STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee	UNPUBLISHED March 17, 2009
v	No. 277874 Berrien Circuit Court
CHARLES LAWRENCE COLE, JR, Defendant-Appellant.	LC Nos. 2006-405834-FC; 2006-405524-FC

Before: Sawyer, P.J., and Zahra and Shapiro, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of uttering and publishing, MCL 750.249, and using a computer to commit uttering and publishing, MCL 752.796. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent terms of 46 to 138 months' imprisonment. Defendant's sentences run consecutively to a sentence he was serving as a consequence of his parole status. Defendant appeals as of right. We affirm.

Defendant argues that his statements to the police were involuntary because they were coerced through threats and false promises, and therefore, the trial court erred in denying his motion to suppress the statements. Our review of the trial court's determination that a statement was voluntary is de novo, but we will affirm unless we have a definite and firm conviction that a mistake was made, *People v Sexton*, 461 Mich 746, 752; 609 NW2d 822 (2000). However, we will not disturb the trial court's factual findings absent clear error. *People v Tierney*, 466 Mich App 687, 707; 703 NW2d 204 (2005). Based on the totality of the circumstances, the trial court must determine whether a statement is "the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired." *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988).

Defendant's claim that his confession was involuntary because it was coerced through police actions is without merit. The trial court found that defendant was given his *Miranda*[1] warnings and that he subsequently waived them. Defendant's age, intelligence, and experience

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

with the criminal justice system coupled with the relatively short period of time between defendant's assertion of his *Miranda* rights and their subsequent waiver all weigh in favor of defendant's statement being voluntary. Furthermore, the police denied defendant's claim of unfulfilled promises and threats and the trial court found the police credible. On this record, we will not disturb the trial court's finding that defendant's statement was voluntary because defendant has failed to establish that the trial court's findings were clearly erroneous.

Defendant next argues that the trial court erred in admitting evidence of other acts pursuant to MRE 404(b)(2) without determining if the prosecutor should be excused for failing to provide notice. The prosecution is generally required to provide defendant with reasonable notice of its intent to present evidence of prior bad acts in advance of trial or during trial by showing good cause. MRE 404(b)(2); *People v Hawkins*, 245 Mich App 439, 453; 628 NW2d 105 (2001). However, if the prior acts constitute res gestae of the offense, the prosecution is not required to provide notice because the acts are so connected to the charged crime that their admission is necessary to give the jury the "complete story." *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996). Under this exception, "evidence of prior 'bad acts' is admissible where those acts are 'so blended or connected with the (charged crime) that proof of one incidentally involves the other or explains the circumstances of the crime', *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978)." *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983).

The trial court correctly admitted the evidence of other acts because the other acts constitute evidence of the res gestae of the charged offenses. The Marathon station employees first became suspicious of Takara Robinson's check because it matched bad checks they received in the past; however, those checks bore the name "David Clark." As they were stalling Robinson and defendant, the Marathon station employees identified defendant as the person who previously presented the checks bearing the name "David Clark." In addition, as defendant was leaving the Marathon station and noticed the police behind him, he threw a large quantity of the "David Clark" checks from his window onto the freeway. These acts are so connected to the charged crime that their admission is necessary to give the jury the "complete story." *Sholl*, *supra* at 741-742. Each of the defendant's acts is incidentally connected with one another; and therefore, they fall within the res gestae exception to MRE 404(b), and no notice was required. *Robinson, supra* at 340. Accordingly, the trial court did not abuse its discretion in allowing the prosecution to introduce the evidence.

Defendant next claims that the prosecutor presented insufficient evidence to support his conviction and support the trial court's denial of his motion for a directed verdict. Our review of both claims is de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

The prosecution must establish three elements beyond a reasonable doubt to prove uttering and publishing: "(1) knowledge on the part of the defendant that the instrument was false; (2) an intent to defraud; and (3) presentation of the forged instrument for payment." *Hawkins, supra* at 457; see also MCL 750.249. To prove the offense of using a computer to commit uttering and publishing, the prosecutor must prove: (1) the defendant used a computer,

(2) with the intention of committing uttering and publishing. MCL 752.796. Defendant was convicted of uttering and publishing under an aiding and abetting theory. "[A]nyone who intentionally assists someone else in committing a crime is as guilty as a person who directly commits it and can be convicted as an aider and abetter." *People v Coomer*, 245 Mich App 206, 223; 627 NW2d 612 (2001). " 'Aiding and abetting' describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime." *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995), overruled in part on other grounds *People v Mass*, 464 Mich 615; 628 NW2d 640 (2001). An aider and abettor's state of mind may be inferred from the facts and circumstances including a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Id.* at 568-569.

We reject defendant's claims that the trial court erred in denying his motion for a directed verdict and that there was insufficient evidence to support his conviction. Defendant confessed to the police that he created the checks on his computer and that he used the account numbers from a valid check and transposed those numbers to put onto the checks he printed. In addition, the evidence established that defendant knowingly provided assistance to Robinson while she attempted to use the checks. Defendant drove Robinson to the Marathon station, and after Robinson was delayed, defendant entered the gas station with a cover story and twice reached over the counter to retrieve Robinson's check and driver's license. Finally, defendant fled the scene, and when the police caught up to them, he and Robinson threw some of the checks he printed out the window. From this record evidence, the jury could infer from the facts and circumstances, including the defendant's participation in the planning and execution of the crime and evidence of flight after the crime, that defendant was guilty beyond a reasonable doubt of using a computer to commit uttering and publishing and aiding and abetting Robinson while she committed uttering and publishing. *Turner, supra* at 568-569.

