STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 16, 2013
v	No. 301915 Wayne Circuit Court
PATRICK HURT, Defendant-Appellant.	LC No. 10-005858-FC

Before: BECKERING, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

Defendant Patrick Hurt appeals by right his jury convictions of carjacking, MCL 750.529a, armed robbery, MCL 750.529, unlawfully driving away a motor vehicle, MCL 750.413, receiving and concealing a stolen motor vehicle, MCL 750.535(7), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced Hurt as a habitual offender, MCL 769.11, to serve 14 to 25 years in prison for the carjacking and armed robbery convictions, two to five years for the unlawful driving away and receiving and concealing stolen property convictions, and to five years for the felony-firearm conviction. The trial court ordered Hurt to serve his felony-firearm sentence consecutively to the four remaining sentences. For the reasons below, we affirm Hurt's convictions and sentences, but remand for the ministerial task of correcting the judgment of sentence.

I. INSTRUCTIONAL ERROR

Hurt first argues that the trial court erred when it denied his request for a "mere presence" instruction. This Court reviews a trial court's determination regarding the applicability of a jury instruction to the facts of the case for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

"When a defendant requests a jury instruction on a theory or defense that is supported by the evidence, the trial court must give the instruction." *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). Evidence that a defendant knew about a crime or was present during the commission of a crime is generally insufficient to establish that the defendant aided and abetted the commission of the crime. See *People v Burrel*, 253 Mich 321, 323; 235 NW 170 (1931). As such, where the prosecution proceeds on an aiding and abetting theory and there is evidence that the defendant did not actively participate in the crime, but was merely present when others committed the crime, the defendant may be entitled to an instruction that his or her mere

presence is not enough to convict: "Even if the defendant knew that the alleged crime was planned or was being committed, the mere fact that [he/she] was present when it was committed is not enough to prove that [he/she] assisted in committing it." CJI2d 8.5. However, a defendant will not be entitled to an instruction on mere presence where the defendant's theory and evidence does not support an inference that the defendant was simply present during the commission of the crime. See *People v Moldenhauer*, 210 Mich App 158, 160; 533 NW2d 9 (1995).

Here, the prosecution did not present evidence and argue that Hurt aided and abetted someone else in committing the crimes, but rather that Hurt alone committed the charged offenses. Despite this, Hurt contends that the prosecution presented evidence that supported giving the instruction. The only evidence to support giving the "mere presence" instruction was Hurt's second statement to officers, in which he admitted that he was at the liquor store on the night in question but stated that his friend "Antoine" suddenly robbed and carjacked Derrick Hardy at gunpoint. At trial, however, Hurt denied making this second statement. In fact, it was Hurt's theory that the testimony regarding this statement was not credible and he implied that the officers fabricated it. Thus, Hurt's theory of the case did not support the requested instruction. Because Hurt was not charged as an aider and abettor, and the requested instruction was contradicted by the evidence and Hurt's theory at trial, the trial court did not abuse its discretion in concluding that the "mere presence" instruction was inapplicable. *Moldenhauer*, 210 Mich App at 160.

Even if the facts supported the instruction, we would conclude that the jury instructions as a whole were not erroneous because they fairly presented the issues to be tried and protected Hurt's rights. See *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). For each of the charged offenses, the trial court instructed the jury that the prosecution had to prove that *Hurt himself* committed the particular act that formed the basis for each charge. Thus, Hurt's concern that the jury might have found him guilty on the basis of his passive presence at the scene is unwarranted.

II. SENTENCING ERRORS

Hurt next argues that the trial court erred in scoring offense variables (OV) 13 and 14. The sentencing guidelines are a comprehensive, integrated, and mandatory sentencing scheme; trial courts must score them and must score them properly. *People v Bemer*, 286 Mich App 26, 32, 34-35; 777 NW2d 464 (2009). This Court reviews de novo whether the trial court properly interpreted and applied the sentencing guidelines to the facts. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). And this Court reviews the trial court's findings underlying a particular score for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

Hurt argues that that the trial court erred in counting his concurrent convictions in scoring OV 13. Under MCL 777.43(1)(d), trial courts must score 10 points for OV 13 if the "offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation [of certain controlled substance offenses.]" "For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a

conviction." MCL 777.43(2)(a). This Court has held that the statutory language encompasses concurrent convictions. See *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001).

