STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 22, 2005
v GREGORY RAY WASHINGTON, Defendant-Appellant.	No. 257149 Wayne Circuit Court LC No. 04-001652-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v RUFUS GENE LANGO, Defendant-Appellant.	No. 257150 Wayne Circuit Court LC No. 04-001652-02

Before: Talbot, P.J., and White and Wilder, JJ.

PER CURIAM.

This case arises out of a robbery and shooting that occurred outside of a nightclub in the city of Detroit. The shooting resulted in the death of Martin Ngaima and the injury of Alex Barmon. Defendants Gregory Ray Washington and Rufus Gene Lango appeal as of right their jury trial convictions for felony murder, MCL 750.316(1)(b), assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Washington also appeals a conviction for being a felon in possession of a firearm, MCL 750.224f. Washington was sentenced to life imprisonment for the felony murder conviction, fifteen to thirty years' imprisonment for the assault with intent to murder conviction, one to five years' imprisonment for being a felon in possession of a firearm, and two years' imprisonment for the felony-firearm conviction. Lango was sentenced to life imprisonment for the felony murder conviction, fifteen to forty years' imprisonment for the assault with intent to murder conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

I.

On appeal, Lango first argues that the trial court erred in admitting his statements to the police implicating himself in past crimes because his statements were involuntary, irrelevant, and inadmissible evidence of prior bad acts. Washington argues that even if these statements were properly admissible against Lango, they were insufficiently redacted to protect his Sixth Amendment right to confront his accuser. We disagree.

With regard to Lango's claim that his statements were not given voluntarily, our Supreme Court has made clear that an effective waiver of *Miranda*[1] rights must be both voluntary given, and knowingly and intelligently made. *People v Daoud*, 462 Mich 621, 633; 614 NW2d 152 (2000). In determining whether *Miranda* rights were validly waived, the trial court must review the totality of the objective circumstances surrounding the waiver. *Id.* at 634. This Court reviews for clear error the trial court's factual findings regarding a defendant's waiver of *Miranda* rights. *Id.* at 629.

The trial court held a *Walker*[2] hearing, at which Officer Newman testified that, although Lango asked to speak with his mother, he never asked for a lawyer. Officer Gutierrez testified that Lango was fed prior to, and during, questioning and was allowed to use the restroom. He also testified that Lango had a calm demeanor during all of the questioning. Lango was able to read his constitutional rights forms without difficulty, and he initialed each right listed on the form and signed each form at the bottom—one form for each statement he made. Further, Lango was given the opportunity to read and make corrections to his statements. Lango initialed all changes on his statements, and he signed the bottom of each page of his statements. Considering that Lango completed the twelfth grade and that he had prior experience with law enforcement, the trial court determined that Lango's will was not overborne and that his confession was not involuntary. Given that the trial court's determination relies in large part on the credibility of the witnesses, the trial court did not clearly err in determining that Lango's statement was not involuntary.

With regard to the statements' admissibility against Lango, to be admissible, the bad acts evidence must be relevant and must be offered for a purpose other than to establish Lango's character or propensity to commit the crime, and its probative value may not be substantially outweighed by the danger of unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). This Court reviews the trial court's decision to admit such evidence for a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). A trial court abuses its discretion when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

A proper purpose for admission of other bad acts evidence is to show that a defendant implemented a common plan, scheme, or system in carrying out the charged and uncharged acts.

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

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

People v Sabin (*After Remand*), 463 Mich 43, 61-64; 614 NW2d 888 (2000). If so, the "evidence of similar misconduct is logically relevant to show that the charged act occurred." *Id.* at 63. Admissibility requires "such a concurrence of common features that the uncharged and charged acts are naturally explained as individual manifestations of a general plan," but "distinctive and unusual features are not required" so long as the evidence supports "the inference that the defendant employed the common plan in committing the charged offense." *People v Hine*, 467 Mich 242, 251- 253; 650 NW2d 659 (2002).

Here, Lango's statements describe a series of robberies he referred to as "missions," in which Lango and others would drive up alongside people near restaurants, bars, or hotels, exit the vehicles, point guns at their victims, and rob them of their possessions. Lango's statements also described the dark colored clothes he and his accomplices would wear and the weapons they would use, which matched the dark colored clothes and the AK-47 and shotgun that witnesses testified they saw outside of Bobby G's during the commission of the charged offenses. The similarities between the robberies described in Lango's statements and the robbery in the present case are congruent enough that the trial court did not clearly abuse its discretion in admitting Lango's statements against Lango.

Although Lango's statements were properly admissible against Lango, they were not admissible against Washington, and Washington contends that the trial court's redaction of Lango's statements was insufficient to prevent the jury from inferring that Lango's statements also implicated him. Washington, however, affirmatively consented to the trial court's redaction of Lango's statement, thus waiving this issue on appeal. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) ("One who waives his rights may not seek appellate review of a claimed deprivation of those rights, for his waiver extinguishes any error.").

However, even if the trial court's redaction of Lango's statements was not proper and the issue had not been waived, reversal is not required. Under *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), any statement by a non-testifying codefendant that implicates another defendant must be properly redacted to protect the defendant's Sixth Amendment right to confront witnesses against him. "[A] defendant's statements are admissible if the co-defendant's name is redacted and replaced with a neutral pronoun or phrase such as 'person' or 'individual' . . . provided there is reasonable assurance that use of such a neutral phrase does not result in a statement that is 'directly accusatory' . . . in the same manner as an unredacted or unrevised statement." *US v Smallwood*, 307 F Supp 2d 784, 788-789 (ED Va 2004), referencing *Bruton*, *supra*. When redaction is coupled with a limiting instruction to the jury that it may not consider the evidence against anyone other than the confessing defendant, a defendant's Confrontation Clause rights are sufficiently protected. See *United States v Sutton*, 337 F3d 792, 799 (CA 7, 2003).

"[*People v Banks*, 438 Mich 408; 475 NW2d 769 (1991)] calls for case-by-case analysis to determine whether a statement in which the names have been redacted is as powerfully incriminating as a statement in which the names are left intact." *People v Frazier*, 446 Mich 539, 563; 521 NW2d 291 (1994). Here, Lango's statement is not directly accusatory of Washington because there are so many blanks in his statement that refer to multiple accomplices that any inference to Washington sufficiently attenuated. Moreover, the trial court instructed the jury to consider Lango's statements against Lango only, and Washington expressed satisfaction with the jury instructions as read. Juries are presumed to follow their instructions. *People v*

Graves, 458 Mich 476, 486; 581 NW2d 229 (1998). Our Supreme Court's analysis in *Frazier* is applicable to facts of the present case:

> "It is not disputed that the jury could have inferentially linked one or all of the defendants whenever the word [blank] was used in a codefendant's statement, but the degree of inference required is sufficiently attenuated that the cautionary instruction can be presumed to have been effective. When the evidentiary context, the manner of redaction, the nature of the statement, and the use of a cautionary instruction are all considered, there was not a substantial risk that the jury utilized the nontestifying codefendant's statements in assessing the guilt of the other defendant[]." [*Frazier*, *supra* at 563-565.]

Finally, in addition to Lango's statements, Washington and Lango were convicted on the basis of identifications by Edwin Bannah and Jessie Stanley, which were more than sufficient to support their convictions even in the absence of Lango's statements. Any alleged error is, therefore, harmless beyond a reasonable doubt, and reversal is not warranted.

II.

Next, Washington contends that the trial court abused its discretion in allowing Stanley, a codefendant being tried before a separate jury, to testify before Washington's jury regarding a duress defense that implicated Washington in the charged crimes. Further, Washington argues that the prosecutor improperly relied on Stanley's testimony during closing argument and that the trial court failed to properly instruct the jury. We disagree.

The decision to sever a joint trial is reviewed for an abuse of discretion. See *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). "The general rule is that a defendant does not have a right to a separate trial." *People v Hurst*, 396 Mich 1, 6; 238 NW2d 6 (1976). However, "[o]n a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant." MCR 6.121(C). The defendant must provide the trial court with a supporting affidavit or make an offer of proof that "clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Hana, supra.* "Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be 'mutually exclusive' or 'irreconcilable.'" *Id.* at 349.

We note, first of all, that Washington's and Stanley's defenses were not "mutually exclusive" or "irreconcilable." Although Stanley put forward a duress defense, Washington did not present any witnesses and merely left the prosecution to its proofs. Under these circumstances, the trial court properly denied Washington's motion to sever. *Id.* The trial court, however, granted Washington and Lango a separate jury to prevent a *Bruton* violation from occurring when the prosecutor introduced Stanley's statement, which implicated Washington and Lango, against Stanley. Despite the fact that the trial court had already granted separate juries, any potential *Bruton* violation was cured when Stanley opted to testify and subject himself to cross-examination, which Washington fully utilized.

Prior to Stanley's testimony, Washington argued that Stanley should only testify before his own jury. The prosecutor argued that the only reason Washington was granted a separate

jury at the outset of the trial was because Stanley had not said for sure whether he would testify, and the prosecution could not compel him to do so. The prosecutor went on to argue that, under the circumstances, "case law more envisions Mr. Stanley becoming a witness against these other two defendants, and he is treated just like a witness." Thus, in substance, if not in form, the prosecutor endorsed Stanley as a witness for the prosecution.

To the extent that Stanley's testimony constituted evidence of prior bad acts under MRE 404(b), this evidence was admissible for the same reason that we determined that Lango's prior statements were admissible in the previous issue—Stanley's testimony described the group's modus operandi of targeting people in parking lots and moving in on them quickly to take whatever was immediately available. In this instance, however, there was no possibility of a *Bruton* violation because Stanley was subject to cross-examination. The trial court did not abuse its discretion in permitting both juries to hear Stanley's testimony.

