

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 4, 2012

v

NEONIS SCOTT GRUBBS,

Defendant-Appellant.

No. 305433
Kent Circuit Court
LC No. 11-001266-FH

Before: M. J. KELLY, P.J., AND HOEKSTRA AND STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110(a)(2); third-degree home invasion, MCL 750.110(a)(4); and domestic assault, MCL 750.81(2). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to 10 to 40 years' imprisonment for first-degree home invasion, 8 to 30 years' imprisonment for third-degree home invasion, and 93 days of imprisonment for domestic assault. Defendant appeals as of right. We affirm.

Defendant argues that the trial court violated his right to be present at trial, his right to confront witnesses, and his due process right to testify. These unpreserved claims of constitutional error are reviewed for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, error that is clear or obvious must have occurred and affected defendant's substantial rights. *Id.* at 763.

Regarding defendant's claim that the trial court's decision to remove him from the courtroom violated his right to be present at trial and the right to confront witnesses, "the Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to be present in the courtroom at every stage of his trial, and a 'face-to-face meeting with witnesses appearing before the trier of fact'" *People v Staffney*, 187 Mich App 660, 663; 468 NW2d 238 (1990) (citations omitted). However, the right to confront witnesses and the right to be present at trial are not absolute and may be waived by a defendant's disruptive behavior. *Id.* at 663-665. In *Illinois v Allen*, 397 US 337; 90 S Ct 1057; 25 L Ed 2d 353 (1970), the Supreme Court addressed the standard for reviewing a defendant's disruptive behavior:

a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive,

and disrespectful of the court that his trial cannot be carried on with him in the courtroom. [*Id.* at 343.]¹

Here, defendant repeatedly interrupted his trial, both in and out of the presence of the jury, with demands that his trial counsel cease representing him. Despite the trial court's warnings that he would be removed from the courtroom, defendant continued those disruptions. Defendant's conduct was so disorderly, disruptive, and disrespectful that his trial could not continue with him in the courtroom. *Id.* Defendant's disruptive behavior waived his right to confront witnesses and the right to be present at trial. *Staffney*, 187 Mich App at 663-665. Defendant fails to show plain error in his claim that his right to be present at trial and his right to confront witnesses were violated. *Carines*, 460 Mich at 763.

Regarding defendant's claim that the trial court's decision to remove him from the courtroom violated his due process right to testify, "[a] defendant's right to testify in his own defense arises from the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution." *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011). While the trial court need not advise a defendant of the right to testify or determine on the record that a defendant has knowingly and intelligently waived that right, *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991), if a defendant expresses a wish to testify he must be permitted to do so, *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). "If the record shows that the trial court prevented defendant from testifying, we will not hesitate to reverse its judgment." *Id.* However, where a defendant "decides not to testify or acquiesces in his attorney's decision that he not testify" the right to testify is waived. *Id.*

Here, defendant argues that the trial court violated his right to testify because it would not allow him to take the stand unless he agreed not to repeat his demand that his trial counsel cease representing him. However, defendant's characterization of the situation is incorrect. While he may have implicitly invoked his right to testify, he told the trial court if he took the stand he would continue in his articulation that, "Counsel must cease." Counsel indicated that defendant did not desire to have the proceedings continue. Defendant's statements could also be reasonably interpreted as a decision to decline to testify about the substance of case before the jury. Based on the record, it was defendant's own decision not to testify about the substance of the case against him and not to cease his requests that the attorney be dismissed and another be appointed or cooperate with the trial court. Thus, defendant waived his right to testify, *id.* and waiver extinguished any error, *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Defendant fails to show plain error in his claim that his due process right to testify was violated. *Carines*, 460 Mich at 763.

Defendant also argues that his convictions for both first-degree and third-degree home invasion violated the Double Jeopardy Clause because the elements of third-degree home invasion as charged were subsumed into the elements of first-degree home invasion as charged.

¹ We employed *Allen's* test for the proper removal of a defendant from a courtroom in *Staffney*, 187 Mich App at 663-665. See also *People v Krueger*, 466 Mich 50, 54 n 9; 643 NW2d 223 (2002).

A double jeopardy claim presents a question of law reviewed de novo. *People v Smith*, 478 Mich 292, 298; 733 NW2d 351 (2007). Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. The federal and Michigan prohibitions on double jeopardy are to be construed consistently. *People v Davis*, 472 Mich 156, 167-168; 695 NW2d 45 (2005). These guarantees protect a defendant against successive prosecutions for the same offense and multiple punishments for the same offense. *Smith*, 478 Mich at 299. Regarding multiple punishments, which is the relevant inquiry herein, the Michigan Supreme Court has recognized that violation of the federal double jeopardy protection depends on the elements of the offenses charged. *People v Denio*, 454 Mich 691, 707; 564 NW2d 13 (1997). Under the federal *Blockburger*² test, two separate offenses exist when each offense requires proof of at least one fact that the other offense does not. *Id.* The validity of multiple punishments under the Michigan Constitution is also determined under the *Blockburger* test. *Smith*, 478 Mich at 315-316.

Applying the *Blockburger* test to this case, the prosecutor was required to prove that a personal protection order existed to prove the second and third elements of third-degree home invasion as charged in this case. This fact was not required as an element of the first-degree home invasion charge. Also, the prosecutor was required to prove that defendant intended to assault the victim while another person was present in the dwelling as the third and fourth elements of the first-degree home invasion charge, while under the second and third elements of third-degree home invasion charge, the personal protection order in place to protect the victim could have been violated merely by defendant entering onto the premises where the victim lived. Thus, under the *Blockburger* test, defendant's first-degree and third-degree home invasion convictions were two separate offenses because each offense required proof of at least one fact that the other offense did not. *Denio*, 454 Mich at 707. The trial court did not err in allowing defendant to be charged with and convicted of both first-degree and third-degree home invasion. *Smith*, 478 Mich at 298.

Finally, defendant argues that he is entitled to resentencing because the trial court erred in scoring offense variable (OV) 10, MCL 777.40 (exploitation of vulnerable victim) at ten points, and in scoring OV 16, MCL 777.46 (property obtained, damaged, lost, or destroyed) at one point. In regard to defendant's preserved challenge of the trial court's scoring of OV 10, a trial court's sentencing scoring decision is reviewed to "determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). "Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Defendant's unpreserved challenge of the trial court's scoring of OV 16 is reviewed for plain error affecting substantial rights. *People v Kimble*, 252 Mich App 269, 275; 651 NW2d 798 (2002), *aff'd* 470 Mich 305 (2004). To avoid forfeiture under the plain error rule, error, which is clear or obvious, must have occurred and affected defendant's substantial rights.

² *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932).

Carines, 460 Mich at 763. This latter requirement requires a showing of prejudice, specifically that the error affected the outcome of the lower court proceedings. *Id.*

Defendant first claims that the trial court erred in scoring OV 10 at ten points because there was insufficient proof of defendant's exploitation of the victim. OV 10 allows the trial court to assign a score of ten points where "[t]he offender exploited a . . . domestic relationship." MCL 777.40(1)(b). To "exploit" means to "manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). In this case, the victim testified that she and defendant were in an abusive relationship and that she obtained a personal protection order against defendant. The incident began when defendant went to the victim's house and knocked on the victim's door and asked to be allowed in to talk. Accordingly, defendant attempted to use his domestic relationship with the victim to manipulate her into allowing him entry into her home. When that failed, defendant kicked in the victim's door. The victim testified that defendant had kicked in her door during a prior incident as well. After entering the victim's home, defendant approached her and grabbed her near the neck, causing pain and fear. This act was a continuation of defendant's pattern of abuse in manipulating his domestic relationship with the victim. There was evidence that defendant exploited his domestic relationship with the victim in this case. Thus, there was evidence in support of the trial court's scoring of OV 10 at ten points, *Hornsby*, 251 Mich App at 468, and the trial court did not abuse its discretion in scoring OV 10, *McLaughlin*, 258 Mich App at 671.

Defendant also claims that the trial court erred in scoring OV 16 at one point because there was insufficient proof of the extent of the property damage that defendant caused. Assuming that the trial court erred in scoring OV 16, defendant is not entitled to resentencing because, if OV 16 was scored at zero points, defendant's recommended minimum sentence range under the legislative guidelines would not change. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). Defendant has not shown prejudice from any error in the trial court's scoring of OV 16. *Carines*, 460 Mich at 763.

Affirmed.

/s/ Michael J. Kelly
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens