STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 30, 2004
v	No. 246345 Kalkaska Circuit Court
IVAN LEE BECHTOL, Defendant-Appellant.	LC No. 01-002162-FC

Before: Neff, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree home invasion, MCL 750.110a(2), conspiracy to commit first-degree murder, MCL 750.316(a) and MCL 750.157a, conspiracy to commit kidnapping, MCL 750.349 and MCL 750.157a, and attempted kidnapping, MCL 750.349 and MCL 750.92. Defendant was sentenced to ten to twenty years' imprisonment for the first-degree home invasion conviction, life imprisonment for the conspiracy to commit first-degree murder conviction, eighteen to twenty-eight years' imprisonment for the conspiracy to commit kidnapping conviction, and three to five years' imprisonment for the attempted kidnapping conviction. Defendant's home invasion sentence is to be served consecutively to his other sentences. We affirm.

I

This case stems from the abduction and murder of a twenty-year-old woman, whose body was found in her partially submerged car in the Torch River on September 5, 2001. Two days earlier, in the early morning hours of September 3, 2001, defendant was involved in a home invasion and attempted abduction of the victim from a trailer by William Cron, who had a previous relationship with the victim. It was the prosecutor's theory that defendant conspired with Cron to kidnap and murder the victim to silence her concerning the perpetrators' drug use or Cron's other alleged criminal activity.

II

Defendant first argues that he was denied due process when the prosecution intimidated a potential defense witness into not testifying at trial. Attempts by a prosecutor to intimidate a proposed witness into not testifying can constitute a denial of due process. *People v Hooper*, 157 Mich App 669, 674-675; 403 NW2d 605 (1987). However, contrary to defendant's assertion, the

record establishes that the prosecutor did not intimidate the proposed witness into not testifying. The prosecutor never told the witness that he would be prosecuted if he testified. Instead, the prosecutor advised the court, out of the presence of the witness and jury, that it may need to inform the witness of his rights under the Fifth Amendment.[1] The court questioned the witness outside the presence of the jury, see *People v Poma*, 96 Mich App 726, 732; 294 NW2d 221 (1980), and the witness subsequently asserted his privilege.

Defendant additionally argues that the witness did not have a valid Fifth Amendment right to assert. However, "testimony having even a possible tendency to incriminate is protected against compelled disclosure." *People v Lawton*, 196 Mich App 341, 346; 492 NW2d 810 (1992); see also *Poma*, *supra* at 733 (observing that a hearing should be held to determine if a witness "will either *properly or improperly* claim the protection against self-incrimination" [emphasis added]). Here, the witness had written a letter to defense counsel offering favorable testimony in exchange for defense counsel's procuring the dismissal of various charges pending against the witness. The witness also threatened to not testify if counsel did not comply with his demands. Given the concern that this could expose the witness to prosecution, e.g., under MCL 750.122(3)(b) referenced by defendant, we reject defendant's argument.

III

Defendant argues that he was denied the effective assistance of counsel when counsel failed to object to testimony regarding defendant's invocation of the right to counsel and the right to remain silent during police questioning. "The Fifth Amendment guarantees an accused the right to remain silent during his criminal trial, and prevents the prosecution from commenting on the silence of a defendant who asserts the right." *Jenkins v Anderson*, 447 US 231, 235; 100 S Ct 2124; 65 L Ed 2d 86 (1980). To establish an ineffective assistance of counsel claim, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing norms, and (2) that counsel's deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate prejudice, the defendant must show that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. *Strickland*, *supra* at 694; *Pickens*, *supra* at 314, 326-327.

In *People v Schollaert*, 194 Mich App 158, 164; 486 NW2d 312 (1992), we addressed the issue whether a defendant's constitutional rights are violated by the admission as substantive evidence of testimony concerning a defendant's silence before either custodial interrogation or the giving of *Miranda*[2] warnings. We held that the admission of defendant's silence before a custodial interrogation or *Miranda* warnings did not violate his constitutional rights. *Schollaert*, *supra* at 166-167; see also *People v Sutton (After Remand)*, 436 Mich 575, 599; 464 NW2d 276 (1990). Here, defendant did not receive *Miranda* warnings before he requested a lawyer, nor

[1] US Const, Am V.

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

was he subject to custodial interrogation.[3] Thus, the statement was admissible. Under these circumstances, counsel cannot be deemed to have rendered ineffective assistance by failing to raise a futile objection. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

IV

Defendant argues that because a statement made by the victim to police investigating the events giving rise to the home invasion charge was testimonial, its admission at trial violated his rights under the Confrontation Clause because he did not have an opportunity to cross-examine her. The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI. Defendant's argument is predicated on *Crawford v Washington*, ___ US ___; 124 S Ct 1354; 158 L Ed 2d 177 (2004). *Crawford* held that for testimonial evidence to be admissible at trial, the Sixth Amendment demands that the declarant be unavailable and that the defendant have had "a prior opportunity for cross-examination" of the declarant. *Id.* at 1374. While the Court decided to "leave for another day any effort to spell out a comprehensive definition of 'testimonial[,]'" the Court did indicate that "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.*

The only exemplar on this list that arguably applies is the last—police interrogations. Clearly, the victim is unavailable. We conclude, however, that the victim's statement to the police officer was not the product of a structured police interrogation. Thus, the rule of *Crawford* does not apply. In any event, even if the statement was testimonial in nature, we find any error in its admission harmless beyond a reasonable doubt given that testimony regarding the events set forth in the victim's statement was properly presented to the jury through other testimony. *People v McPherson*, 263 Mich App 124, 131; 687 NW2d 370 (2004) (observing that "when a trial court commits an error that denies a defendant his constitutional rights under the Confrontation Clause, US Const, Ams VI and XIV, we need not reverse if the error is harmless beyond a reasonable doubt").

