STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES STANLEY HOLLY,

Defendant-Appellant.

UNPUBLISHED
February 9, 2001

No. 214795
Genesee Circuit Court
LC No. 98-002257-FC

Before: Talbot, P.J., and O'Connell and Cooper, JJ.

PER CURIAM.

Defendant was convicted of armed robbery, MCL 750.529, MSA 28.797, for the robbery of a Knight's Inn motel that took place on February 6, 1998. Plaintiff was sentenced as an habitual offender, second offense, MCL 769.10; MSA 20.1082, to twenty-five to fifty years' imprisonment. He appeals as of right. We affirm.

Defendant first argues that two black jurors were improperly removed from the jury on the basis of their race. He argues that he has made a prima facie showing of discrimination under *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), and, therefore, the prosecutor had a burden to provide a racially neutral explanation for the challenges made to the jurors. Defendant admits, however, that the two black jurors at issue were excused for *cause* by the trial court. *Batson* prohibits a prosecutor from exercising *peremptory* challenges to strike jurors from a jury solely on the basis of their race. *Batson, supra* at 96 (emphasis added). Because the jurors at issue were not excused by the prosecutor utilizing peremptory challenges, defendant's claim is patently frivolous and merits no further discussion.

Defendant next argues that the trial court's method of jury selection was improper and violated MCR 2.511(F). We agree. In *People v Colon,* 233 Mich App 295, 302-304, 308-309; 591 NW2d 692 (1998), this Court found that an almost identical system of jury selection was improper and violated MCR 2.511(F). There, as here, the panel of jurors seated and examined was not equal in size to the jury that heard the case, and once a prospective juror was dismissed, a new prospective juror was not selected and examined before additional challenges were made. Unlike *Colon,* however, the jury selection method in this case was not contested by trial counsel at any relevant time and, in fact, it appears that defense counsel enthusiastically accepted the jury

selection method.[1] The error is thus unpreserved for appellate review. Unpreserved constitutional and nonconstitutional errors are reviewed pursuant to the plain error standard of review. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. . . . To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. [*Id.* (citations omitted).]

In this case, although defendant demonstrates a plain error, he does not allege any prejudice resulting from the jury selection process. This is fatal under the plain error analysis. *Id.* Moreover, even if we were to determine that prejudice existed or could be presumed, we would not reverse. Reversal is only required if the error resulted in the conviction of an actually innocent defendant or if it "seriously affected the fairness, integrity or public reputation" of the judicial proceeding. *Carines*, *supra* at 763-764. Here, the prosecution presented overwhelming evidence of defendant's guilt and we do not find that the method of jury selection seriously affected the fairness, integrity or public reputation of the proceeding.

Defendant next argues that the trial court abused its discretion in allowing similar-acts evidence, specifically defendant's February 20, 1998, robbery of the same motel, into evidence. We disagree.

MRE 404(b) provides:

> (1) 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. It may, however, be admissible 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 when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [Emphasis added.]

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[1] This issue addresses the replacement of challenged jurors, as governed by MCR 2.511(F). We note that MCR 2.511(A)(4) provides that "[p]rospective jurors may be selected by any other fair and impartial method directed by the court or agreed to by the parties." See *People v Green*, 241 Mich App 40, 45-46; 613 NW2d 744 (2000).

In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), the Court clarified the test to be utilized to determine the admissibility of other bad-acts evidence:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

It is insufficient for the prosecution to merely recite one of the purposes articulated in MRE 404(b). *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998). The prosecution must also demonstrate that the evidence is relevant. *Id.*

> Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence. . . . The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized. [*Id.* (citation omitted).]

In this case, the prosecution articulated a proper purpose under MRE 404(b) for the admission of evidence of the February 20, 1998 robbery, specifically, to establish the identity of defendant as the perpetrator of the February 6, 1998 robbery. In addition, the evidence was logically relevant.

In *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998), this Court articulated the test to be used to determine relevance when similar-acts evidence is being used to demonstrate identity through modus operandi:

> Although the *VanderVliet* Court adopted a new test for admission of evidence under MRE 404(b), the four-part test of *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982), remains valid to show logical relevance where similar-acts evidence is offered to show identification through modus operandi. *People v McMillian*, 213 Mich App 134, 138; 539 NW2d 553 (1995). The *Golochowicz* test requires that (1) there is substantial evidence that the defendant committed the similar act (2) there is some special quality of the act that tends to prove the defendant's identity (3) the evidence is material to the defendant's guilt, and (4) the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice. *Golochowicz, supra* at 307-309.

