STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 9, 2010
v	No. 292867 Calhoun Circuit Court
EUGENE PHIL LECLEAR, a/k/a EUGENE PHIL WILSON, Defendant-Appellant.	LC No. 2009-000777-FC

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

A jury found defendant guilty of two counts of armed robbery, MCL 750.529, two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, seven counts of possession of a firearm during the commission of a felony, MCL 750.227b(1), and one count each of first-degree home invasion, MCL 750.110a(2), unlawful imprisonment, MCL 750.349b, and felon in possession of a firearm, MCL 750.224f. Defendant appeals his convictions and, for the reasons set forth below, we affirm.

This case arises out of a home invasion that occurred in the early morning hours of March 26, 2008. The night before, the victims, a husband and wife, went to a local bar and won a substantial amount of money playing video poker and the Michigan lottery game, Club Keno. Because they were intoxicated, the victims took a cab home. Soon after they arrived home, defendant and two other men, Ronald Wheeler, and Randy McCue, forced their way into the house. The men wore nylon stockings over their faces and white gloves on their hands. They demanded money and other valuables, and severely beat the victims. The evening before, defendant, Wheeler, and McCue were at the bar with the victims and had plotted to steal their money. A security camera videotape showed defendant, Wheeler, and McCue at the bar. Police arrested defendant and Wheeler the following day while driving in defendant's car. Police found incriminating evidence in the car and at defendant's home. McCue was later arrested at a hotel.

Following police interviews, officers placed defendant and Wheeler in the back of a police car for transfer to the jail. The police car was wired for taping conversations, and officers purposely left them alone, anticipating that they may talk about the crime. At trial, defense counsel argued that Wheeler's statements to defendant during this conversation were inadmissible hearsay. The trial court disagreed and ruled that the statements were admissible under MRE 801(d)(2)(E) as statements in furtherance of a conspiracy.

Defendant argues that the trial court erred when it admitted the statements Wheeler made in the police car. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Spangler*, 285 Mich App 136, 142; 774 NW2d 702 (2009). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009).

Were we to agree that the trial court erroneously admitted the statements, defendant would not be entitled to any relief on this issue. Any alleged error was harmless beyond a reasonable doubt because of the overwhelming evidence supporting the jury's verdict. See *People v Gursky*, 486 Mich 596, 621; 786 NW2d 579 (2010). McCue explicitly testified that he, defendant, and Wheeler committed the crimes. Testimony and video evidence placed defendant, Wheeler, and McCue at the bar on the night the victims were robbed and the victims both testified that three assailants attacked them. The husband testified that he tried to take the mask off of one of the assailants and scratch him to leave DNA evidence, and defendant was photographed with scratches on his head following his arrest. The day after the crime, defendant was arrested while driving his car and, in the back seat, police found a bag containing bloody gloves, nylon masks and personal items belonging to the victims. Two guns in a bag were later recovered from the car, matching the description of those involved in the robbery. Additional items belonging to the victims were later retrieved from defendant's residence. Finally, defendant's DNA profile matched samples found on one of the bloody gloves and on one of the nylon masks. Thus, independent of the brief statements made by Wheeler to defendant in the police car, there is ample evidence that defendant committed the crimes. Accordingly, if the admission of Wheeler's statements constituted error, there was no prejudice to defendant.[1]

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad

[1] Defendant also argues that the admission of Wheeler's statements violated the Confrontation Clause, US Const, Am VII. The Confrontation Clause prohibits the admission of evidence of ex parte "testimonial" statements unless the accused has had a prior opportunity for cross-examination and the declarant is unavailable. *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Here, although police officers placed defendant and Wheeler in the police car together with the hope that they would discuss the crime, Wheeler's statements do not qualify as "testimonial." A conversation with a potential co-defendant is different from one in which a person makes a formal statement to a government officer. *Crawford*, 541 US at 51; *People v Bauder*, 269 Mich App 174, 181; 712 NW2d 506 (2005). Because the statements were not testimonial, no Confrontation Clause violation occurred.