STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 21, 2009
v	No. 275981 Wayne Circuit Court
DEMARCUS LAMAR BANKS, Defendant-Appellant.	LC No. 06-006965-01

Before: Markey, P.J., and Fitzgerald and Gleicher, JJ.

PER CURIAM.

A jury convicted defendant of carjacking, MCL 750.529a, armed robbery, MCL 750.529, unlawfully driving away an automobile (UDAA), MCL 750.413, and receiving or concealing a stolen motor vehicle, MCL 750.535(7). The trial court sentenced defendant to concurrent prison terms of 10 to 20 years for the carjacking and armed robbery convictions, and five years' probation for the UDAA and receiving or concealing convictions. He appeals as of right. We affirm defendant's convictions, but remand for a determination of sentence credit.

Imari Majid, a security guard, testified that at approximately 4:45 a.m. on June 2, 2006, he was parked at a strip mall that he was patrolling when defendant placed a gun in the partially opened driver's side window of his 1998 Oldsmobile Bravada truck and told him to get out of the vehicle. Majid complied, and defendant then drove away in the truck that contained Majid's cell phone, a gym bag, clothes, CDs, books, and $150. The police stopped defendant as he was driving the vehicle on June 3, 2006. A fake firearm was in the pocket of the driver's side door. The title for the truck, which had been altered and had defendant's signature on it, was also inside the vehicle. The title reflected a sales price of $2,480. Majid testified that he purchased the truck on March 22, 2006, for $4,600. According to Sgt. Boyle, the approximate "blue book" value of the vehicle in fair condition was $4,500. Majid identified defendant in a photo array following his arrest. Majid denied knowing defendant previously.

Defendant signed two statements. In a statement signed on June 4, 2006, defendant indicated that he purchased the vehicle from "Crackhead Rob" for $600 and knew that it was stolen. He also stated that Tyree Johnson gave him the fake gun. Defendant signed a second statement on June 5, 2006, in which he stated that Tyree Johnson carjacked the truck, and that he then jumped in the vehicle when the driver came running at him. Defendant claimed that he later picked up the truck and intended to leave it at the location they got it from, but abandoned it when he saw the police. He later returned to the truck after realizing that he had left his cell

phone inside, drove the truck home, and placed his name on the title. Afterward, he changed his mind and decided to "dump" it, but was arrested instead. According to defendant's second statement, the "crack rental stuff" in the first statement was something the police told him.

Defendant testified at trial that he met Majid at the State Theater in Detroit approximately one week before the alleged carjacking, and Majid agreed to sell him the truck for $700 and a motorcycle. According to defendant, they met again at the home of defendant's cousin, Victor Patterson, on May 31, 2006. Defendant gave Majid the money in exchange for the keys, and Majid allowed defendant to use the truck. They were supposed to meet again for defendant to give Majid the motorcycle. Defendant provided contradictory testimony about whether he met Majid again and gave him the motorcycle. He acknowledged that Majid did not sign the title to the truck over to him. He testified that when the police stopped him, he told them that there had been a misunderstanding, but they insisted he tell them about a crack deal. He claimed that the fake gun belonged to Majid and was in the back of the truck. He also claimed that the police coerced him into signing the custodial statements.

Defendant's mother, aunt, and two cousins testified that they saw defendant with the truck before the date it was allegedly stolen. Patterson testified that he saw defendant on May 31, 2006, but first saw defendant with the truck in the afternoon of the following day, at Patterson's cousin's house, and defendant never told him how he acquired it. Although Patterson had been identified by the defense as an alibi witness, Patterson testified that he was not with defendant on the morning of the carjacking.

On appeal, defendant has filed both a brief through appointed appellate counsel and a pro se brief filed pursuant to Supreme Court Administrative Order No. 2004-4, Standard 4.

I. Double Jeopardy

Defendant argues in his pro se brief that the prosecutor "overcharged" him, resulting in multiple punishments for the same offense, in violation of the constitutional protection against double jeopardy. Defendant asserts that he should have been tried for carjacking only.