Here, the trial court properly scored OV 13 using Hurt's concurrent convictions. Unlike the case in *People v McLaughlin*, 258 Mich App 635, 674 n 17; 672 NW2d 860 (2003), Hurt's concurrent convictions did not involve a single, continuous crime. Rather, Hurt's actions involved separate and distinct criminal acts. The facts show that he first took Hardy's money from his pocket at gunpoint. He then grabbed Hardy's car keys while still holding him at gunpoint. Hurt then drove away in Hardy's vehicle and, the following day, sold the vehicle knowing it was stolen. These separate and independent acts formed the basis of Hurt's convictions for four different crimes. Like in *Harmon*, each crime was completed by the time Hurt committed the next offense. *Harmon*, 248 Mich App at 524. Because the concurrent convictions arose from separate criminal acts, the trial court properly counted them for the purposes of scoring OV 13.

Hurt also argues that, because there was no evidence that he was a leader in a multiple offender situation, the trial court erred when it scored OV 14 at 10 points. Under MCL 777.44(1)(a), the trial court must score 10 points if the "offender was a leader in a multiple offender situation." Moreover, in finding whether the offender was a leader, the trial court must consider the "entire criminal transaction." MCL 777.44(2)(a). Hardy testified that when he arrived at Barton's Liquor Store, he saw Hurt and another man inside a white Trailblazer. Hurt then got out, held a gun to Hardy's chest, demanded his money and car keys, and drove away in Hardy's vehicle. This evidence shows that Hurt was not alone when he committed the charged offenses and that he took the leading role in the episode. Given this evidence, we cannot conclude that the trial court clearly erred when it found that he was the leader in a multiple offender situation. *Osantowski*, 481 Mich at 111.

Hurt also contends that the trial court erred in ordering his felony-firearm sentence to run consecutive to all four of his remaining sentences. Because Hurt failed to raise this issue below, our review is limited to plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The Legislature clearly provided that the sentence for a felony-firearm conviction is to be served consecutive only to the underlying predicate felony. MCL 750.227b; *People v Clark*, 463 Mich 459, 463; 619 NW2d 538 (2000). Here, the prosecution alleged in the Information that the predicate felonies for the felony-firearm count were carjacking and armed robbery. At sentencing, however, the trial court ordered Hurt to serve his felony-firearm sentence consecutive to all four sentences, not just the sentences for the predicate offenses. Accordingly, the trial court plainly erred when it order Hurt to serve his felony-firearm sentence consecutive to each of the four other convictions and this error affected Hurt's substantial rights. Therefore, we vacate Hurt's sentence to the extent that the it provides that he must serve his sentence for his felony-firearm conviction consecutive to his sentences for unlawfully driving away and receiving and concealing a stolen vehicle. We further remand this case to the trial court for the ministerial task of correcting the judgment of sentence.

III. DOUBLE JEOPARDY

Hurt argues that his multiple punishments for carjacking and unlawfully driving away violate his double jeopardy rights. This Court reviews de novo, as a matter of constitutional law, a defendant's double jeopardy challenge. *People v Ream*, 481 Mich 223, 226; 750 NW2d 536 (2008). This Court recently addressed this issue in *People v Cain*, 299 Mich App 27, ___-___; ___ NW2d ___ (2012). In that case, the Court concluded that these two offenses were distinct offenses that each had an element that the other did not contain. For that reason, a defendant could be charged and convicted of both offenses without violating double jeopardy. *Id.* Therefore, this claim of error is without merit.

IV. STANDARD 4 BRIEF

Hurt has also submitted a brief under Administrative Order No. 2004-6, Standard 4, in which he argues that there were numerous additional errors that warrant relief.

Hurt argues that the trial court denied him his right to a public trial when it closed the courtroom to the public during jury voir dire. However, Hurt provides no evidence that the courtroom was actually closed to the public and we could find no record evidence to support this claim. Therefore, we conclude that he has not shown plain error warranting relief. *People v Vaughn*, 491 Mich 642, 664-665; 821 NW2d 288 (2012).

He also argues that his arrest warrant was invalid because there was no indication as to how the complaining officer knew, or why he believed, that Hurt committed the alleged offenses. Because the warrant was allegedly invalid, Hurt maintains that the trial court did not have jurisdiction over him. Even if the arrest warrant was invalid, our Supreme Court has previously held that "[a] court's jurisdiction to try an accused person cannot be challenged on the ground that physical custody of the accused was obtained in an unlawful manner." *People v Burrill*, 391 Mich 124, 133; 214 NW2d 823 (1974). Instead, the sole sanction is to suppress the evidence obtained from the person following his illegal arrest. *Id*. Thus, the trial court had jurisdiction to try defendant even if the felony complaint was deficient and resulted in an invalid arrest warrant. *Id*. Because his sole contention regarding this issue—that the trial court did not have jurisdiction to try him—has been rejected by the Supreme Court, Hurt is not entitled to the relief he seeks.