Next, defendant raises several sentencing issues and argues that he is entitled to resentencing. We will affirm a defendant's sentence if it is within the appropriate guideline sentence range, and absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the sentence. MCL 769.34(10); *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003).

First, defendant argues that the trial court erred when it failed to explain why the sentences were proportionate, especially in light of defendant's cooperation with law enforcement, familial support, and addiction to cocaine. A minimum sentence within the sentencing guidelines, as in this case, is presumed proportional, *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008), and, therefore, the trial court was under no obligation to further state its reasons for the sentence.

Second, defendant argues that the trial court erred in failing to conduct an assessment under MCR 6.425(A)(5) to determine defendant's rehabilitative potential. We disagree. The trial court was not required to order an assessment of defendant's rehabilitative potential under MCR 6.425(A)(5). This rule only requires that a presentence report include a defendant's medical and substance abuse history and a current psychological or psychiatric report if indicated. In this case, the presentence report noted defendant's medical and substance abuse history and noted that defendant had not been diagnosed with any mental health issues. Therefore, the presentence report complied with MCR 6.425(A)(5).

Third, defendant argues that his sentence amounted to unconstitutional cruel and/or unusual punishment in violation of the federal and state constitutions. "[A] sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment. *Powell*, *supra* at 323. Because defendant's minimum sentence was within the sentencing guidelines, the sentence is presumptively proportionate, and therefore, the sentence does not amount to cruel and unusual punishment.

Fourth, defendant argues that the trial court's scoring of sentencing guidelines variables violated *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). *Blakely* is inapplicable to our sentencing scheme because Michigan uses an indeterminate sentencing scheme in which a trial court sets a minimum sentence but can never exceed the statutory maximum sentence. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Accordingly, "[a]s long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Id.*

Defendant next argues that the trial court erred by failing to award him sentence credit for time served awaiting trial. Because defendant was on parole when he committed the instant offenses, any credit for time served applies only to the sentence for which parole was granted, not for a new offense. MCL 791.238(2); *People v Stead*, 270 Mich App 550, 551-552; 716 NW2d 324 (2006).

Defendant argues that he received ineffective assistance of counsel. Our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To prevail on his claim, defendant must show that his attorney's performance fell below an objective standard of reasonableness and was so prejudicial that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). He must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . ." *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). Defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *Id.* at 156.

First, defendant argues that defense counsel was unprepared for trial because he failed to call Special Agent Al Dibrito as a witness. To succeed on a claim that defense counsel was unprepared, defendant must demonstrate "that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited" his case. *People v Bass (On Rehearing)*, 223 Mich App 241, 253; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998). Decisions regarding what evidence to present and which witnesses to call are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant offers no proof that Special Agent Dibrito would have testified favorably to the defense if he had been called by defense counsel. "Accordingly, defendant has not established the factual predicate for his claim," i.e., defendant has not shown a reasonable probability that the result of the proceedings would have been different but for trial counsel's failure to call Special Agent Dibrito as a witness. *People v Ackerman*, 257 Mich App 434, 455-456; 669 NW2d 818 (2003).

Second, defendant contends that defense counsel was ineffective because he failed to argue that defendant's consent to search for the computer used to print the checks was coerced.

"A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). However, "defendant must show that he made a good-faith effort to avail himself of this right and that the defense of which he was deprived was substantial." *Id.* "A substantial defense is one that might have made a difference in the outcome of the trial." *Id.* Defendant has failed to demonstrate that defense counsel's failure to raise this issue deprived him of a substantial defense. *Id*. As discussed in Issue I, *supra*, defense counsel did raise an argument concerning the broader issue whether defendant voluntarily waived his *Miranda* rights. Both challenges place the burden of proof on the prosecutor to prove that through the totality of the circumstances defendant's waiver of a constitutional right was voluntary. Because the trial court found no evidence of coercion in conjunction with its rejection of defendant's claimed *Miranda* violation, any claim that consent to search was coerced likewise would have failed for lack of evidentiary support. Defense counsel was not required to raise a frivolous challenge. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Third, defendant argues that defense counsel rendered ineffective assistance when he failed to move to disqualify the trial judge for bias. MCR 2.003(B)(1) requires disqualification if "[t]he judge is personally biased or prejudiced for or against a party or attorney." This Court has interpreted this language to require the party challenging a judge to show actual bias or prejudice. *People v Gomez*, 229 Mich App 329, 331; 581 NW2d 289 (1998). Here, defendant merely concludes that the judge was biased without pointing to any instance in which the alleged bias exhibited itself. Because there is no indication that the trial judge had a personal bias, it would have been futile for defense counsel to move for the trial judge to disqualify himself. Defense counsel will not be faulted for failing to make futile or meritless objections. *Thomas*, *supra* at 457.

Finally, defendant argues that he was denied the right to cross-examine the author of a certificate alleging that the check Robinson used contained fictitious information. We disagree. Defendant validly waived his right to confrontation through his trial counsel's consent to the stipulation. *People v Johnson*, 70 Mich App 349, 350; 247 NW2d 310 (1976).

Affirmed.

/s/ David H. Sawyer
/s/ Brian K. Zahra
/s/ Douglas B. Shapiro