

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY GENE GUY,

Defendant-Appellant.

UNPUBLISHED

July 27, 1999

Nos. 198483 and 201541
LC Nos. 95-000311 FC and
95-020311 FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LUMUMBA ATIF CLARK,

Defendant-Appellant.

No. 201578

LC No. 95-000310 FC

Before: Cavanagh, P.J., and MacKenzie and McDonald, JJ.

PER CURIAM.

Juries convicted each defendant of four counts of possession of a bomb with unlawful intent, MCL 750.210; MSA 28.407, four counts of carrying a concealed weapon (CCW), MCL 750.227; MSA 28.424, two counts of possession of a short-barreled shotgun, MCL 750.224b; MSA 28.421(2), two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2), one count of aiding and abetting or conspiring to place explosives with intent to destroy property, MCL 750.208; MSA 28.405, and one count of conspiracy to commit great bodily harm less than murder, MCL 750.84; MSA 28.279 and MCL 750.157(a); MSA 28.354(1). Defendant Clark also pleaded guilty to one count of felon in possession of a firearm, MCL 750.224f; MSA 28.421(6).

The trial court, applying a second-offense habitual offender enhancement under MCL 769.10; MSA 28.1082, sentenced Clark to (1) eleven terms of 4 to 7½years' imprisonment for the felon in possession of a firearm conviction and for the bomb possession, CCW, and shotgun possession convictions; (2) 4 to 22½years' imprisonment for the conspiracy to place explosives conviction; and (3) 4 to 15 years' imprisonment for the conspiracy to commit great bodily harm conviction. Applying a fourth-offense habitual offender enhancement under MCL 769.12; MSA 28.1084, the court sentenced Guy to (1) four terms of twenty to thirty years' imprisonment for the bomb possession convictions; (2) six terms of twenty to fifty years' imprisonment for the CCW and shotgun possession convictions; and (3) two terms of thirty to fifty years' imprisonment for the conspiracy convictions. Each defendant also received two mandatory, consecutive, two-year terms for the felony-firearm convictions. Defendants now appeal their jury convictions as of right. We affirm.

Both defendants argue that the investigating police officers unlawfully searched the van that contained the weapons and that the weapons should therefore have been suppressed from evidence. This Court reviews de novo a trial court's decision regarding a motion to suppress. *People v Goforth*, 222 Mich App 306, 310; 564 NW2d 526 (1997). We disagree that the police erred in searching the van. After they lawfully stopped the van and were properly attempting to confirm an apparent arrest warrant for the driver, the police were allowed under *Maryland v Wilson*, 519 US 408, 413-415; 117 S Ct 882; 137 L Ed 2d 41 (1997), to order the passengers from the van as a safety precaution. See also *People v Armendarez*, 188 Mich App 61, 69-70; 468 NW2d 893 (1991). Subsequently, given (1) the hour of the night; (2) the time it had taken the van to come to a stop; (3) the occupants' dark clothing; (4) the fact that the occupants outnumbered the police on the scene; (5) the fact that the vehicle was not registered to either the driver or a passenger; (6) the movement of the rearmost passenger as the van was coming to a stop; (7) the information they received concerning the driver's potential for danger; (8) the van's taped-over interior lights; (9) the latex gloves on the floor of the van; (10) the large bundle that was partially hidden underneath a bench seat; and (11) the false name given by one of the passengers, it was reasonable for the police to believe that the occupants of the van were either in the process of committing, or had already committed, a crime and that there might be weapons in the van. The police also recognized that, after completion of the inquiry regarding the driver's apparent arrest warrant, some or all of the occupants might be allowed to reenter the van, in which case they would have access to any weapons it contained. Thus, the police appropriately conducted a "protective frisk" of the van's interior. *Michigan v Long*, 463 US 1032, 1050-1052; 103 S Ct 3469; 77 L Ed 2d 1201 (1983). The discovery of weapons during the frisk, along with the suspicious circumstances mentioned above, then provided probable cause to thoroughly search the van's interior, including any closed containers that could contain weapons. *Wyoming v Houghton*, ___ US ___; 119 S Ct 1297, 1301-1302; ___ L Ed 2d ___ (1999); *People v Carter*, 194 Mich App 58, 60-61; 486 NW2d 93 (1992). Accordingly, the police did not act unlawfully in searching the van, and the trial court properly denied defendants' motions to suppress the evidence found during the search.

Defendants next argue that the trial court erred in allowing Clark's attorney, Rodney Watts, to also serve as standby counsel for Guy and another codefendant because conflicts of interest existed. Clark, who moved for a new trial on this basis, claims that because he constantly felt afraid of and intimidated by Guy and because Guy originally hired Watts, he did not feel free to tell Watts that in

committing the instant crime he acted under duress from Guy. Clark asks that we either remand the case for an evidentiary hearing on this issue or simply grant him a new trial. We note, however, that this Court has already denied Clark's earlier motion for a remand on this issue, and we decline to revisit that decision. Moreover, after reviewing the trial court's denial of Clark's new trial motion for an abuse of discretion, see *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997), we conclude that the motion was properly denied, since there was insufficient evidence to support a duress defense. As the Supreme Court indicated in *People v Lemons*, 454 Mich 234, 246-247; 562 NW2d 447 (1997), before a defendant may raise a duress defense, he must produce evidence that (1) another person threatened him in a way that was sufficient to create a fear of death or serious bodily harm in the mind of a reasonable person; (2) the threat caused such a fear in the defendant's mind; (3) the fear existed at the time of the criminal act; and (4) the defendant committed the act to avoid the threatened harm. Additionally, the threatened harm must have been imminent as opposed to a threat of future injury; generalized allegations of an oppressive, abusive relationship are insufficient to warrant a duress instruction. *Id.* at 247, 249-250. Clark simply failed to show, or even allege, that he committed the instant crimes under a threat of *imminent* death or serious bodily injury from Guy. Indeed, even when he testified against Guy in exchange for sentencing concessions, Clark did not make such an accusation. Therefore, because there was inadequate evidence to support a defense of duress, the trial court did not err in concluding that Watt's potential conflict of interest deprived Clark of the effective assistance of counsel.

Guy contends that his acquiescence in having Watts serve as his standby counsel was defective because the trial court did not adequately advise him regarding the potential for conflicts of interest in having Watts represent Guy, Clark, and their codefendant in some capacity. We disagree. In order to adequately waive the right to separate counsel, a defendant must be advised by the court of the potential problems with joint representation. *People v Clark*, 106 Mich App 771, 773; 308 NW2d 639 (1981); see also MCR 6.005(F). In the instant case, the record indicates that the trial court did mention the potential for conflicts with joint representation several times prior to trial, and no possible conflicts were ever identified. Moreover, Guy has simply not shown the existence of an actual conflict that adversely affected his standby attorney's performance, and, accordingly, he cannot prevail on his claim that the trial court failed to warn him about potential conflicts. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998); *People v Lafay*, 182 Mich App 528, 530; 452 NW2d 852 (1990); *Cuyler v Sullivan*, 446 US 335, 348-350; 100 S Ct 1708; 64 L Ed 2d 333 (1980).

Guy also contends that his waiver of the right to counsel was inadequate and that he should not have been allowed to represent himself. This Court reviews a grant of a defendant's request to proceed in propria persona for an abuse of discretion. *People v Adkins (After Remand)*, 452 Mich 702, 721 n 16; 551 NW2d 108 (1996). Before allowing a defendant to proceed in propria persona, a trial court must assess the propriety of self-representation and ensure that the defendant is intentionally giving up his or her right to counsel. *Adkins, supra* at 720-721. There are three main requirements, originally set forth in *People v Anderson*, 389 Mich 361, 366-367; 247 NW2d 857 (1976), for a valid waiver of counsel: (1) the defendant's request to represent himself or herself must be unequivocal; (2) the request must be made knowingly, intelligently, and voluntarily, meaning that the defendant must understand the dangers and disadvantages of self-representation; and (3) the trial court must determine that self-

representation by the defendant will cause no undue disruption. *Adkins, supra* at 721-722; *Anderson, supra* at 366-367. Furthermore, a trial court must comply with MCR 6.005, which requires it to (1) advise the defendant of the charge and the possible sentence; (2) explain the risks of self-representation to the defendant; and (3) offer the defendant an opportunity to consult with an attorney. In *Adkins, supra* at 726-727, the Court held that a valid waiver of the right to counsel needs only substantial compliance with the requirements of *Anderson* and MCR 6.005. Substantial compliance occurs if “the court discuss[es] the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant and make[s] an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures.” *Adkins, supra* at 726-727.

Guy claims that his waiver of counsel was inadequate because the trial court did not advise him of the risks of self-representation, did not tell him the maximum punishment he faced, and did not obtain a knowing, intelligent, and voluntary waiver. We disagree. The trial court did advise Guy of the risks of self-representation and of the maximum punishment he faced. The court also made clear that Guy could be represented by an attorney if he desired. Subsequently, Guy clearly and without hesitation indicated his desire to represent himself. The record reveals no reason – in fact, Guy does not even provide a reason in his appellate brief – to conclude that Guy involuntarily waived his right to counsel. Therefore, because the trial court substantially complied with the requirements for a proper waiver of counsel, we decline to hold that the waiver was inadequate. *Adkins, supra* at 726-727.

Next, Guy argues that the trial court improperly allowed the prosecution to present allegedly irrelevant and inflammatory evidence concerning defendants’ lifestyle. He specifically objects to evidence regarding defendants’ membership in a large family group that supported polygamy and swift retaliation for wrongs. We review a trial court’s decision to admit or suppress evidence for an abuse of discretion. *People v Sullivan*, 231 Mich App 510, 514; 586 NW2d 578 (1998). We disagree that the evidence was improperly admitted, since it was relevant to the prosecutor’s theory of motive. The evidence helped the jury to understand why Guy and several of his sons planned to attack a home in Lansing. As the Court stated in *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996), “it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place,” even if such a presentation includes the admission of prior bad acts. Therefore, we decline to hold that the admission of the evidence constituted an abuse of discretion. While we agree that the evidence regarding Guy’s alleged view of white people as “the enemy” should not have been admitted, we conclude that its admission did not affect the jurors’ decision to convict Guy, given the strong evidence of his guilt. See *People v Graves*, 458 Mich 476, 482-483; 581 NW2d 229 (1998).

Next, Guy argues that he should have been granted a change of venue due to unfavorable pretrial publicity. This Court reviews rulings regarding change of venue motions for an abuse of discretion. *People v Jendrzewski*, 455 Mich 495, 500; 566 NW2d 530 (1997). To be entitled to a change of venue due to pretrial publicity, a defendant must prove not only the existence of unfavorable pretrial publicity, but also (1) a pattern of prejudice in the community so overwhelming that once exposed to the extensive publicity a juror could not possibly be impartial; or (2) that the jury was in fact biased or that the trial's atmosphere was likely to produce prejudice. *People v Passeno*, 195 Mich

App 91, 98; 489 NW2d 152 (1992), overruled on other grounds sub nom *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998). Guy failed to show a pattern of overwhelming prejudice; indeed, the media coverage that did occur appears to have merely related the facts of the case as opposed to relating information about confessions or other highly prejudicial evidence. See *Jendrzewski, supra* at 504. Nor did Guy show an actually biased jury or a prejudicial atmosphere, since jurors that indicated a familiarity with the case were questioned in sequestration, and those who expressed bias and were not able to set it aside were excused for cause. Accordingly, we disagree that the trial court abused its discretion in refusing to change the venue of Guy's trial, especially since Guy failed to renew his pretrial change of venue motion, which had been held in abeyance, after the jury had been selected. See *People v Mayfield*, 221 Mich App 656, 660-661; 562 NW2d 272 (1997).

Next, Guy claims that he was denied a fair trial by the prosecutor's comment in front of the jury that the trial court had found that the search of the van was proper. Since Guy did not object to this comment at trial, we are to review this issue only if the failure to do so would result in a miscarriage of justice. *People v Graham*, 219 Mich App 707, 712; 558 NW2d 2 (1996). We find no miscarriage of justice in our failure to consider this issue, since the prosecutor rightly made the challenged comment in response to an improper insinuation by defense counsel that the search had been illegal.

Finally, Guy contends that he was denied due process of law when the prosecutor allegedly elicited on cross-examination of a police witness the statement that Guy had asserted his rights to silence and to an attorney. The record reveals, however, that the remark was made in response to questioning by defense counsel, not the prosecution, in attempt to elicit from the officer that Guy told him he knew nothing about the guns and the bombs. Accordingly, Guy cannot now claim an objection to the remark. See *People v King*, 158 Mich App 672, 677; 405 NW2d 116 (1987). Nor can he claim that his attorney was ineffective for failing to object, since the attorney could not be expected to object to his own question. In any event, the remark does not require reversal because it did not result from a "studied attempt by the prosecution to place [the] matter before the jury." *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996), quoting *People v Sain*, 407 Mich 412, 415; 285 NW2d 772 (1979).

The convictions of both defendants are affirmed.

/s/ Mark J. Cavanagh
/s/ Barbara B. MacKenzie
/s/ Gary R. McDonald