STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2007
v	No. 271965 Washtenaw Circuit Court
LEWIS DESHAWN FAIRLEY, Defendant-Appellant.	LC No. 05-001533-FH

Before: Donofrio, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant, Lewis Deshawn Fairley, appeals as of right his jury trial convictions for first-degree home invasion, MCL 750.110a(2), felonious assault, MCL 750.82, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to 20 to 40 years' imprisonment for his home invasion conviction, three years and eight months to 15 years' imprisonment each for his felonious assault and felon in possession of a firearm convictions, and two years' imprisonment for his felony firearm conviction. Because the trial court's admission of the challenged evidence was not an abuse of discretion, and because defendant received the effective assistance of counsel at trial, we affirm.

Defendant's convictions arise out of a home invasion that took place in Ypsilanti on September 5, 2005. On the previous night, defendant and two of his friends had an argument with Tyree Brooks. Several hours later, Brooks shot and killed one of defendant's friends, Daniel Hamilton, near the 600 block of Armstrong. Over the course of the day on September 5, defendant searched for Brooks in the Armstrong neighborhood and at Brooks's relatives' homes. Witnesses observed defendant several times throughout the day with an Intertech nine-millimeter semi-automatic pistol commonly known as a Tech-9. When defendant arrived at the home of the victim, Brooks's cousin, defendant kicked down the door, waved the pistol around, yelled obscenities, and repeatedly demanded that the victim tell him Brooks's whereabouts. The victim, her small child, and her friend feared for their lives. Defendant left without physically harming them. Defendant next walked into the home of another one of Brooks's relatives with a gun, looked around, and left. Police later arrested defendant after he entered another woman's home without her permission. Police officers found an Intertech, nine-millimeter pistol and a magazine with unspent rounds in a child's bedroom in that home.

Defendant first argues that the trial court improperly admitted the highly prejudicial evidence of Hamilton's murder, defendant's refusal to cooperate with police, and defendant's other unauthorized entries into homes. We review a trial court's admission of evidence for an abuse of discretion. *People v Osantowski*, 274 Mich App 593, 607; 736 NW2d 289 (2007). "An abuse of discretion will not be found if the trial court's decision is within the principled range of outcomes." *Id*. We will only grant a new trial on the basis of an evidentiary issue where a substantial right is involved and it is more probable than not that the error was outcome determinative. *Id*. However, unpreserved claims of evidentiary error are reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant preserved his objection to the admission of evidence of Hamilton's murder because he objected to its admission during trial. Defendant did not, however, object to the admission of evidence regarding his refusal to cooperate with police or regarding his other unauthorized entries into homes, so these evidentiary challenges are not preserved.

MRE 402 allows the admission of relevant evidence at trial. *People v Fletcher*, 260 Mich App 531, 552; 679 NW2d 127 (2004). Relevant evidence is that which tends to make a material fact more or less probable. MRE 401; *People v Sabin*, 463 Mich 43, 56-57; 614 NW2d 888 (2000). "Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). Here, evidence of Brooks's involvement in Hamilton's murder was relevant to defendant's motive for invading the victim's home. Because Brooks murdered Hamilton, defendant searched for Brooks at Brooks's relatives' homes. Hamilton's murder explains why defendant would have entered the victim's home with a weapon causing fear, but left without harming anyone or taking anything. On this record, we conclude that the trial court did not abuse its discretion when it admitted evidence of Hamilton's murder. Evidence of motive is always admissible if it suggests the doing of the act charged. *People v Engelman*, 434 Mich 204, 223 n 28; 453 NW2d 656 (1990).

With respect to evidence of defendant's refusal to cooperate with police and his other home invasions, MRE 404(b) prohibits the admission of evidence that defendant committed other bad acts to show that defendant is a bad person, and therefore he must have acted in conformity therewith when he committed this crime. *People v VanderVliet*, 444 Mich 52, 63-64; 508 NW2d 114 (1993). However, "if the proffered other acts evidence is logically relevant, and does not involve the intermediate inference of character, Rule 404(b) is not implicated." *Id*. at 64. To introduce other-acts evidence, the prosecution must show that 1) there is a reason for its admission, other than propensity, 2) the evidence is relevant, and 3) the danger of undue prejudice does not substantially outweigh its probative value. *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). Whether evidence is more unfairly prejudicial than probative is a question "best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony . . . ." *Vandervliet*, *supra* at 81. Unfair prejudice occurs when there is a "danger that marginally probative evidence will be given undue or pre-emptive weight by the jury . . . ." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), citing *Bradbury v Ford Motor Co*, 123 Mich App 179, 185; 333 NW2d 214 (1983). Unfair prejudice is also described as "an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one." *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995).

We conclude that the trial court did not commit plain error when it allowed evidence of defendant's refusal to cooperate with police to be presented to the jury because a proper purpose existed, other than propensity, for its admission. Hamilton's murder caused defendant to become enraged. He wanted to avenge the situation himself, and not leave it to the police. He planned to hunt Brooks down. By itself, defendant's refusal to speak with police does not lead to an inference that defendant is a bad person, and therefore he must have committed a home invasion and felonious assault. It does, however, clarify defendant's motive to invade the victim's home. Because motive to commit a crime makes defendant's guilt more likely, evidence of motive is relevant to the question of defendant's guilt. And, after reviewing the record evidence, we do not conclude that the evidence was unfairly prejudicial. Thus, the trial court did not abuse its discretion in admitting the evidence.

We also conclude that the trial court did not commit plain error when it admitted evidence of defendant's other home invasions. Prior to trial, the prosecution submitted a notice of its intent to admit MRE 404(b) evidence of the home invasions. Its stated intent was to show that there was lack of mistake and intent when defendant kicked down the victim's door, to show that defendant had a system and plan to go from house to house looking for Brooks with a firearm, and to refute defendant's alibi. These are all proper, non-propensity purposes to admit this evidence. MRE 404(b)(1). Furthermore, the evidence was relevant to at least one proper purpose: to contradict defendant's alibi. Because he was seen at the 600 block of Armstrong invading other homes during the time he claimed he was in Belleview, it is likely that his alibi was false. Furthermore, we conclude that this evidence was not unfairly prejudicial because it was critical to support the prosecution's assertion that defendant was not where he claimed to be during the victim's home invasion, and the prosecution had no other evidence to contradict defendant's alibi. *Mills*, *supra* at 76, citing *Bradbury*, *supra* at 185. Moreover, the fact that defendant was seen entering two other homes without authorization with a semi-automatic pistol makes it more likely that the victim's description of events was accurate and truthful. For these reasons, we conclude that the potential of the evidence to cause unfair prejudice did not outweigh the probative value of the evidence.

Defendant also asserts that the prosecutor's open hostility toward defendant was so highly prejudicial that defendant did not receive a fair trial. However, this issue is not properly raised on appeal or supported by sufficient facts or authority; therefore, it is abandoned and we decline to address it. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Defendant next argues that his trial counsel was ineffective. Ineffective assistance of counsel issues present mixed questions of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of fact for clear error, while we review questions of constitutional law de novo. *Id.* Where defendant did not raise this issue at trial or seek a *Ginther*[1] hearing, however, we limit our review to mistakes that are apparent from the record. *People v Taylor*, 275 Mich App 177, 186; 737 NW2d 790 (2007).

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

Defendant's right to effective assistance of counsel is guaranteed under the Sixth Amendment. US Const Am VI. Counsel is presumed effective and it is the defendant's burden to show that 1) counsel's performance fell below objective standards of reasonableness, and 2) that it is "reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007), citing *Strickland v Washington*, 466 US 668, 687, 690, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant first argues that his conviction was the product of an illegal search and arrest, and that counsel's failure to file a motion to this effect was an outcome determinative error. The defendant bears the burden to establish standing to object to a search. *People v Lombardo*, 216 Mich App 500, 505; 549 NW2d 596 (1996). The test is whether the defendant had a reasonable expectation of privacy in the area that was searched. *People v Smith*, 420 Mich 1, 21; 360 NW2d 841 (1984). The expectation of privacy must be an actual, subjective expectation of privacy that society recognizes as reasonable. *Id*. at 27-28. A person who is in a premises wrongfully cannot invoke the privacy of the premises. *Id*. at 28, citing *Jones v United States*, 362 US 257, 267; 80 S Ct 725; 4 L Ed 2d 697 (1960). Furthermore, unless defendant was an overnight guest, he did not have a reasonable expectation of privacy as a visitor in another's home. *People v Parker*, 230 Mich App 337, 340; 584 NW2d 336 (1998).

Here, police found defendant in the house of a woman who was not acquainted with him. He was there without her permission. He did not sleep there overnight or store his possessions there, and he was hiding from police when the police searched the woman's home with her consent. Because defendant was in the home wrongfully, and was not staying there as an overnight guest, he did not have a reasonable expectation of privacy in the premises. See *Smith*, *supra* at 28; *Parker*, *supra*. Therefore, defendant did not have standing to object to the search of the home. And, even if he did, the woman's consent for the police to search her home was valid. Consent to a search "must be freely and voluntarily given in order to be valid." *People v Williams*, 472 Mich 308, 318; 696 NW2d 636 (2005). Because the search was valid, the evidence confiscated during the search was admissible. See *People v Brown*, 127 Mich App 436, 440-441; 339 NW2d 38 (1983).

Similarly, defendant's arrest was valid. An arrest is proper where "an arresting officer possesses enough information demonstrating probable cause to believe that an offense has occurred and that the defendant has committed it." *People v MacLeod*, 254 Mich App 222, 228; 656 NW2d 844 (2002). At the time of defendant's arrest, officers had probable cause to believe that defendant had invaded the victim's home and was spotted around the Armstrong neighborhood carrying a semi-automatic weapon. The victim specifically identified defendant as the person who invaded her home. Defendant also exactly matched the description of the person with the firearm who was running through the Armstrong neighborhood.

Defendant next argues that counsel's failure to admit photographs and letters, and his failure to file a motion for dismissal based on that evidence, were outcome determinative errors. Defendant asserts that the photographs and letters would have conclusively proven he was innocent. Because the pictures at issue are not a part of the record, we will not consider them. See *Taylor*, *supra* at 186. Moreover, an attorney's decision about whether to present evidence is a matter of trial strategy, and we will not second-guess such decisions with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

With respect to the letters, the trial court allowed defendant to question the victim about them and to impeach her with statements she made in the letters. We conclude that this is the extent to which defendant could properly use the letters. If offered for another purpose, MRE 802 would have barred admission of the letters, and they would not be admissible under any hearsay exception. Furthermore, if counsel attempted to admit the letters, the trial court had discretion to prohibit their use, because defense counsel failed to provide them to the prosecution during discovery. See MCR 6.201(J). Counsel's use of the letters was a part of his trial strategy, and we will not second guess it on appeal. *Dixon*, *supra* at 398. Furthermore, trial counsel should not file a meritless motion, and a motion for directed verdict of acquittal "is not warranted if the evidence, viewed in a light most favorable to the prosecution, establishes a prima facie case of the charged offense." *People v Calhoun*, 178 Mich App 517, 524-525; 444 NW2d 232 (1989). In any event, the admission of the letters could not have led to a directed verdict for acquittal. The substance of the letters was already presented to the jury. Considering the evidence in a light most favorable to the prosecution, there was substantial evidence on the record to prove that defendant invaded the victim's home with a firearm and assaulted her. Therefore, a motion to dismiss based on the letters would have been futile. Counsel's actions were objectively reasonable and were not outcome determinative.

Defendant next argues that counsel was ineffective because he failed to object to the number of peremptory challenges that defendant was allowed during voir dire. Defendant points to the discrepancy that existed[2] between MCL 768.12 and MCR 6.412(E), and argues he should have received 20 peremptory challenges instead of 12. The United States Constitution guarantees the right to an impartial jury, not the right to a certain amount of peremptory challenges. *Stilson v United States*, 250 US 583, 586; 40 S Ct 28; 63 L Ed 1154 (1919). Generally, when a defendant fails to exhaust his peremptory challenges, or when he states he is satisfied with the jury, he waives any error in jury selection. *People v Rose*, 268 Mich 529, 531; 256 NW 536 (1934). But see *People v Taylor*, 195 Mich App 57, 59-60; 489 NW2d 99 (1992) (explaining that the exhaustion requirement is not absolute). Here, defendant used only five peremptory challenges. Counsel then stated that defendant was satisfied with the jury. Because counsel only used five peremptory challenges, the number of challenges that he should have been given, 12 or 20, is irrelevant. Counsel's failure to request more challenges, which he would not use, did not fall below an objective standard of reasonableness. Finally, defendant provided no evidence that the jury was not fair or impartial. In fact, counsel thoroughly questioned jurors during voir dire to examine juror bias; therefore, there is no evidence that counsel's actions during jury selection negatively affected the outcome of his trial.

Defendant next argues that the prosecution failed to timely file its notice for his habitual offender sentencing enhancement, that counsel was ineffective because he failed to recognize this issue, and that this failure affected the length of his sentence. Under MCR 6.112(F), the prosecution has 21 days from the defendant's arraignment to file notice of its intent to seek an enhanced sentence. This Court has construed this as a very strict time frame. *People v Morales*, 240 Mich App 571, 583; 618 NW2d 10 (2000). The purpose of an arraignment is to provide

[2] In 2007, the Legislature amended MCL 768.12 so that the number of peremptory challenges allowed by statute is consistent with those allowed by the court rule.

formal notice of the charge against the accused. *People v Thomason*, 173 Mich App 812, 815; 434 NW2d 456 (1988), citing *People v Killebrew*, 16 Mich App 624, 627; 168 NW2d 423 (1969). At an arraignment, the information is read to the accused and the accused may enter a plea to those charges. *Thomason*, *supra* at 815, citing MCR 6.101(D)(1). The accused may waive the reading of the formal charges at the arraignment. *Id*. An arraignment may be noticed at the same time as the preliminary examination. *Id*. at 816.

Here, defendant was arraigned on October 25, 2005, when he waived the formal reading of charges and stood mute for purposes of arraignment. Although defendant's preliminary hearing began on October 18, he did not waive the reading of the charges or answer the charges until October 25. Therefore, defendant was not arraigned until October 25. The prosecution filed its notice on November 15, 2005, within 21 days of October 25. Therefore, we conclude that counsel's failure to file a motion for dismissal of the fourth habitual enhancement was not conduct that fell below an objective standard of reasonableness.

Finally, defendant argues that there was no evidence on the record to support the trial court's scoring of sentencing offense variables (OV) 1, MCL 777.31, and 10, MCL 777.40, and that counsel was ineffective for allowing the sentence to stand. Defense counsel argued vigorously about the scoring of each of these variables during the sentencing hearing. He brought up the victim's contradictory testimony and argued that defendant did not manipulate or exploit anyone when he entered the victim's home. After reviewing the record, we conclude that counsel made an objectively reasonable effort to argue his client's case before the court on sentencing.

When scoring offense variables, a sentencing court has discretion to decide the number of points to be scored. When there is evidence to support the score, the sentencing court's decision will be upheld. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). Here, there was evidence in the record to support the trial court's score of 15 points for OV 1. Under MCL 777.31(1)(c), OV 1 should be scored at 15 points when the defendant pointed a firearm at or toward a victim. A "victim" is any person who is in danger of being injured or losing life. MCL 777.31(2)(a). Evidence was presented at trial that defendant pointed his firearm at the stairs in the victim's house and that the victim's friend was on the stairs. The victim also told police that he pointed his firearm at her. A bullet was found on the victim's porch, so a reasonable inference can be drawn that defendant's gun was loaded and dangerous. Therefore, regardless of counsel's vigorous arguments to the contrary, there was evidence to show that defendant pointed the gun at two victims and placed them in danger.

Defendant's only argument on appeal with respect to the scoring of OV 10, MCL 777.40, is that the trial court improperly considered evidence that was not presented to a jury under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, this argument has no merit because *Blakely* does not apply where, as here, the maximum sentence was prescribed by statute and defendant's sentence did not exceed the statutory maximum. *People v Drohan*, 475 Mich 140, 157, 160; 715 NW2d 778 (2006). Thus, defense counsel's conduct in not lodging a *Blakely* objection did not fall below an objective standard of reasonableness. *Calhoun*, *supra* at 524-525.

Defendant failed to meet his burden to show that counsel acted below an objective standard of reasonableness and consequently affected the outcome of his trial. Therefore, we find that counsel was effective.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Mark J. Cavanagh