STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 29, 2004
v	No. 248654 Saginaw Circuit Court
NATHANIEL HERMAN MITCHELL, Defendant-Appellant.	LC No. 02-021229-FC

Before: Hoekstra, P.J., and O'Connell and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of armed robbery, MCL 750.529, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, felon in possession of a firearm, MCL 750.224f, and carjacking, MCL 750.529a. The trial court sentenced defendant as a third-offense habitual offender to concurrent terms of imprisonment of 270 months to 40 years for each the armed robbery and carjacking convictions and 5 to 10 years for the felon in possession of a firearm conviction, to be served consecutive to 2 years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that there was insufficient evidence to support his conviction for carjacking. Specifically, defendant contends that the prosecutor did not show that the complainant's vehicle was taken in the presence of the complainant.

When determining whether sufficient evidence has been presented to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

For the purpose of the carjacking statute, something is within a victim's "presence" if it is within that person's reach, inspection, observation, or control sufficient to allow the person to retain possession if not prevented from doing so by violence or fear. *People v Raper*, 222 Mich App 475, 482; 563 NW2d 709 (1997). Therefore, the vehicle or means of control over the vehicle need not be taken from a victim's person. This Court has found that possession of keys equals control of the vehicle to which the keys go, even if the vehicle is some distance away. *Id.* at 482-483. Here, the keys were in the victim's pants, which were taken from him, and the only reason the complainant could not retrieve the keys was the threat from the robbers' guns. Thus,

the evidence to establish this element was sufficient. Furthermore, carjacking is a general intent crime, not a specific intent crime, *People v Davenport*, 230 Mich App 577, 580-581; 583 NW2d 919 (1998), so whether the robbers took the complainant's car as an afterthought is irrelevant.

Defendant next argues that the trial court abused its discretion in refusing to sever defendant's felon in possession of a firearm charge from his other charges and in refusing to grant a mistrial after the court mistakenly said that defendant was being charged with felony-firearm, "second offense." We review these issues for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001); *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997).

This Court has set forth three "safeguards" to ensure that a defendant suffers no unfair prejudice if a single trial is conducted for all charges in similar situations, one of which is a specific instruction to consider the prior conviction only as it relates to the felon-in-possession charge. *People v Green*, 228 Mich App 684, 691-692; 580 NW2d 444 (1998). However, this Court found adequate safeguards existed where, as here, the trial court did not give that specific instruction but defendant did not request it. *Id*. at 692. Furthermore, to the extent that defendant also argues that the trial court failed to adequately instruct the jury concerning defendant's prior felony, defendant failed to object to the jury instructions as given. Finally, the presentation of the stipulation at least implied that the prior conviction should only be considered for the felon in possession charge. Defendant was not unfairly prejudiced and the trial court did not abuse its discretion.

A trial court's discretion to declare a mistrial is not absolute, because the trial court must undertake a "scrupulous exercise of judicial discretion" and declare a mistrial only where there are no less-drastic alternatives. *People v Benton*, 402 Mich 47, 60-61, 64 n 26; 260 NW2d 77 (1977) (internal quotations and citation omitted). A defendant's motion for a mistrial should be granted only where an irregularity prejudices the defendant's rights and impairs the defendant's ability to get a fair trial. *People v Griffis*, 218 Mich App 95, 100; 553 NW2d 642 (1996). Juries are presumed to follow curative instructions to disregard inadmissible statements in the absence of an "overwhelming probability" that the jury will be unable to do so. *Dennis*, *supra* at 581. In this case, no evidence suggested that the jury would not have been able to follow a curative instruction with regard to the trial court's recitation of "second offense." Nevertheless, defendant refused the trial court's offer to give one. A party waives appellate review of an error allegedly requiring reversal if the party contributes to it by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003).

Defendant next argues that it was presumptively prejudicial for the trial court to inform a juror, in an ex parte communication, that defendant had been incarcerated. Defendant did not preserve the issue by objecting, so we review for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). Reversal is warranted only where the plain error affecting substantial rights either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id*. at 763.

While MCR 6.414(A) forbids a trial court from ex parte communication with a juror or the jury regarding the case without informing the parties and allowing them to be present, the rule of automatic reversal when a court engaged in ex parte communication with a deliberating

jury "was borne of the frustration of [our Supreme Court] with the failure of our state trial courts to cease the practice of entering the jury room while the jury is deliberating." *People v France*, 436 Mich 138, 142, 161; 461 NW2d 621 (1990). However, "[t]here is scarcely a lengthy trial in which one or more jurors do not have occasion to speak to the trial judge about something," so a new trial is not required every time a juror is potentially compromised. *Id.* at 161-162 (internal quotations and citation omitted). In *France, supra*, the Court granted leave to appeal "to review the strict rule requiring reversal of a conviction in the event of communication with a deliberating jury outside the courtroom and the presence of counsel." *Id*. at 142. Here, the jury was not deliberating at the time the communication took place, and therefore the *France* Court's analysis concerning whether the communication was substantive, administrative, or housekeeping, is arguably not applicable. See *France, supra* at 142-143, 163-164. Even so, the trial court's communication with a juror regarding her inquiry about where defendant worked, possibly in an innocent attempt to discern whether she knew defendant, is not easily classified given the guidance of the *France* Court, but in our estimation could fall only within either the administrative or housekeeping categories, both of which carry a presumption of no prejudice in the absence of an objection. *Id*. at 163-164.

We believe that defendant has failed in his burden to demonstrate outcome-determinative plain error. *Carines, supra* at 763. Defendant asserts that knowledge of incarceration for a past offense is analogous to impermissible evidence of a prior conviction. However, because defendant stipulated to his prior felony conviction, the fact that he had been incarcerated would not have been significant information to the jury. Defendant also analogizes the information to a defendant appearing in court in prison garb, but prison garb impairs the presumption of innocence not because of the knowledge that the defendant had been in prison but because of the "constant reminder of the accused's condition implicit in such distinctive, identifiable attire." *Estelle v Williams*, 425 US 501, 504-505; 96 S Ct 1691; 48 L Ed 2d 126 (1976). A single notation that defendant had, at an unspecified time, been incarcerated is not a "continuing influence throughout the trial." *Id*. at 505. Although the trial court committed error, defendant was not prejudiced thereby.

Defendant next argues that a police officer's unresponsive answer mentioning a criminal history check on defendant further prejudiced his rights and warrants reversal. We disagree.

"An unresponsive answer to a proper question is not usually error," *People v Measles*, 59 Mich App 641, 643; 230 NW2d 10 (1975), especially where a defendant has not sought a cautionary instruction, see *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988). Defendant argues that this unresponsive answer informed the jury that defendant "had a criminal history," which denied him a fair trial and therefore warrants reversal. However, the jury was already aware of defendant's prior felony conviction. Moreover, the unresponsive answer did not state that defendant *had* a criminal history, but that the police conducted a criminal history check. Although a nonresponsive answer from a police officer is more strictly scrutinized than one given by any other witness, *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983), if the statement was brief and did not convey any new information to the jury, as here, it could not have prejudiced defendant. Moreover, even assuming that a potential for prejudice existed, the situation could have been remedied by a cautionary instruction, which defendant did not request.

Defendant next argues that he was prejudiced because no counsel was present at a photographic lineup at which the complainant identified defendant. Defendant did not object to the photographic lineup, so we review for plain error that affected the outcome of the lower court proceedings. *Carines*, *supra*. Absent "unusual circumstances," there is no general right to have counsel present at a precustodial photographic identification lineup. *People v Lee*, 243 Mich App 163, 182; 622 NW2d 71 (2000). Defendant was not in custody at the time and no unusual circumstances existed; the photographic identification merely tied together the statements of the victim and the investigation of the police and provided a positive identification of the perpetrator by the victim. Therefore, defendant had no right to counsel at the photographic lineup.

Finally, defendant argues that the cumulative effect of all errors warrants reversal even if no error standing alone would require reversal. Because there was only one error, which was not prejudicial, there can be no prejudicial cumulative error.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell
/s/ Pat M. Donofrio