STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 21, 2010
v	No. 292185 Allegan Circuit Court
DANIEL RAY DOSENBERRY, Defendant-Appellant.	LC No. 08-015985-FC

Before: HOEKSTRA, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

Defendant, who was charged with open murder, was convicted by a jury of second-degree murder, MCL 750.317, and sentenced to 25 to 40 years' imprisonment. He appeals as of right. We affirm.

Defendant's conviction arises from the March 1993 violent beating death of Randol Sjoerdsma, whose body was discovered approximately two months later in the Thornapple River. The investigation of this "cold case" led to the arrest of defendant and codefendant Ryan Thibodeaux in September 2008. The prosecution's theory at trial was that defendant and Thibodeaux planned the offense and used defendant's car to transport Sjoerdsma's body to the dumpsite. Defendant admitted that he was present during the offense and assisted Thibodeaux in disposing of the victim's body after the victim was killed, but claimed that Thibodeaux was solely responsible for killing the victim. Defendant claimed that he acted under duress when he helped Thibodeaux dispose of the victim's body, because he was afraid that Thibodeaux would kill him too.[1]

I. ADMISSIBILITY OF DEFENDANT'S 2008 POLICE INTERVIEW

Defendant argues that the trial court erroneously denied his motion to suppress his statements that were given during a September 2, 2008, police interview. Defendant contends that the statements were inadmissible because he was not advised of his *Miranda*[2] rights before

[1] After defendant was convicted, Thibodeaux pleaded guilty to manslaughter and was sentenced to 10 to 15 years' imprisonment.

[2] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966).

the interview. The trial court found that defendant was not in police custody during the interview and, therefore, *Miranda* warnings were not required.

"The ultimate question whether a person was 'in custody' for purposes of *Miranda* warnings is a mixed question of fact and law, which must be answered independently by the reviewing court after review de novo of the record." *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001) (citation omitted). However, this Court reviews for clear error the trial court's factual findings concerning the circumstances surrounding the giving of defendant's statement. *Id*.

In *Coomer*, 245 Mich App at 219-220, this Court, quoting *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999), observed:

> It is well settled that *Miranda* warnings need be given only in situations involving a custodial interrogation. *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). The term "custodial interrogation" means "'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of [her] freedom of action in any significant way.'" *People v Hill*, 429 Mich. 382, 387; 415 NW2d 193 (1987), quoting *Miranda, supra* at 444. To determine whether a defendant was in custody at the time of the interrogation, we look at the totality of the circumstances, with the key question being whether the accused reasonably could have believed that [s]he was not free to leave. *People v Roark*, 214 Mich App 421, 423; 543 NW2d 23 (1995). The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned. *Stansbury v California*, 511 US 318, 323; 114 S Ct 1526; 128 L Ed 2d 293 (1994).

This Court cannot find and defendant does not seriously argue that the detailed fact-finding by the trial court was erroneous. Instead, the argument focuses on whether the facts found by the court, along with other facts and circumstances presented for our review, support the court's finding that the interrogation was non-custodial. The trial court did not err in ruling that defendant was not in custody during the September 2, 2008, police interview. Defendant asserts that the fact that the interview occurred away from his home, after two detectives insisted that he accompany them to the police station, thereby isolating him from his support system, signified that he was in custody. However, the evidence showed that the detectives asked, not demanded, that defendant speak to them. Also, defendant's statements to the detectives while at his home did not indicate that he felt any pressure to speak to them. Rather, he voluntarily agreed to speak with them and to being transported to the station by the detectives. While the detectives' repeated offers to drive defendant to the station and to buy him dinner on the way reflect their eagerness to speak with him, their statements were actually deferential to defendant and provided him with options.

The fact that the interview took place at the police station is insufficient by itself to establish that defendant was in custody. *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997). Defendant was at the station after normal hours and did not encounter any uniformed police officers. He was left alone in an unguarded interview room with the door open before the interview began and sat in the chair closest to the door while he was in the room.

Defendant retained possession of his cell phone during the entire encounter. Moreover, he conceded that the detectives did not exhibit any threatening, coercive, or aggressive behavior during the interview.

Given the casual atmosphere of the interview and the detectives' repeated deference to defendant when choices needed to be made while at defendant's house and during the drive to the station, the relaxed environment at the station and during the interview, defendant's freedom of movement at all times, and his ability to use his cell phone at any time, the trial court did not err in determining that the totality of the circumstances established that defendant was not in police custody during the interview. The fact that defendant did not have a car to drive home from the station did not affect his ability to remove himself from the detectives' presence if he so chose. In addition, although defendant presented expert testimony on the question whether he was "in custody," because "[t]he determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by . . . the person being questioned" *Coomer*, 245 Mich App at 219-220, the trial court was justified in not giving weight to defendant's expert's testimony. Therefore, the trial court did not err in finding that defendant was not in custody for *Miranda* purposes. Accordingly, the court properly denied defendant's motion to suppress.

II. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises additional issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, which we find have no merit.

A. MOTION TO AMEND

Defendant argues that the trial court improperly denied his motion to amend the information to add a new count of accessory after the fact and for a corresponding jury instruction on that offense. We disagree.

This Court reviews for an abuse of discretion a trial court's decision whether to grant an amendment to the information. *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008). A court abuses its discretion when it selects an outcome that is not within the range of reasonable and principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

It is the duty of the prosecutor, not the defendant or the trial court, to determine a defendant's initial charges and to add new ones. MCR 6.112(H); *People v Nyx*, 479 Mich 112, 124-125; 734 NW2d 548 (2007) (charging power is within the prosecution's province only); see also *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 682-684; 194 NW2d 693 (1972). Although a trial court is permitted to instruct a jury on necessarily included lesser offenses that are supported by a rational view of the evidence, instruction on lesser cognate offenses is not permitted. *People v Cornell*, 466 Mich 335, 357-359; 646 NW2d 127 (2002). Further, accessory after the fact is not even a lesser cognate offense of murder. *People v Perry*, 460 Mich 55, 62-63; 594 NW2d 477 (1999). Therefore, defendant was not entitled to an amendment to add a charge of accessory after the fact, or to a jury instruction on that offense. Thus, the trial court properly denied defendant's requests.

B. RIGHT TO PRESENT A DEFENSE

At trial, defendant admitted that he was present when the victim was killed, but claimed that Ryan Thibodeaux was alone responsible for the victim's fatal injuries. Defendant argued that his culpability was limited to assisting Thibodeaux in disposing of the victim's body after the victim was killed, which defendant claimed he did under duress because he was afraid that Thibodeaux would kill him as well. On appeal, defendant argues that the trial court erred by excluding evidence of Thibodeaux's violent and aggressive character pursuant to MRE 404(a)(1) or MRE 608, which defendant contends was relevant to his defense theory, and that the exclusion of this evidence violated his constitutional right to present a defense.

A trial court's decision regarding the admissibility of evidence is reviewed for an abuse of discretion. *People v Waclawski*, 286 Mich App 634, 670; 780 NW2d 321 (2009). Although defendant sought to admit evidence of Thibodeaux's character pursuant to MRE 404(a)(1) or MRE 608, he did not argue below that the exclusion of this evidence violated his constitutional right to present a defense. Therefore, defendant's constitutional claim is unpreserved. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004) (an objection on one ground is generally insufficient to preserve an appellate attack on a different ground). This Court reviews unpreserved claims of error for plain error affecting a defendant's substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

A criminal defendant has a constitutional right to present a defense. *People v Hayes*, 421 Mich 271, 278; 364 NW2d 365 (1984), citing US Const Ams VI and XIV; 1963 Const, art 1, §§ 13, 17, 20. However, this right is not absolute. A defendant must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict. *Hayes*, 421 Mich at 279. "Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Unger*, 278 Mich App at 250.

MRE 404(a) provides, in pertinent part:

> (a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) *Character of accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same; or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under subdivision (a)(2), evidence of a trait of character for aggression of the accused offered by the prosecution;
>
> * * *
>
> (4) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

The same legal principles that govern the construction and application of statutes apply to evidentiary rules. *People v Katt*, 468 Mich 272, 300; 662 NW2d 12 (2003). The plain language

of an evidentiary rule must be enforced as written. *Id*. MRE 404(a)(4) is inapplicable on its face because Thibodeaux was not a witness in this case. MRE 608 is also inapplicable because it applies only to a testifying witness. MRE 404(a)(1) is also inapplicable to this case. That rule "'allows a criminal defendant an absolute right to introduce evidence of *his* character to prove that he could not have committed the crime.'" *People v George*, 213 Mich App 632, 634; 540 NW2d 487 (1995), quoting *People v Whitfield*, 425 Mich 116, 130; 388 NW2d 206 (1986). Although Thibodeaux was *an* accused, he was not *the* accused in this case. Therefore, the trial court properly determined that the proffered evidence was not admissible under MRE 404(a)(1) and MRE 608. Further, defendant does not argue that these evidentiary rules are arbitrary or disproportionate to the purposes they are designed to serve. Thus, defendant has not shown that the trial court's reliance on these evidentiary rules to exclude the proffered evidence violated his right to present a defense. Accordingly, we find no plain error.

C. OTHER ISSUES

Lastly, defendant requests that this Court "consider each objection raised at trial" and he attaches to his brief a list of various objections, but without accompanying citations to the record or citations to supporting authority, and without presenting any substantive analysis of the listed claims. An appellant may not simply announce a position or assert an error and leave it to this Court to discover and rationalize the basis for his claims, or leave it to this Court to unravel and elaborate for him his arguments and search for authority either to sustain or reject his position. *Waclawski*, 286 Mich App at 679. Thus, these claims are not properly before this Court and we decline to consider them.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Cynthia Diane Stephens