STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2010
v	Nos. 290675; 297576 Muskegon Circuit Court
STEVEN DARNELL BRIGGS, Defendant-Appellant.	LC No. 08-057107-FH

Before: BECKERING, P.J., and TALBOT and OWENS, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of third-degree fleeing and eluding, MCL 750.479a(3), and resisting and obstructing a police officer, MCL 750.81d(1). Defendant appeals his convictions and resentencing as of right. We affirm.

I. SUMMARY OF FACTS AND PROCEDURAL HISTORY

According to Muskegon Heights Police Officer Daniel Churchill's trial testimony, on October 22, 2008, Officer Churchill was dispatched to a home on Reynolds Street in Muskegon Heights, Michigan in response to a complaint that defendant might harm a woman at the address. Having just read a report concerning defendant, Officer Churchill knew that defendant was previously involved in an incident at the same address, and he intended to arrest defendant for the prior incident. Upon arriving at the address, defendant's brother assisted Officer Churchill in locating defendant, who was driving away in a car. Officer Churchill followed defendant, and when defendant turned without a turn signal, Officer Churchill immediately turned on his overhead lights and followed defendant. Defendant quickly turned into an alley and accelerated. Thinking that defendant was trying to get away, Officer Churchill started clicking his siren. Defendant did not stop, so Officer Churchill continued to sound his siren. Defendant eventually slowed down and stopped in the alley. Officer Churchill stopped about four car lengths behind defendant. Approximately 15 to 25 seconds later, defendant quickly accelerated again. Officer Churchill followed defendant, still with his lights and sirens activated. Defendant turned out of the alley and then stopped his car. Officer Churchill's pursuit of defendant went on for 1-1/2 blocks and lasted about two or three minutes. The speed limit on all the streets was 25 miles per hour, and Officer Churchill was wearing a police uniform, driving in a marked patrol car.

Officer Churchill exited his car and approached defendant's car with his gun drawn. When he got next to the driver's side window, Officer Churchill ordered defendant to get his

hands up and get out of the car. Defendant did not comply. Officer Churchill saw defendant smoking a crack pipe with his driver's side window down a few inches. Officer Churchill continued to order defendant out of the car. Officer Churchill then asked defendant to shut off his car, and defendant complied. Officer Churchill asked defendant to give him his car keys, and defendant handed them to Officer Churchill through the small window opening. Defendant remained in the car. Officer Churchill attempted to open the door, but it was locked.

At this time, Sergeant Gary Cheatum arrived, noticed that Officer Churchill's lights were activated on his patrol car, and saw Officer Churchill ordering defendant to get out of his car. Officer Churchill threatened defendant with pepper spray, but defendant still would not come out. Officer Churchill got his pepper spray and threatened defendant again, but defendant remained in the car, smoking his crack pipe. As a result, Officer Churchill sprayed the pepper spray at defendant. Defendant turned, and the spray hit him in the back. Defendant got out of his car and put his hands on the hood. Officer Churchill and Sergeant Cheatum secured defendant, and Officer Churchill searched the car, wherein he found a 50 milliliter bottle of Seagram's gin, which had been fashioned into a crack pipe, under the passenger seat.

Defendant testified on his own behalf at trial. According to his testimony, after he noticed Officer Churchill, he turned into the alley to see if Officer Churchill would follow him. He claimed that he saw Officer Churchill turn into the alley behind him with his lights on, so he decided to stop. Defendant testified that he had crack in his hand that had fallen in his lap, which he placed back on the crack pipe, and he wanted to leave the alley because he "didn't feel comfortable in the alley." As such, defendant took his foot off the brake, let his car "roll" down the alley, and attempted to smoke his crack pipe while steering with his knees. Defendant testified that after he turned out of the alley and came to a stop, he told Officer Churchill, "I'm not going to resist in any way, but I'm on this shit and I'm on it bad." According to defendant, Officer Churchill told defendant to "finish it," and when defendant attempted to do so, Officer Churchill sprayed him with pepper spray. Defendant claims that the pepper spray got on his pipe, so he got out of the car.

Defendant was convicted by a jury of third-degree fleeing and eluding as well as resisting arrest. At his original sentencing on February 24, 2009, defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 58 months to 30 years' imprisonment for his third-degree fleeing and eluding conviction and to two years and six months to 15 years' imprisonment for his resisting arrest conviction, to be served consecutively. Defendant sought and received resentencing, which took place on March 16, 2010. Defendant was resentenced as an habitual offender, fourth offense, MCL 769.12, to consecutive sentences of four years to 30 years' imprisonment for his third-degree fleeing and eluding conviction and two years and six months to 15 years' imprisonment for his resisting arrest conviction.

II. SUFFICIENCY OF THE EVIDENCE

In challenging his convictions, defendant contends that the evidence was insufficient for a rational trier of fact to find him guilty beyond a reasonable doubt. We examine the evidence in the light most favorable to the prosecution and determine whether a rational juror could conclude that the essential elements of the crime were proven beyond reasonable doubt. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). Evidentiary conflicts are resolved in

favor of the prosecution. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Circumstantial evidence and reasonable inferences arising from such evidence can be satisfactory proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

To be guilty of third-degree fleeing and eluding, the prosecution must prove the following elements beyond a reasonable doubt: (1) the officer was in uniform with an adequately identified law enforcement vehicle performing his or her lawful duties; (2) defendant was driving a motor vehicle; (3) the officer ordered defendant to stop by hand, voice, siren, or emergency light; (4) defendant was aware of the order to stop; (5) defendant refused to obey by trying to flee or elude, such as by increasing the speed of the vehicle or turning off the vehicle's lights; and (6) the incident occurred in an area where the speed limit was 35 miles per hour or less. MCL 750.479a(3); see also *People v Grayer*, 235 Mich App 737, 741; 599 NW2d 527 (1999).

In this case, both Officer Churchill and defendant testified that Officer Churchill was in uniform, driving a marked patrol car, and that Officer Churchill ordered defendant to stop his car by turning on his overhead lights. Officer Churchill testified that after he turned on his overhead lights, defendant quickly turned and accelerated into an alley. Both Officer Churchill and defendant testified that defendant initially stopped in the alley, but defendant then continued driving down the alley despite Officer Churchill's order to stop. This incident occurred in a residential area where the speed limit was 25 miles per hour. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could find defendant guilty of third-degree fleeing and eluding beyond a reasonable doubt.

As to resisting and obstructing a police officer, the prosecution must prove: (1) defendant assaulted, battered, resisted, or obstructed a person; and (2) defendant knew or had reason to know the person was performing his or her duties. MCL 750.81d(1). The definition of "person" under MCL 750.81d includes a police officer, MCL 750.81d(7)(b)(*i*), and "obstruct" means "a knowing failure to comply with a lawful command," MCL 750.81d(7)(a).

In this case, defendant testified that Officer Churchill was in uniform and that he knew Officer Churchill was a police officer. Moreover, both Officer Churchill and Sergeant Cheatum testified that Officer Churchill repeatedly ordered defendant to get out of his car, but defendant did not comply. Viewing this evidence in the light most favorable to the prosecution, there was sufficient evidence to conclude beyond a reasonable doubt that defendant resisted and obstructed Officer Churchill.

III. GREAT WEIGHT OF THE EVIDENCE

Defendant argues that the verdict was against the great weight of the evidence. Specifically, defendant asserts that the lower court's verdict was based on testimony from a witness whose credibility should have been questioned. The issue is not preserved and our review is limited to plain error. See *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

This Court considers whether the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456

Mich 625, 642; 576 NW2d 129 (1998). Conflicting testimony and questions of witness credibility are insufficient grounds for granting a new trial. *Id*. at 643, 647. Exceptions include instances where "testimony contradicts indisputable physical facts or laws," "testimony is patently incredible or defies physical realities," "where a witness's testimony is material and is so inherently implausible that it could not be believed by a reasonable juror," and where a witness's testimony has been seriously impeached and the case is marked by "uncertainties and discrepancies." *Id*. at 643-644 (quotation marks and citations omitted). In this case, the testimony of Officer Churchill and Sergeant Cheatum does not fall under any of these exceptions. Moreover, we emphasize that questions concerning the credibility of witnesses are generally not a sufficient ground for a new trial. *Id*. at 643. Thus, we find that the jury's verdict was not against the great weight of the evidence.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant claims that his trial counsel was ineffective. However, defendant has failed to state how his counsel was ineffective. Rather, he asks this Court to view "the entire record to see what counsel should have done." "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis of his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Thus, the issue is abandoned.

V. VALIDITY OF SEARCH

Defendant argues that Officer Churchill's search of his car was invalid. We review this unpreserved claim for plain error affecting defendant's substantial rights. See *Carines*, 460 Mich at 763-764. The United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." US Const, Am IV. A search or seizure conducted by police without a warrant is unreasonable per se, unless one of several well-established exceptions applies. *People v Brown*, 279 Mich App 116, 131; 755 NW2d 664 (2008). Under the automobile exception, the police may search an automobile without first obtaining a warrant if there is probable cause to support the search. *People v Kazmierczak*, 461 Mich 411, 418-419; 605 NW2d 667 (2000). Probable cause exists when there is a fair probability that contraband or evidence of a crime will be found in a particular place. *People v Mullen*, 282 Mich App 14, 21-22; 762 NW2d 170 (2008). Moreover, under the plain view doctrine, police officers need not obtain a warrant to seize "items in plain view if the officers are lawfully in a position from which they view the item, and if the item's incriminating character is immediately apparent." *People v Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996).

In this case, both exceptions to the warrant requirement apply. Officer Churchill observed defendant smoking a crack pipe in his car in plain view. Officer Churchill's observation provided him with a sufficient basis to conclude that there was a fair probability that contraband or evidence of a crime would be found in defendant's car. Therefore, Officer Churchill had probable cause to search defendant's car, and, under both the automobile exception and the plain view doctrine, Officer Churchill did not have to obtain a warrant before conducting the search and seizing defendant's crack pipe.

VI. ADMISSION OF CRACK PIPE AS EVIDENCE

Defendant appears to contend that the trial court's admission of his crack pipe denied him a fair trial. We disagree. At trial, defense counsel stipulated on the record to the admission of the crack pipe as evidence. Waiver is "the 'intentional relinquishment or abandonment of a known right.'" *Carines*, 460 Mich at 762 n 7, quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993). "'One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.'" *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (citations omitted).

Even if defense counsel had not stipulated to the admission of the crack pipe into evidence, we find that the crack pipe was relevant and admissible, rendering any potential ineffective assistance argument without merit. Generally, all relevant evidence is admissible, and irrelevant evidence is inadmissible. MRE 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "Normally the facts and circumstances surrounding the commission of a crime are properly admissible as part of the res gestae." *People v Shannon*, 88 Mich App 138, 146; 276 NW2d 546 (1979). Indeed, evidence of a defendant's other criminal acts that are blended or connected to the crime for which defendant is charged is generally admissible to explain the circumstances of the crime charged so that the jury can hear the complete story. *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). Nonetheless, under MRE 403, a trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Evidence is not unfairly prejudicial merely because it damages a party's case. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Rather, undue prejudice refers to "an undue tendency to move the tribunal to decide on an improper basis." *Id*.

In this case, even though defendant was not charged with possession of a crack pipe, the crack pipe was direct evidence of the facts and circumstances surrounding the offenses for which defendant was charged. The crack pipe also provided defendant a motive to elude Officer Churchill, which supports the inference that defendant committed the offenses charged. Moreover, defendant's defense in this case rests largely on his possession of the crack pipe. Specifically, defendant testified at trial that he slowly let his car "roll" down the alley—as opposed to quickly accelerating—because he was trying to smoke from the crack pipe. Defendant claimed that Officer Churchill told him to finish smoking his crack pipe, instead of telling him to get out of the car. Moreover, defendant stated in his defense, "[i]f I'm guilty of anything it's possession of a crack pipe." Although the admission of the crack pipe was prejudicial to defendant's case, its probative value was not substantially outweighed by the danger of unfair prejudice. Therefore, the crack pipe was properly admitted as evidence at trial.

VII. DEFENDANT'S *MIRANDA*[1] RIGHTS

Defendant argues that his *Miranda* rights were violated because he was never given *Miranda* warnings or told why he was stopped by the police. The United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." US Const, Am V. Under *Miranda*, statements provided by an accused during custodial interrogation are inadmissible unless the accused knowingly, voluntarily, and intelligently waives the Fifth Amendment right. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005).

Defendant fails to identify what testimony was admitted in violation of his *Miranda* rights. At trial, Officer Cheatham testified that when he approached defendant's vehicle and issued commands, defendant was not saying anything, but rather, making sounds like, "mmm-nnn, mmm-nnn, mmm-nnn" as he smoked his crack pipe. After defendant unlocked the car and got out, "he made the statement he just wanted to finish smoking." Assuming defendant is referring to the above statements as the source of his alleged *Miranda* violation, he did not object to their admission at trial. Thus, this issue was not properly preserved and is reviewed for plain error affecting substantial rights. See *Carines*, 460 Mich at 763-764. *Miranda* warnings are not required unless the accused is subject to a custodial interrogation. *People v Kulpinski*, 243 Mich App 8, 25; 620 NW2d 537 (2000). "The term 'custodial interrogation' means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999) (quotation marks and citations omitted). Review of the record reveals that defendant's statements were not the product of police questioning. Thus, no *Miranda* violation occurred.

VIII. PROSECUTORIAL MISCONDUCT

Defendant claims that the prosecutor engaged in misconduct by bringing improper charges against him. Because this claim is unpreserved, our review is limited to plain error affecting defendant's substantial rights. See *Carines*, 460 Mich at 763-764. A prosecutor has broad discretion when charging a defendant, and this Court will not find an abuse of discretion where there is sufficient evidence to support the crime charged. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). Given our conclusion that there was sufficient evidence for a rational trier of fact to find defendant guilty of the crimes charged beyond a reasonable doubt, we likewise find sufficient evidence to support the prosecutor's charges. Accordingly, the prosecutor did not abuse his discretion in charging defendant, and thus, there was no plain error.

IX. ALLEGED DISQUALIFICATION OF TRIAL JUDGE

Defendant's last argument in challenging his convictions is that the trial judge was disqualified from hearing defendant's case because the judge knew him from another case.

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

MCR 2.003(C) provides a variety of grounds for judicial disqualification, including bias or prejudice for or against a party. MCR 2.003(C)(1)(a). Generally, there must be a showing of actual prejudice to disqualify a judge under MCR 2.003. *People v Wade*, 283 Mich App 462, 470; 771 NW2d 447 (2009). A judge is presumed to be impartial, and a party has a heavy burden to overcome the presumption of impartiality. *Id.* Defendant has not demonstrated that the trial judge was biased in this case. Moreover, the trial judge was not biased just because he knew defendant from another case. *People v Upshaw*, 172 Mich App 386, 388; 431 NW2d 520 (1988).

X. CONSECUTIVE SENTENCES

Defendant challenges the trial court's decision at resentencing to sentence him to consecutive sentences for third-degree fleeing and eluding and resisting and obstructing. Defendant first argues that the trial court abused its discretion in sentencing him consecutively. Defendant asserts that the crimes he committed were the most innocuous possible versions of those crimes and that consecutive sentences are unfair because he received the sentence at the top of the guidelines for fleeing and eluding. This Court reviews a trial court's decision to impose consecutive sentences for abuse of discretion. *People v St John*, 230 Mich App 644, 646; 585 NW2d 849 (1998). A trial court abuses its discretion when it reaches a decision that falls outside the principled range of outcomes. *People v Breeding*, 284 Mich App 471, 479; 772 NW2d 810 (2009). To the extent the imposition of consecutive sentences involves interpretation of a statute, our review is de novo. *People v Gonzalez*, 256 Mich App 212, 229; 663 NW2d 499 (2003).

A trial court may only impose a consecutive sentence when authorized by law. *Id.* As defendant admits, the trial court in this case was authorized under MCL 750.81d(6) to use its discretion in determining whether to sentence defendant consecutively. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12. The presentence investigation report (PSIR) indicates that the 50-year-old defendant has a long criminal record dating back to when he was a teenager. Defendant's criminal record includes seven prior felony convictions, four prior misdemeanor convictions, and a juvenile record. The PSIR also indicates that defendant was on parole at the time he committed the offenses in this case. The PSIR notes that defendant has a tendency to return to criminal activity. Moreover, the fact that defendant chose to sit in a locked car and smoke a crack pipe while a police officer was in his plain view ordering him to exit the car indicates that defendant is unapologetic regarding the criminal actions he takes and has a disregard for the law. Given these facts, the trial court did not abuse its discretion because its decision to impose consecutive sentences did not fall outside the principled range of outcomes.

XI. DOUBLE JEOPARDY

Defendant argues that his consecutive sentences for third-degree fleeing and eluding and resisting and obstructing resulted in multiple punishments for the same offense, violating his rights against double jeopardy under both the federal and state constitutions. Defendant raises the issue for the first time in this appeal; therefore, the issue is not preserved. *People v McGee*,

280 Mich App 680, 682; 761 NW2d 743 (2008). Both the United States and Michigan constitutions protect a person from multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Ford*, 262 Mich App 443, 447; 687 NW2d 119 (2004). When determining whether a defendant has been subjected to multiple punishments for the same offense, this Court first assesses whether the Legislature expressed a clear intention that multiple punishments may be imposed. *People v Garland*, 286 Mich App 1, 4; 777 NW2d 732 (2009). If the Legislature has clearly expressed an intention to impose multiple punishments, then there is no double jeopardy violation. *Id*.

In reading both the third-degree fleeing and eluding statute, MCL 750.479a, and the resisting and obstructing statute, MCL 750.81d, it is clear that the Legislature intended to impose multiple punishments. The resisting and obstructing statute states the following: "This section does not prohibit an individual from being charged with, convicted of, or punished for any other violation of law that is committed by that individual while violating this section." MCL 750.81d(5). Similarly, the fleeing and eluding statute states that "a conviction under this section does not prohibit a conviction and sentence under any other applicable provision for conduct arising out of the same transaction." MCL 750.479a(8).

Accordingly, defendant's rights against double jeopardy under the United States and Michigan constitutions were not violated because the Legislature clearly intended to impose multiple punishments for the crimes defendant committed.

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Donald S. Owens