

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HURU CLARK, a/k/a TONY CLARK,

Defendant-Appellant.

UNPUBLISHED

April 23, 2002

No. 229095

Muskegon Circuit Court

LC No. 99-043717-FC

Before: Owens, P.J., and Markey and Murray, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions for assault with intent to rob while armed, MCL 750.89, possession of a firearm during the commission of a felony, MCL 750.227b, and being a felon in possession of a firearm, MCL 750.224f. We affirm.

Defendant first contends that the trial court abused its discretion when it denied defendant's motion for a mistrial midway through the jury trial. Defendant moved for the mistrial after an interrogating officer in this case testified, contrary to a motion in limine ruling, that defendant had told her that he had hit someone over the head with a gun he was carrying while trying to escape from police pursuit. We find that the evidence, while improperly admitted, did not so prejudice defendant as to compromise his right to a fair trial. Therefore, it was not an abuse of discretion for the trial court to deny the motion.

"A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Here, evidence that defendant was carrying a gun, that he had stuck the gun in the victim's side, and that he had pointed it at another victim was all properly admitted. Therefore, evidence that he hit someone with the gun was not severely prejudicial because the jury knew defendant had a gun and had used it to threaten the victims. Further, as the trial court noted in denying the motion, the interrogating officer's testimony included details of a number of lies that defendant told during his interrogation; we agree that the fact that defendant's statements to the officer were replete with obvious falsehoods lessens the likelihood that the jury would unequivocally accept defendant's comments to the officer. Finally, defense counsel requested and the trial court read a cautionary instruction that directed the jury to disregard the improper testimony. In concluding that a mistrial was not necessary, we rely upon the "almost invariable assumption of the law that jurors follow their instructions" *People v Manning*, 434 Mich 1, 8 (Boyle, J.),

21 (Brickley, J.); 450 NW2d 534 (1990), quoting *Richardson v Marsh*, 481 US 200, 206; 107 S Ct 1702; 95 L Ed 2d 176 (1987). For these reasons, we do not believe that defendant was prejudiced by the improper testimony, and therefore the trial court did not abuse its discretion when it refused to grant defendant's motion for a mistrial.

Next, defendant contends that he should have been allowed to testify regarding the instant assault while refusing to answer questions about the robbery that occurred later the same morning and for which defendant was convicted in another separate proceeding. Both our Supreme Court and this Court have previously rejected this interpretation of the Fifth Amendment. In *People v Robinson*, 306 Mich 167, 176; 10 NW2d 817 (1943), our Supreme Court, distinguishing the rights of a defendant from one who is merely a coconspirator, stated:

One who is on trial for a crime cannot be compelled to testify, either on his own behalf or for the people. However, if he elects to do so, he is held to have waived his constitutional right of refusing to answer any question material to the case, even though the answer tends to prove him guilty of some other crime than that for which he is on trial.

More recently, in *People v Siler*, 171 Mich App 246, 257; 429 NW2d 865 (1988), this Court reasoned as follows when confronted with a similar argument:

Defendant also claims that his Fifth Amendment right to remain silent was violated when the trial court ordered him to submit to cross-examination. We find no merit to this argument. One who is on trial for a crime cannot be compelled to testify, either on his own behalf or for the people. However, if he elects to do so, he is held to have waived his constitutional right of refusing to answer any question material to the case. Defendant elected to testify. Once he took the stand on his own behalf, the prosecutor had the right to cross-examination. The trial court properly instructed defendant to answer the prosecutor's questions. No error occurred. [Citations omitted.]

Here, defendant elected to testify in his own defense, even after the trial court had informed him that he would not be allowed a limited assertion of his Fifth Amendment right. Therefore, once he took the stand he was subject to cross-examination and waived his privilege against self-incrimination. On appeal, defendant offers no reason to reject the rule noted above, and we see no reason to do so. A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997). Thus, defendant is not entitled to relief on this basis.

Nor was defendant denied the effective assistance of counsel with regard to his testimony. Because no evidentiary hearing was held, our review is limited to mistakes apparent on the record. *People v Portillo*, 241 Mich App 540, 543; 616 NW2d 707 (2000). Although defendant's claim is that he was prejudiced by the inclusion of the Graves robbery evidence in the instant trial and that counsel was ineffective for failing to join the instant case with the robbery prosecution, we note that if the trials had been joined, all of the robbery evidence would have been admitted during any joined trial. Therefore, joinder of the cases would not have prevented any evidence from being admitted; indeed, it would have allowed more evidence of the robbery to be put before the jury, and defendant would not have been allowed limited use of

his Fifth Amendment rights to testify regarding one crime and not another. No error occurred regarding this decision. Furthermore, regarding defendant's claim that double jeopardy is somehow implicated here, the robbery and the instant assault involved separate victims and constituted separate crimes; thus, the double jeopardy rule cannot apply. Double jeopardy does not apply to crimes against persons, committed against different victims, even if the crimes occurred during the same criminal transaction. *People v Winquest*, 115 Mich App 215, 218; 320 NW2d 346 (1982). Given this record, counsel's representation was not ineffective. Defendant is not entitled to relief on this basis.

Defendant's third contention on appeal relies upon the premise that a defendant is entitled to be represented by counsel whenever he is subject to an identification procedure. From this assertion, defendant argues that because he was subject to an on-scene identification and because no counsel was present during that identification, the identification was improper. Therefore, defendant concludes that his counsel's failure to object or move to suppress the testimony regarding the on-scene identification was error that prejudiced defendant's right to a fair trial. We disagree.

Defendant's initial premise that he was entitled to counsel during the on-scene identification is mistaken. While a defendant is generally entitled to have counsel present during an identification procedure, *People v Jackson*, 391 Mich 323, 337-338; 217 NW2d 22 (1974), overruled in part on other grounds in *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999), no counsel is required at a prompt on-the-scene corporeal identification. *People v Winters*, 225 Mich App 718, 721-729; 571 NW2d 764 (1997). Here, Graves identified defendant on-the-scene after he had been caught in a garage. Defendant did not have a right to counsel at this identification. *Id.* Therefore, any objection on this basis or any motion to suppress on this basis would have been futile. Counsel is not ineffective for failing to bring a futile motion. *People v Flowers*, 222 Mich App 732, 737-738; 565 NW2d 12 (1997). Thus, defendant's right to the effective assistance of counsel was not violated by a failure to move to suppress the on-scene identification, and defendant is not entitled to relief on this basis.

Defendant next argues that the trial court abused its discretion when it refused to grant the jury's request to have the testimony of one of the officers involved in defendant's arrest read back to the jury. We disagree. The court rule at issue here, MCR 6.414(H), states:

If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

"An abuse of discretion exists when the court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias." *People v Gadomski*, 232 Mich App 24, 33; 592 NW2d 75 (1998). Here, the trial court informed the jury that it should rely on its collective memory to determine if it could agree on what Hepworth had said, but that if it could not, it should send a second note and the trial court would then have the testimony read back. This instruction by the trial court closely tracks the discretion

granted courts by MCR 6.414(H). We therefore find no abuse of discretion. Defendant is not entitled to relief on this basis.

Defendant's final issue on appeal is that his sentence violates the principle of proportionality. However, his crime was committed on August 6, 1999 and is therefore subject to the legislative guidelines. MCL 769.34(2). MCL 769.34(10) provides, in pertinent part:

If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.

In this case, defendant's sentence falls within the applicable guidelines range; his minimum sentence was 336 months (twenty-eight years) and his guidelines range was 135 to 450 months. Further, defendant does not claim any error in the scoring of the guidelines or inaccuracy of the information relied upon in determining the sentence. Therefore, we are constrained to affirm defendant's sentence. MCL 769.34(10). Defendant is not entitled to resentencing.

We affirm.

/s/ Donald S. Owens
/s/ Jane E. Markey
/s/ Christopher M. Murray