STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2008
v	No. 278956 Wayne Circuit Court
STEVEN GREGORY THOMAS, Defendant-Appellant.	LC No. 07-005408-01

Before: Meter, P.J., and Talbot and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of felonious assault, MCL 750.82, and one count each of possession of a firearm during the commission of a felony, MCL 750.227b, fourth-degree fleeing or eluding a police officer, MCL 257.602a(2), and resisting or obstructing a police officer, MCL 750.81d(1). He was sentenced to concurrent prison terms of 23 months to 4 years for each felonious assault conviction and one to two years each for the resisting arrest and fleeing a police officer convictions, to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant was convicted of assaulting two repossession agents with a shotgun when the agents attempted to repossess a van on defendant's property. Defendant later left in the van, pursued by the victims and eventually by the police. According to police officers, defendant failed to yield to an officer's signal to stop his vehicle. Defendant eventually stopped his van and was pursued on foot. He was eventually apprehended and, according to police officers, resisted efforts to be handcuffed and struggled with the officers until he was tasered. After his arrest, the police took defendant to a hospital for medical treatment, after which he was released. Approximately a day and a half after he was arrested, defendant gave a statement in which he admitted obtaining a gun from his house after a tow truck pulled into his driveway and the driver refused to speak to him to explain what was going on.

Defendant testified at trial that he confronted the two victims with a gun because he thought they were trying to steal his work tools from his van, but denied pointing the gun at either victim. Defendant also denied failing to stop for the police or resisting his arrest.

I. Effective Assistance of Counsel

Defendant argues that trial counsel was ineffective for failing to move to suppress his police statement on the ground that it was not given voluntarily. We disagree.

Because defendant did not raise an ineffective assistance issue in the trial court, our review is limited to errors apparent from the record.[1] *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action was sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). He must also show that the proceedings that took place were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

The record does not factually support defendant's argument that his police statement was not voluntarily made. In *People v Tierney*, 266 Mich App 687, 707-708; 703 NW2d 204 (2005), this Court explained:

> The right against self-incrimination is guaranteed by both the United States Constitution and the Michigan Constitution. US Const, Am V; Const 1963, art 1, § 17; *People v Cheatham*, 453 Mich 1, 9; 551 NW2d 355 (1996) (opinion by Boyle, J.). Statements of an accused made during a custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives that Fifth Amendment right. . . . The prosecutor must show by a preponderance of the evidence that the defendant knowingly, intelligently, and voluntarily waived his Fifth Amendment right. *People v Daoud*, 462 Mich 621, 634; 614 NW2d 152 (2000). Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law, which the court must determine under the totality of the circumstances. *Cheatham*, *supra* at 27. . . . Whether a statement was voluntary is determined by examining police conduct[.] . . .
>
> This Court reviews de novo the question of voluntariness. *People v Sexton* (*After Remand*), 461 Mich 746, 752; 609 NW2d 822 (2000). . . . However, deference is given to the trial court's assessment of the weight of the evidence and the credibility of the witnesses, *id*., and the trial court's findings will not be reversed unless they are clearly erroneous and leave "this Court with a definite and firm conviction that a mistake was made." *People v Shipley*, 256 Mich App 367, 372-373; 662 NW2d 856 (2003). . . .

[1] We reject defendant's suggestion that this case be remanded for an evidentiary hearing.

> In determining voluntariness, the court should consider all the circumstances, including: "[1] the age of the accused; [2] his lack of education or his intelligence level; [3] the extent of his previous experience with the police; [4] the repeated and prolonged nature of the questioning; [5] the length of the detention of the accused before he gave the statement in question; [6] the lack of any advice to the accused of his constitutional rights; [7] whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; [8] whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; [9] whether the accused was deprived of food, sleep, or medical attention; [10] whether the accused was physically abused; and [11] whether the suspect was threatened with abuse." *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). No single factor is determinative. *Sexton*, *supra* at 753. "The 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." *Cipriano*, *supra* at 334.

According to the detective who took defendant's statement, defendant stated that he could not read or write, so the detective, in the presence of another officer, read defendant his rights. Defendant thereafter signed the advice of rights form. Defendant then gave a statement, which the detective wrote out and read to defendant. Defendant signed the statement, which consisted of the following:

> I was working on my house when a tow truck pulled up. I went outside and spoke to the tow truck driver. He refused to speak with me. I went inside the house and got my shotgun because the driver refused to speak with me and I didn't know what was going on.
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> The driver backed out of the driveway, still not explaining to me what was going on. I put the gun back into the house and drove off in my van. The police tried to stop me and I was scared.

Although there was evidence that defendant was injured during his arrest, he was promptly taken to a hospital, treated for his injuries, and released. Defendant's statement was not given until almost two days after he was arrested. The record does not support a causal connection between defendant's treatment at the time of his arrest and the giving of his statement. See *People v Wells*, 238 Mich App 383, 389-390; 605 NW2d 374 (1999). Further, although defendant claimed at trial that he was still distraught when he gave his statement, there is no evidence that any police misconduct or coercion was used to obtain the statement. Defendant emphasizes that he is unable to read or write, but the record discloses that the officer verbally read defendant his rights and that defendant signed the advice of rights form before he gave a statement. In sum, there is no support in the record for defendant's claim that his statement was not voluntarily given. Accordingly, there is no basis for concluding that defense counsel was ineffective for failing to seek suppression of the statement. Counsel is not required to file a futile motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Furthermore, defendant was not prejudiced by the admission of his statement. Defendant admitted at trial that the majority of the statement was accurate. The only portion that he identified as inaccurate was the part indicating that he had been working on his house when the

tow truck pulled up. Defendant claimed that he instead told the detective that he was preparing to go to work before the tow truck arrived. This minor discrepancy was immaterial to the determination regarding whether defendant committed the charged offenses. Because defendant's trial testimony was largely cumulative of his statement, there is no reasonable probability that the outcome of the trial would have been different if the statement had been suppressed. See *People v McRunels*, 237 Mich App 168, 184-185; 603 NW2d 95 (1999).

II. Defendant's Choice of Counsel

Next, defendant argues that he was deprived of his right to be represented by counsel of his choice. At trial, defendant was represented by attorney Sharon Woodside. Because defendant never objected to Woodside's representation at trial, or complained that he was not being represented by an attorney of his choice, this issue is not preserved. Therefore, our review is limited to plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant originally retained attorney David Braxton to represent him. Braxton represented defendant at the preliminary examination, but, with defendant's consent, two other attorneys represented defendant at the next two hearings because Braxton had been hospitalized and was unable to appear. A third attorney, Woodside, represented defendant at trial because of Braxton's continuing incapacity. Notably, Woodside also represented defendant at two pretrial conferences dating back to one month before trial. Although defendant never consented on the record to Woodside's representation, he never objected or voiced any disagreement with her representation either.[2]

At the root of the Sixth Amendment's right to counsel is the right of a defendant to select counsel of his own choosing. *United States v Gonzalez-Lopez*, 548 US 140, 147-148; 126 S Ct 2557, 2563; 165 L Ed 2d 409 (2006). Therefore, a defendant who does not require the appointment of counsel has the right to choose who will represent him. *Id*. at 144. A violation of a defendant's right to counsel is established when the defendant is erroneously prevented from being represented by his lawyer of choice, regardless of the quality of representation he may receive from another lawyer. *Id*. at 148. However, the right is not absolute and may be circumscribed in different ways. *Wheat v United States*, 486 US 153, 159; 108 S Ct 1692; 100 L Ed 2d 140 (1988). Trial courts maintain the authority to establish criteria for lawyers who appear before them, and may remove a defendant's attorney based on "gross incompetence, physical incapacity, or contumacious conduct." *People v Coones*, 216 Mich App 721, 728-729; 550 NW2d 600 (1996); see also *Wheat, supra* at 159.

In this case, the record discloses that defendant's original retained attorney, Braxton, was unavailable because of physical incapacity. More significantly, there is no indication in the record that the trial court interfered with defendant's choice of counsel. Woodside stated on the

[2] Defendant's reliance on MCR 6.005(E) is misplaced. That rule addresses a trial court's obligation to advise a defendant of the right to counsel where the defendant decides to waive the assistance of counsel. Because defendant never waived his right to counsel, the rule is not applicable.

record that she was brought into the case because of Braxton's health problems. Although defendant asserts that he did not consent on the record to Woodside's representation, Woodside was not an appointed attorney and there is no indication that the trial court compelled Woodside to represent defendant against defendant's wishes. Further, defendant never asked that the trial be adjourned or delayed to enable him to proceed with Braxton or another attorney of his choosing. For these reasons, defendant has not established that his right to counsel of his choice was violated.

In addition, nothing in the record supports defendant's claim that he was denied the effective assistance of counsel merely because he was represented by different attorneys throughout this case. As explained elsewhere in this opinion, there is no merit to defendant's specific claims of ineffective assistance of counsel, and defendant does not explain what else his attorneys should have done differently.

III. Defendant's Standard 4 Brief

Defendant raises three additional issues in a supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-4, Standard 4, none of which have merit.

He first argues that his attorney was ineffective for not moving to quash the information. However, defendant does not contend that the evidence at trial was insufficient to support each of his convictions. Where sufficient evidence is presented at trial to convict the defendant, a magistrate's erroneous decision to bind the defendant over for trial is rendered harmless. *People v Libbett*, 251 Mich App 353, 357-358; 650 NW2d 407 (2002). Evidence was presented that defendant aimed a loaded shotgun toward both victims and threatened them. He thereafter failed to heed an officer's signal to stop his vehicle and fought with the officers when they attempted to place him under arrest. The evidence was sufficient to prove each of the charged crimes. See *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007) (felonious assault), *People v Nichols*, 262 Mich App 408, 410; 686 NW2d 502 (2004) (resisting an officer), *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999) (felony-firearm), and *People v Wood*, 276 Mich App 669, 670-671; 741 NW2d 574 (2007) (fleeing or eluding). Defendant has not demonstrated that counsel was ineffective for failing to file a motion to quash.

Defendant also asserts that defense counsel was ineffective for failing to call Orlando Jones as a witness at the preliminary examination. At trial, Jones testified that defendant never pointed his gun at the victims and, also, attempted to ask the victims what they were doing on his property, but they did not respond. Even if Jones had testified in this manner at the preliminary examination, his testimony would not have precluded a bindover, but would have only established the presence of a factual dispute to be resolved by the trier of fact at trial. *People v Greene*, 255 Mich App 426, 443-444; 661 NW2d 616 (2003).

Further, contrary to defendant's assertion, any defect in the arrest warrant or complaint did not affect the trial court's jurisdiction over this matter. See *People v Burrill*, 391 Mich 124, 133-134; 214 NW2d 823 (1974). Accordingly, defendant was not prejudiced by counsel's failure to challenge the arrest warrant or complaint.

Defendant also argues that counsel was ineffective for not requesting an instruction on specific intent for the felonious assault charges and for not requesting an instruction on defense of property. We disagree.

"The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007) (internal citation and quotation marks omitted). Specific intent is not an element of felonious assault; the prosecution need only prove "the general criminal intent to commit an unlawful act necessary for simple assault." *People v Joeseype Johnson*, 407 Mich 196, 227-228; 284 NW2d 718 (1979). Further, as plaintiff points out, deadly force or the endangerment of human life may not be used to defend property such as the van. *People v Shaffran*, 243 Mich 527, 528-529; 220 NW 716 (1928); *People v Doud*, 223 Mich 120, 130-131; 193 NW 884 (1923). Because defendant has failed to show that a specific intent of defense of property instruction was applicable, we conclude that counsel was not ineffective for failing to request these instructions.

Finally, defendant argues that the trial court erred by failing to give a supplemental instruction in response to a jury note concerning the elements of felonious assault, and erroneously foreclosed the jury from rehearing requested testimony. Because defendant did not object to the trial court's handling of either of these matters, we review these issues for plain error affecting defendant's substantial rights. *People v Hill*, 257 Mich App 126, 151-152; 667 NW2d 78 (2003).

When a jury asks for supplemental instructions on a specific issue, the trial court need only instruct the jury on that issue. *People v Katt*, 248 Mich App 282, 311; 639 NW2d 815 (2001), aff'd 468 Mich 272 (2003); *People v Parker*, 230 Mich App 677, 681; 584 NW2d 753 (1998). Here, contrary to defendant's claim, the record discloses that the trial court responded to the jury's inquiry regarding the elements of felonious assault. After discussing the matter with the attorneys, the court instructed the jury that it was not necessary that a weapon be pointed at a victim in order to establish an assault. The court also reread its earlier instruction defining the elements of felonious offense. Defendant does not contend that the substance of the trial court's supplemental instructions was inaccurate. Accordingly, we find no plain error.

Defendant additionally argues that the trial court erroneously responded to the jury's request to rehear certain testimony. In response to the jury's request, the trial court instructed the jury as follows:

> All right. You may be seated, folks. Thank you. We got your note a little while ago. We had to take care of some other things and talk about your note a little bit. You asked to see the Defendant's testimony in order to make a final determination on one of the five counts.
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> You cannot see the Defendant's testimony. We cannot have a transcript of his testimony prepared and clearly that's not something that can be done instantaneously anyway. It takes quite a bit of time for that. Usually when we run into this sort of a problem what we do is we have the Court Reporter read back his testimony. That's the only thing that we can do.

> Now, Mr. Thomas was on the stand for a good hour and a half so the read back would take at least an hour and a half. I can't do it today. I can't do it tomorrow.
>
> I can't do it Monday, but it can be done Tuesday morning starting at nine o'clock[;] I can carve out an hour and a half or two of our time to have his testimony read back to you if that's what you think you have to have.
>
> Now, let me remind you that there are twelve of you, twelve sets of ears listening to that man's testimony a couple of days ago, twelve of you presumably taking notes about what his testimony was.
>
> I would urge you to search your collective memories and your notes to try to resolve any doubts you have about what he said or didn't say. Twelve of you working on this ought to achieve some consensus about what his testimony was.
>
> So I'm going to send you back into the jury room to continue your deliberations at least for another twenty minutes or so today and if you're unable to conclude the matter without a read back then I'm going to have you come back Tuesday morning and we'll have testimony read back and then you can go back into deliberations.
>
> That's the best I can do. We are extremely busy tomorrow. I cannot take two hours out of our court time tomorrow for a read back because we all have to sit here and stop everything else and the Court Reporter, of course, has to sit there and read it back and I just can't do it tomorrow and Monday morning I'm scheduled -- I've got two other jury trials on the docket that I've got to deal with and I can't do it Monday. I can do it Tuesday.
>
> So continue your deliberations for another twenty minutes or so and if you're unable to resolve this we'll send you home for the next three or four days and you can come back Tuesday, okay.

The jury was thereafter able to reach a verdict without having to rehear defendant's testimony.

When a jury requests that testimony be read back, both the reading and the extent of the reading is a matter within the sound discretion of the trial court. *People v Howe*, 392 Mich 670, 675; 221 NW2d 350 (1974). The trial court's decision is reviewed for an abuse of discretion. See *id*. at 677. Under MCR 6.414(J),[3] the trial court must exercise its discretion to ensure fairness and deny unreasonable requests. However, the court must also not refuse a reasonable request. *Id*.; *People v Carter*, 462 Mich 206, 210-211; 612 NW2d 144 (2000). The court may order the jury to continue deliberations without the requested testimony, as long as the court does

[3] As of August 5, 2008, certain judges, under a pilot project, are to use different specific procedures concerning jury questions. See Supreme Court Administrative Order No. 2008-2.

not foreclose the possibility of having the testimony reviewed at a later time. MCR 6.414(J); *Carter*, *supra* at 211.

In this case, the trial court asked the jurors to continue deliberating because it was unable to immediately provide the requested testimony, but it never foreclosed the jurors from rehearing the testimony. On the contrary, while it urged the jurors to rely on their collective memories to achieve some consensus about defendant's testimony, it also gave the jurors the option of adjourning deliberations if they determined that the requested testimony was necessary to reach a verdict. Accordingly, there was no plain error.

We also find no merit to defendant's claim that the trial court's instructions were unduly coercive. A defendant does not have the right to have a jury rehear testimony. *Carter*, *supra* at 218. Also, because this was not a situation involving a deadlocked jury, it was not necessary that the court instruct the jury in accordance with CJI2d 3.12 or ABA Standard 5.4. See *People v Pollick*, 448 Mich 376, 381-382; 531 NW2d 159 (1995), and *People v Rouse*, 272 Mich App 665, 669-670; 728 NW2d 874 (2006), rev'd 477 Mich 1063 (2007). Moreover, the fact that the trial court was willing to adjourn deliberations, if necessary, to accommodate the jury's request to rehear defendant's testimony indicated that its instructions were not coercive. Defendant has failed to establish plain error.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Christopher M. Murray