STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 15, 2011
v	No. 295245 Oakland Circuit Court
ANTHONY LAVELLE MARTIN, Defendant-Appellant.	LC Nos. 2009-224937-FC, 2009-225004-FC

Before: TALBOT, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions. In docket number 2009-224937-FC, the jury found defendant guilty of one count of armed robbery, MCL 750.529, two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, one count of felonious assault, MCL 750.82, and one count of possession of a firearm while ineligible to possess it (felon in possession), MCL 750.224f. In docket number 2009-225004, the jury found defendant guilty of one count of armed robbery, three counts of felony-firearm, conspiracy to commit bank robbery, MCL 750.531, and felon in possession of a firearm. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to serve 24 to 40 years in prison for each armed robbery conviction, five years in prison for each felony-firearm conviction, three to eight years in prison for the felonious assault conviction, five to ten years in prison for each felon in possession conviction, and 15 to 40 years in prison for his conspiracy to commit bank robbery conviction. On appeal, defendant argues that there were numerous errors that warrant a new trial or resentencing. Because we conclude that there were no errors warranting relief, we affirm.

Defendant first argues that he deserves a new trial because some potential jurors might have seen him in shackles. This Court reviews a trial court's decision to deny a motion to dismiss potential jurors and to deny a motion for a mistrial for an abuse of discretion. *People v Williams*, 241 Mich App 519, 522; 616 NW2d 710 (2000); *People v Waclawski*, 286 Mich App 634, 708; 780 NW2d 321 (2009). A trial court abuses its discretion when it selects an outcome that is outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

We first note that defendant has waived any claim that he should have been permitted to question the dismissed potential jurors as to what they might have seen and discussed. Although defendant's trial counsel requested that all members of the juror array be dismissed and requested a mistrial, when given the opportunity, defendant's trial counsel specifically declined to question the five dismissed potential jurors. See *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000).

A criminal defendant has the right to be tried by an impartial jury. *People v Miller*, 482 Mich 540, 547; 759 NW2d 850 (2008). And this right includes the right to appear before the jury free from restraints. See *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002). However, even if shackled, in order to warrant relief, the defendant must still make some showing that he suffered prejudice. *People v Horn*, 279 Mich App 31, 37; 755 NW2d 212 (2008). Here, based on videotape evidence, the trial court dismissed five members from the *juror array*, as opposed to the actual jury, who might have seen defendant in shackles. In fact, the record indicates that it is far from certain that these five individuals even saw defendant in shackles. Accordingly, defendant cannot show that any actual members of the jury that convicted him saw him in shackles, and therefore, he cannot show prejudice. *Id.*

Defendant next argues that he was denied a fair trial when the court admitted a letter that he purportedly wrote in which he threatened a witness. This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007).

In this case, the prosecution sought to introduce a note, which defendant purportedly sent to a cellmate, Donta Frazier. In the note, defendant appears to ask the recipient to take actions against Frazier, who was then cooperating with the prosecution:

> This is Weezy from C-5-A. What up doe? There's a new [N word] in your cell named Donta Frazier, he's a snitch, put him on blast, he jumped case, my lawyer just brought me the paperwork yesterday, they're going to call him out, ya'll cell Tuesday, Wednesday, or Thursday to come get on the stand in my trial. I start my trial Monday. Put that [N word] on blast, let everybody know.

Defendant argues that the note is irrelevant because there is no reason to believe that he wrote it. Defendant asserts that the only foundation was Frazier's testimony that he was familiar with defendant's handwriting, but that testimony did not meet the requirements of MRE 901. He additionally argues that the note is unduly inflammatory and constitutes improper character evidence. For that reason, he maintains, it was inadmissible under MRE 403 and MRE 404(b).

Relevant evidence is generally admissible. MRE 402. And 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. Nevertheless, otherwise relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." MRE 403. "Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence." *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002).

A writing may be authenticated by "evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901(a). Here, the prosecution claimed that defendant wrote the letter and sent it to Frazier's cellmate. Frazier testified that he was familiar with defendant's handwriting and that it appeared to be in his handwriting. This was sufficient to establish that defendant was the author. MRE 901(b)(2). Frazier also testified that the note came with a copy of the report that Frazier had made to the police regarding statements defendant made about the robberies, which was provided to defendant's trial counsel. Defendant does not dispute this fact. Moreover, Frazier explained how the note was passed: defendant passed it to a trustee inmate, who gave it to Frazier's new cellmate, an inmate nicknamed "Russian," who in turn revealed it to Frazier. Finally, Detective Sergeant David Wurtz of the Oakland County Sheriff's Department confirmed that Frazier had shared a cell with defendant. The trial court did not err when it concluded that, taken together, this evidence sufficiently authenticates the note under MRE 901.

Although defendant argues that the note was irrelevant, unduly prejudicial under MRE 403, and constituted improper character evidence under MRE 404(b), he limits his analysis to claims that the note lacked a proper foundation. Therefore, he has abandoned any claim of error other than lack of foundation. See *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004). Further, even if these claims of error had not been abandoned, because defendant did not object on these grounds at trial, he "must demonstrate plain error affecting his substantial rights, meaning that he was actually innocent or that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of his innocence." *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

In this case, even if it were error to admit the note, defendant cannot show prejudice because the evidence of his guilt was overwhelming. First, Stacie Coburn and Malissa Williams, two coconspirators who had pleaded guilty and were serving sentences, testified that defendant was involved in the planning and execution of two armed bank robberies. Sylvia Poole, a bank employee, also positively identified defendant as the robber. Sumita Antonakos, an employee of the same bank, testified that the suspect left behind a black garbage bag, which was taken by police and determined to have defendant's fingerprints on it. Deanna Treece, an employee of the second bank, identified a photograph taken from the security system and stated that defendant resembled the suspect. Frazier, defendant's cellmate, testified that defendant had discussed details of the case, specifically regarding a bank robbery that he committed with two women. The jury was also shown photographs taken from the surveillance systems at both banks. Therefore, defendant cannot show plain error affecting his substantial rights.

Defendant next argues that the trial court erred in giving a flight instruction because the evidence showed that he merely left the banks after the robberies. This Court reviews a trial court's decision that an instruction applies to the fact of the case for an abuse of discretion. *Waclawski*, 286 Mich App at 675.

Here, the trial court instructed the jury that it could consider defendant's flight from the scene of the robberies as evidence of guilt:

> There has been some evidence that the defendant ran away after the alleged crime. This evidence does not prove guilt. A person may run or hide for innocent reasons such as panic, mistake or fear. However a person may also run or hide because of consciousness of guilt. You must decide whether the evidence is true and if true, whether it shows that the defendant had a guilty state of mind.

"It is well established that evidence of flight is admissible to show consciousness of guilt." *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). "The term 'flight' has been applied to such actions as *fleeing the scene of the crime*, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody." *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995) (emphasis added, citation omitted). Nevertheless, "[f]light can result from factors other than guilt, and it is for the jury to determine what caused defendant to flee." *People v Taylor*, 195 Mich App 57, 63; 489 NW2d 99 (1992).

In this case, Antonakos, who worked at one of the banks, testified that the robbers left the bank before the police arrived, the female standing near the back yelled, "let's go, let's move, let's move," and the entire episode lasted one to two minutes at most. Treece, a teller at the other bank, similarly testified that defendant ordered her to hurry up and give him the money, and the incident lasted two to three minutes. Michael Harris, who was present at one robbery, testified that defendant ran out of the bank, dropping some of the money on the floor as he went. In addition, after each robbery, Coburn drove a short distance away, at which point, Rowe met them and defendant got into Rowe's car. Thus, there was evidence presented that defendant fled the scene of the crime, which warrants a flight instruction. *Coleman*, 210 Mich App at 4. Further, defendant's rights were protected because the instruction properly informed the jury that a person might run for innocent reasons. The trial court did not err in giving a flight instruction.

Defendant also argues that the trial court erred when it scored Offense Variables (OVs) 7, 12, and 19. This Court reviews de novo the proper interpretation of statutory sentencing guidelines. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). An appellate court must affirm a sentence that is within the appropriate guidelines range unless there is "an error in scoring the sentencing guidelines or reliance on inaccurate information in determining the sentence. . . . Scoring decisions for which there is any evidence in support will be upheld." *Id*. This Court reviews a trial court's findings of fact at sentencing for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

Defendant first argues that the trial court incorrectly scored 50 points for OV 7, which addresses aggravated physical abuse. Defendant concedes that the gun was discharged into the ceiling at one bank, it was a real gun, it was put into a person's face, and the person testified that she was told she would be killed. However, defendant, relying on an unpublished opinion, concludes that this OV should have been scored zero points.

We first note that, under MCR 7.215(C)(1), unpublished opinions are not precedentially binding. Further, scoring 50 points for OV 7 "is proper where '[a] victim was treated with sadism, torture, or excessive brutality or *conduct designed to substantially increase the fear and anxiety a victim suffered during the offense*.'" *People v Blunt*, 282 Mich App 81, 89; 761 NW2d 427 (2009), quoting MCL 777.37(1)(a) (emphasis added). Thus, "[w]hile the label of OV 7 is 'aggravated physical abuse,' when the section is read as a whole, it is clear that the Legislature does not require actual physical abuse in order for points to be assessed under this variable." *People v Mattoon*, 271 Mich App 275, 277-278; 721 NW2d 269 (2006).

The evidence supported a score of 50 points for OV 7. During one robbery, defendant pointed a gun at teller Antonakos's head and told her to give him money or he would shoot her. Similarly, he instructed employee Poole not to press the panic button or he would "blow [her] f'n head off." He made her lay on the floor and persisted in "waving that gun." Defendant, in fact, told everyone to get on the floor, and when teller Strong started to get back up, defendant told her to get back down or he would shoot her. While robbing the other bank, defendant fired a shot into the ceiling upon entering the bank. He then ordered teller Treece to hurry up and give him large bills while he waved his gun around. Defendant instructed Harris, a customer at the bank, to put his hands up, and then, upon running from the bank, said "don't follow me or I'll blow you away." Thus, defendant repeatedly threatened employees and others by pointing his gun at them, waving it around, and saying that he would shoot them. Moreover, he actually discharged his weapon at one bank. See *People v Hornsby*, 251 Mich App 462, 469; 650 NW2d 700 (2002) ("[The] [d]efendant's actions in cocking the weapon and repeatedly threatening the life of the shift supervisor and the other employees" supported a score of 50 points.) Thus, defendant clearly engaged in "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense," MCL 777.37(1)(a), and a score of 50 points for OV 7 was proper.

Defendant next argues that the trial court incorrectly scored ten points for OV 12, contemporaneous felonious criminal acts, for his attempts to rob banks on Veteran's Day (when the banks were closed).

Under MCL 777.42(1)(b), a trial court must score ten points when "two contemporaneous felonious criminal acts involving crimes against a person were committed," or, under MCL 777.42(1)(c), where "[t]hree or more contemporaneous felonious criminal acts involving other crimes were committed." A felonious criminal act is contemporaneous if it occurred within 24 hours of the sentencing offense and has not and will not result in a separate conviction. MCL 777.42(2)(a).

In this case, the trial court scored ten points for OV 12 for the three attempted armed robberies that occurred on November 11, 2008, for which, despite defendant's claims to the contrary, he was not convicted.[1] "The elements of armed robbery are: (1) an assault and (2) a felonious taking of property from the victim's presence or person (3) while the defendant is armed with a weapon." *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007); MCL 750.529. Under MCL 750.92(2), "an 'attempt' consists of (1) an attempt to commit an offense prohibited by law, and (2) any act towards the commission of the intended offense." *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001). Although Coburn did not state how many bank locations the group tried to rob before realizing that they were closed for Veteran's Day, Williams stated that it was three to four. The group, armed with handguns and intending to rob the banks, drove to the different locations and attempted to enter, but found the doors locked. Although no people were present at the closed banks, "the concept of 'impossibility,' . . . has never been recognized by this Court as a valid defense to a charge of attempt." *Id.* at 162. Thus, in this case, driving to at least three banks with the intent to rob, while armed, and attempting to enter, constitutes an attempt to commit armed robbery. The trial court properly scored 10 points for OV 12.

Defendant next argues that the trial court erred when it used the letter that he allegedly sent to score OV 19, which involves a threat to security or interference with the administration of justice, at 25 points. According to defendant, the testimony at trial was not adequate to support the conclusion that defendant was responsible for the note. A trial court must score OV 19 at 25 points if the offender "by his or her conduct threatened the security of a penal institution or court." MCL 777.49.

As discussed, there was sufficient evidence to establish that defendant authored and sent the note at issue. In the note, defendant informs Frazier's cellmate that Frazier is a snitch and instructs him to put Frazier "on blast." Defendant's arguments on the scoring decision rehash the arguments he made above regarding the authenticity of the note, which, as discussed, are not valid. The question is whether defendant threatened the security of a penal institution. There was no testimony regarding what, exactly, "put on blast" means. However, evidence suggests that jail authorities considered the note to be a threat, as they immediately moved Frazier to a different cell for his safety. Thus, the note can be construed as a threat meant to prevent Frazier from testifying, and, at the time the threat was made, Frazier resided at the Oakland County Jail. Therefore, defendant's conduct in sending the note constituted a threat to the security of a penal institution and a score of 25 points was appropriate.

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[1] Defendant was convicted of conspiracy to commit bank robbery, but "conspiracy is a separate and distinct from the substantive crime that is its object." *People v Mass*, 464 Mich 615, 632; 628 NW2d 540 (2001).

Defendant next argues that his trial counsel was constitutionally ineffective on a variety of grounds. "The determination whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *People v Seals*, 285 Mich App 1, 16; 776 NW2d 314 (2009) (citation omitted). In this case, because the trial court did not hold an evidentiary hearing, "review is limited to the facts on the record." *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

To establish ineffective assistance of counsel, a defendant must show that his trial counsel's performance fell below an objective standard of reasonableness under professional norms and that there is a reasonable probability that, if not for counsel's errors, the result would have been different. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant argues that, regarding the possibility that jurors saw defendant in shackles, defense counsel's failure do anything to uncover potential juror bias or to make a proper objection and record constituted error that fell below an objective standard of reasonableness.

Because there was no evidentiary hearing, this Court cannot speculate on defense counsel's decision not to interview the dismissed members of the juror array regarding whether they talked to others, but even "[a] failed strategy does not constitute deficient performance." *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008). At any rate, defense counsel did move to have the entire array dismissed and moved for a mistrial as well. Further, as discussed above, the record clearly indicates that any members of the array that *might* have seen defendant in shackles were, in fact, dismissed upon trial counsel's request, and there is no evidence on the record that any actual jurors saw defendant in shackles. Therefore, defendant cannot show prejudice.

Defendant next argues that his counsel was ineffective for failing to object to the jailhouse note. As discussed above, defense counsel *did* object that the note did not have a proper foundation, at which point, Frazier provided the foundation required under MRE 901. Although defense counsel did not object as to relevancy, prejudice, or other grounds, as discussed above, any error in the admission of the letter did not result in prejudice, and therefore, defendant cannot show ineffective assistance of counsel.

He also argues that his defense counsel should have objected to the note on confrontation grounds. Specifically, he contends that he was denied the right to confront the inmate to whom he purportedly sent the note.

A defendant has the right to confront the witnesses against him at trial:

> [A] primary objective of the Confrontation Clause is to compel witnesses to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. . . . The required elements of the Confrontation Clause are: (1) physical presence, (2) an oath, (3) cross-examination, and (4) observation of

> demeanor by the trier of fact. The combined effect of these elements ensures that evidence admitted against an accused is reliable and subject to rigorous adversarial testing. [*People v Buie*, 285 Mich App 401, 408; 775 NW2d 817 (2009) (internal citations and punctuation omitted).]

In this case, defendant's right to confrontation was not infringed because he was able to cross-examine Frazier regarding his claims about the origins of the note. Furthermore, regarding any questioning of "Russian," "the right to confrontation is not violated by the prosecution failing to call witnesses that defendant could have called to testify." *People v Cooper*, 236 Mich App 643, 659; 601 NW2d 409 (1999). Because Frazier was available for cross-examination, defendant's trial counsel's objection on this basis would have lacked merit. See *Matuszak*, 263 Mich App at 58.

Defendant also argues that his counsel was ineffective in failing to ask for a continuance in order to subpoena defendant's employer. Defendant has not established on appeal what it was that his employer might have testified about. For that reason, he cannot show that his trial counsel's decision not to ask for a continuance in order to call this witness deprived him of a fair trial. See *People v Ackerman*, 257 Mich App 434, 455-456; 669 NW2d 818 (2003). In addition, there is no evidence that defendant's trial counsel was aware of this witness. "[C]ounsel cannot be found ineffective for failing to pursue information that his client neglected to tell him. . . ." *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005).

Defendant argues that his trial counsel was ineffective because he failed to request funds to hire an expert on fingerprints to examine the latent thumb print found on the garbage bag. Defendant asserts that he was thereby prevented from challenging the fingerprint evidence offered by the prosecution.

"Counsel's decision whether to call a witness is presumed to be a strategic one for which this Court will not substitute its judgment." *Ackerman*, 257 Mich App at 455. And defendant has again failed to offer proof as to what the witness would have testified about. Accordingly, defendant has not established the factual predicate for his claim.

Defendant next argues that trial counsel provided ineffective assistance by failing to impeach Treece's testimony because, at the preliminary examination, Treece gave no statement regarding the description of the assailant who robbed the bank. However, defendant contends that, at trial, when asked the same question, Treece insinuated that defendant looks like the individual who robbed the bank.

At the preliminary examination, Treece testified that she did not see anyone in the courtroom resembling the bank robber. At trial, Treece testified to the robber's general appearance, noting that he was wearing a hat, hooded sweatshirt, and glasses, which obscured her ability to see his face, although she could note the man's size and skin tone. She observed that defendant was similar in appearance, but she could not positively identify him. Accordingly, her trial testimony was not inconsistent with her preliminary examination testimony and defense counsel could not be ineffective for failing to impeach her. Regardless, as noted, decisions regarding the questioning of witnesses are a matter of trial strategy, not to be second guessed on appeal. *Id.*

Defendant also argues that his counsel was ineffective for failing to impeach Williams' testimony.

Defendant asserts that, on November 20, 2009, Williams told the police that she did not know the identity of the male who was involved with the bank robberies, however, at trial, she identified defendant as a coconspirator. Defendant references a police report, the attached portion of which simply states that "Williams was in the black Olds with Stacie [Coburn] and *an unknown male subject* when they went to the Meijer parking lot and met up with J.T., who was driving a black Impala. J.T. told Williams to rob another bank and Williams refused and had Stacie take her back down to the deli." (Emphasis added.) Nothing in this statement indicates that Williams was unable to identify defendant.

Defendant further asserts that another police report indicates that Williams also implicated defendant in a bank robbery that took place on October 30, 2008, in Bloomfield, but when asked about it at trial, she denied ever making that statement. It is true that, in the police report attached to defendant's brief, Williams purportedly indicated that she robbed a bank in Bloomfield Township with Coburn, Coleman, and defendant. At trial, however, she said that only Coleman and Coburn participated in the robbery, which took place on October 30, 2008. Nevertheless, defense counsel *did* question Williams regarding the discrepancy and Williams denied that she told the police that defendant was with her on October 30, 2008. Thus, defendant's argument is without merit.

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Michael J. Kelly