Hurt next argues that he was denied his right to counsel at a critical stage in the proceedings: the arraignment on the warrant proceeding. Because he failed to raise this issue below, our review is limited to plain error. *Carines*, 460 Mich at 763. This Court has previously rejected similar arguments. See *People v Green*, 260 Mich App 392, 400; 677 NW2d 363 (2004) ("Nothing in the record indicates that the arraignment was a critical stage of the proceedings in this case during which the absence of counsel . . . denied defendant a fair trial."), overruled on other grounds by *People v Anstey*, 476 Mich 436 (2006); *People v Horton*, 98 Mich App 62, 72; 296 NW2d 184 (1980) ("[T]he arraignment on the warrant [is] not a critical stage in the criminal prosecution and therefore the presence of counsel is not required . . . ."). Hurt acknowledges these authorities, but appears to argue that the decision in *Rothgery v Gillespie Co, Tex*, 554 US 191, 213; 128 S Ct 2578; 171 L Ed 2d 366 (2008), compels a different result.

The issue in *Rothgery* was whether an accused's Sixth Amendment right to counsel attached at the preliminary arraignment. *Rothgery*, 554 US at 198. Relying on its earlier holdings, the Court in *Rothgery* reaffirmed the established rule that "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." *Id*. at 213. Hurt's argument regarding the denial of counsel at a critical stage in the proceedings is entirely different from the issue in *Rothgery*, which was the point at which the right to counsel *attaches*. Indeed, the Court stressed the distinction between when the right attaches and what constitutes a critical stage:

> Attachment occurs when the government has used the judicial machinery to signal a commitment to prosecute as spelled out in *Brewer* and *Jackson*. Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any "critical stage" of the postattachment proceedings; what makes a stage critical is what shows the need for counsel's presence. Thus, *counsel must be appointed within a reasonable time after attachment* to allow for adequate representation at any critical stage before trial, as well as at trial itself. [*Id*. at 211-212 (emphasis added).]

As noted in *Rothgery*, whether the right to counsel has attached is distinct from whether a defendant has been denied his right to counsel at a critical stage in the proceeding. *Rothgery* did not address whether an arraignment on the warrant is a critical stage. In fact, the logical implication is that it is not. See *id*. at 212 ("[C]ounsel must be appointed within a reasonable time after attachment . . . ."). In short, this Court's holding that the arraignment on the warrant proceeding is not a critical stage is unaffected by *Rothgery*. See *Green*, 260 Mich App at 399-400; *Horton*, 98 Mich App at 72. As in *Green*, Hurt did not waive any defenses and none of his rights were compromised. See *Green*, 260 Mich App at 400. Therefore, Hurt was not denied his Sixth Amendment right to counsel.

Hurt next argues that the trial court lacked subject matter jurisdiction because the individual provisions of the Michigan Compiled Laws, which the prosecution cited in its charging documents, contain no "enacting clause." The Michigan Constitution provides that "[t]he style of the laws shall be: The People of the State of Michigan enact." Const 1963, art 4, § 23. All of the offenses at issue are codified under the Michigan Penal Code, MCL 750.1 *et seq*. See MCL 750.529a, MCL 750.529, MCL 750.413, MCL 750.535. The Michigan Penal Code begins with: "The People of the State of Michigan enact." See 1931 PA 328. Contrary to Hurt's argument, this enacting clause is also found in the bound volume of the compiled laws. Moreover, the relevant Public Acts that created or amended the statutory offenses also contain the enacting clause. See 2006 PA 374; 2004 PA 128; 1931 PA 328. Therefore, this argument is without merit.

Hurt also alleges that the prosecutor deprived him of a fair trial through misconduct. Because Hurt did not object to these instances of alleged prosecutorial misconduct, we shall review these claims for plain error. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Issues of prosecutorial misconduct are examined on a case-by-case basis to determine whether the defendant was denied a fair and impartial trial. *Id.*

Hurt first states that the prosecutor improperly withheld exculpatory evidence. Specifically, he alleges that the prosecutor failed to disclose security camera footage of the incident and a witness statement by Hardy. Hurt, however, has not supported his accusation concerning the video with any evidence tending to show that the prosecutor actually failed to disclose it; therefore, he has not established the factual predicate for his claim. See *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000).

Hardy testified at trial that he gave a statement to officers on March 29, 2010, shortly after the carjacking. In it, he described his assailant and the circumstances of the incident. On cross-examination, Hurt's lawyer showed Hardy his statement and asked on what date the statement was made. After Hardy answered, "March 29th," the prosecution stipulated that the date of the statement was April 13, 2010. Although it was dated April 13, 2010, Hardy recognized it as the statement he gave on March 29, 2010. It is unclear why the statement had a later date, but it is evident from the record that Hardy's March 29 statements are on the form with the later date and that they were disclosed to the defense. As such, Hurt has again failed to establish that the prosecutor improperly failed to disclose any evidence.

Hurt also argues that the prosecution committed misconduct when it questioned him about being an alleged gang leader. Because Hurt did not object to the allegedly improper remark, we shall review this claim for plain error. *Carines*, 460 Mich at 763. In addressing a claim of prosecutorial misconduct involving an improper remark, this Court examines the entire record, evaluating the remark in context and in light of the defendant's argument. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Even if the defendant establishes that a remark was improper, the defendant has the burden of also establishing that "it is more probable than not that the error in question 'undermine[d] the reliability of the verdict,' thereby making the error 'outcome determinative.'" *People v Blackmon*, 280 Mich App 253, 270; 761 NW2d 172 (2008), quoting *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

At no point did the prosecution question Hurt about being a gang leader. The prosecution did ask him whether "the guys [he] hang[s] around with" are part of the Young Fenkell Group. When Hurt said that the friend he implicated in the carjacking, Juwuan Gordon, was a member, the prosecution asked Hurt if he too was a member of that group. Hurt then denied that he was and the prosecutor moved on. There was no mention that the Young Fenkell Group was a gang, much less that Hurt was a leader. Thus, there was no plain error. See *Carines*, 460 Mich at 763. And, even assuming that members of the jury knew the Young Fenkell Group was a gang, Hurt has failed to demonstrate that the remark was so prejudicial that it infected the entire trial or that a timely objection could not have cured the prejudice. See *Williams*, 265 Mich App at 71; *Blackmon*, 280 Mich App at 269. As such, any error does not warrant relief.

Hurt further argues that the trial erred in scoring 10 points for OV 2 because there was no evidence that the firearm he used was "short-barreled." See MCL 777.32(1)(c) (stating that the trial court must score 10 points if the "offender possessed or used a short-barreled rifle or a short-barreled shotgun."). We agree that the trial court clearly erred in scoring this variable. *Osantowski*, 481 Mich at 111. At trial, Hardy described the firearm as "a long like shotgun or rifle." As such, the evidence showed that the appropriate score for OV 2 was five points. MCL 777.32(1)(d) (stating that the trial court must score five points if the "offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon."). However, because this

error does not affect Hurt's sentencing range, he is not entitled to resentencing. *People v Francisco*, 474 Mich 82, 94 n 8; 711 NW2d 44 (2006).

Finally, Hurt asserts that his trial lawyer was ineffective. Because there was no hearing on these claims, are review is limited to those errors that are evident on the record alone. *People v Gioglio (On Remand)*, 296 Mich App 12, 20; 815 NW2d 589 (2012), leave denied in relevant part 493 Mich 864. Hurt asserts seven instances where he claims that his trial lawyer's performance fell below an objective standard of reasonableness under prevailing professional norms. See *id.* at 22-23 (stating that the defendant must establish that his trial lawyer's act or omission fell below an objective standard of reasonableness under prevailing professional norms). However, he predicates most of these claims on his lawyer's failure to assert the claims he raised in Standard 4 brief. To the extent that we have determined that those claims lack merit, they plainly do not warrant relief on this alternate basis. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Hurt also argues that his lawyer was ineffective for failing to object to the trial court's scoring of OV 2. Although the court incorrectly scored this variable, the error was not outcome-determinative because the five-point reduction does not change the sentencing range. Therefore, Hurt cannot establish prejudice. *Gioglio*, 296 Mich App at 23.

Hurt's remaining ineffective assistance claim pertains to his lawyer's failure to object to the invalid complaint and arrest warrant. He argues that, had his lawyer objected to the complaint and arrest warrant, evidence obtained after the invalid arrest warrant was issued could have been suppressed. See *Burrill*, 391 Mich at 132. Even assuming the arrest warrant was invalid, Hurt fails to show how he was prejudiced. See *Gioglio*, 296 Mich App at 23. The only evidence admitted at trial that would theoretically have been subject to suppression was Hurt's statements. Even without the statements, the prosecution presented testimony from Hardy positively identifying Hurt as the person who committed the offenses. An officer also testified that he learned Hurt was involved in the acquisition of the stolen vehicle from Hurt's cousin, who was in possession of the stolen vehicle. Furthermore, the prosecution did not rely on the substance of Hurt's statements to establish his guilt. Instead, the prosecution argued that the case was about identification and Hardy's credibility. Hurt's statements were useful only to the extent that they were inconsistent with Hurt's competing testimony that he was not present during the events at issue. Therefore, even if his lawyer had successfully moved to suppress Hurt's statements, it is not reasonably probable that the outcome of the proceeding would have been different. *Id.*

There were no errors warranting relief.

Affirmed, but remanded for the ministerial task of correcting the judgment of sentence. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Kathleen Jansen
/s/ Michael J. Kelly