

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DESHONE RIGGINS,

Defendant-Appellant.

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UNPUBLISHED

March 22, 2005

No. 251453

Oakland Circuit Court

LC No. 2003-189462-FC

Before: Owens, P.J., and Sawyer and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of armed robbery, MCL 750.529. Defendant was sentenced, as a second habitual offender, MCL 769.10, to ten to twenty years in prison for the armed robbery conviction. We affirm.

First, defendant contends that his counsel was ineffective for failing to file a motion in limine to suppress evidence of defendant's "five unrelated crimes," namely, a traffic offense, an outstanding warrant, a possession of the taser, the knife and the second knife with codefendant's blood. We disagree. Because defendant has not fully preserved this issue by moving for a new trial or a *Ginther*<sup>1</sup> hearing, our review is limited to the mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002), and the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant assumes a heavy burden of proving otherwise. *Id.*

First, the evidence of "five unrelated crimes" was admissible under the "res gestae exception" to MRE 404(b), which allows the admission of evidence of other crimes or acts if

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

they are connected to the charged crime in such a way to require the admission of the evidence to give the jury "the complete story." *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996). Here, this case remained unsolved for more than six months until defendant's arrest. Defendant's traffic violation formed the basis for the stop of his vehicle, and the outstanding warrant for defendant and his possession of weapons at the time of his arrest led to a subsequent discovery of a knife used in the robbery. The knife and defendant's police statements regarding codefendant's blood on the knife ultimately led the police to solve the crime. Thus, the evidence at issue, which dealt with circumstances surrounding defendant's arrest, was so entwined with the crime charged that the evidence was necessary to give the jury the "complete story." *Id.* Thus, the evidence was admissible as part of the *res gestae* of the crime.

Also, the knife with codefendant's blood was admissible because it was an instrument of the armed robbery. Both defendant and codefendant admitted that codefendant cut himself with the knife at issue during the commission of the robbery. It is well established that "[e]vidence of a defendant's possession of a weapon of the kind used in the offense with which he is charged is routinely determined by courts to be direct, relevant evidence of his commission of that offense." *People v Hall*, 433 Mich 573, 580-581; 447 NW2d 580 (1989). Here, the victim, Marie Budop, testified that the knife with codefendant's blood was similar to the knife used in the robbery. As such, it was admissible to show that the defendant was involved in the charged armed robbery using a similar weapon. *Id.* at 580-583.

Furthermore, the evidence of other weapons as well as the bloody knife was relevant to support codefendant's testimony, his version of the events and his credibility. Questions that bear on a witness' credibility are always relevant. *People v Mills*, 450 Mich 61, 72-74; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995). Defendant denied carrying the "bag of weapons," and denied ever threatening codefendant with a knife. But codefendant testified that he had reasons to fear defendant because defendant had been physically abusive to codefendant in the past and had carried "a bag of weapons" in his car. Codefendant also testified that, prior to the incident, defendant threatened codefendant with a knife, defendant provided a knife and coerced codefendant to commit the robbery. The evidence of the weapons in defendant's car was relevant to impeach defendant's credibility and support codefendant's credibility. As such, defense counsel was not required to move to suppress the properly admitted evidence of the "five unrelated crimes" or "make a frivolous or meritless motion." *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Even if defense counsel was ineffective, defendant failed to show that he was prejudiced. Defendant, as a former cashier at Burger King, was well aware of the night deposit procedure of Burger King. Budop was allegedly responsible for defendant's termination from his job at Burger King, and defendant wanted to retaliate. After changing the story about the events at least three times, defendant told the police that codefendant told him about the plan to rob Budop, but defendant suggested that they would simply "scare" Budop and dropped codefendant off at the bank. In addition, in order to help defendant, defense counsel introduced a letter purportedly written by codefendant admitting his guilt in the crime. After codefendant's counsel called a handwriting expert, the jury learned that the writing in the letter did not match codefendant's handwriting, but matched the writing of defendant's mother. Furthermore, the evidence at trial shows that defendant had harassed and abused codefendant until the day of defendant's arrest. The evidence of five unrelated crimes was merely a small part of the

overwhelming evidence against defendant, and thus, it was highly improbable that the results of the proceedings would have been different but for counsel's alleged errors. *Bell, supra*, p 695. As such, defendant was not denied effective assistance of counsel.