V

Defendant argues that the trial court erred in determining that defendant's convictions arose from the same transaction and thus sentencing him to consecutive terms of imprisonment. We disagree. The primary goal of judicial interpretation of statutes is "'to ascertain and give effect to the intent of the legislature.'" *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004), quoting *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002). If the plain meaning of the statute is clear, judicial construction is neither necessary nor permitted. *Weeder, supra*; *Pasha, supra.*

[3] While defendant was in police custody, he was not subjected to police interrogation while in custody.

MCL 750.110a(8) provides: "The court may order a term of imprisonment imposed for home invasion in the first degree to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction." If statutory terms remain undefined by the Legislature, this Court may consult dictionary definitions of those terms. *People v Stone*, 463 Mich 558, 563; 621 NW2d 702 (2001). Black's Law Dictionary (6th ed) defines 'transaction' as: "[a]ct of transacting or conducting any business; between two or more persons; . . . that which is done; an affair." Random House Webster's College Dictionary (2nd ed) defines 'arise' as "to result; spring or issue . . . ."

Despite defendant's assertion to the contrary, the evidence presented in this case shows that the conspiracy, attempt, and home invasion convictions arose from the same overall scheme or plan to abduct the victim, and thus from the same transaction. Therefore, the trial court did not err in imposing consecutive sentences.

VI

In a related argument, defendant asserts that because the trial court's imposition of consecutive sentences increased his cumulative penalty, a jury should have determined whether the crimes arose from the same transaction. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000); see also *Blakely v Washington*, ___ US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, MCL 750.110a(8), does not permit the trial court to increase the maximum penalty beyond the statutory maximum on the basis of judicial fact-finding. Although a defendant is exposed to an overall longer period of imprisonment when consecutive sentences are imposed, the penalty for each crime is not increased beyond the statutory maximum.

VII

Defendant raises two additional issues in his Standard 11 brief. We are unpersuaded that either claim warrants reversal of his conviction.

A

Defendant argues that he was denied his right to a fair trial when the trial court allowed the prosecutor to introduce a witness's prior consistent statement, MRE 801(d)(1)(B), absent an allegation that the witness had recently fabricated his story and despite the fact that the witness had a strong motivation to lie when he made the prior statement. We disagree.

Defendant failed to preserve this issue for appeal by objecting to the admission of the evidence during trial. This Court reviews unpreserved evidentiary issues for plain error affecting defendant's substantial rights. *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002). "Reversal is only warranted if the unpreserved error resulted in the conviction of an actually innocent defendant" or "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*.

Defendant has not shown plain error that affected his substantial rights. Four requirements must be satisfied for admission of a prior consistent statement under MRE 801(d)(1)(B): (1) the declarant must testify at trial and be subject to cross-examination, (2) there must be an express or implied charge of recent fabrication or improper influence or motive, (3) the statement must be consistent with the declarant's challenged testimony, and (4) the statement must be made before the time that the motive to fabricate arose. *People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000).

Contrary to defendant's assertion that there was no allegation of recent fabrication in this case, the record indicates that defense counsel alleged that the witness fabricated the story to obtain a plea deal with prosecutors. Further, it appears that the statement was made before, not after an offer of leniency, i.e., the time that the alleged motive to lie arose. *Id*. at 711. Thus, we find no plain error. Moreover, we cannot conclude that even if the admission of the prior statement was error, it warrants reversal of defendant's conviction. *Taylor, supra.*

B

Defendant argues that the evidence was insufficient to sustain his convictions. We disagree.

Viewed in a light most favorable to the prosecution, there was sufficient evidence presented to sustain defendant's convictions. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). Contrary to defendant's argument, there was sufficient evidence to sustain defendant's convictions of first-degree home invasion and attempted kidnapping on an aiding and abetting theory given the evidence of William Cron's entry into the trailer where the victim was staying and his attempt to forcibly remove her from the trailer, and given evidence of defendant's acknowledgement of his involvement. The jury could properly choose to reject defendant's exculpatory testimony in assessing witness credibility. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Likewise, there was sufficient evidence to sustain defendant's conspiracy convictions. The prosecutor presented testimony that established defendant's involvement in the subsequent abduction and murder of the victim by conspiring with Cron. Although defendant challenges this testimony, as noted above, matters of credibility are left to the trier of fact. *Id*.

We reject defendant's argument that because he was taken into temporary custody on September 3, 2001, and the victim was found dead on September 5, 2001, that no agreement could have continued during that time to support a conviction of conspiracy. The offense of conspiracy is complete upon the formation of the agreement. *People v Justice (After Remand)*, 454 Mich 334, 345-346; 562 NW2d 652 (1997). The fact that defendant was in temporary custody during the period at issue does not automatically negate proof of defendant's involvement in a conspiracy to kidnap and murder the victim.

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Bill Schuette