In this case, the prosecution presented substantial evidence that defendant committed the second robbery about which the victim, the motel desk clerk, testified. First, the victim indicated that she recognized defendant as being the same robber from two weeks earlier. Second, defendant was caught "red handed" after the second robbery. Further, he basically matched the description given by the victim and was carrying the approximate amount of money taken from the second robbery. Some of the money was packaged in an unusual way which had been

described by the victim. Thus, the first element of the *Golochowicz* test was met; there was substantial evidence that defendant committed the crime.

Second, the special qualities of the robberies tended to link both of them to defendant. Both robberies occurred at the same location on a Friday night when the same desk clerk was working. Both robberies occurred in the same basic time frame, around the 9:00 p.m. to 10:00 p.m hour. Both robberies involved the same or a similar looking gun. The robber wore a small, gold loop earring in his left ear and appeared to be wearing the same dark coat in each robbery. When the robber fled the scene, he ran in the same direction each time, south behind the motel. The evidence of the February 20, 1998 robbery was thus sufficiently "like" or "similar" to justify the inference that both crimes were the "handiwork of the same person." *Golochowicz, supra* at 312.

The evidence was also material to defendant's guilt and the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. *VanderVliet, supra* at 55; *Ho, supra* at 186. MRE 403 does not prohibit the use of prejudicial evidence. It only prohibits the use of unfairly prejudicial evidence. *Crawford, supra* at 398. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Id.* Similar-acts evidence is substantially more prejudicial if the most powerful inference likely to be made from the other-acts evidence is the "forbidden one," i.e., that defendant must have committed the crime because he has committed others. *Id.*

The similar-acts evidence was material and highly probative of defendant's identity as the perpetrator. In fact, the February 20, 1998 robbery was part and parcel of the ultimate identification of defendant as the armed robber in the February 6, 1998 robbery. Defendant denied being at the Knight's Inn on February 6, 1998, asserted an alibi defense, and claimed that the victim was mistaken in her identification. The testimony regarding the similarities of the robberies and the circumstances under which defendant was apprehended were highly probative of defendant's identity and tended to make defendant's alibi for February 6, 1998 unbelievable. Although the evidence was prejudicial, like all evidence implicating a defendant, there was no showing that the evidence was likely to adversely affect defendant by injecting extraneous considerations at trial. There was also no showing that the most powerful inference to be made was an improper character inference or that the evidence was given undue or preemptive weight by the jury. In addition, the trial court issued a cautionary instruction to the jury about the proper consideration of the other acts evidence.

In conclusion, the evidence was offered for a proper purpose and was logically relevant. Its probative value was not substantially outweighed by unfair prejudice and a cautionary instruction was given. Therefore, we conclude that the trial court did not abuse its discretion in admitting the similar-acts evidence.

Defendant next argues that the prosecutor improperly attempted to elicit testimony that defendant threatened a witness through a third person. We disagree. "Evidence of a defendant's threat against a witness is generally admissible as conduct that can demonstrate consciousness of guilt." *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998), citing *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). The prosecutor's questions to defendant about whether he had sent a threat to a witness via a third party were therefore proper.

Defendant next argues that the trial court erred when it refused to give the requested jury instruction for unarmed robbery. We agree that the trial court erred. Unarmed robbery is a necessarily lesser included offense of armed robbery. *People v Garrett*, 161 Mich App 649, 652; 411 NW2d 812 (1987). "When an offense is necessarily included, the evidence will always support the lesser offense if it supports the greater." *People v Torres (On Remand)*, 222 Mich App 411, 416; 564 NW2d 149 (1997). "Regardless of the evidence in a given case, the court must instruct the jury on necessarily included lesser offenses." *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997). Thus, it is clear that the trial court erred. See also, *People v Reese*, 242 Mich App 626; 619 NW2d 708 (2000). However, the error is subject to a harmless error analysis. *Id.* at 635. Under the circumstances where there was no testimony to contradict that a weapon was used and the use of a weapon was not an issue at trial, we find that any error was harmless. See, *id.*

Defendant also argues that the felony complaint was based on perjured and false statements and, therefore, the felony warrant could not have been based on probable cause. This argument has no merit. The victim signed a felony complaint stating that defendant committed armed robbery upon her on February 6, 1998. Defendant concludes that, because the victim had not identified him prior to signing the complaint, the complaint was perjured. This argument ignores the basic facts of the case. Investigatory police work identified defendant as the perpetrator of the robberies at issue. The victim told police that the person who robbed her on February 20, 1998 was the same person who robbed her on February 6, 1998. Defendant was basically caught "red handed" by the police on February 20, 1998. The victim thereafter signed the felony complaint and a felony warrant was issued. Nothing in the record supports defendant's claim that the felony complaint was based on false or perjured statements or that the felony warrant was not based on probable cause.

Defendant next argues that he was not provided with a prompt, judicial determination of probable cause after his warrantless arrest and that the failure to provide the prompt determination of probable cause requires a dismissal of the charges against him. Defendant argues that there was no judicial determination of probable cause until his preliminary examination on March 10, 1998. This is untrue. Defendant admitted that he was arraigned on February 26, 1998. An arraignment constitutes a judicial determination of probable cause. See *People v Whitehead*, 238 Mich App 1, 2; 604 NW2d 737 (1999), where this Court stated:

> In *Riverside Co v McLaughlin*, 500 US 44, 56; 111 S Ct 1661; 114 L Ed 2d 49 (1991), the United States Supreme Court held that, following an arrest without a warrant, "a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter [be found to] comply with the promptness requirement" of the federal constitution's Fourth Amendment. Police authorities who hold an arrestee for more than forty-eight hours without *an arraignment* can constitutionally do so only if they can "demonstrate the existence of a bona fide emergency or other extraordinary circumstance" that would justify the delay. *Id.* at 57. [*Whitehead, supra* at 2 (emphasis added).]

It is clear that the arraignment did not take place within forty-eight hours of defendant's arrest. Defendant was arrested on February 20, 1998, and was arraigned on February 26, 1998. The

issue in this case is whether any remedy is available to defendant for the violation of his right to a prompt arraignment. The failure to arraign a defendant within the applicable time period may result in the exclusion of evidence gathered during the delay unless the delay was necessitated by a bona fide emergency or other extraordinary circumstances. *People v Manning*, ___ Mich App ___; ___ NW2d ___ (2000) (Docket No. 224898, rel'd 12/15/00, slip op pp 7, 17-18); *Whitehead, supra* at 7, 13-14.

> Persons arrested without a warrant are "presumptively innocent." A prompt judicial determination of probable cause for arrest is "one of the most important" protections afforded citizens under the Fourth Amendment's prohibition of unreasonable seizures. To assure that protection, the forty-eight-hour rule established by *Riverside* must be carefully observed by police authorities. Those who ignore that rule will do so at their own peril, *running the risk that confessions obtained will be deemed inadmissible and that convictions based on those confessions will be reversed on appeal.* [*Id.* at 13-14 (citations omitted; emphasis added).]

In this case, all of the evidence admitted at defendant's trial was gathered before or at the time of defendant's arrest. No evidence that was used against defendant at trial was gathered between the warrantless arrest and the arraignment six days later. Because there was no evidence gathered during the delay and used against defendant at trial, there is no remedy for defendant to pursue with regard to the claimed violation of his right to a prompt judicial determination of cause. Defendant was not entitled to have all adverse proceedings dismissed because of the procedural violation.

Defendant next argues that the district court abused its discretion when it failed to grant his request for a lineup before the preliminary examination. Under the circumstances, we disagree. Defendant had no constitutional right to a pretrial lineup. *People v Farley*, 75 Mich App 236, 238-239; 254 NW2d 853 (1977). "Rather, the granting of a pretrial lineup is a matter which is addressed solely to the examining magistrates' discretion." *Id.* Recently, this Court reaffirmed that the decision to grant a motion for a lineup is discretionary. *People v McAllister*, 241 Mich App 466, 471; 616 NW2d 203 (2000). The Court in *McAllister* also stated, "[a] right to a lineup arises when eyewitness identification has been shown to be a material issue and when there is a reasonable likelihood of mistaken identification that a lineup would tend to resolve." *Id.*, citing *People v Gwinn*, 111 Mich App 223, 249; 314 NW2d 562 (1981).

In *Gwinn*, this Court stated:

> Michigan law permits a trial court to grant a defendant's motion for a lineup if the court chooses to do so in an exercise of its discretion. This rule is the same as that stated in *Evans v Superior Court of Contra Costa County*, 11 Cal 3d 617, 625; 114 Cal Rptr 121; 522 P2d 681 (1974). In that case, the California Supreme Court held that there is a due process right to a lineup "in an appropriate case". The Court held, however, that it was within the discretion of the trial judge to determine whether fundamental fairness requires a lineup. The Court directed lower courts to consider the benefits to an accused, the burden to the prosecution, police, courts, and witnesses, and the timeliness of the motion involved. The

> Court pointed out that a right to a lineup should arise when eyewitness identification has been shown to be a material issue and when there is a reasonable likelihood of mistaken identification which a lineup would tend to resolve.
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> In the case at bar, the accuracy of the identification was undoubtedly a material issue. The prosecution and defense disagree over whether there was a reasonable likelihood of mistaken identification based on the photographic showup.
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> In the present case, the victim spent from one to two hours with her attacker and was able to observe him in artificial light in the trailer, by the light of the half moon, and by the light of street lights in the trailer park. Her identification through these proceedings was positive. There was little chance of mistaken identification by the complainant where there was an adequate, independent basis for an in-court identification. There was, therefore, no abuse of discretion in refusing defendant's request to have the complainant view him in a lineup. [*Gwinn*, *supra* at 249-250.]

In this case, the trial court did not abuse its discretion in refusing defendant's request for a lineup. Defendant requested a lineup, arguing that the victim should not be allowed to identify him for the first time at the preliminary examination where he would be the only black man in jail clothing. He argued that the proceeding would be unduly suggestive. Defendant's request for a lineup was made on the day set for his preliminary examination, which was twelve days after his arraignment. Neither the prosecutor nor the trial court expressed opposition to the lineup. Defendant, however, refused to waive his right to a preliminary examination within fourteen days of his arraignment. MCL 766.4; MSA 28.922; MCR 6.104(E)(4). The trial court decided to proceed with the preliminary examination because defendant was adamant about his fourteen-day right to a preliminary examination. The motion for a lineup was not timely, given that it was made on the twelfth day after arraignment and defendant refused to waive his right to a preliminary examination within fourteen days. It also seems that defendant's request for a lineup was not sincere under the circumstances. Rather, it appears that defendant was attempting to build error into his case. More importantly, while defendant made identification an issue in the case, there was no showing that there was "a reasonable likelihood of mistaken identification which a lineup would tend to resolve." *Gwinn*, *supra* at 249. Here, the victim testified that she clearly saw defendant's face from a distance of two feet while he robbed her. She testified that his facial features were stamped in her mind. Further, the victim had the opportunity to see defendant two weeks after the first robbery. When defendant entered the Knight's Inn on February 20, 1998, the victim immediately and without hesitation recognized him and let him know that she recognized him. He robbed her again. The second time he robbed her, he was caught "red handed." The victim was positive at all times that the same man robbed her twice. Her description of the robber basically matched defendant and, when defendant was caught, he was wearing the clothes and earring described by the victim. There was little chance of mistaken

identification by the victim under the circumstances and an independent basis existed for the in-court identification.

Defendant next argues that the trial court should not have allowed the victim to identify him at trial because her identification was indelibly tainted by the suggestiveness of the identification she made at the preliminary examination. Again, we disagree. This Court recently addressed this same issue in *Colon, supra* at 304-305.

> The decision to admit an in-court identification would not be reversed on appeal unless it is clearly erroneous. If a witness is exposed to an impermissibly suggestive pretrial identification procedure, the witness' in-court identification will not be allowed unless the prosecution shows by clear and convincing evidence that the in-court identification will not be based on a sufficiently independent basis to purge the taint of the illegal identification. The defendant must show that in light of the totality of the circumstances, the procedure used was so impermissibly suggestive as to have led to a substantial likelihood of misidentification. Simply because an identification procedure is suggestive does not mean it is necessarily constitutionally defective. *The fact that the prior confrontation occurred during the preliminary examination, as opposed to a pretrial lineup or showup, does not necessarily mean that it cannot be considered unduly suggestive.* When examining the totality of the circumstances, relevant factors include: the opportunity for the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of a prior description, the witness' level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation.
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> Here, there is no question that the preliminary examination was a suggestive atmosphere in that defendant was placed in the courtroom in prison garb. However, the victim testified that he observed defendant for at least five minutes in a small bedroom where the lights were on. Two days after the incident, the victim identified the main perpetrator as an Hispanic male with curly hair, which is apparently an accurate description of defendant. Less than two weeks passed between the time of the beating and the preliminary examination, which is a "relatively short span of time," that "does not reduce the reliability" of the identification. The prosecution showed, by clear and convincing evidence, that the victim's identification of defendant had a sufficiently independent basis and was not based on any suggestiveness surrounding the preliminary examination. [*Id.* (citations omitted; emphasis added).]

