that an offense variable of the judicial sentencing guidelines was misscored. The judicial sentencing guidelines do not apply to habitual offender sentencings. *People v Hansford (After Remand)*, 454 Mich 320, 323; 562 NW2d 460 (1997). Although the record reflects that the trial court gave some consideration to the judicial sentencing guidelines in its sentencing decision, we hold that defendant Jackson's claim that Offense Variable 2 was misscored provides no cognizable basis for relief. *People v Raby*, 456 Mich 487, 497; 572 NW2d 644 (1998); see *People v Cain*, 238 Mich App 95, 131; 605 NW2d 28 (1999).

II

Defendant Wood raises three issues on appeal regarding his convictions, none of which warrant relief.

Defendant Wood first claims that he was denied a fair trial as a result of prosecutorial misconduct. We disagree.

Because defendant Wood did not object to the prosecutor's opening statement, we limit our review to whether he has shown a basis for relief under the plain error standards in *Carines*, *supra* at 763. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). The opening statement is the time for the prosecutor to make a full and fair statement of the case and the facts that he or she intends to prove. MCR 6.414(B). Having reviewed the opening statement in the case at bar and considering the robbery victim's trial testimony, we do not agree with defendant Wood's claim that the prosecutor's remark about the victim recognizing the man who robbed her constituted misconduct. The victim did, in fact, give testimony about having seen the man before. The remark, examined in context, does not plainly suggest that the victim previously identified the man as defendant or otherwise establish misconduct. See *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997).

Further, defendant Wood has not plainly established that the prosecutor's closing and rebuttal argument constituted misconduct. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995); *Schutte*, *supra* at 721. Even if there was some prosecutorial misconduct, it was cured by the judge's instruction that attorney arguments are not evidence. *Bahoda*, *supra* at 281.

With regard to defendant Wood's claim that the prosecutor engaged in misconduct by eliciting testimony from three Livonia police officers that defendant may have been involved in other armed robberies, we note that no defense objection was made to the prosecutor's questioning of the first two witnesses, Sergeant Schlachter and Sergeant Caid. Had an objection been timely made, the trial court would have had an opportunity to cure any perceived error by precluding further questions on the nature of the Livonia police investigation or by giving a curative instruction. *People v Badour*, 167 Mich App 186, 197; 421 NW2d 624 (1988), rev'd on other grounds sub nom *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990). Moreover, the trial court took action to preclude questions about the nature of the Livonia investigation when objections were made by defendant Jackson's attorney, and joined by defendant Wood's attorney, during the testimony of the third Livonia police witness, Sergeant Teeter.

In any event, we find that the record does not plainly support defendant Wood's claim that the prosecutor attempted to introduce "other acts" evidence under MRE 404(b). Examined in context, we find the prosecutor's brief questioning on the nature of the investigation was merely an effort to give some context to the testimony of the Livonia police officers about the statement made by defendant Wood to Sergeant Schlachter that led to the seizure of a shotgun, which the robbery victim identified at trial as having been used by the perpetrator. Indeed, we note that the prosecutor specifically made a contextual argument during a discussion on objections to Sergeant Teeter's testimony.

Because the prosecutor did not elicit testimony on the details regarding why the Livonia police considered defendant Wood to be a suspect in armed robberies, and because some context for the Livonia Police Department's involvement in this matter and defendant Wood's statement about the shotgun arguably had some relevancy, we conclude that defendant Wood has not shown plain prosecutorial misconduct. See generally *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996); *People v McReavy*, 436 Mich 197, 214-215; 462 NW2d 1 (1990).

We also note that defendant Wood's attorney had previously asserted in his opening statement that the proofs would show that the Livonia police were investigating defendant Wood and arrested him. Further, defense counsel made use of this evidence in closing argument by suggesting that defendant Wood may have signed a statement containing a confession because he was bombarded by the police about numerous crimes while in custody at the Livonia Police Department. Counsel also refused the cautionary instruction offered by the trial court during Sergeant Teeter's testimony as a matter of trial strategy.

