

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AZIZ AL-AWADI,

Defendant-Appellant.

UNPUBLISHED

September 16, 2010

No. 291853

Wayne Circuit Court

LC No. 08-016729-FC

Before: TALBOT, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Al-Awadi challenges his conviction for armed robbery¹ asserting his waiver of a jury was not knowing and voluntary because he did not have an interpreter available and that he was deprived of a fair trial due to the improper admission of testimony by police officers of his previous arrests and use of various aliases. Al-Awadi also claims he was denied his right to due process by being sentenced when he was not competent and that he was deprived of the effective assistance of counsel during the proceedings. We affirm Al-Awadi's conviction and sentence of five to 18 years' imprisonment.

Al-Awadi contends that the trial court erred in accepting his waiver of a jury trial because an interpreter was not present to assist him during the waiver proceeding and, therefore, his waiver was not knowingly and voluntarily made. Because Al-Awadi did not object to proceeding without an interpreter or to proceeding to trial without a jury, these issues are not preserved.² We review unpreserved issues for plain error affecting a defendant's substantial rights.³

"A valid waiver of the constitutional right to a trial by jury must be voluntary."⁴ Before accepting a waiver, the court must advise the defendant of his right to a trial by jury and

¹ MCL 750.529.

² See *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007).

³ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

⁴ *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998).

ascertain, by questioning the defendant personally, that he understands and voluntarily chooses to give up that right and be tried by the court.⁵ Thus, to properly waive a jury, a defendant must be able to understand the court. If it appears to the court that a defendant is incapable of understanding the court because of a lack of ability to understand or speak the English language, the court must appoint a qualified interpreter for the defendant.⁶ If the record shows that the court complied with MCR 6.402(B), it is presumed that the waiver was knowing, voluntary, and intelligent.⁷

The record indicates that Al-Awadi was appointed an interpreter to assist him at trial because he claimed that he was not fully fluent in the English language.⁸ The interpreter was not present when the court conducted the waiver proceeding. There is, however, no showing that he was in need of this interpreter. At that proceeding, Al-Awadi stated that his attorney had explained the waiver form to him as allowing him to choose between a jury trial and a bench trial, and added that he wanted a bench trial. The court explained that Al-Awadi had a right to a jury trial. Al-Awadi stated that he understood that right, that he freely relinquished that right, and that he had not been promised anything in exchange for having a bench trial. Because Al-Awadi advised the court in his own words that he understood the meaning of the waiver form and stated that he wanted to have “the judge decide” his case, responded to the court’s questions in a manner indicating that he understood them, and stated both that he understood his right to a jury trial and that he was freely and voluntarily waiving that right, the record does not support a finding that Al-Awadi was incapable of understanding the waiver proceedings without the aid of an interpreter. Because Al-Awadi has not shown a plain error with respect to the court proceeding without an interpreter or in accepting his jury waiver, his related claim that counsel was ineffective for not objecting must also fail. “Defense counsel is not required to make a meritless motion or a futile objection.”⁹

Al-Awadi next argues that he was denied a fair trial because the prosecutor offered and the trial court accepted inadmissible testimony regarding his bad character. Whether this issue is characterized as an evidentiary issue or one of prosecutorial misconduct, it is unpreserved because there was no objection to either the challenged evidence or the prosecutor’s conduct.¹⁰ Accordingly, our review is limited to plain error affecting defendant’s substantial rights.¹¹

⁵ MCR 6.402(B).

⁶ See MCL 775.19a.

⁷ *People v Mosly*, 259 Mich App 90, 96; 672 NW2d 897 (2003).

⁸ The assertion regarding his lack of fluency in English is inconsistent with Al-Awadi’s own representation that in the early 1990’s he served as an interpreter for the U.S. Army during Desert Storm.

⁹ *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

¹⁰ *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

¹¹ *Carines*, 460 Mich at 763-764.

“It is the duty of the prosecutor to see that the defendant has a fair trial and to protect the interests of the people, who are as concerned with protecting the innocent as with convicting the guilty.”¹² While a prosecutor may not knowingly offer inadmissible evidence¹³, he is entitled to prove his case “by whatever admissible evidence he chooses.”¹⁴ To be admissible, evidence must be relevant to the case.¹⁵ Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”¹⁶ “A material fact is ‘[a] fact that is significant or essential to the issue or matter at hand.’”¹⁷ Evidence need not relate to an element of the charged crime or an applicable defense to be material.¹⁸

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”¹⁹ If the sole purpose of the evidence is to show the defendant’s propensity for particular conduct based on his character as inferred from other wrongful conduct, it is not admissible.²⁰ It is admissible, however, for other purposes, “such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident” to the extent it is relevant.²¹

We find that some of the evidence was not admissible and should not have been offered by the prosecutor or volunteered by the police witnesses. Although the fact that Al-Awadi was stopped in a silver Mazda that looked like the same car the store clerk had seen the robber enter upon leaving the store was relevant, because it tied Al-Awadi to the robbery, the fact that the car was stolen was of no consequence. Nor was the fact that a stolen license plate was inside the car material to a fact in issue. Likewise, the fact that Al-Awadi had been arrested several times for unspecified offenses was not relevant to any fact in issue. But that testimony was not particularly prejudicial because the nature of the offenses and whether Al-Awadi was convicted of anything was not disclosed. The fact that the police were familiar with Al-Awadi from prior contacts was relevant because it showed why they identified him as a possible suspect and included his picture in the photographic lineup despite having been told that the robber was Ali Al-Mayahis. In general, the mere fact that a defendant has used aliases sometime in the past is

¹² *People v Wilson*, 163 Mich App 63, 65; 414 NW2d 150 (1987).

¹³ *People v Giacalone*, 399 Mich 642, 645; 250 NW2d 492 (1977).

¹⁴ *People v Pratt*, 254 Mich App 425, 429; 656 NW2d 866 (2002).

¹⁵ MRE 402.

¹⁶ MRE 401.

¹⁷ *People v Katt*, 468 Mich 272, 292; 662 NW2d 12 (2003), quoting Black’s Law Dictionary (7th ed).

¹⁸ *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996).

¹⁹ MRE 404(b)(1).

²⁰ *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996).

²¹ MRE 404(b)(1).

not relevant.²² But the fact that Al-Awadi used aliases was relevant for purposes of identification.²³

Although Al-Awadi has demonstrated plain error with respect to the admission of some of the evidence, he has not shown that the objectionable evidence affected his substantial rights. The risk of unfair prejudice from the evidence was virtually nonexistent because this was a bench trial in which the trial court is presumed to have followed the law²⁴ and to have ignored errors and decided the case on properly admitted evidence.²⁵ That presumption has not been rebutted here. Although the case came down to the issue of credibility, there is no indication that the court took any of the inadmissible evidence into consideration in deciding the case. The only evidence the court mentioned was the stolen car, and then only in passing. The context of the court's remarks indicates that it was focused on the fact that the gun the victim described was found in the car, not on the fact that the car was stolen. We find no basis for concluding that the court would have decided the case any differently had the inadmissible evidence been excluded. Al-Awadi's related claim that defense counsel was ineffective for not objecting to the evidence must also fail, given that there is no reasonable probability that, but for counsel's error, the result of the proceeding would have been different.²⁶

Al-Awadi also claims that the trial court erred in proceeding with sentencing while he was incompetent. This issue is not preserved, because Al-Awadi did not object to being sentenced, or move for resentencing or an evidentiary hearing on this ground below,²⁷ and is reviewed for plain error affecting defendant's substantial rights.²⁸

"[A] criminal defendant's mental condition at the time of trial must be such as to assure that he understands the charges against him and can knowingly assist in his defense."²⁹ "The conviction of an individual when legally incompetent violates due process of law."³⁰ "[A] defendant is presumed competent to stand trial unless his mental condition prevents him from understanding the nature and object of the proceedings against him or the court determines he is unable to assist in his defense."³¹ Where defendant does not raise the issue, "the trial court ha[s]

²² *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997).

²³ *People v Pointer*, 133 Mich App 313, 316; 349 NW2d 174 (1984).

²⁴ *People v Farmer*, 30 Mich App 707, 711; 186 NW2d 779 (1971)

²⁵ *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988); *People v Payne*, 37 Mich App 442, 445; 194 NW2d 906 (1971).

²⁶ *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008).

²⁷ Cf. *People v Lucas*, 393 Mich 522, 529; 227 NW2d 763 (1975); *People v Abraham*, 256 Mich App 265, 283; 662 NW2d 836 (2003).

²⁸ *Carines*, 460 Mich at 763-764.

²⁹ *People v McSwain*, 259 Mich App 654, 692; 676 NW2d 236 (2003).

³⁰ *In re Carey*, 241 Mich App 222, 227; 615 NW2d 742 (2000).

³¹ *People v Mette*, 243 Mich App 318, 331; 621 NW2d 713 (2000), citing MCL 330.2020.

no duty to sua sponte order a competency hearing,”³² unless facts are brought to the trial court’s “attention which raise a ‘bona fide doubt’ as to the defendant’s competence.”³³ Applying these principles to sentencing proceedings³⁴, there is no support for Al-Awadi’s contention that the trial court should have entertained a bona fide doubt regarding his competency.

The presentence report, which defense counsel admitted was accurate, indicated that Al-Awadi had “denied any past or present mental or emotional problems” or substance abuse. When Al-Awadi appeared for sentencing, he did not reply to anything the interpreter or the trial court said to him. The transcript indicates that at one point Al-Awadi fell and was placed in a chair, but no one remarked on the incident. Based on the lower court record, it appears that Al-Awadi was being uncooperative by refusing to speak when addressed and was either physically ill or feigning a fainting spell, but there is no indication that he had a physical or mental condition that rendered him unable to understand the nature of the proceedings or participate if he so desired.

The expanded record involving Al-Awadi’s medical records while in jail does nothing to further the contention of incompetence at sentencing, which is raised for the first time on appeal. Al-Awadi purportedly attempted to commit suicide while in jail by hanging himself. He was found on the floor of his cell with a bed sheet wrapped around his neck and was transported to the hospital for evaluation. No anomalies were identified in his neck³⁵, spine or ability to breathe. He was noted by the attending physician to be “nonverbal, not speaking,” but this was attributed to his “unwilling[ness] to talk” and not a psychiatric or physical deficiency. According to the admission note Al-Awadi “denies any previous psychiatric history or services.” On his return to jail on March 24, 2009, Al-Awadi indicated feeling “better now that I had someone to talk to. They talked to me and listened to what I had to say at the hospital. I was ok until I went to court and was found guilty of charges.”³⁶ The following day he denied “any suicide ideas.” A few days later the attending psychologist documented his evaluation indicating Al-Awadi was “alert, oriented” and showed “no evidence of any psychotic symptoms.”³⁷ Al-Awadi denied the presence of any suicidal ideation and indicated feeling “somewhat better.” Two days later, Al-Awadi was observed to be mobile and interacting with his peers and was described as being “calm” and demonstrating no behavioral problems.

In the evening of March 30, 2009, Al-Awadi again required medical intervention and transport.³⁸ He was found “lying on his back staring upward” in his cell. He was reported as

³² *People v Inman*, 54 Mich App 5, 12; 220 NW2d 165 (1974).

³³ *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990).

³⁴ See *Saddler v United States*, 531 F2d 83, 86 (CA 2, 1976).

³⁵ In fact no ligature marks were noted when Al-Awadi was evaluated in his cell.

³⁶ These statements further belie Al-Awadi’s claims regarding his lack of fluency in English.

³⁷ Similarly, on March 29, 2009, a note by the psychiatric social worker confirmed that Al-Awadi was verbally engaged in conversation and denied suicidal ideations, hallucinations and “did not report difficulty concentrating.”

³⁸ This incident apparently resulted in postponing the scheduled sentencing.

being unresponsive to verbal commands but that his vital signs were “good.” A red ligature mark was observed on his neck. On return to his cell the following day Al-Awadi would “not talk to staff” but was observed to be “up [and] walking around in cell.” It was opined that he might have been overmedicated and showed a degree of lethargy and poor eye contact. The day before sentencing Al-Awadi was observed in his cell and noted to be “more lucid,” responsive to his name and taking sustenance, but still refusing to speak and was uncooperative with medication.³⁹ Health Services notes indicate Al-Awadi was taken to the hospital for evaluation after his “falling out” at court. Within a few hours he was returned to the jail and indicated to a physician that “he will not try to harm himself” and that “no one understood him due to language barrier.” Later that same day he was “out . . . for exercise” and observed to be “alert making needs known.” The following day Al-Awadi was noted to “remain[] selectively mute, quiet, isolative” but cooperative with medication, eating his meals and denied any intent to harm himself.

Rather than demonstrating incompetence it would appear that Al-Awadi was only too aware of his situation and able to “understand[] the nature and object of the proceedings against him.”⁴⁰ Neither the lower court record nor the expanded record supports Al-Awadi’s claim that the trial court had reason to question his competency. The trial court did not err in proceeding with the sentencing and any claim that counsel was ineffective for not objecting must also fail.⁴¹

Affirmed.

/s/ Michael J. Talbot

/s/ Patrick M. Meter

/s/ Pat M. Donofrio

³⁹ Notes indicate that while Al-Awadi would not speak he did nod his head to indicate “yes or no” and continued to deny suicidal ideation.

⁴⁰ MCL 330.2020(1).

⁴¹ *Goodin*, 257 Mich App at 433.