See also *People v Davis*, 146 Mich App 537, 548; 381 NW2d 759 (1985), wherein this Court stated:

> The fairness of an identification procedure is evaluated in light of the totality of the circumstances. The test is not whether the procedure was suggestive but rather whether the totality of the circumstances shows it to be reliable.

In this case, viewing the totality of the circumstances, the victim's identification of defendant had a substantial independent basis apart from seeing him at the preliminary examination. Therefore, the victim's in-court identification of defendant was proper. First, the victim had the opportunity to observe defendant, without a mask, during two robberies. The area in which the robberies occurred was well lit and the victim testified that defendant's facial features were stamped in her mind. She testified that when defendant walked into the Knight's Inn two weeks after the first robbery, she immediately recognized him and told him that she could not believe that he was going to rob her again. The description that the victim gave to police was similar to the description of defendant. On February 6, 1998, the victim described the robber as a black male in his thirties, approximately five feet, eight inches or five feet, nine inches tall, wearing a mustache, not cleanly shaven, and having a gold loop earring in his left ear. She also believed that she described him as not being very light-skinned. After the second robbery, the victim told the police that she was robbed by the same man. At the preliminary examination, defendant was noted to have a mustache and a goatee. And, at trial, defendant described himself to be almost five feet, eight inches tall with a weight of one hundred seventy pounds. While he described himself as being of a thin build, a police officer indicated that defendant was of medium build. The victim's description of defendant was also detailed, including details of the hat defendant was wearing, his coat, and his earring. It was clear that she had studied defendant. In addition, the victim was certain of defendant's identification at the pretrial examination. The length of time between the first robbery and the second robbery was two weeks. The preliminary examination was less than three weeks after the second robbery. Thus, there was little time between the robberies and the identification at the pretrial examination. As in *Colon,* defendant here has failed to show that, under the totality of the circumstances, there was a substantial likelihood of misidentification. Because the victim's identification of defendant had a sufficient independent basis, it cannot be said to have been based on any suggestiveness surrounding the preliminary examination. The trial court properly allowed the victim to identify defendant at trial.

Defendant also makes an argument that the police search of his person after the February 20, 1998 robbery, which search revealed two large wads of cash, was improper. Defendant was initially subject to a *Terry* patdown after his vehicle was pulled over and a weapon was found next to it. Defendant has not preserved any arguments with regard to the stop of his vehicle, the *Terry* patdown, or the subsequent intrusive search of his person. Because the issues were never raised below, the necessary facts for a resolution of those issues are not before this Court and we are unable to review the question presented. We also note that, in support of his argument, defendant attaches a copy of the police report to his brief on appeal. It is impermissible to expand a record on appeal. *People v Powell,* 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999).

Defendant also argues that his sentence is disproportionate and is not based on the proper criteria. We disagree. Defendant's sentence is proportionate to the seriousness of the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). The presentence investigation report (PSIR) confirms that defendant's conviction was, at least, his second felony and that the crime was committed while defendant was on parole for unarmed robbery and assault with intent to do great bodily harm less than murder. Defendant was thirty-eight years old. His list of prior offenses is extremely lengthy, dating back to 1980, and includes

many property and assaultive crimes. The PSIR also notes a substance abuse problem. Defendant has a long criminal history and has exhibited an inability to be rehabilitated.

In addition, the nature of the crime was not as benign as defendant indicates on appeal. Defendant approached a pregnant desk clerk, who was working alone at night. He brandished a weapon, yelled at her to give him money, and then fled the scene. The victim testified that she was scared for herself and her unborn baby. Defendant perpetrated the same crime on the same victim two weeks later, demonstrating a cavalier disregard for her, her unborn baby, and the law. The trial court sentenced defendant by taking into account the circumstances surrounding the offense and the offender. It specifically noted defendant's history and the facts of the crime.

We note that defendant raises other issues on appeal. We need not address those issues because we find that they have been abandoned on appeal. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999) (issue abandoned where it is not raised in the statement of questions presented); *Kelly*, *supra* at 640-641 (issue abandoned where the appellant fails to cite any authority in support of his position).

Affirmed.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell