# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>May17, 2007 |
| v | No. 269645<br>Delta Circuit Court |
| LIONEL GARY SIROIS,<br><br>Defendant-Appellant. | LC No. 05-007483-FH |

Before: Hoekstra, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and assault and battery, MCL 750.81. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrently serve terms of 134 to 300 months in prison for the assault with intent to do great bodily harm conviction and 93 days' incarceration for his conviction of assault and battery. Defendant appeals as of right. We affirm.

Defendant's convictions arise from an incident in which he stabbed one individual with a knife, bit another, and then fled. The victim suffered lacerations to his liver and kidney, as well as a defensive wound to his hand. When the police questioned defendant about the incident at his home later that morning, he admitted his involvement but denied having intentionally stabbed the victim.

On appeal, defendant alleges error in the admission of testimony that he contends should have been excluded from his trial under MRE 404(b), and that was offered by what defendant deems to be experts unqualified to offer such testimony. Because defendant did not object to the admission of this evidence at trial, we review these claims for plain error affecting his substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). To prevail, defendant must identify evidentiary errors that were plain or obvious, and demonstrate that those errors affected the outcome of the trial. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). As explained below, defendant has failed to make the requisite showing.

First, the admission of evidence that defendant had been banned from a local bar only a few hours before the assaults was not error, plain or otherwise. The testimony provided the background from which the police explained their ability to identify defendant as a suspect. This evidence was a significant aspect of the chronicle of the night's events. Evidence of chronologically related events involving other wrongs is not precluded under MRE 404(b)(1) if

the evidence is necessary to allow the jury to hear the "complete story" of the case. *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).

Defendant has similarly failed to show that the admission of testimony concerning the manner in which his appearance had changed while he was in jail awaiting trial constitutes plain error warranting relief. Defendant points to nothing plainly erroneous or unduly prejudicial about the testimony that his appearance had changed since the time of the assaults. Furthermore, defendant himself made the first reference at trial to his jail term, when he explained that he had a beard because "in the jail, you can't hardly ever get a razor." See *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999) ("error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence"). Defendant's assertion that his trial counsel was ineffective for having elicited such testimony is not supported by the record, which reveals that defendant volunteered the testimony at issue without any specific prompting by counsel. In any event, defendant has failed to demonstrate that reference to his jail status affected the outcome of the case. *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001) (to prevail on a claim of ineffective assistance of counsel, defendants must show that, but for the attorney's error, a different outcome reasonably would have resulted). Thus, given that the testimony challenged on appeal was properly admissible or did not otherwise prejudice defendant, defendant's claim that his counsel was ineffective for failing to object or otherwise challenge the testimony at issue fails. *Id*.; see also *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001) ("[a] trial attorney need not register a meritless objection to act effectively").[1]

We also reject defendant's arguments regarding the admission of expert testimony. Under MRE 702, "a witness qualified as an expert by knowledge, skill, experience, training, or education may testify" regarding "scientific, technical, or other specialized knowledge" if it will assist the fact-finder in understanding the evidence or determining a fact in issue. Defendant challenges testimony offered by Dr. Guy Jeanblanc regarding the nature and extent of the wounds suffered by the stabbing victim. However, given Dr. Jeanblanc's extensive experience performing surgery on stab wounds, and indeed with making incisions himself as a surgeon, it is not plain that he lacked the requisite knowledge or skill to provide this testimony. As to the testimony of David Stephens regarding blood stains on the knife used in the stabbing, given his status as a forensic scientist, it is similarly not plain that he lacked the requisite knowledge or skill to provide that testimony.

[1] Defendant also argues that counsel was ineffective for having failed to request a mistrial after the trial court sustained objections to the elicitation of other "bad character" evidence. This argument, however, is waived because it was not raised in defendant's statement of questions presented, as required by MCR 7.212(C)(5), and fails to address with any substance or citation to authority the merits of such a request. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999); see also *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004) ("[a]n appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue").

Defendant also argues that the trial court should have instructed the jury on the offense of felonious assault as a lesser included offense of assault with intent to do great bodily harm. However, as defendant acknowledges, felonious assault is not a necessarily lesser included offense of assault with intent to murder. Rather, it is a cognate lesser offense. See *People v Vinson*, 93 Mich App 483, 485-486; 287 NW2d 274 (1979). Under *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002), instructions on cognate lesser offenses are not to be given to the jury. See MCL 768.32(1). Because we are required to follow *Cornell*, we must reject defendant's argument regarding this issue.

