

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 26, 2014

v

HENRY ALLEN MAGER,

Defendant-Appellant.

No. 314493
Montmorency Circuit Court
LC No. 12-003003-FC

Before: BORRELLO, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felony-murder, MCL 750.316, first-degree home invasion, MCL 750.110a(2), safe breaking, MCL 750.531, unlawful driving away of an automobile, MCL 750.413, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to serve concurrent terms of life without the possibility of parole for felony-murder, 5 to 20 years for first-degree home invasion, life for safe breaking, and 2 to 5 years for unlawful driving away of an automobile, to be served consecutively to a 2 year term for felony-firearm, with 411 days jail credit. Defendant appeals as of right, and for the reasons set forth in this opinion, we affirm defendant's convictions, vacate defendant's sentence on the safe breaking conviction, and remand for resentencing.

I. BACKGROUND.

In the summer and fall of 2011, defendant was employed by Donald Ehlers as a wood cutter and miller. On October 7, 2011, according to Ehlers, he fired defendant because defendant was putting time down on his time sheet when he was not actually working. Three days later, on October 10, 2011, when Ehlers and his wife returned home, they discovered that they were missing a 9mm Ruger semi-automatic handgun, a .22 caliber Ruger revolver, ammunition, prescription pain medication, a large jar containing \$400 in change, gold jewelry, a black duffel bag, and a camera from their home. Ehlers testified that he "immediately knew someone had been [in the house] because the place reeked of cigarette smoke, and nobody at our place smokes." Ehlers's wife found a cigarette butt in the trash can of the master bedroom and later forensic testing revealed that DNA on the cigarette butt matched defendant's DNA. According to the DNA expert, "the probability [of] selecting a person at random in the population to match that cigarette butt would be approximately 1 and 44.5 quadrillion."

Defendant's fiancée at the time, Erin Weatherwax, testified that defendant told her that he had broken into the Ehlers's house and stolen guns, pills, change, jewelry, and a camera. Additionally, she testified that defendant stated he left the guns in the woods.

Weatherwax testified that defendant was an opiate addict who would buy prescription pain medicine from his uncle, the murder victim, Terry Lee. Weatherwax testified that on October 22, 2011, she and defendant were sick and suffering withdrawal symptoms because they had run out of opiates and Lee refused to sell them any. Weatherwax then testified that defendant told her that while Lee was at a motorcycle club meeting that night, he was going to ride his bike to Lee's house, break a window, and take the drugs, which Lee kept in a gun safe. Weatherwax testified that defendant left at around 7:30 p.m. and returned sometime after 11:00 p.m., informing her that he had stolen from Lee change, cash, two different kinds of opiate pills, four Zippo lighters, and marijuana.

Dennis Schael testified that he was with Lee on October 22, 2011 at the motorcycle club meeting from 7:00 p.m. until 10:15 p.m., which is when Lee left to go home. Schael testified that Lee had become tired of defendant bothering him for pills and did not want to sell defendant any more.

On October 23, 2011, Michigan State Police Trooper Charles Collier and Montmorency County Sheriff's Deputy Thomas Santer conducted a welfare check on Lee, whose pick-up truck had been spotted down the road from the residence, and backed up onto someone else's property. When nobody answered the door of Lee's home, and when Lee could not be found in the woods near his truck, the two entered the home through an unlocked door. In the home, Collier found Lee deceased, wrapped in a blanket "in the narrow section of the kitchen." Collier testified that he initially thought that Lee died of natural causes because he did not see any blood; however he came to suspect foul-play when he saw that Lee's gun safe was open. When Lee's cell phone rang two or three times, the two removed the blanket to try to get to the phone, and saw a massive amount of blood. Collier saw bullet holes in Lee's body¹ and found a 9mm shell casing on the floor in the dining room as well as shattered glass on the inside and outside of a doorway at the rear entrance.

Ehlers brought police two spent shell casings that had been fired from the stolen 9mm Ruger and an expert in firearm and tool mark identification compared these shell casings with the shell casing found at the murder scene, concluding that all were fired from the same weapon.

On October 24, 2011, the police spoke with defendant about the murder and the Ehlers home invasion. Defendant denied any involvement. Defendant's house was searched, the police

¹ Forensic pathologist Stephen Cohle performed an autopsy of Lee, concluding the cause of Lee's death was the gunshot wounds and that the manner of death was homicide. Cohle testified that he was unable to determine the exact time of death, but that it was consistent with sometime after 10:15 p.m. on October 22, 2011.

found one of Lee's Zippo lighters, as well as ammunition for a 9mm handgun on top of insulation in the attic.²

On October 28, 2011, while in custody, defendant asked to speak to the police. During the interview, defendant admitted to breaking into Lee's house, prying open the gun safe, and taking paper money, change, narcotics, and lighters. Defendant said that he was only in the house for 15 minutes, leaving between 10:45 p.m. and 11:00 p.m.³ Defendant also denied knowing anything about the guns from the Ehlers home invasion, and said that Christopher Kwapis had placed the 9mm ammunition in his attic.

Dewayne Haag, who was housed in the local jail with defendant for two or three days, testified that he and defendant talked about the Ehlers home invasion and this case. In regard to the Ehlers home invasion, defendant told Haag that he and Kwapis had broken into the Ehlers residence and that he had stolen a "gun of some sort" from the Ehlers's house. Regarding this case, Haag testified defendant stated that he had moved Lee's truck down the road and that he would possibly blame a cousin who had recently been released from jail for the killing. Although defendant did not mention the cousin's name, Haag believed defendant was referring to Kwapis.

Kwapis testified at trial and denied being involved in the Ehlers home invasion or the instant offense, and denied putting any ammunition in defendant's attic. Kwapis said that he was at home with his wife and son on the night of the murder.⁴ Additionally, according to police testimony, Kwapis's house was searched and nothing was found pertaining to the Ehlers home invasion or this offense.

The jury returned a verdict of guilty on all charges, and this appeal ensued.

I. ADMISSION OF OTHER ACTS EVIDENCE

Defendant first argues that the trial court erred in admitting evidence regarding an earlier home invasion and that defendant knew the location of property stolen from that home invasion, and evidence that defendant planned to escape from jail and rob another individual. Whether the trial court erred in admitting evidence regarding the earlier home invasion and that defendant knew the location of property stolen during that home invasion is preserved because defendant

² The brand of ammunition stolen from the Ehlers was "Magtech," the same brand that was found in defendant's attic.

³ Defendant's cell phone records indicated that a phone call had been made from defendant's cell phone to Lee on October 22, 2011, at 9:11 p.m., and that defendant's cell phone was in the same sector as Lee's residence between 9:40 p.m. and 11:31 p.m. A tape from a gas station near Lee's residence showed that on October 22, 2011, defendant was in the gas station for approximately seven minutes, between 11:42 to 11:49 p.m.

⁴ Michigan State Police Detective Mark Harris, confirmed Kwapis's alibi for the night of the murder.

objected to the admission of this evidence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Whether the trial court erred in admitting evidence that defendant planned to escape from jail and rob another individual is unpreserved because defendant did not object to the admission of this evidence. *Id.*

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). "An abuse of discretion occurs . . . when a trial court's decision falls outside the range of reasonable and principled outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). As for defendant's unpreserved evidentiary issue, defendant "must demonstrate plain error affecting his substantial rights, meaning that he was actually innocent or that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of his innocence." *Knox*, 469 Mich at 508.

MRE 404(b)(1) establishes that other acts evidence is not admissible to prove a person's character in order to show behavior consistent with those other wrongs, but provides that such uncharged conduct may be admissible for other purposes, "such as proof of motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material." Accordingly, other acts evidence is admissible if (1) the evidence is offered for something other than a character or propensity theory, (2) is relevant under MRE 402, and (3) its probative value is not substantially outweighed by unfair prejudice under MRE 403. *Knox*, 469 Mich at 509. "The determination whether the probative value of evidence is substantially outweighed by its prejudicial effect is best left to a contemporaneous assessment of the presentation, credibility, and effect of the testimony." *People v Waclawski*, 286 Mich App 634, 670; 780 NW2d 321 (2009).

A. EVIDENCE REGARDING THE EARLIER HOME INVASION

The prosecutor filed notice of her intent to admit other acts testimony regarding defendant's involvement in a home invasion that occurred 12 days before the murder. During this earlier home invasion, two firearms were taken. One of the firearms was a 9mm Ruger pistol, the weapon that the prosecutor argued was the murder weapon in this case. A shell casing found at the murder scene matched shell casings that had been fired from the 9mm Ruger. The prosecutor intended to use evidence of the earlier home invasion to demonstrate that defendant had access to the murder weapon. The prosecutor also sought to introduce evidence that defendant knew of the location of items stolen during the earlier home invasion, including the location of the other stolen firearm, "to link defendant with the [9mm] firearm."

Although defendant concedes that this evidence was relevant to establish his access to the alleged murder weapon, he complains that the prosecutor was permitted to admit *too much* evidence about the home invasion, such that the probative value of the evidence was outweighed by the danger of unfair prejudice. Specifically, defendant complains that evidence was admitted regarding a cigarette butt that was found in a trashcan at the location of the first home invasion that contained DNA matching defendant's DNA, as well as evidence that defendant told a cellmate the location of the second weapon that was stolen during the earlier home invasion.

Defendant's argument that the probative value of this evidence was outweighed by the danger of unfair prejudice is without merit. That defendant's DNA was found on a cigarette butt at the scene of the earlier home invasion was circumstantial evidence that defendant committed the charged home invasion and stole the murder weapon. Additionally, the shell casings found at the murder scene directly linked the murder weapon to the prior home invasion. That defendant knew the location of items stolen during the earlier home invasion, including the location of the second, .22 caliber firearm, and further linked defendant to the home invasion. Because this evidence was material to the issue of whether defendant had access to and possession of the murder weapon, the trial court did not err in concluding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

We additionally conclude that the risk of any potential unfair prejudice, was minimized by the trial court's multiple instructions regarding this evidence (occurring during the trial and at the trial's conclusion) and that the evidence could only be considered for a limited purpose and not to show that defendant was a bad person, likely to commit crimes, or that defendant should be convicted because he may be guilty of other bad conduct. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

B. PLANNED ESCAPE AND ROBBERY EVIDENCE

Defendant revealed the location of the firearm and other property that was stolen during the earlier home invasion to a cellmate while the two were discussing a plan to escape from jail and then rob another individual. The weapon was to be used in the robbery. This testimony was highly probative because it explained the circumstances under which defendant told his cellmate the location of the weapon and why the two needed to retrieve the weapon. Without this information, the jury could have been confused as to why defendant told the cellmate where the weapon was located. Further, any risk of unfair prejudice was alleviated by the trial court's detailed cautionary instruction regarding this evidence, i.e., that the evidence that defendant sought to escape from jail could be considered for a limited purpose and not to show that defendant was a bad person, likely to commit crimes, or that defendant should be convicted because he may be guilty of other bad conduct. Again, "[i]t is well established that jurors are presumed to follow their instructions." *Id.*

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that his counsel rendered ineffective assistance by failing to object to certain testimony. The determination as to whether there has been a deprivation of the effective assistance of counsel is a mixed question of law and fact. The factual findings, if any, are reviewed for clear error, and the matters of law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Defendant points to the following exchange that a police detective had with the prosecutor, asserting that the detective impermissibly expressed an opinion as to defendant's guilt or innocence:

Q. Are you aware that a blanket was tucked around [the victim] after his death?

A. I am, yes.

Q. Does that signify anything to you as a detective?

A. Yes. To me, and I don't think you have to be a detective to figure this one out, but it indicates that somebody took the time to care for the victim. The normal person that shoots somebody is not going to care about somebody enough to basically tuck them in. And I think that's what happened. It's a sign of guilt or remorse for what happened.

Q. And this . . . comes from your training and experience and knowledge?

A. Yes, and . . . just common sense too.

First, defendant is incorrect that the detective expressed an opinion as to defendant's guilt or innocence. Rather, the detective was explaining the significance, relative to his investigation, that the murderer took the time to wrap up the victim's body in a blanket. This testimony was relevant to the issue of the focus of the police investigation, namely that it was focused on identifying and eliminating possible suspects in the murder, and what factors led to eliminating some persons, but not others, as suspects. Thus, the detective was explaining why he concluded that the crime scene evidence was inconsistent with a murder committed by a stranger. The prosecutor did not ask the detective to comment on defendant's guilt or innocence and the detective did not express an opinion that he believed defendant was guilty.

Having concluded that the detective expressed no opinion as to defendant's guilt or innocence, we find that defendant's argument of ineffective assistance of counsel is without merit. Counsel cannot be faulted for failing to make a futile or meritless objection. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004). Moreover, this short exchange played an insignificant role in the trial, and thus defendant cannot show that but for counsel's alleged errors, the result of his trial would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005) ("The deficiency must be prejudicial to defendant to the extent that, but for counsel's error, the result of the proceedings would have been different.")

III. THE LIFE SENTENCE FOR SAFE BREAKING

Defendant next argues that the trial court erred in sentencing him to life for safe breaking. There is no indication that the trial court ever calculated the sentencing guidelines range for the safe breaking conviction. Rather, the trial court sentenced defendant to life for this offense without providing any explanation or discussion as to what the guidelines range was and whether this sentence was within the guidelines range or outside that range. While we agree that the trial court abused its discretion by sentencing defendant to life without first calculating the appropriate guidelines range, we do so for reasons other than those argued by defendant.

Defendant argues that the trial court abused its discretion by imposing a life sentence for safe breaking, a class C offense, when the maximum guideline range should have been 228 months. Defendant's arguments are somewhat misplaced. Neither party disputes that a felony-murder conviction is not covered by the sentencing guidelines because it carries a mandatory and determinate sentence (life without the possibility of parole). MCL 769.34(5). However, when a defendant is subject to concurrent sentences for multiple convictions, a sentencing information report is required to be prepared for only the highest class conviction. *People v Mack*, 265 Mich App 122, 127-128; 695 NW2d 342 (2005). And, if the sentences are to be served concurrently, as in this case and in *Mack*, MCL 771.14(2)(e)(ii) provides that the PSIR must include the sentencing grid and recommended minimum sentencing guideline range for the highest class felony alone. *Mack*, 265 Mich App at 127. In *Mack*, this Court stated: "Our construction of MCL 771.14(2)(e)(ii) and (iii) recognizes the Legislature's clear intent, expressed in its amendment of MCL 771.14, that, for sentencing on multiple concurrent convictions, a PSIR would only be prepared for the highest crime class felony conviction and would no longer be prepared for each of the defendant's multiple convictions." *Mack*, 265 Mich App at 128. Accordingly, a sentencing information report is not prepared for the lower class convictions, which in this case would be the safe breaking conviction. Thus, contrary to the assertions of defendant, the trial court was required only to score the highest crime class subject to scoring, which was the first-degree home invasion conviction. Because the conviction in the lower class (safe breaking) is not required to be scored under the guidelines, the trial court is not obligated to score it within the range delineated. *Id.*

However, because the trial court failed to prepare a PSIR regarding the sentencing guidelines for the first-degree home invasion, error was committed warranting reversal. See, generally, *People v Smith*, 482 Mich 292, 304; 754 NW2d 284 (2008).

On remand the trial court must prepare a sentencing guideline for the first-degree home invasion, and must sentence defendant on the safe breaking charge to a sentence which does not exceed the minimum sentence guidelines scored for the first-degree home invasion, absent, of course, a finding by the trial court of substantial and compelling reasons to depart from the guidelines. MCL 769.34(3). See also, *Babcock*, 469 Mich at 272-273; 666 NW2d 231 (2003); *People v Hardy*, 494 Mich 430; 835 NW2d 340 (2013).

Accordingly, we affirm but vacate defendant's sentence on the safe breaking conviction and remand for resentencing. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Deborah A. Servitto
/s/ Jane M. Beckering