To the extent that Washington argues that the prosecutor's closing argument was improper, Washington failed to preserve this issue with a contemporaneous objection and request for a curative instruction, *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003), and abandoned the issue by failing to properly brief it on appeal, *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority.").

With regard to Washington's claim of instructional error, he waived this issue on appeal when he affirmatively expressed satisfaction with the instructions as read. If a party expresses satisfaction with the trial court's instructions, it constitutes a waiver that extinguishes any error regarding the instructions. *Carter*, *supra* at 216.

III.

Next, Washington and Lango argue that the trial court erred when it refused to instruct the jury to consider Stanley's testimony as accomplice testimony. We disagree.

This Court reviews a trial court's decision of whether to give a cautionary accomplice instruction for an abuse of discretion. *People v Young*, 472 Mich 130, 135; 693 NW2d 801 (2005), citing MCL 768.29. CJI 5.4 applies where the witness (1) has already been convicted of charges arising out the commission of the crime the defendant is charged with committing, (2) the evidence clearly shows that the witness is guilty of the same crime the defendant is charged with, or (3) the witness has been promised that he will not be prosecuted for the crime the defendant is charged with committing. The prosecutor argued, and the trial court agreed, that the evidence presented in the present case did not indicate that any of those instances applied. Stanley had not already been convicted of the charged crime, he was not clearly guilty of the charged crime, as he maintained his innocence all along, and he clearly had not been promised he would not be prosecuted, as he was on trial for the very same crimes as Lango and Washington. A trial court need not give requested instructions that the facts do not warrant. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). The trial court determined that CJI 3.6, the standard instruction on witness credibility, was sufficient.

> "In a criminal case it is not only proper but it is the duty of counsel for defendant to place before the jury all circumstances surrounding the people's witness upon the stand, as well as any fact which would have any reasonable tendency to affect their credibility. It is the function of the jury to decide first if the witness is interested, and second if the witness' interest has affected the credibility of his testimony. The trial judge is not required to comment in his instruction concerning a witness' interest since it bears upon the question of credibility[,] which is reserved to the jury. [*Young, supra* at 138, quoting *People v Sawicki*, 4 Mich App 467, 475; 145 NW2d 236 (1966).]

As the Supreme Court in *Young* recently held that whether to give a cautionary accomplice instruction lies within the trial court's sound discretion, the trial court did not abuse that discretion in refusing to give the instruction in the present case.

IV.

Next, defendants argue that the trial court's grant of an eleven-day adjournment due to Stanley's illness prejudiced them so as to require a new trial. We disagree.

A trial court's decision whether to grant a continuance is reviewed for an abuse of discretion. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002), citing MCR 2.503(D)(1) ("*In its discretion* the court may grant an adjournment to promote the cause of justice") (emphasis supplied by *Jackson*). As we determined in Issue II, supra, Stanley's testimony was relevant and admissible against Washington and Lango; therefore, Washington and Lango suffered no unfair prejudice from the adjournment that allowed Stanley to testify before their jury. The trial court did not abuse its discretion in granting the prosecution's motion to adjourn.

V.

Lastly, Washington argues that the trial court erred, so as to require reversal, in admitting testimony regarding the victims' experience in Liberia during a civil war. We disagree. We review a trial court's decision regarding the admission or exclusion of evidence for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

During the prosecutor's opening statement, direct examination of Bannah and Barmon, and the prosecutor's closing argument, the prosecutor several times noted that Ngaima, Bannah, and Barmon, lived in Liberia during a civil war. Both Washington and Lango objected to the prosecution's questions about the witnesses' war experiences as irrelevant, but the prosecution argued that their "experience with trauma and weapons bears directly on [their] ability to identify and retain information." The trial court overruled defendants' objections and admitted the testimony.

Evidence is relevant if it has any tendency to make the existence of a fact, which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *Crawford, supra* at 388-389. Thus, "evidence is admissible if it is helpful in throwing light on any material point." *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). Just because evidence is relevant, however, does not mean that it is admissible. The trial court

may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." MRE 403. All damaging evidence is prejudicial to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). Unfair prejudice results only if the evidence is likely to be given undue weight by the jury or the probative value is substantially outweighed by the danger of unfair prejudice. *Id.* The applicability of MRE 403 "is 'best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony.'" *Sabin*, *supra* at 71, quoting *People v VanderVliet*, 444 Mich 52, 81; 508 NW2d 114 (1993).

Given that Bannah's and Barmon's experience with weapons and violence has some tendency to make it more probable that they would have remained calm and been able to identify defendants and their weapons, which was clearly of consequence in this case, this evidence was relevant under MRE 401. Also, the possibility of unfair prejudice from this evidence did not appear to substantially outweigh its probative value, given the importance of identification in this case. The trial court did not abuse its discretion in admitting evidence of the victims' experience in Liberia during a civil war.

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder