STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 21, 2013
v	No. 308191 Wayne Circuit Court
LUTHER CLEVELAND HARRIS, Defendant-Appellant.	LC No. 11-006497-FH

Before: SHAPIRO, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced to consecutive terms of 10 years' imprisonment for the felony-firearm conviction and two to five years' imprisonment for the felon in possession conviction. We affirm.

Officers Gray and his partner, Charon Johnson, responded to a run involving a person described as wearing an orange shirt and brown pants, pointing a black handgun with a brown handle at two young girls. After the officers saw defendant, who matched the description, across the street sitting on a porch, they removed defendant from the porch and patted him down on the front lawn of the house. The officers also detained and patted down Michael Glenn, who had emerged from inside the house after defendant was detained. Neither man had a weapon on his person. Officer Gray then went up onto the porch of the house, and could clearly see through the open front door. He saw a black handgun with a wooden handle sitting on a table in the front room, two shotguns leaning against a chair, and three spent shotgun shells all within five feet of the front door.

On appeal, defendant first asserts that the admission at trial of the weapons constituting the basis of his convictions violated his Fourth Amendment rights against unreasonable searches and seizures. We disagree.

Defendant challenged admission of this evidence at a pretrial suppression hearing, but the trial court allowed the evidence to be admitted at trial. This Court "reviews a trial court's factual findings in a suppression hearing for clear error." *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). "Application of the exclusionary rule to a Fourth Amendment violation is a question

of law that is reviewed de novo." *Id.*

For a defendant to attack the propriety of a search and seizure, the search must have infringed a constitutionally protected interest. *People v Parker*, 230 Mich App 337, 339-340; 584 NW2d 336 (1998). Fourth Amendment rights against unreasonable search and seizure are personal and cannot be vicariously asserted. *People v Gadomski*, 274 Mich App 174, 178; 731 NW2d 466 (2007); *People v Hunt*, 171 Mich App 174, 178-179; 429 NW2d 824 (1988) ("[c]onstitutional protections are personal," and a person lacks standing to challenge a search based on the privacy expectations of another). A person has standing only where he has a reasonable expectation of privacy in the object or area searched. *People v Smith*, 420 Mich 1, 17, 26-28; 360 NW2d 841 (1984). A person does not have a reasonable expectation of privacy in the living quarters of a separate tenant in the same building. See *Hunt*, 171 Mich App at 178-179. See also, *Parker*, 230 Mich App at 339-341(the defendant, who was neither a resident nor an overnight guest of an apartment, lacked standing to challenge a search of the apartment).

In this case, defendant was a paying tenant in an upstairs apartment of a two-story house, owned by Diane Wyrick. Another tenant once lived in the basement of the home. At trial Ms. Wyrick testified that although she and defendant had a romantic relationship, defendant was not allowed in her lower-level apartment from which the guns were seized. Wyrick was adamant that defendant was "never" permitted in her apartment, even to visit, and that their visits took place in his apartment. Defendant cannot point to anything in the lower court record suggesting he had a reasonable expectation of privacy in Wyrick's apartment. Where the inculpatory evidence—the guns—were found in a place where defendant had no reasonable expectation of privacy, defendant has no standing to challenge the search of that place and the seizure of the evidence found therein.[1]

Even if defendant did have standing, defendant's Fourth Amendment rights are still not implicated in this matter. First, while defendant claims that the police had no warrant to allow them to step onto the porch and no justification for stepping onto the porch without one, defendant had no reasonable expectation of privacy on the porch. There is no indication that the porch was part of the living area of the home, i.e., was functionally and structurally the same as the rest of the home, or that it was used as anything other than an entryway into the home. See, e.g., *People v Tierney*, 266 Mich App 687, 703; 703 NW2d 204 (2005). See also, *People v Custer (On Remand)*, 248 Mich App 552, 561; 640 NW2d 576 (2001) ("Because Detective Flores was properly present on defendant's porch when he observed the objects through defendant's window, his actions were entirely proper."); see also *People v Houze*, 425 Mich 82,

[1] The argument for defendant's lack of standing is premised solely on testimony adduced at trial, even though the suppression issue was raised and decided at a pretrial motion hearing. Diane Wyrick, whose testimony is the source of the prosecution's argument on appeal that defendant lacked standing, did not testify at the pretrial motion hearing. "This Court will affirm a lower court's ruling when the court reaches the right result, albeit for the wrong reason." *People v Lyon*, 227 Mich App 599, 612-613; 577 NW2d 124 (1998).

93; 387 NW2d 807 (1986) ("A mere 'technical trespass' [does] not transform an otherwise reasonable investigation into an unreasonable search.").

In *Custer*, 248 Mich App at 555-556, an officer went to the defendant's home to determine if the house contained illegal drugs. A detective stepped on the defendant's porch, and, with a flashlight, observed evidence of contraband through a window. *Id.* This Court upheld the detective's search because there was no reasonable expectation of privacy where the window was not obstructed by blinds or any other coverings. *Id.* at 561. In this case, after detaining defendant, Officer Gray walked onto the porch and simply looked in the open doorway, which was unobstructed, and saw the guns and spent casings. The searches in *Custer* and in this case were similar, with contraband in open view from a porch.

Second, Officer Gray's seizure of the weapons was justifiable because there was probable cause to search the front area where the firearms were found, and because Officer Gray recognized the exigent circumstances of protecting himself and his partner, and protection of evidence. The basic rule is that searches conducted without a warrant are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions. *Arizona v Gant*, 556 U.S. 332, 338; 129 S Ct 1710, 1716; 173 L Ed 2d 485 (2009). "Each of these exceptions, while not requiring a warrant, still requires reasonableness and probable cause." *People v Brzezinski*, 243 Mich App 431, 433–434; 622 NW2d 528 (2000). "Probable cause exists when the facts and circumstances known to the police officers at the time of the search would lead a reasonably prudent person to believe that a crime has been or is being committed and that evidence will be found in a particular place." *People v Beuschlein*, 245 Mich App 744, 750; 630 NW2d 921 (2001). Among the exceptions is the plain view doctrine, which, "allows police officers to seize, without a warrant, 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 Wilkens*, 267 Mich App 728, 733; 705 NW2d 728 (2005). Another is the "exigent circumstances" exceptions. Under this exception, "police may enter a dwelling without a warrant if the officers possess probable cause to believe a crime was recently committed on the premises, and probable cause to believe that the premises contain evidence or perpetrators of the suspected crime." *Beuschlein*, 245 Mich App at 749. The exigent circumstances exception further requires the police to establish "the existence of an actual emergency on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect." *Id.* at 749-750.

Here, there was probable cause to seize the firearms. Defendant's clothing and location matched the exact clothing description and location of a man who was reported as pointing a gun at two children. Neither defendant nor Glenn possessed weapons when the officers patted them down, but they were sitting on the front porch of the home when the officers first made contact with them. Thus, there was probable cause to believe that an assault with a weapon occurred, and that the weapon used was inside the house.

In addition to probable cause, the weapons were seen in plain view, from a location where the officers had a lawful position to be in (the porch), as explained above. And, the facts in this matter establish exigent circumstances. After patting down defendant and Glenn, Officer Gray looked through the open door to find a gun matching the description of the gun pointed at

the children—a black handgun with a brown handle—along with two shotguns and spent casings. The existence of the spent casings reasonably suggested an urgency to seize the weapons as they had likely been fired recently. Furthermore, given his experience in law enforcement, Officer Gray perceived potential danger of an unknown person inside the building. These facts show that Officer Gray was entitled to protect himself and others from an unknown individual potentially emerging from the house by confiscating the weapons.

Officer Gray had an additional legitimate reason to seize the weapons—to prevent destruction of the evidence of weapons on the premises. *Id.* at 749-750. Even though defendant was detained, Glenn, who had come from that same house, could easily have destroyed or hid the evidence. The seizures were well within the exigent circumstances exception the Fourth Amendment's warrant requirement.

Defendant next argues that his statement to an investigator that the weapons belonged to him should have been suppressed because defendant did not make a voluntary, knowing, and intelligent waiver of his *Miranda*[2] rights. We disagree.

This Court reviews for clear error the trial court's factual findings regarding a defendant's waiver of *Miranda* rights. *People v Daoud*, 462 Mich 621, 629-30; 614 NW2d 152 (2000). This Court "will affirm the trial court's findings unless left with a definite and firm conviction that a mistake was made." *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010). The trial court's determination of whether a waiver was voluntary, knowing, and intelligent is reviewed de novo. *Id.*

A defendant's statements made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda*, 384 US at 444; *Gipson*, 287 Mich App at 264. "The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).

"[W]hether a waiver of *Miranda* rights is voluntary depends on the absence of police coercion." *Daoud*, 462 Mich at 635. In other words, the relinquishment of a right must have been "the product of a free and deliberate choice rather than intimidation, coercion or deception." *Id.* (internal quotations omitted). In determining whether a statement is voluntary, a trial court should consider the following factors, though "the absence or presence of any one of these factors is not necessarily conclusive":

1) the age of the accused;

2) his lack of education or his intelligence level;

3) the extent of his previous experience with the police;

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

4) the repeated and prolonged nature of the questioning;

5) the length of the detention of the accused before he gave the statement in question;

6) the lack of any advice to the accused of his constitutional rights;

7) whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession;

8) whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement;

9) whether the accused was deprived of food, sleep, or medical attention;

10) whether the accused was physically abused; and

11) whether the suspect was threatened with abuse. [*Cipriano*, 431 Mich at 334.]

To show a waiver was knowing and intelligent, "the state must present evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him." *Daoud*, 462 Mich at 637. It is not this Court's duty to determine whether defendant's waiver was a wise decision, but only whether defendant understood his rights. *Id.* at 643-644.

Defendant here raises an argument only with respect to factor 8; specifically, that he was intoxicated or in ill health when receiving his *Miranda* rights and was thus unable to knowingly and intelligently waive the same. Defendant had consumed a pint of vodka, three 40 ounce beers, and an undetermined amount of gin the day of his arrest. After his arrest, defendant was taken to the hospital because he had a headache, a body ache, a "woozie" stomach, and was throwing up. The next day, when interviewed by investigator Boyle, defendant said he just wanted to get through with the interview so he could go back to his cell and lay down, as he was not feeling well. Defendant also points out that he needs eyeglasses to read, and did not have them on that day, so was unable to read the form containing his Miranda rights.

These facts alone are not sufficient to overturn the trial court's decision that he made a voluntary waiver, and their strength dissipates when compared with testimony tending to show that he knowingly and voluntarily waived his *Miranda* rights. Defendant did not disagree that he initialed next to each right, nor that investigator Boyle read defendant's rights aloud. Defendant's education level—having received a GED—tends to suggest he was not coerced. The questioning session did not appear to last for an extended period of time, and defendant was brought to be questioned only approximately 16 hours after his arrest. Defendant was provided medical attention the evening before because of apparent alcohol poisoning and was given pain relievers for his headache and stomach ache. There is no evidence that defendant was deprived of food, sleep, or medical attention, was physically abused, or was threatened with abuse. And, defendant acknowledged that he had been arrested before and, from past experience, knew he

would be taken in to speak with a detective. Defendant further acknowledged it was not the first, second or even third time, he had heard the questions related to the waiver of his Miranda rights and that he had heard those questions "several times" before. And even though defendant said he was not "paying attention," whether defendant was distracted is not the test—the test is whether he understood his rights sufficiently that his waiver was knowing and intelligent. See *Gipson*, 287 Mich App at 264. The trial court did not commit a clear error in determining defendant made a knowing and intelligent waiver of his right to remain silent.

Finally, defendant contends that his felony-firearm and felon in possession convictions together violate his rights against double jeopardy. Defendant did not raise the issue at trial, and therefore, it is unpreserved. *People v Wilson*, 242 Mich App 350, 359-360; 619 NW2d 413 (2000). An unpreserved claim of constitutional error is subject to plain error review. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). Plain error review

> requires the defendant who has forfeited his claim of error to prove (1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. [*People v Vaughn*, 491 Mich 642, 663-664; 821 NW2d 288 (2012).]

Substantial rights are those "affect[ing] the outcome of the . . . proceedings." *Id.* at 665-666.

In *People v Mitchell*, 456 Mich 693, 695; 575 NW2d 283 (1998), the Supreme Court held, "[w]here multiple punishment is involved, the Double Jeopardy Clause acts as a restraint on the prosecutor and the Courts, not the Legislature." Thus, so long as the legislature intended to authorize multiple punishments, the Double Jeopardy Clause is not offended. The legislature clearly intended that the "felony-firearm statute . . . provide for an additional felony charge whenever a person possessing a firearm committed a felony other than those four explicitly enumerated in the felony-firearm statute." *Id.* at 698.

In *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003) our Supreme Court explicitly held:

> We follow . . . our *Mitchell* opinion in resolving this matter. Because the felon in possession charge is not one of the felony exceptions in the statute, it is clear that defendant could constitutionally be given cumulative punishments when charged and convicted of both felon in possession, MCL 750.224f, and felony-firearm, MCL 750.227b. . . . [T]here is no violation of the double jeopardy clause.

The Supreme Court's holding on the issue forecloses this Court from deciding differently; there was no clear error. *People v Crockran*, 292 Mich App 253, 256-57; 808 NW2d 499 (2011) ("[O]nly the Supreme Court has the authority to overrule one of its prior decisions . . . . Until it does so, all lower courts and tribunals are bound by that prior decision and must follow it even if they believe that it was wrongly decided.") (Internal citations and quotation marks omitted.)

Affirmed.

/s/ Douglas B. Shapiro
/s/ Deborah A. Servitto
/s/ Amy Ronayne Krause