STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 11, 2010
v	No. 289162 Calhoun Circuit Court
RONALD ERNEST WHEELER, Defendant-Appellant.	LC No. 2008-001743-FC

Before: BANDSTRA, P.J., and FORT HOOD and DAVIS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, and unlawful imprisonment, MCL 750.349b. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 35 to 60 years' imprisonment for each armed robbery conviction, 10 to 30 years' imprisonment for the home invasion conviction, 12 to 30 years' imprisonment for each assault conviction, and 19 to 35 years' imprisonment for the unlawful imprisonment conviction. We affirm.

Defendant first argues that the trial court erred in denying his pretrial motion to suppress incriminating statements he made while in police custody. Defendant waived his *Miranda*[1] rights at the beginning of his interview with police. After approximately one hour, the interviewing detective left the room and returned a short time later and asked defendant if he wanted to talk. Defendant responded by stating, "[g]ot nothing left to say." The detective proceeded to ask defendant questions and defendant made incriminating statements. Defendant contends that his statements were obtained in violation of his *Miranda* right to remain silent. We review a trial court's decision whether to admit evidence for an abuse of discretion, however, preliminary questions of law, including whether a criminal defendant waived his Fifth Amendment rights are reviewed de novo. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003); *People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005). This Court "will not disturb a trial court's factual findings regarding a knowing and intelligent waiver of *Miranda* rights unless that

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

ruling is found to be clearly erroneous." *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999).

"The Fifth Amendment and Const 1963, art 1, § 17 provide that no person shall be compelled to be a witness against himself in a criminal trial." *People v Schollaert*, 194 Mich App 158, 164; 486 NW2d 312 (1992). Pursuant to the Fifth Amendment, statements of an accused made during "custodial interrogation" are not admissible unless the prosecution shows that before any questioning, the accused was advised of his constitutional rights and he voluntarily, knowingly, and intelligently waived those rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

In this case, the trial court did not err in denying defendant's motion to suppress his statements because a review of the record indicates that defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights and, subsequently, did not invoke his rights at the beginning of the second interview. Whether a waiver was proper involves a review of the totality of the circumstances. *Abraham*, 234 Mich App at 645, and involves two separate inquiries: whether waiver was voluntary and whether it was knowing and intelligent. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005). When determining voluntariness, the court should consider all circumstances. *Id.* at 708. A waiver is "knowingly and intelligently" made if evidence supports that the "accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him." *Id*. at 647 (quotation omitted). Here, considering the totality of the circumstances, the waiver was voluntary. Further, it was knowing and intelligent where defendant was informed of his rights, he agreed that he understood his rights, and he signed a waiver form and agreed to talk with the detective. The evidence does not support that defendant was unaware of what he was doing or coerced into waiving his rights. *Id*. at 645.

In addition, defendant did not invoke his constitutional right to remain silent when he stated, "got nothing else to say." "[A] suspect is free at any time to exercise his right to remain silent, and all interrogation must cease if such right is asserted." *People v Catey,* 135 Mich App 714, 722; 356 NW2d 241 (1984); *Miranda*, 384 US at 436. To invoke his Fifth Amendment rights, an accused must "unequivocally" indicate that he wishes to remain silent. *Catey*, 135 Mich App at 722. We conclude that defendant did not invoke his right of silence because he did not unequivocally assert that right. *Id*. Here, defendant's statement was not a clear indication that he wished to cut off all questioning and terminate the interview.

Next, defendant contends that his convictions of armed robbery and assault with intent to do great bodily harm less than murder amounted to multiple punishments for the same offense and thus were in violation of the constitutional provisions barring double jeopardy. Defendant failed to preserve this issue for our review because he did not raise it in the trial court. *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). A double jeopardy challenge generally presents a question of constitutional law that we review de novo. *People v Lett*, 466 Mich 206, 212; 644 NW2d 743 (2002). Unpreserved constitutional errors are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

Both the state and federal constitution contain provisions barring double jeopardy. *People v Chambers*, 277 Mich App 1, 4-5; 742 NW2d 610 (2007). "The Double Jeopardy

Clause affords individuals three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *People v Smith*, 478 Mich 292, 299; 733 NW2d 351 (2007) (quotation omitted). The "same elements" test set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), governs whether multiple punishments are barred on double jeopardy grounds. *Smith*, 478 Mich at 295. Under the *Blockburger* "same elements" test, "two offenses are not the "same offense" if each requires proof of an element that the other does not." *Chambers*, 277 Mich App at 5, citing, *Blockburger*, 284 US at 300, 307.

