STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 24, 2012
v	No. 304751 Oakland Circuit Court
EDWARD JAMES COLE, Defendant-Appellant.	LC No. 2011-235174-FH

Before: DONOFRIO, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree home invasion, MCL 750.110a(2), and second-degree home invasion, MCL 750.110a(3). We affirm.

This case involves two incidents of home invasion that occurred at two separate homes on November 2 and November 5, 2010, respectively. The police extracted latent fingerprints from each crime scene; these prints were the only evidence linking defendant to either crime.

Defendant first argues that the trial court's joinder of his two charges was improper and denied him his right to a fair trial. Specifically, defendant argues that joinder was improper because his charges were unrelated and joinder was unduly prejudicial. We disagree. We review defendant's unpreserved claim for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Under the plain error rule, defendant must show that an obvious error occurred and "that the error affected the outcome of the lower court proceedings." *Id*. at 763.

MCR 6.120(B) provides the framework for the requirement of cases to be viewed by separate juries in order to ensure a fair determination of the defendant's guilt or innocence of each charged offense. See *People v Breidenbach*, 489 Mich 1, 14; 789 NW2d 738 (2011). MCR 6.120(B) and (C) provide:

> (B) On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.

> (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
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> (a) the same conduct or transaction, or
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> (b) a series of connected acts, or
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> (c) a series of acts constituting parts of a single scheme or plan.
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> * * *
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> (C) On the defendant's motion, the court must sever for separate trials offenses that are not related as defined in subrule (B)(1).

Defendant first challenges joinder on the ground that his two charged offenses were unrelated. "[I]f the offenses charged were 'unrelated,' defendant would have a right to severance under MCR 6.120(B)." *People v Williams*, 483 Mich 226, 234 n 6; 769 NW2d 605 (2009). Here, the two offenses occurred three days apart and not only on the same residential street, but only a few houses away from each other. The two houses in question were both ranch style homes with one main floor and a basement. In both incidents, the perpetrator forcibly entered through the back of the house, stole items from the main floor of the house–including money stolen from each victim's bedroom–and trashed the house. Neither victim knew defendant. These facts support a finding that defendant's two charged offenses were a series of connected acts or acts constituted parts of a single scheme or plan and, thus, were "related." MCR 6.120(B)(1)(b) and (c); see *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003) (holding that the two shooting incidents "were 'related' under MCR 6.120(B)," in part because they occurred "in the same neighborhood[,]" and that joinder was appropriate because, in part, "the same witnesses" provided testimony "applicable to both offenses").

Defendant also argues that joinder unfairly prejudiced him because the jury considered evidence of each separate charge when determining guilt on the other charge, and the trial court failed to give the jury a limiting instruction. Where the charged offenses are related, MCR 6.120 does not require the trial court to sever the charges on the basis of undue prejudice, but merely "gives the court discretion to sever related charges on grounds of unfair prejudice." *People v Girard*, 269 Mich App 15, 18; 709 NW2d 229 (2005). Additionally, the trial court instructed the jury that defendant's two charges represented distinct offenses that must be considered "separately in light of all the evidence in the case. You may find the defendant guilty of all or one of these crimes or not guilty." Michigan Courts have found that such a jury instruction limits the potential for prejudice stemming from the joinder of multiple charges. *Williams*, 483 Mich at 244 (finding that joinder did not unduly prejudice the defendant because, in part, "the trial court instructed the jury that it 'must consider each crime separately in light of all of the evidence in this case' and further that it 'may find the defendant guilty of all or any combination of these crimes or not guilty'").

The investigation into each offense relied on latent fingerprints left at the crime scene, which linked defendant to both home invasions. The same police department investigated each crime scene and sent the fingerprint evidence from both crime scenes to the same crime laboratory, where the same two forensic experts examined all of the fingerprints. Much of the

testimony at trial related to both charges. Where evidence regarding one of defendant's charges would have been admissible at a separate trial on defendant's other charge, and vice versa, the joinder of defendant's two charges could not have prejudiced him. *Breidenbach*, 489 Mich 12-13; *Williams*, 483 Mich at 237, 244-245. We find that evidence of each charge of home invasion would have been admissible at trial on the other charge under MRE 404(b) to prove defendant's intent and his plan, scheme, and system. See *People v Starr*, 457 Mich 490, 500-502; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 79-81; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). For all of the foregoing reasons, defendant has failed to show that the joinder constituted a plain error that "affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763.

Defendant next argues that reversal is warranted because the jury convicted defendant on the basis of fingerprint evidence that was scientifically unreliable and therefore inadmissible under *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and MRE 702. We reject this argument. This issue is unpreserved because defendant did not object to the admissibility of the fingerprint evidence in the trial court. "[T]he United States Supreme Court has recognized the importance of . . . criminal defendants to raise objections at a time when the trial court has an opportunity to correct the error." *People v Grant* 445 Mich 535, 551; 520 NW2d 123 (1994).

Defendant relies entirely on a single law review article that was written by a person with no obvious credentials and, more importantly, that was never submitted to the trial court. Defendant is effectively seeking admission of expert testimony on appeal, thus improperly expanding the lower court record and misunderstanding this Court's role as an appellate court. This Court can disregard the issue preservation requirement and allow the expansion of the record under MCR 7.216 (a)(4). See *People v Gioglio*, 296 Mich App 12, ___; ___ NW2d___ (2012) slip op at 2. However, we find it inappropriate in this case to do so. Although Michigan has incorporated the *Daubert* standard for reliability, we have not addressed the reliability of fingerprint evidence under *Daubert* or MRE 702. We recognize that defendant makes the argument that fingerprint evidence under MRE 702 may not be scientifically reliable but we decline to address this issue under the procedural posture of this case. This argument should be first addressed to a fact finding court with the opportunity to properly hear and evaluate expert testimony, not for the first time on appeal.[1]

[1] Under ordinary circumstances, defendant's failure to assert to the trial court that evidence is inadmissible would merely forfeit the issue, not waive it. Consequently, it would be subject to review under the heightened standard of plain error affecting substantial rights, not absolutely unreviewable. See *People v Vaughn*, ___ Mich ___, ___; ___ NW2d ___ (Docket No. 142627, filed July 9, 2012, slip op at 19-20). We decline to consider defendant's evidentiary argument not because we conclude that it is waived—which it is not—but because doing so would depend on resolving factual disputes, considering expert evidence, otherwise engaging in considerations appropriate for a trial court but inappropriate to originate in an appellate court. It is the nature of the argument, not the nature of the issue, that leads us to conclude that it must be considered by a trial court before we will do so.

In light of our conclusion that the joinder of defendant's charges was proper, and our refusal to consider whether the admission of the fingerprint evidence was improper, we reject defendant's claims of ineffective assistance of counsel. In order to prove ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and affected the outcome of his trial. *Gioglio*, 296 Mich App at ___ (slip op at 3-4). We review this inquiry de novo. *Id*. As discussed, the joinder of defendant's trials was proper and did not affect the outcome of the proceedings. Consequently, defendant cannot show that trial counsel was ineffective for not seeking severance of his trials.

We further conclude that trial counsel's performance could not have fallen below and objective standard of reasonableness for failing to seek exclusion of the fingerprint evidence on the basis of *Daubert*. Courts from each of the other federal circuits and the Eastern District of Michigan have applied the *Daubert* test and found that fingerprint evidence is sufficiently reliable. *United States v Stone*, ___ F Supp 2d ___, (ED Mich, 2012); 2012 WL 219435 at 4. See also, e.g., *United States v Pena*, 586 F3d 105, 110-111 (CA 1, 2009); *United States v Salameh*, 152 F3d 88, 128-129 (CA 2, 1998); *United States v Mitchell*, 365 F3d 215, 246 (CA 3, 2004); *United States v Crisp*, 324 F3d 261, 268-270 (CA 4, 2003); *United States v John*, 597 F3d 263, 273-276 (CA 5, 2010); *United States v George*, 363 F3d 666, 672-673 (CA 7, 2004); *United States v Janis*, 387 F3d 682, 690 (CA 8, 2004); *United States v Sherwood*, 98 F3d 402, 408 (CA 9, 1996); *United States v Baines*, 573 F3d 979, 989-992 (CA 10, 2009); *United States v Abreu*, 406 F3d 1304, 1306-1307 (CA 11, 2005); *United States v Clarke*, 767 F Supp 2d 12, 72-74 (DC Cir, 2011). "Although lower federal court decisions may be persuasive, they are not binding on state courts." *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NM2d 325 (2004). However, in the face of the sheer volume of authority finding fingerprint evidence admissible, it would have been reasonable for counsel to assume that a strategy of seeking exclusion of the fingerprint evidence would be unlikely to succeed. See *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007) ("Counsel is not ineffective for failing to make a futile objection."). Defendant's trial counsel instead pursued a sound strategy of arguing weaknesses in the handling of the evidence.

Affirmed.

/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra