STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 27, 2007
v	No. 271442 St. Clair Circuit Court
DARRYL VON JOHNSON, Defendant-Appellant.	LC Nos. 05-002683-FC 05-002854-FC

Before: Servitto, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of armed robbery, MCL 750.529, and assault with intent to rob while armed, MCL 750.89. He was sentenced to concurrent prison terms of 19 to 39 years for each conviction, to be served consecutive to a one-year jail term defendant previously received for violating his probation. We affirm.

I. Joinder of Charges

Defendant was charged in two separate files. He was originally charged in LC No. 05-002854-FC with armed robbery against Angela Essenmacher and assault with intent to rob while armed against Jennifer Steiner. The offense against Essenmacher occurred on the afternoon of October 29, 2005, and the offense against Steiner occurred at approximately 2:00 a.m. on October 30, 2005. Defendant was separately charged in LC No. 05-002683 with armed robbery against Miranda Stimac for an offense that was committed at approximately 3:00 a.m. on October 30, 2005. Both cases were consolidated for trial.

Defendant first argues that the trial court erred in granting the prosecutor's motion to join the two cases for trial. We disagree.

Joinder of related offenses is governed by MCR 6.120. The question whether charges are related for purposes of consolidating them for trial is a question of law that this Court reviews de novo. *People v Girard*, 269 Mich App 15, 17; 709 NW2d 229 (2005). A trial court's decision on a motion for joinder under MCR 6.120 is reviewed for an abuse of discretion. *Id.*

MCR 6.120(B) provides, in pertinent part

> **Postcharging Permissive Joinder or Severance.** On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.
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> (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
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> (a) the same conduct or transaction, or
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> (b) a series of connected acts, or
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> (c) a series of acts constituting parts of a single scheme or plan.
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> (2) Other relevant factors include 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.

In this case, the three incidents were part of a crime spree that began on the afternoon of October 29 and ended during the early morning hours of October 30, 2005. They involved a series of robberies against business establishments and in each incident defendant wielded a knife against a woman who was tending to a cash register and demanded the money from the register. The timing of the offenses and the manner in which each was committed demonstrate that they involved a series of acts constituting parts of a single scheme or plan and, therefore, the offenses were related under MCR 6.120(B)(1)(c). Moreover, the prosecutor informed the court that the same police witnesses would be presented in both cases, so the convenience of the witnesses weighed in favor of joinder. Under these circumstances, the trial court did not abuse its discretion in joining the charges for trial.

II. Self-Representation

Defendant next argues that the trial court erred in denying his request for new appointed counsel, and also erred when it subsequently permitted defendant to represent himself at trial. We disagree.

A. Request for New Counsel

A trial court's decision concerning substitution of counsel is reviewed for an abuse of discretion. *People v Flores*, 176 Mich App 610, 614; 440 NW2d 47 (1989). Although an indigent defendant is constitutionally guaranteed the right to counsel, he is not entitled to the appointment of an attorney of his choice. *Id*. at 613. Nevertheless, a defendant is entitled to have his assigned lawyer replaced upon a showing of adequate cause, provided that substitution will not unreasonably disrupt the judicial process. *Id*. at 613-614.

In this case, the trial court had already granted defendant's earlier request for new appointed counsel and warned defendant at that time that he needed to cooperate with his new attorney. Defendant again requested appointment of new counsel on the day of trial. Defendant complained that his new attorney had not come to see him and had no knowledge about the case. Upon further inquiry by the court, however, defendant admitted that defense counsel had discussed the case with him. The trial court also elicited prior to trial that defense counsel had reviewed various videotapes, obtained necessary discovery, and was prepared for trial. Defense counsel admitted that he had not filed certain motions requested by defendant, but explained that the motions were frivolous. On appeal, defendant has not identified any nonfrivolous motion that counsel failed to file. It is apparent from the record that the trial court provided defendant with the opportunity to state his reasons for wanting new counsel, and that defendant failed to demonstrate adequate cause for substitution. Additionally, new counsel had already been appointed once before at defendant's request, and another substitution on the day scheduled for trial would have unreasonably disrupted the judicial process. Under the circumstances, the trial court did not abuse its discretion in denying defendant's request for new counsel.

B. Self-Representation

Defendant was permitted to represent himself at trial, with his appointed attorney serving as standby advisory counsel. Defendant now argues that the trial court erred by allowing him to represent himself at trial without complying with MCR 6.005(D)(1), or the requirements of *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976).