Given this record, we conclude that defendant Wood has established neither plain prosecutorial misconduct nor that his substantial rights were affected by the prosecutor's questioning of Sergeant Caid and Sergeant Schlachter. *Carines, supra* at 763; see also *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999) ("[t]he prosecutor is entitled to introduce evidence that he legitimately believes will be accepted by the court, as long as that attempt does not prejudice defendant"). Further, defendant Wood has not shown that the prosecutor's questioning of Sergeant Teeter deprived him of a fair trial. Finally, we find no basis for reversal due to alleged cumulative error. *Bahoda, supra* at 292-293, n 64.

Defendant Wood next claims that the trial court erred by allowing evidence of his involvement in the Old Kent Bank robbery to be presented to his jury to establish his identity pursuant to MRE 404(b). We disagree. Although the trial court did not state that it conducted the balancing test under MRE 403, reversal is not required because it is apparent from the record that the court was aware of this issue and properly resolved it. See *People v Lindberg*, 162 Mich App 226, 231; 412 NW2d 272 (1987). The trial court deferred its ruling until evidence unfolded at trial, consistent with our Supreme Court's observation that the MRE 403 determination is "best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony." *People v Sabin (After Remand)*, 463 Mich 43, 70-71; 614 NW2d 888 (2000), quoting *People v VanderVliet*, 444 Mich 52, 81; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994). We further note that the proofs on the Old Kent Bank robbery were limited to defendant Wood's own confession, as testified to by Southfield Police Detective Helgert, being offered to prove the truth of the matter asserted, MRE 801(d)(2), and that the only purpose for which the evidence could be considered, pursuant to the jury instructions, was "whether this evidence tends to show who committed the crime that the defendant is charged with." Given this record, we conclude that defendant Wood has not shown that the trial court's ruling to allow the evidence of the Old Kent Bank robbery was an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Finally, defendant Wood claims that he was denied the effective assistance of counsel as a result of his attorney's alleged failure to fully investigate and raise material defenses. We note that this Court previously denied defendant Wood's untimely motion to remand for an

evidentiary hearing, filed with a supporting affidavit, because it was not persuaded of the need for remand at that time. Limiting our review to the record, we conclude that defendant Wood has not established any basis for reversal. *Avant, supra* at 507-508. Further, having considered his affidavit in light of the entire record, we are not persuaded that the case warrants a remand for an evidentiary hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

With regard to defendant Wood's claim that his attorney should have moved to suppress evidence of his confession, there is some evidence in the record that defendant Wood may have waived a suppression hearing. However, even if there were no waiver, we are not persuaded that defendant Wood would be able to show a reasonable probability that the trial court would have granted a motion to suppress evidence of his confessions or statements about the shotgun to law enforcement officers. Assuming that defendant Wood would have testified at a suppression hearing in the manner claimed in his affidavit, defendant Wood would have, at best, presented a credibility issue similar to that presented to the trial court when denying defendant Jackson's motion to suppress.

With regard to defendant Wood's claim that his attorney had him waive a preliminary examination, it is clear from the existing record that defendant Wood cannot establish the requisite deficient performance or prejudice. *Avant, supra* at 507. The preliminary examination is only a statutory right providing for the judicial determination of probable cause. *People v Hall*, 435 Mich 599, 603; 460 NW2d 520 (1990).

With regard to defendant Wood's claim that his attorney convinced him not to testify, this claim is inconsistent with his remark at the trial that it was his choice not to testify. In any event, if a defendant decides not to testify or acquiesces in his attorney's decision not to testify, the right to testify is deemed waived. *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). Further, the decision on whether to call a defendant to testify is a matter of trial strategy. *People v Alderete*, 132 Mich App 351, 360; 347 NW2d 229 (1984). This Court will not substitute its judgment for that of defense counsel in matters of trial strategy. *Avant, supra* at 508. Hence, based on the existing record, we are not persuaded that defendant Wood can establish ineffective assistance of counsel.

Finally, we are unpersuaded that having the jury view the videotape from the gas station could have provided a substantial defense. *People v Bass (On Rehearing)*, 223 Mich App 241, 252-253; 565 NW2d 897 (1997), vacated in part on other grds 457 Mich 866; 577 NW2d 667 (1998). Defendant Wood has not shown that either reversal or a remand for an evidentiary hearing is warranted.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Patrick M. Meter