Defendant maintains that his counsel rendered ineffective assistance by failing to request that defendant's jury be excused during codefendant's presentation of his defense. There was no danger that defendant's jury would convict defendant, "despite the absence of proof beyond a reasonable doubt, in order to rationalize the acquittal of [codefendant]." *Hana, supra*, p 360. Each jury was concerned only with the credibility of one defendant and they could easily have reached inconsistent results. *Id.* Because defendant and codefendant were tried before separate juries, the risk of prejudice was significantly reduced in this circumstance. *Id.*

Moreover, because each defendant waived his Fifth Amendment rights, the juries were entitled to hear codefendant's version of the event in question. *Hana, supra*, pp 361-362. Both defendant and codefendant were subject to extensive examination and cross-examination, and their credibility was plainly presented to the juries. See *People v Reed*, 453 Mich 685, 693; 556 NW2d 858 (1996). Questions of their credibility were properly left to the juries to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). As such, defendant failed to establish any prejudice to his substantial rights. *Hana, supra*, pp 346-347.

Further, the testimony of codefendant and his defense witnesses, Robert Lewis Peacock and Furman Tate, that defendant had a controlling power over codefendant, was properly admitted before defendant's jury. The testimony was relevant to attack defendant's credibility and to support the prosecution's theory that defendant was the mastermind behind the plan to rob Budop and defendant used his power over codefendant to force him to commit the robbery. Defense counsel was not required to object to the properly admitted evidence and "advocate a meritless position." *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003). In addition, defense counsel's decisions regarding what evidence to present and which witnesses to call are presumed to be matters of trial strategy that we will not second-guess. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant also maintains that his defense counsel should have moved to suppress the testimony of codefendant's witness, Ruth Holmes, discrediting codefendant's "confession" letter. This evidence was properly presented to impeach the credibility of defendant's mother and relevant to show that defendant was not merely present during the armed robbery as the letter alleged. As such, defense counsel was not required to move to suppress the properly admitted testimony of Holmes or "make a frivolous or meritless motion." *Darden, supra*, p 605.

Furthermore, defendant failed to show that he suffered any prejudice. Even without the testimony of Peacock, Tate and Holmes, the evidence supporting defendant's guilt was overwhelming as discussed above. Also, this case presented a credibility contest between defendant and codefendant. Codefendant gave consistent statements that he had been abused by defendant for several years, and he acted under duress, under the coercive influence of defendant, to carry out defendant's plan. However, defendant's credibility was undermined when the prosecution presented numerous different versions of the events that defendant told the police. Also, at trial, defendant admitted lying to the police and defendant again gave different versions of the events to the jury. Given that defendant changed his version of events, it was highly probable that defendant's jury would disbelieve defendant. In light of the overwhelming

evidence against defendant, defendant failed to show a reasonable probability that he would have been acquitted had defense counsel excused defendant's jury during the examination of codefendant's defense witnesses. *Rockey, supra*, p 76.

Finally, defendant argues that the trial court's scoring decisions violate his right to jury trial pursuant to *Blakely v Washington*, 542 US \_\_\_\_; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), the Michigan Supreme Court noted that *Blakely* is inapplicable to Michigan's sentencing scheme. Defendant maintains that *Claypool* is mere dicta and not binding on this Court. In *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), the defendant raised the exact same argument regarding *Blakely* that defendant does in this case and this Court rejected the assertion that the statement from *Claypool* pertaining to *Blakely* is not binding precedent. Pursuant to MCR 7.215(C)(2), *Drohan* is binding precedent and controls in this case.

In addition, we find that the United States Supreme Court's recent holding in *United States v Booker*, \_\_\_ US \_\_\_; 125 S Ct 738; 160 L Ed 2d 621 (2005), is not applicable here because *Booker* dealt with the federal sentencing scheme, which is different from Michigan's indeterminate sentencing scheme. As such, we hold that defendant's challenge to the trial court's scoring decision is without merit.

Affirmed.

/s/ Donald S. Owens

/s/ David H. Sawyer

/s/ Helene N. White