STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 20, 2007
v	No. 270607 Oakland Circuit Court
RODRIQUEZ FRITS WHORTEN, a/k/a RODRIQUEZ FRITS WHORTON, a/k/a RODREGUEZ WHORTON, Defendant-Appellant.	LC No. 2005-205410-FC

Before: Talbot, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, stealing or retaining a financial transaction device without consent, MCL 750.157n(1), resisting or obstructing a police officer, MCL 750.81d(1), and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to 11 ½ to 40 years in prison for the armed robbery conviction, 3 to 7 ½ years in prison for the felon-in-possession conviction, 1 ½ to 6 years in prison for the stealing or retaining a financial transaction device conviction, 1 ½ to 3 years in prison for the resisting or obstructing conviction, and two years in prison for the felony-firearm convictions. We affirm.

I. Basic Facts

Several students at Lawrence Technological University arrived outside their dormitory early one morning after a Halloween party and were accosted by three or four armed men who demanded their valuables. After taking money, credit cards, and some personal items, the men got into a vehicle and drove away. The victims notified the police and provided a description of the vehicle. The police quickly located a vehicle matching the description and pursued it, ultimately forcing the vehicle off the road. The suspects fled on foot, and one of the officers saw defendant drop an object that was later identified as a handgun. Defendant was discovered hiding in a garbage can or "mini dumpster" in a backyard near the abandoned vehicle. The police arrested defendant and discovered several credit cards and cellular telephones.

II. Defendant's Custodial Statement

Defendant argues that the trial court erred when it denied his motion to suppress his custodial statement. We disagree.

A. Standards of Review

We review de novo a trial court's decision regarding a motion to suppress. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). However, we will not disturb a trial court's findings of fact following a suppression hearing absent clear error. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). A factual finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made. *Id.* at 651.

B. Defendant's Motion To Suppress

Defendant contends that he was coerced into speaking with the police through threats of violence and promises of leniency, and his repeated requests for a lawyer were denied. The right against self-incrimination is a right guaranteed by both the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 17. "[A] suspect in police custody must be informed specifically of the suspect's right to remain silent and to have an attorney present before being questioned." *People v Kowalski*, 230 Mich App 464, 472; 584 NW2d 613 (1998). Once an accused requests counsel, the police must cease interrogation until counsel has been made available, "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981); *People v McRae*, 469 Mich 704, 715; 678 NW2d 425 (2004).

"A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003), applying *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). A confession or waiver of the right against incrimination requires that the statement be made without "intimidation, coercion, or deception." *Akins*, *supra* at 564. The prosecution is required to prove by a preponderance of the evidence that the defendant's statement was voluntary. *Id.* To determine the voluntariness of a statement, a court must consider the non-exclusive factors as identified in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988):

> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

Moreover, "[t]he ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Id*.

Defendant was 22 years old, had an eleventh grade education, and signed the constitutional rights forms. He was not sick or under the influence of drugs or alcohol, and he declined food and water. The interrogation lasted 90 minutes, and defendant was interrogated within hours of his arrest. Defendant had one previous arrest and conviction, and he requested a lineup and a polygraph examination, which shows his level of sophistication and experience with the police. The only evidence offered in support of defendant's assertions that he was coerced and denied his right to counsel are his own statements. The police, however, testified that there was no coercion, and the trial court, which is in the best position to evaluate credibility, resolved this credibility question in favor of the police. *Daoud*, *supra* at 629. Thus, by a preponderance of the evidence, based on all of the relevant circumstances, the trial court's finding that defendant's statements were voluntary was not clearly erroneous and no reversal is warranted.

III. Defendant's Motion for A Mistrial

Defendant argues that he was denied a fair trial by the introduction of inadmissible evidence of another, unrelated robbery. We disagree. Although defendant frames this issue as one of the improper admission of character evidence under MRE 404(b), he properly argues it as a denial of his motion for a mistrial, and we will analyze it as such. A trial court's decision regarding a motion` for a mistrial is reviewed for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). "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." *Id*. (citations omitted).

Use of other acts evidence is generally precluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 494-495; 577 NW2d 673 (1998). In the instant case, evidence that defendant had been involved in another robbery would be improper character evidence. However, not every improper response warrants a mistrial; rather, "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *Haywood*, *supra* at 228. In the instant case, the prosecutor asked one of the police officers if the stolen property had been returned to its owners. The police officer replied that it had not been returned and elaborated as follows:

> [H]owever, there had been a piece of identification found in the vehicle. Initially [they] viewed that as a potential identification of a fourth suspect and in fact, as [he] came to talk to one of the people who had property in the car, was a victim of the street robbery, they identified that person as her companion that night.

There was nothing improper about asking if the property was returned, and the officer's response about a possible fourth suspect and a victim of another street robbery is an unresponsive and volunteered answer to that question.

Moreover, the wording of the response is rather vague, as evidenced by the trial court's need to review the testimony before ruling on defendant's motion. Indeed, it is reasonable to believe that the officer was referring to this "street" (i.e., parking lot) robbery, not another "street" robbery. Further, even if the jury did understand that the challenged reference was to

another robbery, there is nothing in that reference to suggest defendant had anything to do with that other robbery, and "[i]t is highly unlikely that this one isolated . . . unresponsive comment resulted in significant prejudice to defendant." *People v Allen*, 429 Mich 558, 656; 420 NW2d 499 (1988). In addition, the trial court offered a curative instruction, which defense counsel declined. Given the overwhelming evidence against defendant and the ambiguous nature of the statement, it is unlikely there was any prejudice to defendant from the challenged unresponsive testimony. Thus, the trial court did not abuse its discretion when it denied defendant's motion for a mistrial.

IV. Sufficiency of the Evidence

Defendant claims there was insufficient evidence to support his convictions for resisting or obstructing a police officer and stealing or retaining a financial transaction device without consent. We disagree. To determine whether there was sufficient evidence to support a conviction, we review the evidence de novo, in the light most favorable to the prosecution, and decide whether any rational fact-finder could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

A. Resisting or Obstructing A Police Officer

Defendant asserts that there was insufficient evidence for his resisting or obstructing conviction because there was no evidence that he knowingly and willfully intended to resist. Defendant's argument is misplaced. MCL 750.81d(1) provides in relevant part that "an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony." See also *People v Nichols*, 262 Mich App 408, 410; 686 NW2d 502 (2004). MCL 750.81d(7)(b)(i) defines "person" to include police officers, and there is no dispute that the arresting officers were dressed in full uniform at the time of the arrest. However, the statute contains no mention of a knowing and willful intent to resist.

Defendant also challenges this conviction on the basis that the officers gave conflicting accounts of the incident. However, the officers agreed that defendant struggled or wrestled with one of the officers, refused to put his hands behind his back, and resisted being handcuffed, which suffices to establish that he resisted arrest. Further, absent exceptional circumstances, issues of witness credibility are for the jury to resolve, *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998), and this Court will not interfere with the role of the trier of fact of determining the weight of the evidence or witness credibility, *People v Hill*, 257 Mich App 126, 141; 667 NW2d 78 (2003). Therefore, reversal is not warranted on this ground.

B. Stealing or Retaining A Financial Device

Defendant challenges his stealing or retaining a financial device conviction because the officers provided conflicting testimony about where they discovered the stolen credit cards. MCL 750.157n(1) provides in relevant part that "person who . . . knowingly retains, knowingly possesses, knowingly secretes, or knowingly uses a financial transaction device without the consent of the deviceholder, is guilty of a felony." See also *People v Anderson*, 268 Mich App 410, 412-414; 706 NW2d 889 (2005). One officer testified that defendant was found in

possession of credit cards that were owned by someone he did not know and who had not given him permission to possess. Another officer agreed that the credit cards were recovered from defendant's person. A third officer, however, initially testified that the credit cards were found in the car. When this officer was recalled, he asserted that he realized his prior testimony had been mistaken and testified that the credit cards had been recovered from defendant's person. Thereafter, the trial court instructed the jury to disregard this testimony, and jurors are presumed to follow the trial court's instructions. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342, 352 (2004). However, absent exceptional circumstances, issues of witness credibility are for the jury to resolve, *Lemmon*, *supra* at 642, and this Court will not interfere with the role of the trier of fact of determining the weight of the evidence or witness credibility, *Hill*, *supra* at 141. Therefore, there was sufficient evidence to support both challenged convictions.

V. Double Jeopardy

Defendant argues, in his supplemental brief filed in propria persona, that his constitutional right against double jeopardy was violated because his felony-firearm charge was predicated on his felon-in-possession charge. We disagree. We review this unpreserved constitutional issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

As our Supreme Court has previously held, cumulative punishments for felon in possession and felony-firearm do not violate double jeopardy. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003). Therefore, reversal is not warranted on this ground.

VI. Ineffective Assistance of Counsel

A. Standards

Defendant, in propria persona, claims that his trial counsel was ineffective on several grounds. Because defendant failed to file a motion for a new trial or request a *Ginther*[1] hearing, our review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). Whether a defendant has been the denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact for clear error and questions of constitutional law de novo. *Id.*

The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. Where the issue is counsel's performance, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under professional norms, and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309, 312-313; 521 NW2d 797 (1994). An appellate court will not second-guess matters of strategy or use the benefit of hindsight when

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

assessing counsel's competence. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

B. Alibi Witnesses

Defendant contends that he was denied the effective assistance of counsel by his attorney's failure to investigate or call alibi witnesses who would allegedly have testified that defendant was at a party until after the time of the robbery. However, the evidence showed that a police chase ensued within minutes of the robbery and the suspect vehicle crashed. Defendant was seen running from the vehicle and dropping a handgun and was discovered hiding in a trashcan in the vicinity of the abandoned vehicle. Therefore, defendant has failed to show that there is a reasonable probability that he would have been acquitted if his trial counsel had investigated or called alibi witnesses. See *Strickland, supra* at 694; *Pickens, supra* at 314.

C. *Walker*[2] Hearing

Defendant argues that his trial counsel was ineffective in failing to object to the trial court's ruling following the *Walker* hearing. However, the original objections that necessitated the *Walker* hearing already preserved the issue, so there was no need for counsel to raise further objection. Defense counsel is not required to make futile objections. *People v Wilson*, 252 Mich App 390, 393-394, 397; 652 NW2d 488 (2002). Therefore, defendant has failed to show that trial counsel's failure to object fell below an objective standard of reasonableness under prevailing professional norms. See *Strickland, supra* at 687-88; *Pickens, supra* at 309.

D. Double Jeopardy

Defendant asserts that counsel was ineffective for failing to raise a double jeopardy challenge to the felony-firearm charge with felon in possession as the predicate felony. As noted above, the double jeopardy challenge defendant argues his counsel should have raised is without merit. *Calloway, supra* at 452. Defense counsel is not required to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Accordingly, defendant has failed to show that trial counsel's failure to object fell below an objective standard of reasonableness under prevailing professional norms. See *Strickland, supra* at 687-88; *Pickens, supra* at 309. Further, we are not persuaded that it is necessary to remand for a *Ginther* hearing on any of defendant's ineffective assistance of counsel challenges.

VII. Evidence Properly Admitted

Defendant argues, in propria persona, that he was denied a fair trial by the jury's consideration of evidence that was never properly admitted into evidence. We disagree. We review a trial court's decision on a motion to reopen the proofs for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 419; 633 NW2d 376 (2001). When evaluating a motion to reopen proofs, we must consider "whether any undue advantage would be taken by the

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

moving party and whether there is any showing of surprise or prejudice to the nonmoving party." *Herndon*, *supra* at 420.

After the prosecution rested its case, the trial court realized that several of the prosecution's exhibits had not been entered into evidence. The prosecution moved to reopen the proofs to have the following exhibits admitted: exhibit 7, a gun carried by one of the other robbers; exhibit 13, a photograph of the inside of the suspect vehicle; and exhibit 19, defendant's written statement to the police. There was a brief discussion on the record, but defendant is correct that the trial court did not provide a ruling on the motion on the record. Assuming the trial court granted the motion to reopen proofs and these three exhibits were admitted into evidence and given to the jury to examine, defendant has failed to show that he suffered any surprise or prejudice or the prosecution received an undue advantage. Defendant was certainly aware of the existence of these exhibits because testimony about them was provided by prosecution witnesses.

Further, defendant's challenge to the foundation for exhibits 13 and 19 is not persuasive. "Logical relevance is the foundation for admissibility of evidence." *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002). Exhibits 13 and 19 were certainly relevant and therefore had a foundation laid for their admission. The trial court had already ruled, following the *Walker* hearing, that defendant's statement to the police was admissible. Moreover, defendant has cited no authority to support the assertion that an exhibit with an appropriate foundation may not be admitted later in a trial. An appellant may not simply announce a position or assert an error and leave it to this Court to "discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001) (citations omitted). Therefore, the trial court did not abuse its discretion in reopening the proofs to admit exhibits 13 and 19.

To the extent that defendant challenges the admission of exhibit 7 and claims there was no foundation for its admission, any error in the admission of evidence is not grounds for vacating a verdict or granting a new trial unless substantial justice requires it. MCL 769.26; MCR 2.613(A); see also *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001). The evidence showed that a police chase ensued within minutes of the robbery, and the suspect vehicle crashed. Defendant was seen running from the vehicle and dropping a handgun and was later discovered hiding in a trashcan or dumpster in the vicinity of the abandoned vehicle. Therefore, even assuming that there was no foundation for the admission of exhibit 7, defendant has failed to show that substantial justice requires vacating the verdict or granting a new trial.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly