STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 24, 2012
v	No. 301804 Saginaw Circuit Court
LAVELL DEVON CONERLY, Defendant-Appellant.	LC No. 10-034239-FC

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

PER CURIAM.

Defendant Lavell Devon Conerly appeals by right his jury convictions of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, carrying a dangerous weapon with unlawful intent, MCL 750.226, and three counts of carrying or possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a habitual offender, fourth offense, MCL 769.12, to serve concurrent mandatory prison terms of 60 months for each felony firearm conviction. The trial court also sentenced defendant to serve concurrent prison terms of 46 to 180 months for his felon in possession of a firearm conviction, 46 to 180 months for his carrying a dangerous weapon conviction, and 180 to 300 months for his armed robbery conviction, which sentences were to be served consecutively to the terms imposed for the three felony firearm convictions. Because we conclude that there were no errors warranting relief, we affirm.

I. BASIC FACTS

In April 2010, Joseph Williams was walking back from the store when defendant stopped in his truck and demanded money. Williams testified that defendant had a gun on his lap with the barrel tipped out of the window. Defendant then reached out and grabbed Williams' money; Williams stated that he had had about $1,200.

Williams called 9-1-1, and police officers arrested defendant at his house. One of the officers testified that he asked defendant for consent to search his house, but defendant refused. Shortly thereafter, the officers obtained a warrant to search defendant's home. The officers found two shotguns and ammunition during the search. They did not find any money in the house and defendant had only $83 on him.

While defendant was in a holding cell, a detective went to take photographs of him and the clothing he was wearing. Defendant asked the detective what he was being charged with and the detective stated that he would "take a hit on the guns." Defendant responded, "I know." Defense counsel did not object to the admission of this statement, and the prosecutor referred to this statement in closing argument.

Months after the trial, Williams purportedly recanted his testimony in a handwritten, unnotarized letter given to defense counsel. In the letter, he stated that he was on medications, which clouded his judgment, and that defendant never stole his money. Defendant filed a motion for a new trial or evidentiary hearing with the trial court, as well as a motion to remand with this Court. This Court denied defendant's motion to remand, for failure to persuade this Court that a remand was necessary. The trial court also denied defendant's motion.

Defendant now appeals.

II. MOTION FOR A NEW TRIAL AND EVIDENTIARY HEARING

Defendant first argues that the trial court abused its discretion when it denied his motion for a new trial or evidentiary hearing premised on newly discovered evidence. This Court reviews a trial court's decision regarding a motion for a new trial or evidentiary hearing for an abuse of discretion. *People v Mischley*, 164 Mich App 478, 481-482; 417 NW2d 537 (1987). A trial court abuses its discretion when it selects an outcome that is outside the range of reasonable and principled outcomes. *People v Rose*, 289 Mich App 499, slip op at 12; ___ NW2d ___ (2010).

Defendant bore the burden to show that he was entitled to have an evidentiary hearing premised on newly discovered evidence. See *People v McMillan*, 213 Mich App 134, 141-142; 539 NW2d 553 (1995) (holding that an evidentiary hearing was not necessary because the defendant failed to support his request with evidence that established the need for an evidentiary hearing); see also *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007). Here, defendant provided the trial court with a handwritten, unnotarized letter in which Williams purportedly recanted his testimony. This letter was inherently suspect, given that it lacked notarization and, therefore, could have been written by anyone. Defendant also did not provide any evidence that Williams would appear in person to testify at an evidentiary hearing. Moreover, although Williams allegedly wrote that he was under the influence of medications and that this led him to mischaracterize the events at issue, defendant's trial lawyer explored Williams' medical issues at trial. Under these circumstances, we cannot conclude that the trial court abused its discretion when it declined to order a full evidentiary hearing to explore whether Williams lied at defendant's trial.

Additionally, defendant argues that he was entitled to a new trial on the basis of the newly discovered evidence. A motion for a new trial based on newly discovered evidence may be granted if the defendant can prove that: "(1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial." *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992). However, if the newly discovered evidence is a witness recanting testimony, Michigan courts

generally consider it suspect and untrustworthy and are reluctant to grant a new trial on that basis alone. *Id.* at 559-60. "In reviewing the trial court's decision, due regard must be given to the trial court's superior opportunity to appraise the credibility of the recanting witness and other trial witnesses." *Id.* at 560. Here, Williams did not sign a notarized affidavit and the handwritten letter is itself highly suspect. In addition, the trial court recalled Williams' testimony and stated that it did not think complainant had the mental capabilities to fabricate the incident. On this record, we cannot conclude that the trial court abused its discretion when it denied defendant's motion for a new trial.

III. SCOPE OF CROSS-EXAMINATION

Defendant next argues that the trial court abused its discretion when it prevented his lawyer from inquiring into the cause of Williams' disability on cross-examination. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010).

Defendants have a constitutional right to cross-examine the witnesses testifying against them. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). The purpose of cross-examination is to expose a witness' bias, lack of care or attentiveness, or other matters bearing on the witness' credibility. *United States v Owe*ns, 484 US 554, 559; 108 S Ct 838; 98 L Ed 2d 951 (1988). Nevertheless, the right to cross-examine is not unlimited, and trial courts are given wide latitude to impose reasonable limits. *Adamski*, 198 Mich App at 138.

Defendant had significant opportunities to question Williams about his disability. Williams testified on direct that he was schizophrenic and was taking four different medications at the time of the incident. He also testified that he was on disability because of this. On cross-examination, defense counsel asked Williams "Why did [the federal government] say you were disabled?" The prosecutor objected and the trial court sustained the objection, because the cause of complainant's disability was already established on direct examination. That is, the trial court was merely preventing repetitive questioning. In addition, the trial court allowed defendant's lawyer to ask Williams numerous questions about his medications. Accordingly, the jury had ample testimony from which to evaluate Williams' disability and the veracity of his testimony. The trial court did not improperly limit defendant's lawyer's cross-examination. *Id.* (noting that a trial court may properly limit cross-examination to prevent repetitive or marginally relevant questioning).

IV. IRRELEVANT AND PREJUDICIAL EVIDENCE

Defendant also argues that the trial court erred when it allowed an officer to testify that he refused to consent to the search of his home and about the process used to get a search warrant. Specifically, he argues that this testimony was irrelevant and prejudicial and should have been excluded. This issue is unpreserved; therefore, we review it for plain error. *People v Buie*, 285 Mich App 401, 407; 775 NW2d 817 (2009). In order to establish plain error, defendant must show: (1) an error occurred; (2) the error is obvious; and (3) the obvious error affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.*

To be admissible, evidence must be relevant. MRE 402. Relevant evidence is evidence that has any tendency to make a fact of consequence more or less probable. MRE 401. Evidence will be inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403. To be prejudicial, there must be a danger that the jury will give the evidence undue or preemptive weight. *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008).

The admission of the testimony at issue was not plain error. The fact that defendant refused to consent to a search of his home, even if not relevant, is not the type of evidence that is likely to be given undue or preemptive weight by the jury. The same is true for the process the police underwent to execute the warrant. Testimony regarding who typed the warrant and that the judge signed it is nothing more than a review of the formalities followed to obtain the search warrant that led to the police's discovery of the weapons in defendant's home. At most, this indicates that the police had probable cause to search defendant's home, but it was not unfairly prejudicial. Further, even if this evidence were prejudicial to some degree, that prejudice was minimal and clearly did not affect the outcome of the proceedings in light of the other evidence. Therefore, defendant is not entitled to relief. *Carines*, 460 Mich at 763.

V. *MIRANDA* VIOLATION

In his Standard 4 brief, defendant argues that his incriminating statement was obtained in violation of *Miranda*, and the prosecutor erred by using it in the closing argument. Defendant has failed to properly preserve this issue by objecting to the use of the statement during closing. Therefore, our review is for plain error. *Buie*, 285 Mich App at 407.

If a defendant is subject to custodial interrogation, the police are required, as a procedural safeguard, to advise the defendant of his constitutional rights before questioning him. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966). Generally, the prosecutor cannot use a defendant's custodial statements as evidence unless these procedural safeguards are followed. *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997).

A custodial interrogation occurs when police officers initiate questioning after the defendant has been taken into custody or deprived of his freedom to act in a significant way. *Yarborough v Alvarado*, 541 US 652, 661; 124 S Ct 2140, 2147; 158 L Ed 2d 938, 949 (2004). Custody is defined as whether a reasonable person in the defendant's position would not feel free to leave. *People v Vaughn*, 291 Mich App 183, 189; 804 NW2d 764 (2010). "Interrogation refers to express questioning and to any words or actions on the part of police that the police should know are reasonably likely to elicit an incriminating response from the subject." *Raper*, 222 Mich App at 479. Voluntary statements made by a defendant in custody fall outside the scope of *Miranda* and are admissible. *Id.*

In *People v McCuaig*, 126 Mich App 754, 760; 338 NW2d 4 (1983), the Court held that an interrogation did not occur because "the statements made by the police officer, which merely advised defendant of the crime with which he was charged and which described the events which led to that charge, cannot be characterized as further interrogation or its functional equivalent." Likewise, in *Raper*, the Court stated that the police officer's statements to defendant regarding

the crimes defendant was charged with were "to provide information rather than to elicit a response." *Raper*, 222 Mich App at 480.

Defendant was clearly in custody, as he was being held at the jail. However, his statement was not made in response to a custodial interrogation. The facts here are similar to the facts in *Raper* and *McCuaig* in that the detective was merely informing defendant about the charges. The detective testified that he went to the holding area to take pictures of defendant. He also advised defendant that he would be meeting with the prosecutor to discuss the charges. In response, defendant inquired about the arresting charge and the detective said he would "take a hit" for the guns found in his home. At that point defendant volunteered: "I know." The record does not indicate that the detective questioned defendant or that he was trying to elicit an incriminating response. He was only informing defendant that he would probably be charged for having the guns in his house. This does not constitute an interrogation and there was no *Miranda* violation.

Defendant also argues that the detective should not have questioned him because he had invoked his right to remain silent and to an attorney. However, as noted above, the detective's actions did not constitute further interrogation. Therefore, the detective did not violate *Miranda* by telling defendant what he would most likely be charged with after he supposedly invoked his right to an attorney.

Because defendant's statement was not obtained in violation of *Miranda*, the prosecutor could properly refer to it in closing. See *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008).

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his trial lawyer's failure to object to the testimony regarding defendant's refusal to consent to a search of his house and the process the police underwent to execute the search deprived him of effective assistance of counsel. Because there was no hearing on defendant's claim that his trial lawyer was ineffective, our review is limited to mistakes apparent on the record. *Vaughn*, 291 Mich App at 190. In order to warrant relief, defendant must show that his trial lawyer's decision not to object fell below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for that failure, the outcome of the proceedings would have been different. *Id.* at 191. As we already stated, the evidence concerning the search of defendant's home was—at most—minimally prejudicial and plainly did not affect the outcome. Hence, even if it could be said that the failure to object fell below and objective standard of reasonableness under prevailing professional norms, the error would not warrant relief. *Id.*

Defendant also argues that his lawyer was ineffective for failing to object to the prosecutor's use of his incriminating statement because it was obtained in violation of *Miranda*. However, defendant's statement was not obtained in violation of *Miranda* and, consequently, his trial lawyer was not ineffective for failing to raise a meritless objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Finally, defendant argues in his Standard 4 brief that defense counsel was ineffective for failing to call eleven favorable witnesses. Whether to call witnesses are matters of trial strategy, and courts presume that counsel has used sound trial strategy. In support of his argument, defendant submitted eleven affidavits from people claiming that complainant was not credible. All of these "affidavits" are unnotarized documents. Some appear to have the same handwriting, but with different signatures. There is no way to determine who actually wrote these documents and when. Given the suspect nature of these documents, we must conclude that defendant has not overcome the presumption that his lawyer's decision not to call these witnesses was anything other than sound trial strategy. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

There were no errors warranting relief.

Affirmed.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Michael J. Kelly