

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD FRANKLIN FREES, a/k/a GAROLD  
FRANKLIN FREES,

Defendant-Appellant.

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UNPUBLISHED  
February 12, 2008

No. 275095  
Muskegon Circuit Court  
LC No. 06-053216-FH

Before: Bandstra, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of armed robbery, MCL 750.529, and bank robbery, MCL 750.531. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 25 to 38 years for each conviction. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions arise from the robbery of a bank by his cousin Keith Eastling, who passed a note to a teller that stated, "I have a gun, 20's and 50's only." The teller gave Eastling \$900 in twenty dollar bills that included "bait money." Eastling fled from the bank and entered a truck across the street that pulled into traffic, cutting off several cars. One of the drivers followed the truck into a parking lot and saw the passenger pull a shirt off the truck's license plate. The truck then stopped at another parking lot, where police apprehended both Eastling and defendant, who was driving. Defendant had 14 twenty dollar bills in his pocket, including five bait bills. The remainder of the money was either with Eastling or had been stuffed between the seats of the truck. Defendant initially claimed that he obtained the money by selling scrap metal. Inside the truck the police found a bag from a fast food restaurant that had a piece torn out; the torn piece matched the robbery note. The police also discovered the shirt and hat worn by Eastling during the robbery.

Defendant denied planning the robbery or knowing that Eastling was planning a robbery. He also denied seeing Eastling tear the bag or write a note. Defendant testified that he went into an optical store near the bank to browse for sunglasses while Eastling went into the bank purportedly to cash a check. Defendant claimed that afterward Eastling paid him \$280 that he had loaned to Eastling.

Defendant first argues that the trial court erred in allowing evidence concerning an unarmed robbery that occurred the day before the charged offenses. Defendant contends that the evidence was not admissible because there was no evidence that he was involved in the earlier offense.

This Court reviews a trial court's decision regarding the admissibility of other-acts evidence for a "clear abuse of discretion." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." MRE 404(b). Such evidence is admissible for other purposes, including knowledge. *Id.* To be admissible under MRE 404(b), other acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

According to a cashier at Born's market, when she opened the till, Eastling reached over and grabbed all of the twenty dollar bills, ran out to a red pickup truck, entered on the passenger side, and shouted, "Go." The driver drove into traffic at a high rate of speed. Items, including some blue tile, went "flying" from the back of the truck. The license plate of the truck from this incident matched that of the truck used in the bank robbery. The tile was the same as that recovered from the truck used in the robbery. Although neither the cashier nor the driver who observed the truck leaving the parking lot could identify defendant, the cashier's description of the driver's race and gender was consistent with defendant. Defendant told the police that he was home all afternoon and evening on the date of the grocery store robbery and that Eastling was with him. At trial, defendant did not remember telling the police that neither he nor Eastling left the trailer. He testified that Eastling and defendant's brother left for a couple of hours.

We agree with the trial court that the evidence concerning the unarmed robbery of the grocery store was probative of defendant's knowledge that Eastling was robbing the bank at the time defendant provided assistance. Defendant's knowledge was relevant to an issue or fact of consequence at trial because defendant was convicted under an aiding and abetting theory and knowledge of the principal's intent to commit the charged offense at the time assistance is provided is necessary to establish guilt under an aiding and abetting theory. *Crawford, supra*, pp 388-389. Further, the risk of unfair prejudice was minimized because this was a bench trial and the judge's understanding of the law allowed him to use the evidence only for its proper purpose. See *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001) (A judge's understanding of the law enables him to ignore errors and decide a case solely on the properly admitted evidence). Accordingly, the court did not abuse its discretion in allowing this evidence at trial.

Defendant also argues that trial counsel was ineffective for failing to have the truck tested to determine if it was incapable of being operated in reverse, as defendant testified.

Because defendant did not move for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective assistance of counsel, a defendant must show that his counsel's representation "fell below an objective standard of reasonableness" and "overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant must also demonstrate "a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . ." *Id.*, pp 302-303 (citation and internal quotation marks omitted).

The record does not provide a factual basis for assuming that a test of the vehicle would have benefited defendant. Defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). In the absence of any evidence factually supporting defendant's claim, his ineffective assistance of counsel claim fails.

In a Standard 4 brief, defendant argues that the trial court erred by excluding evidence of a purported statement made by Eastling that would have exculpated defendant.

Pursuant to MRE 103(a)(2), a party may not predicate a claim of evidentiary error on the exclusion of evidence unless the party's substantial rights were affected and "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." In this case, the substance of the evidence was not made known to the court by offer of proof and is not apparent from the context of the question asked. Cf. *People v Snyder*, 462 Mich 38, 42-43; 609 NW2d 831 (2000). Because defendant did not make an offer of proof at trial and the record does not indicate the substance of the evidence he sought to admit, there is no basis for concluding that exclusion of the evidence affected defendant's substantial rights. See *People v Hampton*, 237 Mich App 143, 154; 603 NW2d 270 (1999).

Defendant also argues that OV 9 and OV 13 were both incorrectly scored. Defendant concedes that these scoring challenges were not preserved with an appropriate objection below. MCL 769.34(10). Unpreserved scoring issues are reviewed for plain error affecting defendant's substantial rights. *People v Kimble*, 470 Mich 305, 310; 684 NW2d 669 (2004). A scoring decision will be upheld if evidence of record adequately supports a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Defendant received ten points for OV 9, which is scored at ten points if there were two to nine victims. MCL 777.39(1)(c). Each person who is placed in danger of injury or death is considered a victim for purposes of OV 9. MCL 777.39(2)(a). Regardless of the actions of Eastling, defendant's conduct alone supports the ten-point score for OV 9. Defendant drove the truck in an erratic manner as he left the bank, cutting off several drivers. Mark Berg, Jr., testified that defendant's truck nearly struck his car and he had to swerve to avoid it. A passenger accompanied Berg in the car. Because these two men were placed in danger of injury by defendant's actions, the record supports the trial court's scoring of OV 9.

Defendant received 25 points for OV 13, which is scored at 25 points where "the offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43. Defendant contends that the scoring of this variable on the basis of convictions that were already taken into account in determining his prior record variables constitutes a "double count" and therefore zero points should have been scored. However, defendant cites no authority for his contention that such "double counting," which is inherent in the scoring of the guidelines, is improper. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000) (citations omitted). See also *People v Van Tubbergen*, 249 Mich App 354, 364; 642 NW2d 368 (2002).

Defendant also contends that he committed only one other crime against a person, i.e., identity theft, within the pertinent five-year period. He asserts that the remaining felony offenses committed during this period were crimes against property or public trust. Therefore, he argues that a “more appropriate” score for OV 13 is ten points pursuant to MCL 777.43(1)(c) (“offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property”).

Even if defendant is correct that OV 13 should have been scored at ten points, rather than 25 points, any error would not have affected defendant’s placement in Offense Variable Level II and, therefore, would not have affected defendant’s sentencing guidelines range. MCL 777.62. Because the alleged scoring error did not affect defendant’s substantial rights, resentencing is not required. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Defendant also claims that trial counsel was ineffective for failing to object to the scoring of OV 9 and OV 13. Because record evidence supports the trial court’s scoring of OV 9, defendant counsel was not ineffective for failing to object. Any objection would have been futile. Further, because any error in the scoring of OV 13 at 25 points instead of ten points did not affect defendant’s sentencing guidelines range, defendant was not prejudiced by counsel’s failure to object. Therefore, defendant has not established a claim of ineffective assistance of counsel.

Affirmed.

/s/ Richard A. Bandstra  
/s/ Pat M. Donofrio  
/s/ Deborah A. Servitto