In *People v Willing*, 267 Mich App 208, 219-220; 704 NW2d 472 (2005), this Court explained:

> Defendants who face incarceration are guaranteed the right to counsel at all critical stages of the criminal process by the Sixth Amendment, which applies to the states through the Due Process Clause of the Fourteenth Amendment. Both federal and state law also guarantee a defendant the right of self-representation, although this right is subject to the trial court's discretion.
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> Before granting a defendant's request to represent himself or herself, the trial court must determine that the three factors set forth in *People v Anderson* have been met: (1) the defendant's request is unequivocal, (2) the defendant is asserting the right knowingly, intelligently, and voluntarily after being informed of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business. In addition, a trial court must satisfy the requirements of MCR 6.005(D), which prohibits the trial court from allowing the defendant to make an initial waiver of the right to counsel without first
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> "(1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and

(2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer."

A trial court must substantially comply with the *Anderson* factors and the court rule for a defendant to effect a valid waiver of the right to counsel.

When determining whether the requirements were met, we indulge every reasonable presumption against waiver of fundamental constitutional rights. Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver. [Footnotes and internal quotations omitted.]

We disagree with defendant's claim that the trial court failed to adequately inform him of the risks and disadvantages of self-representation. The trial court is required to make the defendant aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open. *Anderson, supra* at 368. In this case, the trial court informed defendant that he would be subject to the same rules as any attorney, explaining what this meant in the context of a trial. The court later referred to the maxim that "an attorney who represents himself has a fool for a client," and explained to defendant that although he had no legal background and did not understand parts of the law, he would have to follow proper trial procedures and rules, and follow the rules of evidence. We conclude that defendant was sufficiently informed of the dangers and disadvantages of self-representation.

We also reject defendant's argument that he did not unequivocally request to represent himself. Although defendant initially indicated that he wanted substitute counsel appointed, after the trial court denied that request and defendant was given the choice between proceeding with his present attorney or representing himself, he clearly stated that he wanted to represent himself. Further, the trial court repeatedly gave defendant the option of changing his mind, but defendant never exercised that option and defendant asked several questions about representing himself and received answers to those questions. The record establishes that defendant's request to represent himself was unequivocal.

Defendant also argues that various rulings by the trial court prevented him from properly representing himself. Defendant does not expand on this claim and a review of the cited portions of the record fails to disclose any support for defendant's claim that the trial court improperly interfered with defendant's right of self-representation. To the extent that the trial court required defendant to adhere to established rules of procedure, this was not error.

III. Adjournment

Defendant argues that the trial court erred in denying his motion for an adjournment. A trial court's decision denying a request for an adjournment is reviewed for an abuse of discretion. *People v Coy*, 258 Mich App 1, 18-19; 669 NW2d 831 (2003).

A motion for an adjournment must be based on good cause. *Id*. at 18. "Good cause" factors include whether the defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments. *Id*. Even with good cause and due diligence, the trial court's denial of such a request is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion. *Id*. at 18-19.

Defendant requested an adjournment, explaining that he needed time to prepare for trial. On appeal, however, defendant does not explain how further preparation would have aided his case and he makes no attempt to explain how he was prejudiced by the denial of his request. Therefore, reversal is not warranted on the basis of this issue.

IV. Lesser Offense Instruction

Defendant argues that the trial court erred in denying his request for a lesser offense instruction on attempted robbery. We disagree.

A requested instruction on a necessarily included lesser offense or an attempt is proper only if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support the instruction. Instruction on cognate included lesser offenses is not permissible. *People v Cornell*, 466 Mich 335, 354; 646 NW2d 127 (2002); *People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002); see also *People v Smith*, 478 Mich 64, 73; 731 NW2d 411 (2007).

"Necessarily included offenses are offenses in which the elements of the lesser offense are completely subsumed in the greater offense." *People v Mendoza*, 468 Mich 527, 532 n 3; 664 NW2d 685 (2003). Generally, a necessarily included offense is one which must be committed as part of the greater offense; it would be impossible to commit the greater offense without first having committed the lesser. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001).

In this case, an instruction on attempted robbery as a lesser offense to the armed robbery charges was not supported by a rational view of the evidence. The victims' testimony clearly established a completed robbery. Further, although assault with intent to rob while armed may include as a factual matter conduct that, taken alone, would constitute an attempted armed robbery, the legal elements of attempt are not duplicated in the completed offense of assault with intent to rob while armed. Cf. *People v Adams*, 416 Mich 53, 56, 58-59; 330 NW2d 634 (1982). Therefore, attempted armed robbery is a cognate lesser included offense of assault with intent to rob while armed, and instruction on that offense is not permitted. Accordingly, the trial court properly denied defendant's request for an instruction on attempted armed robbery.

V. Prosecutorial Misconduct

Defendant argues that the prosecutor's conduct denied him a fair trial. We disagree.

Questions of misconduct by the prosecutor are decided case by case. This Court must examine the prosecutor's conduct in context to determine whether the defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994).

Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; this Court will only review the defendant's claim for plain error. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003).

Defendant first argues that the prosecutor engaged in misconduct by moving to join the charges for trial. In light of our conclusion in section I that the offenses were sufficiently related under MCR 6.120(B)(1)(c), and that the trial court did not abuse its discretion in consolidating the charges for trial, we reject this claim of misconduct.

Defendant also argues that the prosecutor improperly elicited Officer Karen Brisby's testimony that when she received a description of the perpetrator from one of the victims, she thought of defendant. Defendant argues that this testimony was irrelevant and highly prejudicial because it suggested that defendant had a prior criminal record. Because defendant did not object to this testimony at trial, our review is limited to plain error affecting defendant's substantial rights. At trial, Brisby explained that she was familiar with defendant because she grew up in the area and had just seen him the day before at a local gas station. Brisby also testified that she was surprised that defendant could possibly be involved in the crime. Viewed in context, Brisby's testimony did not improperly suggest that defendant had a prior criminal record, nor was it particularly prejudicial. Thus, it did not constitute plain error or affect defendant's substantial rights.

VI. Scoring of Offense Variables

Defendant raises several challenges to the trial court's scoring of the sentencing guidelines offense variables. Although the trial court's factual findings at sentencing are reviewed for clear error, *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003), the trial court's scoring of the sentencing guidelines will be upheld if there is any evidence in the record to support it, *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Here, we find no scoring errors.

A. OV 1

The trial court scored 15 points for OV 1. Fifteen points are to be scored for OV 1 where the victim had a reasonable apprehension of an immediate battery when threatened with a knife. MCL 777.31(1)(b). In this case, one robbery victim testified that defendant came into the store, grabbed her arm, and demanded money while holding a knife. She explained that she was scared and pleaded with defendant not to hurt her. The other robbery victim testified that defendant came into the gas station, armed with a knife, and demanded money. The incident scared her so much that she quit her job. This evidence was sufficient to support the trial court's 15-point score for OV 1.

B. OV 4

The trial court scored ten points for OV 4, which addresses psychological injury to a victim. The court should score ten points if "serious psychological injury requiring professional treatment occurred to a victim." Ten points are proper is the serious psychological injury *may* require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive. MCL 777.34(2).

One robbery victim stated to a probation officer that the robbery left her emotionally and mentally scarred. She further stated she has had nightmares about the robbery, is afraid to be alone in her house, and is paranoid about going out in public alone. The other robbery victim also expressed that she was emotionally and psychologically scarred by the incident, has problems being out in public, and is very nervous around strangers. This evidence was sufficient to show that both robbery victims suffered a serious psychological injury that may require professional treatment. Therefore, ten points were properly scored for OV 4.

C. OV 9

The trial court scored ten points for OV 9. Under the version of the sentencing guidelines in effect at the time of the crime and defendant's sentencing, the trial court was required to score ten points under OV 9 if there were between two and nine victims. MCL 777.39(1)(c). In determining the number of victims, the trial court was to count each person who was placed in danger of physical injury or loss of life as a victim. MCL 777.39(2)(a); *People v Melton*, 271 Mich App 590, 592; 722 NW2d 698 (2006).

In *People v Cook*, 254 Mich App 635, 641; 658 NW2d 184 (2003), this Court held that it is proper to consider the entirety of a defendant's conduct in calculating the sentencing guideline range with respect to each offense where the crimes involved constitute one continuum of conduct. In this case, the police pursued defendant after the Admiral gas station robbery and defendant physically fought with the officers. Officer Bean stated that defendant attempted to flip him over, causing him to fall to the ground. Thus, at a minimum, both Miranda Stimac and at least one police officer were placed in danger of physical injury during that offense, thereby justifying a ten-point score.[1]

D. OV 12

The trial court scored five points for OV 12. Five points should be scored for OV 12 if one contemporaneous felonious criminal act involving a crime against a person was committed *or* if two contemporaneous felonious criminal acts involving other crimes were committed. MCL 777.42(1)(d) and (e). A felonious criminal act is contemporaneous if both of the following exist (1) the act occurred within 24 hours of the sentencing offense, and (2) the act has not and will not result in a separate conviction. MCL 777.42(2).

The evidence indicated that after the Admiral gas station robbery, the police pursued defendant, who eventually fled on foot. Defendant physically fought with the police before he was arrested. This evidence showed that defendant committed the crime of resisting or obstructing a police officer, see MCL 750.479 and MCL 750.81d, which involved a contemporaneous felonious act involving a crime against a person. Because defendant was neither charged with, nor convicted of that offense, the trial court properly scored five points for OV 12.

[1] Although unnecessary to our analysis, we note that because all three offenses involved a series of acts constituting parts of a single scheme or plan, each robbery victim could be considered a victim in the scoring of each offense, thereby also justifying a ten-point score for OV 9.

E. OV 13

The trial court scored 25 points for OV 13, continuing pattern of criminal behavior. Twenty-five points should be scored if the offense was part of a pattern of felonious criminal activity involving three or more crimes against a person. MCL 777.43(1)(b). For determining the appropriate points under this variable, all crimes within a five-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction. MCL 777.43(2)(a). However, it is improper to score conduct that was considered in the scoring of offense variables 11 or 12. MCL 777.43(2)(c).

In this case, the evidence showed that defendant's convictions arose out of a crime spree involving two robberies and an assault with intent to rob during a 15-hour period. The trial court properly scored 25 points for OV 13.

F. OV 19

The trial court scored ten points for OV 19, which is proper where the offender interfered with or attempted to interfere with the administration of justice. MCL 777.49(c).

Contrary to what defendant argues, his conduct in fleeing the police and physically resisting the police after the Admiral gas station robbery properly could be considered in the scoring of that offense because it was part of one continuum of conduct. *Cook*, *supra* at 641. Further, because law enforcement officers "are an integral component in the administration of justice," defendant's conduct in physically resisting them constitutes the interference with the administration of justice. *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004).

Lastly, we find no merit to defendant's claim that OV 19 is unconstitutionally void for vagueness. The critical terms "interfere," "administration," and "justice" are neither unusual nor esoteric, nor are they used in an uncommon or extraordinary context. Further, the commonly accepted meanings of these terms can be readily ascertained by reference to a dictionary. A person of ordinary intelligence would understand the type of conduct referred to in the statute, and the statute provides fair notice of what conduct it proscribed. *People v Hill*, 269 Mich App 505, 524; 715 NW2d 301 (2006); *People v Russell*, 266 Mich App 307, 311; 703 NW2d 107 (2005); *People v Sands*, 261 Mich App 158, 161; 680 NW2d 500 (2004).

VII. Judicial Fact-Finding at Sentencing

We reject defendant's claim that the trial court improperly engaged in judicial fact-finding at sentencing, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. Our Supreme Court has determined that *Blakely* does not apply to Michigan's indeterminate sentencing scheme in which the maximum sentence is set by statute and the trial court's scoring of the guidelines affects only the defendant's minimum sentence. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Although defendant contends that

Drohan was wrongly decided, we are bound to follow that decision. *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005).

VIII. Consecutive Sentencing

Defendant next argues that the trial court improperly ordered that his sentences be served consecutive to a one-year jail term for a prior conviction. We disagree.

Concurrent sentencing is required, absent statutory authority for consecutive sentencing. *People v Sawyer*, 410 Mich 531, 534; 302 NW2d 534 (1981). MCL 768.7b(2) provides, in pertinent part:

> Beginning January 1, 1992, if a person who has been charged with a felony, pending the disposition of the charge, commits a subsequent offense that is a felony, upon conviction of the subsequent offense or acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to the subsequent offense, the following shall apply:
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> (a) Unless the subsequent offense is a major controlled substance offense, the sentences imposed for the prior charged offense and the subsequent offense may run consecutively.

Although defendant correctly argues that an offense is not "pending" within the meaning of this statute where a person has been sentenced to probation, *People v Malone*, 177 Mich App 393, 401; 442 NW2d 658 (1989), in this case defendant pleaded guilty to violating his probation approximately a week before committing the instant offenses and was awaiting sentencing for the prior offense. Thus, disposition of the prior offense was pending when defendant committed the instant offenses and consecutive sentencing was authorized under MCL 768.7b(2).

IX. Ineffective Assistance of Counsel

We reject defendant's claim that he was denied the effective assistance of counsel. First, because defendant elected to represent himself at trial, he cannot raise a claim of ineffective assistance of counsel based on any trial-related issues. *People v Kevorkian*, 248 Mich App 373, 419; 639 NW2d 291 (2001). Second, defendant does not raise an ineffective assistance of counsel issue independent of the issues previously addressed in this opinion. Having found no error with respect to any of defendant's issues, either at trial or sentencing, there is no basis for concluding that defense counsel was ineffective. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Affirmed.

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Christopher M. Murray