STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2007
v	No. 271792 Oakland Circuit Court
CHOZEN BARACHA GREENE, Defendant-Appellant.	LC Nos. 2006-206966-FC; 2006-206970-FC

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

PER CURIAM.

Defendant appeals as of right his jury convictions of armed robbery, MCL 750.227b, assault with intent to rob while armed, MCL 750.89, four counts of possession of a firearm during the commission of a felony, MCL 750.227b, possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), carrying a concealed weapon, MCL 750.227, and possession with intent to deliver ecstasy, MCL 333.7401(2)(b)(i). The trial court sentenced defendant to 11 to 40 years' imprisonment for the armed robbery conviction, two years' imprisonment for the felony-firearm conviction, 11 to 70 years' imprisonment for the assault with intent to rob while armed conviction, one to four years' imprisonment for the possession with intent to deliver marijuana conviction, one to five years' imprisonment for the carrying a concealed weapon conviction, and 1 to 20 years' imprisonment for the possession with intent to deliver ecstasy conviction. Because we conclude that there were no errors warranting reversal, we affirm.

Defendant first argues that the trial court erred when it permitted the admission of defendant's confession. Specifically, defendant asserts that he was injured and intoxicated when he was interrogated, and therefore, his waiver of rights and resulting confession was not voluntary. We disagree.

This Court reviews de novo a trial court's finding that a defendant confessed voluntarily, knowingly and intelligently. *People v Tierney*, 266 Mich App 687, 707-708; 703 NW2d 204 (2005). The trial court's factual findings are reviewed for clear error. *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004). Questions of law are reviewed de novo. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000).

A defendant's statements made during custodial interrogation are admissible at trial if the defendant voluntarily, knowingly and intelligently waived his Fifth Amendment rights. *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004), citing *Miranda v Arizona*, 384 US 436,

444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966). The prosecutor carries the burden of establishing a valid waiver by a preponderance of the evidence. *Harris*, *supra*.

When determining whether a waiver of *Miranda* rights was knowing and intelligent, the examining court looks at a defendant's level of comprehension. *Daoud*, *supra* at 633-634. "'The waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *Id*. at 633, quoting *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1986). In other words, "the state must present evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him." *People v Cheatham*, 453 Mich 1, 29; 551 NW2d 355 (1996).

Testimony indicated that defendant was read his rights twice, understood his rights yet chose to speak, appeared coherent, lucid, and was able to answer questions logically. The officers that questioned defendant further testified that they had experience with individuals with head injuries and individuals who were under the influence of alcohol and drugs, but defendant did not display any indication of injury or intoxication. Moreover, defendant did not present evidence of his intoxication or injury, other than his own statements to police that he had at some point been drinking, smoking marijuana and using ecstasy. Defendant walked into the interview room without any problem. He was questioned nine and one-half hours after his arrest and from 10 to 30 hours after he had consumed alcohol or drugs. Hence, the trial court did not err when it determined that defendant knowingly and intelligently waived his *Miranda* rights.

Defendant next argues on appeal that the charges brought in lower court numbers 2006-206966-FC and 2006-206970-FC were unrelated and, therefore, that the trial court abused its discretion when it permitted these cases to be tried jointly. This error, defendant further contends, deprived him of due process and warrants reversal. We disagree. This Court reviews an unpreserved claim for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 763-764; 597 NW2d 130 (1999). Reversal is warranted only "when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*.

Under MCR 6.120(B)(1), joinder of separate charges is permissible if the offenses are related. *People v Girard*, 269 Mich App 15, 17-18; 709 NW2d 229 (2005). Offenses are related if they are based on the "same conduct" or a "series of connected acts" or "acts constituting part of a single scheme or plan." *People v Daughenbaugh*, 193 Mich App 506, 509; 484 NW2d 690, mod in part on other grounds 441 Mich 867 (1992); MCR 6.120(B)(1). Additionally, when determining joinder of related offenses, the court should consider "the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial." MCR 6.120(B)(2).

In this case, although the robbery of the cell phone store and the attempted robbery of the 7-Eleven were distinct offenses, they occurred only nine and one-half hours apart and occurred in relatively close proximity to each other on the same road. When the police apprehended defendant after the attempted robbery, he was found to be in possession of cell phones stolen in the earlier robbery. Further, defendant told police that he committed the crimes because he had a baby on the way and needed money. Thus, it appears that defendant and his accomplice were on

a crime spree. Finally, the witnesses for the crimes were the same except for the two store clerks. Because the criminal acts were part of a series of connected acts and separate trials would have needlessly caused a drain on resources through the duplication of testimony and evidence, the trial court did not abuse its discretion when it concluded that the trials should be joined.

Defendant next argues on appeal that he was denied a fair trial by the improper admission of evidence concerning an earlier robbery at a Food Mart for which he was not on trial. We disagree. This Court reviews an unpreserved claim for plain error affecting a defendant's substantial rights. *Carines, supra* at 763-764.

Generally, evidence of other acts is admissible under MRE 404(b)(1) if offered for a proper purpose, the evidence is relevant, and its probative value is not substantially outweighed by its prejudicial effect. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). The prosecution bears the burden of establishing the admissibility of other acts evidence. *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998); MRE 404(b)(2). Evidence of other crimes is not admissible to show a person's character in order to show the person acted in conformity with that character. MRE 404(b)(1).

At trial, the prosecution elicited testimony from an officer concerning an earlier robbery, with which defendant denied any involvement, but which tended to show how defendant came into possession of the weapon with which he was later found. In addition, a police officer testified that defendant admitted to committing the charged robberies in a recorded telephone conversation, but denied participating in the Food Mart robbery. On appeal, defendant contends that this evidence was improperly admitted contrary to MRE 404(b). However, because the testimony indicated that defendant did not participate in the robbery at the Food Mart, it is not plainly apparent that the testimony constitutes evidence of other crimes, wrongs or acts committed by defendant. Furthermore, because the testimony had some relevance for establishing how defendant came into possession of the weapon used in the charged offenses, it is not readily apparent that the evidence was admitted for an improper purpose. Consequently, there was no plain error. *Carines, supra* at 763-764.

Even if we were to conclude that the admission of this testimony constituted plain error, because the evidence was, at best, minimally prejudicial, we would conclude that any error was harmless. *Id.* Defendant gave statements to police admitting his involvement in the charged crimes. Defendant also admitted in a different recorded conversation that he robbed the 7-Eleven. Defendant was apprehended with cell phones, which testimony established were stolen from the cell phone store, a gun that a victim testified was the gun defendant pointed at him, along with ecstasy and marijuana. Furthermore, contrary to defendant's contention, there is no evidence that the officer who testified, "clearly thought defendant was involved" in the Food Mart robbery. There was no error warranting relief.

Defendant next argues on appeal that the trial court erred by giving the jury an instruction concerning the inferences that may be drawn from evidence of defendant's flight. We disagree. To preserve an instructional issue, a party must object to the instruction before the jury deliberates. MCR 2.516(C); *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). The failure to make a timely assertion of a right constitutes a forfeiture of the issue, but an "intentional relinquishment or abandonment of a known right" waives the issue and

extinguishes the error. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). When the trial court finished instructing the jury, it asked both parties if they were satisfied with the instructions. Defense counsel responded, "Yes, your Honor." Therefore, defendant waived any error.

Defendant next argues on appeal that he was denied the effective assistance of counsel. We disagree. When reviewing an unpreserved claim of ineffective assistance of counsel, this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that this performance was so prejudicial that it denied the defendant a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A defendant must show a reasonable probability that, but for counsel's error, the outcome would have been different. *Id.* at 302-303.

First, defendant claims that his counsel was ineffective for failing to move for a mistrial or object to the admission of the testimony concerning the Food Mart robbery. Defendant claims that this could not have been sound trial strategy. However, even if defendant's trial counsel should have objected to this testimony, we have already determined that this testimony did not affect the outcome of the trial. Therefore, any error would not warrant relief. *Toma*, *supra* at 302.

Defendant further argues that his counsel was ineffective for failing to object to the jury instruction on flight. The trial court gave the following instruction to the jury:

> There is some evidence, ladies and gentlemen, that Mr. Greene attempted to run away after the crime or crimes. That evidence does not prove guilt. A person may run or hide for innocent reasons such as panic, mistake or fear. However, a person may also run or hide because of a consciousness of guilt. You must decide whether the evidence is true and if so whether or not it shows he had a guilty state of mind.

There was a sufficient evidentiary basis to justify the instruction. Police were pursuing defendant's accomplice and defendant for an attempted robbery. Defendant's accomplice drove the car, but there was evidence that he and defendant were acting in concert in committing the crimes. There is a logical inference between the crimes defendant committed, the contraband he had on his person, his flight and his consciousness of guilt sufficient to support the instruction. Thus, the instruction was proper. Defense counsel is not required to advocate a meritless position. See *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Defendant was not denied the effective assistance of counsel.

Last, defendant argues that the trial court erred when it improperly scored OV-19 and considered his failure to admit guilt in determining his sentence. These errors, defendant contends, warrant resentencing. We disagree. Generally, this Court reviews a preserved

challenge to the scoring of the sentencing guidelines for an abuse of discretion. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). This Court will uphold the trial court's scoring if there is any evidence in the record to support it. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). Because these claims of error are unpreserved, we shall review them for plain error affecting the defendant's substantial rights. *People v Conley*, 270 Mich App 301, 312; 715 NW2d 377 (2006).

When determining whether a sentencing court improperly considered a defendant's failure to admit guilt, this Court looks at: "(1) the defendant's maintenance of innocence after conviction, (2) the judge's attempt to get the defendant to admit guilt, and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe." *People v Wesley*, 428 Mich 708, 713; 411 NW2d 159 (1987) (opinion of Archer J.). While a sentencing court cannot base its sentence on the defendant's failure to admit guilt, *Spanke*, *supra* at 649-650, a court "may consider evidence of a lack of remorse in determining an individual's potential for rehabilitation." *Wesley*, *supra* at 711.

The presentence report in the instant case indicated that defendant denied involvement in the crimes for which he was convicted. In response, the sentencing court implied that defendant did not appreciate the impact he had on his victims by stating, "You're involved with somebody that holds a gun on two different people and you, yeah you just walk away." Upon review of the *Wesley* factors, we conclude that the court did not consider defendant's failure to admit guilt when imposing defendant's sentence. First, while defendant claimed he was not involved in the crimes in the presentence interview, he did not explicitly maintain his innocence at sentencing. He stated, "I want to apologize to my family for all the problems I caused you know," and discussed the desire to "better myself." Second, the court did not attempt to have defendant admit guilt. In fact, the court did not give defendant a chance to speak again after making the challenged statements, but rather, immediately sentenced defendant. Third, there was no discussion regarding a lesser sentence upon any admission of guilt by defendant. There was no plain error affecting defendant's substantial rights.

Finally, even if the trial court had not scored OV-19, defendant's minimum sentence range would still have been from 81 to 135 months. See MCL 777.62. Therefore, any error in scoring OV-19 does not warrant resentencing. *People v Jarvi*, 216 Mich App 161, 164; 548 NW2d 676 (1996).

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Bill Schuette