STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 26, 2011
v	No. 296730 Wayne Circuit Court
ROMANDO LEWIS, Defendant-Appellant.	LC No. 09-020831-FC

Before: CAVANAGH, P.J., and TALBOT and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to do murder, MCL 750.83, armed robbery, MCL 750.529, unlawful imprisonment, MCL 750.349b, assault with intent to do great bodily harm, MCL 750.84, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

Defendant argues that the trial court abused its discretion when it failed give the requested duress instruction to the jury. We disagree. We review questions of law, including questions of the applicability of jury instructions, de novo on appeal. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003); *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). When properly preserved, as here, "jury instructions [are reviewed] in their entirety to determine if error requiring reversal occurred." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if instructions are imperfect, reversal is not required if they fairly present the issues to be tried, and sufficiently protect the defendant's rights. *People v Chapo*, 283 Mich App 360, 373; 770 NW2d 68 (2009). However, we review for an abuse of discretion "a trial court's determination whether a jury instruction is applicable to the facts of the case." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

Generally, a defendant is entitled to a jury instruction that is supported by the evidence. *People v Hawthorne*, 474 Mich 174, 182; 713 NW2d 724 (2006). Duress is an affirmative defense that "is applicable in situations where the crime committed avoids a greater harm." *People v Lemons*, 454 Mich 234, 245-246; 562 NW2d 447 (1997). The defense of duress is

successfully raised where a defendant presents evidence from which a jury could conclude: (1) there was threatening conduct sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm, (2) the conduct in fact caused such fear of death or serious bodily harm, (3) the fear or duress was operating upon the mind of the defendant at the time of the alleged act, and (4) the defendant committed the act to avoid the threatened harm. *People v Terry*, 224 Mich App 447, 453-454; 569 NW2d 641 (1997); CJI2d 7.6. "Once a defendant successfully raises the defense, the prosecution has the burden of showing, beyond a reasonable doubt, that the defendant did not act under duress." *Terry*, 224 Mich App at 453-454.

Here, in response to defense counsel's request for a duress instruction, the trial court held:

> Come on. Please. I d[o]n't believe that you are sitting there asking me for duress. There is nothing he said in his testimony that indicates that he was being threatened by life or bodily harm to do something that he would not do.
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> * * * *
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> Nothing that he said indicates that he was under any kind of duress or he was doing something because he was being threatened in some way by [Bishop Perry] or any other Defendant or anybody else. Duress is denied.

The trial court did not abuse its discretion when it refused to instruct the jury on duress because defendant did not present any evidence from which the jury could conclude that the essential elements of duress were present. There was simply nothing in the record to suggest that defendant's conduct was aimed at avoiding a greater harm. Specifically, there was no evidence that any threatening conduct in fact caused defendant to fear death or serious bodily harm. There was no evidence that Bishop Perry, Lorenzo Allen, or Olantimon Brintley threatened defendant. There was no evidence that Bishop or anybody else pointed a gun at defendant or forced him to drive. Although Bishop was "real hyper" and agitated, defendant never indicated that Bishop's violent behavior was directed towards him or that Bishop verbally threatened him. In fact, there was no evidence that defendant was afraid of being killed or seriously injured at the hands of Bishop.

Although defendant claimed that he "was scared at the time," the evidence indicates that he was not scared of Bishop or acting under duress. Rather, he was afraid of being held responsible for Brintley's beating, robbing, and kidnapping and wanted to get out of the increasingly violent situation. As further indication that a duress instruction was unwarranted, when asked if he was afraid for his life while driving the van, defendant failed to mention any fear of Bishop. To the contrary, defendant responded, "[y]eah, 'cause I don't know if [Allen] and them people or whoever are going to come back and do something to me because I don't have nothing else." Notably, defendant did not mention any fear of Bishop. In sum, there was no evidence that Bishop engaged in threatening verbal or physical conduct toward defendant

sufficient to cause a reasonable person to fear death or serious bodily harm, that any of Bishop's conduct was directed at defendant, or that his conduct actually caused defendant fear to the point that he went along with Bishop in committing the crimes.

Defendant also argues that the trial court abused its discretion when it denied defendant the opportunity to question Allen on pending charges. We disagree. A party must object to a trial court's evidentiary ruling at trial in order to preserve the issue for appeal. MRE 103(a)(1); *People v Smith*, 243 Mich App 657, 669; 625 NW2d 46 (2000). On appeal, the prosecutor argues that defendant did not preserve this issue for review because defendant's counsel did not join Bishop's counsel's objection to the trial court's decision to exclude evidence of pending charges against Allen. While defendant's counsel did not address this question before the trial court, Bishop's counsel objected and argued with respect to this issue. This Court has previously held that where a codefendant raises an objection and the trial court's ruling affects both defendants, this Court may "decline to regard the technicality of [a] defendant's lawyer failing to join in the objection as failing to preserve [the] issue." *People v Griffin*, 235 Mich App 27, 41 n 4; 597 NW2d 176 (1999), overruled in part on other grounds *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007); see, also, *People v Brown*, 38 Mich App 69, 75; 195 NW2d 806 (1972). Thus, we will address this issue as preserved because the objection and ruling at trial pertained equally to both defendants in this case.

Further, we review a trial court's evidentiary decisions for an abuse of discretion. *People v Starr*, 457 Mich 490, 491; 577 NW2d 673 (1998). An abuse of discretion occurs only when the court chooses an outcome outside the principled range of outcomes. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). However, we review de novo questions of law involving the admission of evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Generally, under MRE 609, evidence of arrests not resulting in convictions or pending charges is inadmissible to impeach the credibility of a witness. *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990). Nonetheless, an exception to that rule exists where the evidence is being offered to show the witness' interest in the matter, his bias or prejudice, or his motive to testify falsely because that witness has charges pending against him which arose out of the same incident for which the defendant is on trial. *Id*. That is, MRE 609 does not apply to past arrests that do not result in convictions or pending charges to show a witness' interest in testifying. *People v Layher*, 464 Mich 756, 771; 631 NW2d 281 (2001).

The trial court allowed into evidence Allen's prior convictions involving theft under MRE 609, but prohibited inquiry into pending charges of which he had not yet been convicted. Bishop's defense counsel indicated that Allen had six prior convictions and was charged with first-degree home invasion and conspiracy to commit home invasion in Macomb County, had entered guilty pleas, but had not yet been sentenced. The trial court excluded evidence of the pending charges because defendant could still withdraw his pleas since he had not been sentenced and there was no conviction or judgment yet, and they were irrelevant in the present case.

The trial court's ruling to exclude evidence of Allen's pending charges was within its discretion and not outside the principled range of outcomes. The pending charges were in a different jurisdiction in an unrelated case. Further, Allen's pending charges provide little to no evidence to show that Allen had an interest in testifying at defendant's trial. The pending charges also provide no evidence of any motive to testify falsely because the charges pending against Allen did not arise out of the same incident for which defendant is on trial.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael J. Talbot
/s/ Cynthia Diane Stephens