The elements of assault with intent to do great bodily harm less than murder, MCL 750.84, are: "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). In order to establish the elements of armed robbery, MCL 750.529, a prosecutor must prove:

> (1) the defendant, in the course of committing a larceny … used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*Chambers*, 277 Mich App at 7 (footnotes omitted).]

Comparing the elements of both these offenses, assault with intent to do great bodily harm requires proof of an element not required to prove armed robbery, i.e. intent to do great bodily harm. Additionally, armed robbery requires proof of an element not required to prove assault with intent to do great bodily harm, i.e. commission of a larceny and possession or representation of a dangerous weapon. Defendant's convictions did not amount to multiple punishments for the same offense. *Blockburger*, 284 US at 300, 307.

Next, defendant argues that there was insufficient evidence to support his convictions of armed robbery and assault with intent to do great bodily harm less than murder. We review a challenge to the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In determining whether the prosecution has presented sufficient evidence to sustain a conviction, this Court must construe the evidence in a light most favorable to the prosecution and consider whether there was sufficient evidence to justify a rational trier of fact in finding all of the elements of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

With respect to assault with intent to do great bodily harm less than murder, "[t]his Court has defined the intent to do great bodily harm as an intent to do serious injury of an aggravated nature." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (quotation omitted). "A factfinder can infer a defendant's intent from his words or from the act, means, or the manner employed to commit the offense." *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001). In addition, contrary to defendant's assertion in his brief on appeal, the trial court

instructed the jury on aiding and abetting. To support a conviction under an aiding and abetting theory, the prosecutor must prove beyond a reasonable doubt:

> (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. [*Carines*, 460 Mich at 757-758.]

After reviewing the record, we conclude that there was sufficient evidence to allow a rational jury to convict defendant beyond a reasonable doubt, either as a principal or as an aider and abettor, of two counts of armed robbery and two counts of assault with intent to do great bodily harm. *Johnson*, 460 Mich at 722-723. Evidence showed that defendant and two other men were at the same bar that the victims were shortly before three masked men, two of whom had guns, followed the two victims into their home. The men informed the victims that they saw the victims with money at the bar, and they held the victims at gunpoint and beat them. The three perpetrators took personal property from the home. Defendant acknowledged to police that he participated in the offense. Defendant was arrested less than 24 hours after the home invasion in a vehicle where guns were eventually found hidden in the trunk, and police found a plastic bag in the back seat of the vehicle with bloody gloves, masks, and stolen property inside. Defendant was wearing one of the victim's rings when he was arrested and he tried to hide the ring. Defendant's DNA was found on the inside of a mask that had one of the victim's DNA on the outside. A police detective testified that defendant was significantly shorter than the other two codefendants, and one of the victim's testimonies indicated that the short man actively participated in the home invasion and robbery. One victim testified that she did not know which man hit her in the face with a gun. The other victim was repeatedly beaten over the head with a gun and he suffered near life threatening injuries. Police discovered both victims covered in blood and blood was all over the floor and the walls of the home.

Next, defendant raises two constitutional arguments. Defendant contends that the police violated his Fourth Amendment right when they conducted an illegal search and seizure of the vehicle in which he was riding when he was stopped and arrested. Defendant also contends that trial counsel rendered ineffective assistance when he failed to call an alibi witness and failed to move to suppress the evidence seized from the vehicle. With respect to defendant's Fourth Amendment claim, defendant failed to preserve that issue for appeal because he did not first raise the issue in the trial court. *Grant*, 445 Mich at 545, 553. Defendant preserved his ineffective assistance of counsel claim for review when he moved this Court to remand this case for an evidentiary hearing; however, because defendant's motion was denied, out review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

Whether defendant was denied his right to the effective assistance of counsel generally presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error and issues of constitutional law are reviewed de novo by this Court. *Id.* Whether a defendant was denied his Fourth Amendment right is a question of constitutional law that we generally review de novo. *Id*. Unpreserved constitutional errors are reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764, 774.

In order to demonstrate that he was denied the effective assistance of counsel under either the federal or state constitutions, a defendant must first show that trial counsel's performance was "deficient," and second, a defendant must show that the "deficient performance prejudiced the defense." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Id*. at 600. "Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004).

First, with respect to defendant's argument regarding the alibi witness, a decision whether to call witnesses is a matter of trial strategy that can constitute ineffective assistance of counsel only if defendant shows that it deprived him of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). In this case, defendant has not shown that defense counsel's failure to call the alibi witness deprived him of a substantial defense. *Id*. Defendant's claim that the witness would have offered favorable testimony is speculative and he failed to provide this Court with an offer of proof or affidavit to substantiate his claim that the witness would have testified as he purports. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) (defendant has the burden of proving the factual predicate for his claim). Moreover, defendant fails to show how the alleged alibi witness's testimony would have had any impact on the jury verdict because he admitted to police that he was involved in the offenses in this case, and given the fact that his DNA was found on a mask that also contained one victim's DNA and he was in possession of some of the victims' stolen property.

Second, defendant was not denied his Fourth Amendment right when police stopped and subsequently searched his vehicle after his arrest and seized evidence from the vehicle. "The Fourth Amendment of the United States Constitution and the analogous provision in Michigan's Constitution guarantee the right of the people to be free from unreasonable searches and seizures." *People v Champion*, 452 Mich 92, 97-98; 549 NW2d 849 (1996). A search and seizure conducted without a warrant is unreasonable per se unless it falls within one of the specific and well-delineated exceptions to the warrant requirement. *Id*. Under the "automobile exception" to the warrant requirement, police may search a readily mobile automobile if probable cause exists to search the vehicle. *People v Kazmierczak*, 461 Mich 411, 419; 605 NW2d 667 (2000), citing *Pennsylvania v Labron*, 518 US 938; 116 S Ct 2485; 135 L Ed 2d 1031 (1996). Pursuant to the automobile exception, a search is constitutionally permissible if it is "based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained." *United States v Ross*, 456 US 798, 809; 102 S Ct 2157; 72 L Ed 2d 572 (1982). Probable cause to support a search warrant exists if there is a "'fair probability that contraband or evidence of a crime will be found in a particular place.'" *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992), quoting *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983). With respect to the constitutional legality of a warrantless seizure, once police are lawfully in an area or are authorized to search an area pursuant to a warrant exception, police may seize incriminating evidence or contraband pursuant to the "plain view" doctrine. *Champion*, 452 Mich at 101.

In this case, police lawfully stopped the vehicle to effectuate an outstanding arrest warrant for defendant after defendant was observed in the vehicle by an officer. Defendant's arguments that the stop was somehow an illegal *Terry*[2] stop simply misconstrues the law. Further, once the police lawfully stopped the vehicle, they arrested defendant pursuant to an outstanding warrant. Following his arrest, police were able to observe incriminating evidence in plain view in the vehicle's center console and on the vehicle's back seat. In addition, police had received information that defendant may have been involved in the home invasion at the time they effectuated the stop of the vehicle. Therefore, police had probable cause to search the vehicle pursuant to the automobile exception to the warrant requirement. *Kazmierczak*, 461 Mich at 419; *Labron*, 518 US 938. Once police were in a lawful position to search the vehicle, pursuant to the plain-view doctrine, police had authority to seize the incriminating evidence. *Champion*, 452 Mich at 101. Because police did not violate defendant's constitutional rights with respect to the search and seizure, defense counsel did not act deficiently when he failed to move to suppress the evidence. See *Chambers*, 277 Mich App at 11 ("[c]ounsel is not ineffective for failing to make a futile objection").

Affirmed.

/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood
/s/ Alton T. Davis

[2] *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).