"A double-jeopardy challenge presents a question of constitutional law that this Court reviews de novo." *People v Ream*, 481 Mich 223, 226; 750 NW2d 536 (2008). Among the protections afforded by the Double Jeopardy Clause of the United States and Michigan Constitutions, US Const, AM V; Const 1963, art 1, § 15, is protection against multiple punishments for the same offense. *Ream*, *supra* at 227. Whether two offenses are the same for purposes of the "multiple punishments" strand of double jeopardy analysis is determined by using the *Blockburger*[1] "same elements" test. *Id.* at 228. "[M]ultiple punishments are authorized if each statute requires proof of an additional fact which the other does not . . . ." *Id.* (citations and internal quotation marks omitted). The focus is on the statutory elements, not the particular facts of the case. *Id.* at 238. Even if two offenses share the same elements, imposition of multiple punishments does not violate the Constitution "if the legislature expressed a clear

[1] *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932).

intention that multiple punishments be imposed." *Id*. at 228 n 3 (citations and internal quotation marks omitted).

Defendant asserts that he should not have been charged with both armed robbery and carjacking because the evidence showed that the only items that were stolen were already in the truck. However, carjacking and armed robbery, even if committed during the same criminal transaction, are not the "same offense" under the *Blockburger* test. *People v Parker*, 230 Mich App 337, 344; 584 NW2d 336 (1998); *People v McGee*, 280 Mich App 680, 682-685; ___ NW2d ___ (2008). Armed robbery and UDAA are also separate offenses because each crime requires proof of an element that the other does not. *People v Hurst*, 205 Mich App 634, 638; 517 NW2d 858 (1994).

We also reject defendant's contention that he should not have been charged with receiving or concealing stolen property as well as armed robbery and carjacking because he cannot be "the principal for the direct offense and also charged as a principal for after the fact, which is what receiving and [c]oncealing is[.]" As our Supreme Court observed in *People v Hastings*, 422 Mich 267, 271; 373 NW2d 533 (1985), "[p]rosecution of the thief for possessing or concealing stolen property does not torture the language of [MCL 750.535]." In addition, receiving or concealing stolen property requires proof of elements that carjacking does not. Cf. *People v Davenport*, 230 Mich App 577, 579; 583 NW2d 919 (1998), and *People v Pratt*, 254 Mich App 425, 427; 656 NW2d 866 (2002). Whereas carjacking involves the stealing of a vehicle, receiving or concealing involves conduct related to a vehicle that was previously stolen. Furthermore, the receiving or concealing statute, MCL 750.535(7), provides that "[t]his subsection does not prohibit the person from being charged, convicted, or punished under any other applicable law." This is indicative of the Legislature's "clear intention" that multiple punishments may be imposed. *Ream, supra* at 228 n 3. For these reasons, we reject defendant's double jeopardy arguments.

II. Use of Perjured Testimony

Defendant also argues in his pro se brief that "constitutional error" occurred because Majid's "perjured" testimony affected the jury's verdict. Constitutional issues are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). But because defendant did not object to Majid's testimony at trial, this issue is unpreserved and our review is subject to the plain error test in *People v Carines*, 460 Mich 750, 764-767; 597 NW2d 130 (1999).

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [*Id*. at 763 (citations omitted).]

Majid admitted at trial that his preliminary examination testimony concerning whether he played high school football was inaccurate. From this admission, defendant extrapolates that Majid's trial testimony as a whole was "perjured." Although defendant correctly observes that the prosecution may not knowingly use false testimony to obtain a conviction, *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998), he has not provided any record support for his claim that Majid's testimony at trial was false. Further, while defendant asserts that he should have been allowed an evidentiary hearing to substantiate his claim that Majid was seeking revenge for "a deal gone bad," the appropriate time for exploring this issue was at trial. We therefore reject this claim of error.

III. Defendant's Custodial Statements

Defendant also argues in his pro se brief that the trial court erred by failing to conduct a *Walker*[2] hearing to determine the admissibility of his custodial statements. Defendant did not request a *Walker* hearing below or object to the admission of his statements on the basis that the statements were involuntary. Therefore, this issue is not preserved and our review is limited to plain error. *Carines, supra.*

In general, a trial court is not required to sua sponte conduct a *Walker* hearing to assess the voluntariness of a defendant's statement before admitting it into evidence. *People v Ray*, 431 Mich 260, 269; 430 NW2d 626 (1988). In *Ray*, however, the Court recognized an exception to "the general raise-or-waive rule," observing that "certain alerting circumstances require the trial court to raise the issue of voluntariness on its own." *Id*. at 271. "'Alerting circumstances may be a defendant's mental, emotional or physical condition, evidence of police threats, or other obvious forms of physical and mental duress.'" *Id.* at 269, quoting *People v Hooks*, 112 Mich App 477, 480; 316 NW2d 245 (1982). The Court in *Ray* explained that "because of the heavy burden placed upon the trial court by such a rule, the *Hooks* rule is limited to those cases in which the evidence clearly and substantially reflects a question about the voluntary nature of a confession or implicates other due process concerns." *Id*. at 271.

