# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>September 20, 2012 |
| v | No. 305382; 305384<br>Branch Circuit Court |
| AUSTIN MICHAEL WYNN,<br><br>Defendant-Appellant. | LC Nos. 10-089451-FC;<br>10-089436-FC |

Before: M. J. KELLY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

In these consolidated appeals, defendant Austin Michael Wynn appeals by right his jury convictions of two counts of armed robbery and two counts of conspiracy to commit armed robbery. See MCL 750.529; MCL 750.157a. The trial court sentenced Wynn to serve concurrent terms of 225 months to 50 years in prison for the armed robbery and conspiracy to commit armed robbery convictions arising under docket no. 305382. The trial court sentenced Wynn to serve concurrent terms of 285 months to 50 years in prison for the armed robbery and conspiracy to commit armed robbery convictions arising under docket no. 305384. On appeal, we conclude that there were no errors warranting a new trial in either case. However, because the trial court erred in scoring Wynn's offense variables in both dockets, we conclude that Wynn is entitled to be resentenced. For these reasons, we affirm, but remand for resentencing in both dockets.

## I. BASIC FACTS

Wynn's convictions arise from the robbing of a food mart at a gas station and a credit union on the same day in July 2010. After his arrest, Wynn confessed his involvement in the robbery of the food mart to Corporal Mark Miller. Wynn told Miller that he was driving around with Jason Oetting in the early morning when Oetting asked him to stop at a gas station. Oetting then put on a stocking cap and sunglasses, took a gun from the back of the car, and went into the gas station. Wynn acknowledged that he knew that Oetting was going to rob the gas station at that point. Wynn said he stayed in the car and that afterward he drove Oetting away. Wynn did not admit to any involvement with the credit union robbery.

Testimony and evidence established that Wynn and Oetting robbed the credit union later that same day. Two credit union customers followed Wynn and Oetting after they drove from the credit union and police officers arrested Wynn and Oetting soon after. There was substantial evidence—including video evidence—that established that Wynn was the man who entered the credit union while Oetting waited outside.

## II. DISCOVERY VIOLATION

### A. STANDARD OF REVIEW

Wynn first argues that the trial court erred when it refused his request for a mistrial or the exclusion of his confession. Specifically, he argues that the prosecution improperly failed to turn over his confession to the defense and the trial court should have punished this discovery violation by granting a mistrial or excluding the confession. "This Court reviews a trial court's decision regarding the appropriate remedy for a discovery violation for an abuse of discretion." *People v Rose*, 289 Mich App 499, 524; 808 NW2d 301 (2010). A trial court abuses its discretion when it chooses an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). In order to obtain relief for a discovery violation, the defendant must establish that the violation prejudiced him. *Rose*, 289 Mich App at 525-526.

### B. ANALYSIS

Wynn confessed his involvement in the food mart's robbery to Miller, who took notes throughout the interview. Miller's notes were transcribed into a police report. Before trial, Wynn's then lawyer made a discovery request under MCR 6.201(B)(3), which included a request for Wynn's written or oral statements to police officers. The prosecution provided Wynn's lawyer with a copy of the police report with the transcribed confession, but did not provide a copy of Miller's actual notes. Wynn did not get a copy of the notes until the second day of trial, at which point he moved to have the charges dismissed because of the discovery violation. The trial court agreed that the prosecution violated the discovery rules, but denied Wynn's motion. It also denied Wynn's alternative request to exclude evidence of the confession.

The court rules govern the scope of discovery in a criminal case. See MCR 6.201; *People v Phillips*, 468 Mich 583, 588-589; 663 NW2d 463 (2003). MCR 6.201(B)(3) provides that the prosecution, upon request, must provide the defendant with "any written or recorded statements, including electronically recorded statements, by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial." The prosecution has 21 days to comply with a discovery request. MCR 6.201(F). Here, the prosecution failed to timely produce Miller's notes in response to Wynn's request.

Trial court's have the authority to fashion an appropriate remedy for a discovery violation. See MCR 6.201(J); *Rose*, 289 Mich App at 524. In order to be entitled to relief under MCR 6.201(J), the defendant must demonstrate that he was prejudiced by the discovery violation. *People v Davie (After Remand)*, 225 Mich App 592, 598; 571 NW2d 229 (1997).

