STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2011
v	No. 299251 Oakland Circuit Court
CHRIS WILLIAM ASHLEY, Defendant-Appellant.	LC No. 2008-223135-FC

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of two counts of armed robbery, MCL 750.529, and three counts of stealing or using a financial transaction device without consent, MCL 750.157n(1). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 20 to 40 years for each armed robbery conviction and 2 to 15 years for the remaining convictions. We affirm.

Defendant's convictions arose out of an armed robbery that occurred during the early morning hours of July 27, 2008, in the parking lot of a store. The credit cards taken during the robbery were later used at multiple locations. Defendant was arrested after a gas station attendant called the police to report suspicious activity, whereby defendant was offering to fill up customers' gas tanks using the stolen credit cards in exchange for cash.

Defendant first argues the trial court improperly denied his motion to suppress evidence recovered from an automobile impounded from the gas station parking lot where defendant was arrested.

Both the United States and Michigan Constitutions protect against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Taylor*, 253 Mich App 399, 403; 655 NW2d 291 (2002). Warrantless searches are unreasonable per se unless a specific exception to the warrant requirement applies. *People v Beydoun*, 283 Mich App 314, 323; 770 NW2d 54 (2009). The prosecution has the burden of proving the applicability of a warrant exception when a motion to suppress is raised. *People v Martinez*, 192 Mich App 57, 61-62; 480 NW2d 302 (1991).

We review for clear error a trial court's findings of fact at a suppression hearing and review de novo the ultimate decision whether to suppress the evidence. *People v Mullen*, 282

Mich App 14, 21; 762 NW2d 170 (2008). We conclude the trial court properly denied defendant's motion to suppress because both the inventory and automobile exception to the warrant requirement were applicable in the instant case.

An inventory search in accordance with departmental regulations is a recognized exception to the warrant requirement. *People v Toohey*, 438 Mich 265, 271; 475 NW2d 16 (1991). An inventory search is part of the community caretaking functions performed by police and must not be used as a pretext for criminal investigation. *Id.* at 274, 276. Similarly, impoundment of a motor vehicle is part of the caretaking function, and the reasonableness of a seizure during impoundment depends on the existence of an established departmental procedure and the absence of pretext for conducting a criminal investigation. *Id.* at 284-285.

In *Toohey*, 438 Mich at 286, our Supreme Court relied on the following portion of the Ann Arbor Police Department's policy to find that the impoundment in that case was reasonable:

> A police officer *may* immediately remove and impound a vehicle in any of the following situations.
>
> * * *
>
> [T]he driver of a vehicle is taken into custody by the Police Department and such vehicle would thereby be left unattended.

Here, the impound policy stated "[t]hat officers shall impound a vehicle regarded as evidence from a crime scene, a recovered stolen vehicle, a vehicle used in the commission of a felony, or for lack of proper identification." This policy appears to contain reasons for impoundment that do not relate to criminal investigations, which would be reasonable under the police's caretaking functions. However, the policy also provides for impoundment for reasons related to conducting criminal investigations, which would not be valid under the caretaking function, but would instead relate to the automobile exception discussed below. At the hearing on defendant's motion to suppress, Officer Sawyer testified that his decision to impound the vehicle was based on his belief that it was connected to a crime that had occurred. This would appear to be improper under *Toohey*. However, Sawyer directed another officer, Marciniak, to supervise the impoundment. Officer Marciniak similarly testified that the car was an "evidence vehicle impound." However, on the form Marciniak prepared, he listed the reasons for the impound as "driver arrest" and also wrote, "Other. Plate was improper. VIN does not match plate." These last two reasons would pass muster under both *Toohey* and the impound policy, as they were not related to an investigation, but to the police's caretaking function. Here, where the car was running, unattended, had improper plates, and the perceived driver had been arrested, the impoundment was reasonable, as was the later inventory search. See *Toohey*, 438 Mich at 284.

Moreover, while defendant's argument on this issue is confined to a discussion of the applicability and appropriateness of the inventory exception, the trial court's denial of defendant's motion to suppress was also based on its finding that the automobile exception

applied in this case. Under the automobile exception, police officers need not obtain a warrant to search a car if they have probable cause to believe contraband is inside, irrespective of whether the police would have the time and opportunity to obtain a warrant.[1] *People v Clark*, 220 Mich App 240, 242; 559 NW2d 78 (1996). Probable cause exists when there is a fair probability that the search of a particular place will uncover contraband or evidence of a crime. *People v Garvin*, 235 Mich App 90, 102; 597 NW2d 194. "The determination whether probable cause exists to support a search, including a search of an automobile without a warrant, should be made in a commonsense manner in light of the totality of the circumstances." *Id.*

Here, the officer responded to a report of suspicious activity at a gas station. Upon arriving at the scene, he observed an unoccupied running vehicle that matched the general description of a vehicle that may have been involved in an armed robbery. The officer also observed several credit cards spread across the seat of the vehicle, and during a safety pat down of defendant discovered more credit cards not belonging to defendant on defendant's person. Dispatch later confirmed the names on the cards matched the names of the victims of an armed robbery. In light of these facts, the officer had probable cause to believe that the automobile had been involved in a crime and contained contraband or evidence of the crime, and thus had probable cause to search the vehicle.

The trial court properly found that, under the totality of the circumstances, the warrantless search of defendant's vehicle was constitutional under the automobile exception to the warrant requirement, as well as the inventory search exception. Defendant's motion to suppress was properly denied.

Defendant next argues that he was denied a fair trial when the trial court refused his request for funds to retain a DNA expert and a fingerprint expert. We disagree.

We review for an abuse of discretion a trial court's decision related to a motion to appoint expert witnesses at the public's expense. *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003). Pursuant to MCL 775.15, a criminal defendant may request appointment of an expert if he or she can demonstrate that there is a nexus between the facts of the case and the need for an expert. *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006). However, "[i]t is not enough for the defendant to show a mere possibility of assistance from the requested expert." *Tanner*, 469 Mich at 443. Instead, a defendant must show that he "'cannot proceed safely to a trial' without the proposed witness." *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002), quoting MCL 775.15. A trial court does not abuse its discretion by denying a request for funds for an expert witness if there is no indication that the expert's testimony would likely benefit the defense. *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995).

[1] This exception, permitting a warrantless automobile search when there is probable cause to believe that the automobile contains contraband or evidence of a crime, survives the United States Supreme Court's recent decision in *Arizona v Gant*, 556 US 332; 129 S Ct 1710; 173 L Ed 2d 485 (2009). See *United States v Zahursky*, 580 F3d 515, 521 (CA 7, 2009); see also *Gant*, 129 S Ct at 1719, 1721.

In this case, defendant's request for a DNA expert was merely a request to explore an avenue that might be helpful. There was no indication that it would not be safe for defendant to proceed to trial without the requested expert. Defendant's main basis for requesting an expert was his belief that there was an error in the DNA testing based on inconsistencies in the results of two tests performed on one of the recovered hats. However, the different results were adequately explained by the fact that the second test was performed on a separate sample. Moreover, the prosecution's DNA expert testified at trial and was available to be cross-examined concerning her findings, and the two test results were not totally incompatible. Defendant had viable options to challenge the evidence other than the appointment of an expert witness. Accordingly, defendant is not entitled to relief on this issue.

We also reject defendant's argument that the request for an expert was improperly denied because fingerprint evidence is unreliable. Defendant did not make this argument below. In addition, while defendant argues that similar fingerprints can lead to confusion and mistaken analysis, he has provided no argument that such was the case here. We perceive no error entitling defendant to relief in this regard.

Defendant also argues that the trial court improperly responded to the jury's request to review certain witness testimony during deliberations. We disagree.

Generally, we review for an abuse of discretion a claim related to the trial court's decision on a jury request to rehear testimony. *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996). However, because defendant failed to preserve this issue, it is reviewed for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

MCR 6.414(J) authorizes a trial court to exercise its discretion when responding to a jury request to review testimony or evidence during deliberations. The court rule specifically allows the trial court to order the jury to "deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed." *Id*. We reject defendant's argument that the trial court effectively foreclosed the possibility of further review of the requested testimony. Indeed, the trial court's decision to prepare videos of the requested witness testimony adequately demonstrates that further review was not foreclosed.

Defendant also argues that he was denied a fair trial by the admission of evidence related to his statements and behavior following his arrest. We disagree.

"We generally review de novo claims of prosecutorial misconduct on a case-by-case basis, in the context of the issues raised at trial, to determine whether a defendant was denied a fair and impartial trial." *People v Fyda*, 288 Mich App 446, 460; 793 NW2d 712 (2010). However, to the extent defendant's claims are unpreserved, we review them for plain error affecting his substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the

record and evaluate a prosecutor's remarks in context. *Id*. at 64. Generally, prosecutors are accorded great latitude regarding their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant argues that the prosecution engaged in misconduct by eliciting testimony related to his medical condition and behavior at the hospital following his arrest. He asserts that this evidence was irrelevant and unfairly prejudicial. Each argument will be addressed in turn.

The challenged evidence was relevant. 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. This is a broad definition, allowing the admission of evidence that is helpful in throwing light on any material point. *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). "A jury may infer consciousness of guilt from evidence of lying or deception." *People v Unger*, 278 Mich App 210, 227; 749 NW2d 272 (2008). Accordingly, evidence tending to show that defendant engaged in conduct that would delay his arrest, such as claiming to be in medical distress when he was not and providing a false name, would be relevant to show consciousness of guilt.

Nor was the challenged evidence unfairly prejudicial. All evidence presented is prejudicial to one side or the other at trial. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). Thus, only *unfairly* prejudicial evidence should be excluded. *Id*. Evidence is unfairly prejudicial when it presents a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). Defendant fails to explain how or why the evidence that he feigned a medical condition and gave a false name would have been given undue or preemptive weight by the jury.

Defendant's argument that the prosecution improperly argued facts not in evidence by telling the jury during closing argument that he had feigned a heart attack is also unpersuasive. Admittedly, there was no testimony from a medical professional to state that defendant had faked a heart attack. However, a prosecutor is authorized to make arguments that can be reasonably inferred from the evidence. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). Here, there was testimony that defendant claimed to be having a heart attack after attempting to escape from the backseat of the patrol car, that he was then observed acting inconsistently with his claims, and that he was ultimately cleared to be taken to jail shortly after arriving at the hospital. In addition, defendant provided a false name to police. The prosecutor's remarks that defendant had feigned a heart attack and was demonstrating consciousness of guilt were based on reasonable inferences from the testimony.

Defendant additionally argues that the prosecutor engaged in misconduct by misrepresenting the testimony of witnesses during closing arguments. We disagree.

Defendant first takes issue with the prosecutor's remark that the person identified by defendant as the actual robber had nothing to do with this case. Defendant also challenges the prosecutor's statement during rebuttal argument concerning a vehicle seen in the area of the robbery. We find that the prosecutor's statements, when read in context, did not rise to the level of prosecutorial misconduct requiring reversal. The prosecutor's statements related to the other vehicle were made in response to defense counsel's statements during closing argument. See

People v Kennebrew, 220 Mich App 601, 608; 560 NW2d 354 (1996). Moreover, any error related to the prosecution's challenged statements was eliminated by the instructions provided to the jury before and after the presentation of evidence. Specifically, the trial court instructed the jury on multiple occasions that only witness testimony could be considered as evidence and that the jury was specifically prohibited from considering the attorneys' closing statements as evidence. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

Defendant also argues that he is entitled to resentencing because his sentence was based on incorrectly scored variables. In the alternative, defendant argues that he was denied the effective assistance of counsel when his trial attorney failed to object to the scoring of the variables at sentencing. We disagree.

We review the trial court's scoring decisions for an abuse of discretion and to determine whether the record evidence adequately supports a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). However, our review of defendant's unpreserved claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *People Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Michigan's sentencing guidelines generally require a sentencing court to impose a minimum sentence within the appropriate sentence range as determined by the number of offense variable (OV) and prior record variable (PRV) points assigned. See MCL 769.34(2); *People v McCuller*, 479 Mich 672, 684-685; 739 NW2d 563 (2007). "A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *People v Ratkov* (*After Remand*), 201 Mich App 123, 125; 505 NW2d 886 (1993).

Defendant specifically challenges the assessment of 15 points for PRV 5. Fifteen points may be assessed for PRV 5 when the offender has five or six prior misdemeanor convictions, including juvenile adjudications. MCL 777.55(1)(b). Defendant does not dispute that his record reflects a sufficient number of convictions to warrant the imposition of 15 points. Instead, he argues that some of his past convictions relied upon to assess points under this variable were obtained without the benefit of counsel.

The federal and state constitutions guarantee a criminal defendant the right to the assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. Thus, convictions obtained in violation of the constitutional right to counsel may not be used to enhance a criminal sentence. *United States v Tucker*, 404 US 443, 449, 92 S Ct 589, 30 L Ed 2d 592 (1972); see also *Burgett v Texas*, 389 US 109, 115, 88 S Ct 258, 19 L Ed 319 (1967). However, when a criminal defendant makes a collateral challenge of prior convictions or adjudications used subsequently for purposes of sentencing, the defendant "bears the initial burden of establishing that the conviction was obtained without counsel or without proper waiver of counsel." *People v Carpentier*, 446 Mich 19, 31; 521 NW2d 195 (1994).

Defendant asserts that three of the prior misdemeanor convictions relied upon to support the assessment of 15 points for PRV 5 were obtained without the benefit of counsel. It is true

that the presentence investigation report prepared in advance of defendant's sentencing indicates that it is "unknown" whether defendant was afforded counsel or waived counsel for those prior convictions. However, defendant has offered no proof to establish that he was, in fact, denied the benefit of counsel with regard to those prior convictions. Thus, defendant has failed to meet his burden. *Carpentier*, 446 Mich at 31.

Defendant also challenges the assessment of five points for OV 2. Five points may be assessed under OV 2 if "the offender possessed or used a pistol, rifle, shotgun or knife, or other cutting or stabbing weapon." MCL 777.32(1)(d). The statute clarifies that "pistol," "rifle" or "shotgun" "includes a revolver, semi-automatic pistol, rifle, shotgun, combination rifle and shotgun, or other firearm manufactured in or after 1898 that fires fixed ammunition, but does not include a fully automatic weapon or short-barreled shotgun or short-barreled rifle." MCL 777.32(3)(c). "Firearm" is defined in the penal code as a "weapon from which a dangerous projectile may be propelled by an explosive or by gas or air. Firearm does not include a smooth bore rifle or handgun designed and manufactured exclusively for propelling by a spring or gas or air, BBs not exceeding .177 caliber." MCL 750.222.

The prosecution concedes that zero points should have been assessed for OV 2 because the weapon recovered from the impounded vehicle was an airsoft pistol that expelled small plastic pellets. Therefore, it did not qualify as a weapon that would justify the imposition of five points under OV 2. Nevertheless, we conclude that defendant is not entitled to resentencing. If OV 2 had been correctly scored at zero points, defendant's total OV score would have been 30 points instead of 35 points. The corrected score still would have placed defendant in OV level II and PRV level F. Thus, defendant's guidelines range of 126 to 420 months would have remained the same. MCL 777.62; MCL 777.21(3)(c). Resentencing is not required when a scoring error does not alter the appropriate guidelines range. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

We also reject defendant's alternative claim that he is entitled to resentencing because he was denied the effective assistance of counsel when his trial attorney failed to object to the scoring of PRV 5 and OV 2. As explained previously, there was no error with respect to the scoring of PRV 5. Defense counsel has no obligation to make a meritless objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). Moreover, even if it was objectively unreasonable for defense counsel to fail to object to the assessment of five points for OV 2, defendant cannot demonstrate that counsel's error affected the outcome of the proceedings. This is because, as already explained, defendant's minimum sentence range was unaffected by the erroneous scoring of OV 2.

Defendant lastly argues that the trial court's order requiring him to pay over $7,000 in costs and fees must be vacated. We disagree.

A trial court must have statutory authority to order a criminal defendant to pay costs associated with the trial. *People v Lloyd*, 284 Mich App 703, 707; 774 NW2d 347 (2009). MCL 769.34(6) authorizes a sentencing court to order a defendant "to pay any combination of a fine, costs, or applicable assessments." In addition, MCL 769.1k(1)(b)(iii) specifically authorizes the imposition of costs related to "providing legal assistance to the defendant."

The trial court ordered that $6,640 be paid for defendant's attorney fees, that $340 be paid as minimum state costs, and that $60 be paid for the crime victim rights fund. Added together, defendant was assessed a total of $7,040 in costs and fees. Defendant's reliance on this Court's decision in *People v Dilworth*, ___ Mich App ___; ___ NW2d ___ (2011), to support his argument that the order must be vacated is misplaced. In *Dilworth*, the defendant was assessed $1,235 in prosecution costs, which this Court reversed because it was impossible to discern from the record whether the costs had been incurred for allowable expenses. *Id*. In contrast, the court's decision to order costs and fees in the present case is sufficiently explained in the record and authorized by statute.[2] We find no error.

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Peter D. O'Connell

[2] Defendant does not argue that he lacks the ability to pay the costs and fees or that the trial court erred by failing to inquire into his financial means before ordering that the money be taken from his account. See *People v Jackson*, 483 Mich 271, 275; 769 NW2d 630 (2009). In any event, our Supreme Court has held that "remittance orders of prisoner funds . . . generally obviate the need for an ability-to-pay assessment with relation to defendants sentenced to a term of imprisonment because the statute is structured to only take monies from prisoners who are presumed to be nonindigent." *Id*.