Defendant's claims of coercion by the police are the type of "alerting circumstances" that require a trial court to raise the issue of voluntariness on its own. Defendant testified that Sgt. Boyle grabbed him by the shirt, held him in the chair, and told him that he had to sign the first statement. He also stated that an officer hit him in the mouth. Defendant testified that he signed the second statement because, although it was June, it was "freezing" in the jail cell and the officers would not give him the clothes that his brother had brought for him. Defendant claimed that the statements were made "under duress." He testified that he signed them because he was afraid and had never been abused by anyone before.

Nevertheless, defendant has failed to show that the trial court's failure to conduct a *Walker* hearing affected his substantial rights. Even without defendant's statements, the case essentially presented a credibility contest, but defendant's explanation for acquiring the vehicle and altering the title was both implausible and contradictory. Under the circumstances, the

[2] *People v Walker (On Rehearing),* 374 Mich 331, 337-338; 132 NW2d 87 (1965).

admission of defendant's statements did not affect the outcome of the proceedings and, therefore, defendant is not entitled to relief.

We also reject defendant's claim that the trial court refused to allow defense counsel to make an offer of proof concerning whether an investigator was a party to a civil lawsuit involving a claim of excessive force. The trial court did not disallow an offer of proof, but rather sought defense counsel's agreement that the relevant inquiry was not whether the investigator was a party to a lawsuit, but whether he used excessive force against defendant.

Defendant also contends that an audio and videotape of his police interrogation was improperly withheld. However, defendant fails to cite any record support for his belief that his interrogations were recorded, and there is no indication in the record that any recording exists.

IV. Effective Assistance of Counsel

Defendant argues through appellate counsel that trial counsel was ineffective for failing to challenge the voluntariness of defendant's custodial statements before trial.

To establish ineffective assistance of counsel, a defendant must show that his counsel's representation "fell below an objective standard of reasonableness" and must "overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant must also demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . ." *Id*. at 302-303 (citation and internal quotation marks omitted).

As explained in section III, *supra*, there is no reasonable probability that the result of the proceeding would have been different had defendant's statements been suppressed. Thus, defendant was not prejudiced by defense counsel's failure to move to suppress those statements before trial.

Defendant also argues in his pro se brief that defense counsel was ineffective because he did not voir dire the jurors or challenge any of the jurors during jury selection. The record discloses that the trial court questioned the potential jurors concerning their residence, employment and occupation, their spouses' employment and occupation, their education and alma mater, prior jury experience, prior experience as a witness or involvement in a lawsuit, relatives or friends in law enforcement or the legal profession, arrests or charges for criminal offenses, study of law, and experience as a crime victim. Although defense counsel did not further question the prospective jurors, there was no apparent need to do so. As this Court observed in *People v Unger*, 278 Mich App 210, 257-258; 749 NW2d 272 (2008), an appellate court is "disinclined to find ineffective assistance of counsel on the basis of an attorney's failure to challenge a juror" because as a reviewing court, it cannot observe the potential jurors' expressions, body language, and manner of answering questions. In this case, defendant has not overcome the presumption of sound trial strategy with regard to counsel's conduct during jury selection.

V. Sentence Credit

Defendant lastly argues through appellate counsel that the trial court erred when it determined that defendant was not entitled to sentence credit pursuant to MCL 769.11b because he was on probation when he committed the offenses.

The question whether defendant is entitled to sentence credit pursuant to MCL 769.11b for time served in jail before sentencing is an issue of law that we review de novo. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997). Because defendant did not object to the denial of credit at sentencing, we review this issue for plain error affecting defendant's substantial rights. *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754 (2005).

MCL 769.11b provides that a defendant is entitled to credit for time served in jail before sentencing "because of being denied or unable to furnish bond for the offense of which he is convicted."

The trial court declined to award defendant credit for time served because he was on probation at the time he committed the offenses. When a person commits a new offense while on *parole*, credit for time served in jail prior to sentencing on the new offense is not available, because a defendant held on a parole detainer is serving jail time for the parole offense, not "because of being denied or unable to furnish bond for the offense of which he is convicted[.]" MCL 769.11b. See *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004). However, there is no similar restriction on the granting of credit for individuals who commit offenses while on probation. Accordingly, we remand for a determination of sentence credit pursuant to MCL 769.11b and amendment of the judgment of sentence to reflect the appropriate award of credit.

Affirmed in part and remanded for a determination of sentence credit consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Elizabeth L. Gleicher