Here, Wynn cannot demonstrate prejudice because the record shows that he had the substance of Miller's notes before trial. The police report that he received during discovery contained a nearly verbatim copy of Miller's notes. In *People v Taylor*, 159 Mich App 468, 486 n 27, 487-488; 406 NW2d 859 (1987), this Court held that where a defendant has actual knowledge of materials that were withheld in violation of the discovery rules that is independent of the materials themselves, he is not prejudiced by the discovery violation. Moreover, where the defendant himself created the evidence, he is entitled to "no remedy" because he had "knowledge of it independent of discovery." *Id.* at 488.

Wynn knew that he had confessed his involvement in the food mart's robbery to Miller and had a copy of the police report that gave the specific details from that confession. Thus, the prosecution's failure to turn over an exact copy of Miller's notes until the second day of trial could not have prejudiced Wynn's defense and he was not entitled to a remedy. *Id.* Given these facts, we cannot conclude that the trial court abused its discretion when it determined that the discovery violation did not warrant relief. See *Davie*, 225 Mich App at 598.

## III. OFFENSE VARIABLES

### A. STANDARD OF REVIEW

Wynn next argues that the trial court erred in scoring his offense variables (OVs) and that these errors warrant resentencing. The sentencing guidelines are a comprehensive, integrated, and mandatory sentencing scheme; trial courts must score them and must score them properly. *People v Bemer*, 286 Mich App 26, 32, 34-35; ___ NW2d ___ (2009); see also *People v Bonilla-Machado*, 489 Mich 412, 427; 777 NW2d 464 (2011) (noting that the Legislature unambiguously directed how to score OV 13 and that includes a directive to score OV 13 at zero when the defendant has not engaged in the requisite pattern of criminal behavior). This Court reviews de novo whether the trial court properly interpreted and applied the sentencing guidelines to the facts. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). And this Court reviews the trial court's findings underlying a particular score for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

### B. ANALYSIS

Wynn challenges the trial court's scoring of OVs 1, 13, 14, and 19. We shall first address Wynn's claim that the trial court erred when it scored OV 13 at 25 for both dockets.

Under MCL 777.43(1)(c), a trial court must score 25 points if the "offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." In scoring OV 13, the trial court treated Wynn's two convictions for conspiracy to commit armed robbery as crimes against a person on the basis of the underlying conduct. However, as our Supreme Court recently explained, the Legislature did not give trial courts the discretion to look past the category actually assigned to a particular crime. *Bonilla-Machado*, 489 Mich at 427 ("[N]othing in the language of MCL 777.43 allows courts to consider crimes falling within other designated offense categories to establish a continuing pattern of criminal behavior."). And the Legislature specifically designated conspiracy to be a crime against public safety. See MCL 777.18. The trial court did not have the discretion to ignore that designation and look to the underlying

conduct in determining whether the conspiracy amounted to a crime against a person. *People v Pearson*, 490 Mich 984, 984-985; 807 NW2d 45 (2012). Consequently, the trial court erred when it scored OV 13 at 25 points in both cases.

Wynn is entitled to resentencing in both dockets because this error alone affected his recommended minimum sentence range under the guidelines. *People v Francisco*, 474 Mich 82, 90-91; 711 NW2d 44 (2006). Moreover, because Wynn's remaining claims of error with regard to his sentencing might reoccur on remand, we shall briefly address them. MCR 7.216(A)(7).

The trial court also plainly erred in scoring OV 1. The trial court scored five points under OV 1 for each robbery because it found that a weapon was displayed or implied. Under MCL 777.31(1)(e), the trial court had to score five points if during the sentencing offense "[a] weapon was displayed or implied." But when the sentencing offense is armed robbery—as it was here—the trial court may not score five points under OV 1. MCL 777.31(2)(e); *People v Greene*, 477 Mich 1129, 1130; 730 NW2d 478 (2007) (stating that "[t]he defendant should have been scored zero points for OV 1 in light of MCL 777.31(2)(e), which prohibits a score of 5 points when the conviction offense is armed robbery, as it was here."). Therefore, the trial court erred when it scored OV 1 at five points.

Next, we shall address Wynn's contention that the trial court erred by scoring ten points under OV 14 in docket no. 305384. MCL 777.44(1)(a) directs the trial court to score ten points under OV 14 if "[t]he offender was a leader in a multiple offender situation . . . ." Here, the trial court found that Wynn was the leader in the robbery of the credit union. There is record evidence that Wynn had the most involvement in the credit union robbery and therefore can be considered the leader of the offense. See *People v Apgar*, 264 Mich App 321, 331; 690 NW2d 312 (2004). Given the evidence, we cannot conclude that the trial court clearly erred when it found that Wynn was a leader for that offense. As such, the trial court properly scored OV 14 at 10 points.

Wynn also challenges the trial court's decision to score ten points under OV 19 in docket no. 305384. MCL 777.49(c) directs the trial court to score ten points under OV 19 if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice . . . ." OV 19 "encompasses more than just the actual judicial process." *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). An act that interferes with law enforcement personnel during the investigation of a crime can justify the trial court's scoring decision under OV 19 because "[t]he investigation of crime is critical to the administration of justice." *Id.* Here, the trial court found that Wynn interfered with the investigation of a crime by discarding evidence from the credit union robbery as he and Oetting drove away. See *People v Ericksen*, 288 Mich App 192, 204; 793 NW2d 120 (2010) (upholding the scoring of OV 19 where the defendant interfered with the investigation of the offense by attempting to dispose of evidence). Because the record evidence supported the trial court's finding that Wynn interfered with the investigation by disposing of evidence, the trial court did not err when it scored OV 19 at ten points.

Finally, in his Standard 4 brief, Wynn challenges the trial court's scoring of OV 4. He does not specify which docket number his challenge pertains to; however, we conclude that the trial court correctly scored OV 4 in both dockets. The trial court scored ten points under OV 4 for each armed robbery conviction. MCL 777.34(1)(a) directs the trial court to score ten points if "[s]erious psychological injury requiring professional treatment occurred to a victim . . . ." The trial court is not precluded from scoring ten points under OV 4 if the victim does not seek professional treatment. *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009). Instead, the victim's expression of fear is sufficient to support the trial court's scoring decision under OV 4. *Id.*; *Apgar*, 264 Mich App at 329. In docket no. 305382, the clerk who was robbed testified that she was afraid and in shock after the robbery. Her expression of fear justified the trial court's finding. *Id.* at 329. Likewise, in the credit union robbery, one credit union employee testified that she was "terrified" during the robbery; another employee testified that he was afraid. Their testimony also provides sufficient support for the trial court's finding. *Id.*

## IV. INEFFECTIVE ASSISTANCE

Wynn also argues in his standard 4 brief that that he was denied his right to effective assistance of trial counsel. In order to establish a claim of ineffective assistance of counsel, Wynn must demonstrate that his trial lawyer's acts or omissions fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for those acts or omissions, the result of the proceeding would have been different. *People v Gioglio (On Remand)*, 296 Mich App 12, 22-23; 815 NW2d 589 (2012). Because the trial court did not hold a hearing on this claim, we shall review this claim for errors that are evident on the record. *Id.* at 22.

Defendant alleges that his trial counsel was ineffective for a variety of reasons. First, he contends that trial counsel was ineffective in docket no. 305382 for failing to file a motion to suppress his confession and for failing to seek a hearing on whether his statements were voluntary. He contends that his statements were involuntary because he was under the influence of methamphetamine at the time of his interview and because his trial counsel was not present at the time of his interview. "Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his or her Fifth Amendment rights." *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010). Here, there is no record evidence to substantiate Wynn's claim that his statements were involuntary; rather, the record supports the conclusion that he knowingly and intelligently waived his rights. Moreover, there is no indication from the record that Wynn was under the influence of drugs at the time of his interview or that he sought to have a lawyer present. Accordingly, he has not established the factual predicate for his ineffective assistance of counsel claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Next, Wynn argues that his lawyer was ineffective in both dockets for failing to strike several jurors who expressed potential biases during jury selection. However, he has not developed this argument with citations to the record or relevant authority. As such, we conclude that he has abandoned it on appeal. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Moreover, we have reviewed the record and determined that his claim is without merit.

Wynn also contends that his trial counsel was ineffective for failing to object to his shackling. Wynn again fails to cite evidence that supports his assertion that he was shackled before the jury; likewise, our review of the record revealed no evidence in support of his claim. Thus, we conclude that this argument too has been abandoned. *Id.*

Affirmed, but remanded for resentencing in both dockets. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens