STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 22, 2005
v	No. 256121 Kent Circuit Court
SONNY AMES BAEZ, Defendant-Appellant	LC No. 03-011789-FH

Before: Bandstra, PJ, and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals by right from his jury conviction for first-degree home invasion, MCL 750.110a(2). He was sentenced as an habitual offender, fourth offense, to 15 to 50 years' imprisonment. We affirm.

Defendant went to Monica Arizola's house several times on December 1, 2003, to retrieve rings he had pawned to her. Defendant was unable to retrieve the rings because Arizola was not home. At approximately 11 p.m. defendant returned to Arizola's house. Jonathan Betts, a resident of the home, opened the door for defendant and told defendant that Arizola was not home. (Arizola was home, but she was sleeping.) Betts and Shane Karwowski, another resident of the home, testified that defendant pushed his way into the house and began arguing with Betts about getting the rings back. Betts and Karwowski also testified that defendant pulled out a gun and fired it in the house before leaving at his girlfriend's insistence. Arizola called 911 because she heard arguing. Officer Rieth responded to the scene and was shown a hole in the living room floor. The forensics team determined that the hole was caused by a .22 caliber bullet. Karwowski testified that he found a .22 caliber shell in the dining room approximately five to ten minutes after Officer Rieth left the house. The shell was admitted into evidence.

Defendant first argues that he is entitled to appellate review of his sentence, even though it is within the appropriate sentencing guidelines range, because MCL 769.34(10) is unconstitutional. We disagree.

Defendant failed to preserve this issue for appeal. We review unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764, 774; 597 NW2d 130 (1999).

Defendant argues that MCL 769.34(10) violates the constitutional principle of separation of powers located in Article 3, § 2 of the Michigan Constitution. MCL 769.34(10) provides, in relevant 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." Article 3, § 2 provides: "The powers of government are divided into three branches: legislative; executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

In *People v Garza*, 469 Mich 431; 670 NW2d 662 (2003), our Supreme Court, addressing this exact argument, held that MCL 769.34(10) is constitutional. The Court opined:

> As we explained in *People v Hegwood*, 465 Mich 432, 436-437; 636 NW2d 127 (2001):
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> > [T]he ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature. Const 1963, art 4, § 45. The authority to impose sentences and to administer the sentencing statutes *enacted by the Legislature* lies with the judiciary. See, e.g., MCL 769.1(1). [Emphasis supplied.]
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> We have not been presented with a persuasive argument that the constitution of this state or of this nation bars the Legislature from enacting such a measure; nor have we located such an argument on our own. Accordingly, we reject the defendant's assertion that the first sentence of MCL 769.34(10) is unconstitutional. [*Garza, supra* at 434-435.]

Defendant argues that *Garza* is not on point because "the Court in that case did not address the fact that the [L]egislature is granting sentencing discretion to trial courts that can be reviewed by the Supreme Court, but not the Court of Appeals." Defendant contends that "[t]his distinction by the [L]egislature violates the principle of 'one court of justice' found in Article 6, section 1 of the Michigan Constitution." Defendant, however, does not explain how "this distinction" violates the principle of "one court of justice." Although MCL 769.34(10) only mentions this Court, the statute affects our Supreme Court as well. When this Court properly affirms a sentence pursuant to MCL 769.34(10), our Supreme Court has no basis on which to review our decision.

Defendant also claims that he has a constitutional right to an appeal of his sentence and that MCL 769.34(10) violates that right and, therefore, violates his right to due process of law. Defendant contends that his constitutional right to an appeal of his sentence is guaranteed by Article 1, § 20 of the Michigan Constitution. That section reads, in pertinent part:

> In every criminal prosecution, the accused shall have the right . . . to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court; and as

> provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.

This section clearly grants a criminal defendant the right to an appeal; however, it does not grant the defendant the specific right to appeal every aspect of his sentence. As stated above, our Supreme Court has not found anything in our constitution or the federal constitution that MCL 769.34(10) violates. This Court must affirm defendant's sentence because MCL 769.34(10) is not unconstitutional, and defendant's sentence is within the appropriate sentencing guidelines range.

Defendant next argues that defense counsel was ineffective in failing to object to the admission of the .22 caliber shell because there were gaps in the chain of custody. We disagree.

First we note that defendant failed to preserve this issue for appeal. We review unpreserved issues for plain error affecting substantial rights. *Carines, supra* at 774.

Defendant contends that a gap in the chain of custody exists because Karwowski found the shell after Officer Rieth had conducted a brief search of the premises and left Arizola's home. For the purposes of addressing this issue, this Court will assume there is a gap in the chain of custody.

Defense counsel is not ineffective for failing to object to admissible evidence. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Generally, all relevant evidence is admissible. MRE 402. Evidence is relevant if it is helpful in shedding light on any material point. *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). The shell was relevant because it sheds light on the complainants' allegations that defendant was armed with a gun and fired the gun in the house.

Further, the admission of evidence does not require a perfect chain of custody. *People v White*, 208 Mich App 126, 130; 527 NW2d 34 (1994). Any deficiency in the chain of custody is addressed to the weight of the evidence rather than its admissibility, once the proffered evidence is shown to a reasonable degree of certainty to be what its proponent claims. *Id*. at 130-131. Here, the prosecution showed that the shell was to a reasonable degree of certainty, what the prosecution claimed it to be – that is, the shell of a bullet fired from defendant's gun in Arizola's house on the night of December 30, 2003. Importantly, defense counsel, in his closing, argued that the shell should not be given great weight by the jury. He reminded them that the bullet was never found and that the police did not find the shell. The people making the accusations against defendant found it. Defense counsel was clearly not ineffective.

Defendant next argues that he is entitled to an evidentiary hearing to establish with evidence his claim that defense counsel was ineffective. We disagree.

Defendant failed to preserve this issue for appeal. We review unpreserved issues for plain error affecting substantial rights. *Carines, supra* at 774.

Defendant is not entitled to an evidentiary hearing because he did not seek one at the trial court level. *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973). A defendant is entitled to an order directing the trial court to conduct an evidentiary hearing only if the record

"manifestly shows" that the trial court judge refused or would have refused such a hearing. *Id*. at 443-444. There is no evidence in the record that would support such a finding.

Defendant next argues that the prosecutor's allusion to defendant's invocation of his Fifth Amendment right to remain silent was plain error. We disagree.

Defendant failed to preserve this issue for appeal. We review unpreserved issues for plain error affecting substantial rights. *Carines, supra* at 774.

At trial, the prosecutor indirectly informed the jury that defendant declined to speak to the police about the incident. This was not plain error because the record contains no evidence that defendant invoked his Fifth Amendment right to remain silent. Use of a defendant's silence is error only "[w]here the record indicates that a defendant's silence is attributable to an invocation of his Fifth Amendment privilege or a reliance on *Miranda* warnings." *People v McReavy*, 436 Mich 197, 201; 462 NW2d 1 (1990).

Defendant finally argues that he was denied a fair trial by the cumulative effect of the alleged errors. We disagree.

Defendant failed to preserve this issue for appeal. We review unpreserved issues for plain error affecting substantial rights. *Carines, supra* at 774.

Defendant was not denied a fair trial by the cumulative effect of the alleged errors. As discussed above, MCL 769.34(10) is not unconstitutional; defense counsel was not ineffective; defendant is not entitled to an evidentiary hearing; and the prosecutor's allusion to defendant's silence was not plain error.

We affirm.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Jane E. Markey