In his Standard 4 brief,[2] defendant argues that the trial court erred in scoring prior record variables (PRVs) 2 and 5 and offense variable (OV) 9 of the sentencing guidelines. In addition, defendant advances derivative ineffective assistance of counsel arguments regarding the scoring of PRV 5 and OV 9. Because defendant did not object below to the scoring of these guideline variables, our review is for plain error. *Knox*, *supra* at 508.

Defendant's argument regarding the scoring of PRV 2, and a portion of his argument regarding PRV 5, can only plausibly be understood as asserting that his prior convictions that were over ten years old at the time of sentencing should have been disregarded under the "ten-year gap rule" of MCL 777.50.[3] This argument misapprehends MCL 777.50. While arguably somewhat cumbersome, the plain language of MCL 777.50(1) and (2) requires that a defendant's prior convictions be disregarded for purposes of scoring PRVs 1 through 5 only if they precede a ten-year period in which the defendant had no convictions, not merely because they are more than ten years old. In this case, the record reflects that no prior conviction preceding such a ten-year period in which defendant was free of convictions was considered by the trial court in scoring PRV 2 or PRV 5. It follows that trial counsel was not ineffective in failing to object to the scoring of PRV 5 on this basis. *Hawkins*, *supra* at 457.

Defendant also challenges the scoring of PRV 5 on the ground that it considered prior misdemeanor convictions for which he did not have or waive legal representation. An indigent defendant is constitutionally entitled to appointed counsel with regard to a misdemeanor charge if the defendant is actually imprisoned as a result of that conviction. *People v Reichenbach*, 459 Mich 109, 115-122; 587 NW2d 1 (1998). However, there is no record evidence as to whether defendant was indigent at the time of any of his prior convictions. Thus, defendant has not shown any plain error with regard to the trial court's consideration of those convictions. For this same reason, defendant has failed to meet his burden of establishing the factual predicate for his derivative claim of ineffective assistance of counsel. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

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[2] See Administrative Order No. 2004-6, 471 Mich c, Standard 4 (permitting a defendant to file a brief in propria persona).

[3] Defendant also makes a vague assertion that in scoring PRV 2, the trial court erroneously considered certain convictions for which "the crimes were never adjudicated." This argument is so unclear and lacking in substantive analysis that we deem it abandoned for failure to meaningfully argue its merits. *Harris*, *supra* at 50.

The trial court also did not plainly err in scoring ten points for OV 9 based on there being two victims. The record reflects that this scoring was based on the principal victim being stabbed by defendant while another victim was bitten by him when she attempted to secure his knife. MCL 777.39(2)(a), as in effect at the time of defendant's sentencing, directed that in scoring OV 9 a trial court should "[c]ount each person who was placed in danger of injury or loss of life as a victim." In *People v Morson*, 471 Mich 248, 261-262; 685 NW2d 203 (2004), our Supreme Court held that under that statutory language OV 9 was properly scored at ten points for two victims with regard to an armed robbery where, although only one person was robbed, another person "who was standing nearby and responded to [the robbery victim's] call for help was also 'placed in danger of injury or loss of life' by the armed robbery." It follows that the trial court did not plainly err in scoring ten points under OV 9 in this case because the female victim was placed in danger of injury (and indeed actually injured) as a result of the attack on the male victim. It follows that trial counsel was not ineffective in failing to make a futile objection to the scoring of OV 9. *Hawkins*, *supra* at 457.

Finally, defendant argues that the trial court violated his constitutional right to a jury trial by scoring the OV and PRV variables of the sentencing guidelines without the participation of a jury. Because this issue was not raised below we review it only for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763. We conclude defendant has shown no such error.

Defendant essentially challenges Michigan's scheme of trial judge scoring of the guidelines variables as inconsistent with *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). In *Apprendi*, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id*. at 490. Later, in *Blakely*, the Court explained that the term "statutory maximum" refers to the maximum sentence a judge could impose *without* making additional findings to enhance the sentence. *Blakely*, *supra* at 303-304.

With regard to Michigan's scheme of indeterminate sentencing, our Supreme Court has concluded that the statutory maximum sentence within the meaning of *Apprendi* for such a sentence is the maximum set by statute and, accordingly, a trial court's utilization of judicially ascertained facts to fashion a sentence within that range does not violate *Apprendi* or *Blakely*. *People v Drohan*, 475 Mich 140, 160-164; 715 NW2d 778 (2006). Under *Drohan*, *supra*, the trial court's scoring of the sentencing guideline variables to determine a minimum sentence within the maximum provided for by statute did not constitute plain error.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens