STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 27, 2011
v	No. 297455 Kent Circuit Court
BOBBY JAY FISK, Defendant-Appellant.	LC No. 08-011230-FC

Before: MARKEY, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a); felony murder, MCL 750.316(1)(b); armed robbery, MCL 750.529; kidnapping, MCL 750.349; two counts of first-degree home invasion, MCL 750.110a(2); felony-firearm, MCL 750.227b; possession of a firearm by a felon, MCL 750.224f; and conspiracy to commit first-degree home invasion, MCL 750.157a; MCL 750.110a(2). Defendant was sentenced, as a third habitual offender, MCL 769.11, to concurrent terms of life in prison on each of the murder, armed robbery, and kidnapping convictions, thirty to forty-five years' imprisonment on each of the home invasion and conspiracy to commit home invasion convictions, six to ten years' imprisonment on the felon in possession conviction and a consecutive two-year term of imprisonment for the felony firearm conviction. Because defendant was not denied the effective assistance of counsel and is not entitled to a new trial or resentencing, we affirm.

On October 5, 2008, defendant and his friend, Tim Stephan broke into the home of Robert and Norma Bean. They stole Mrs. Bean's purse, money from Mr. Bean's wallet, guns, an ATM card, and prescription medication. The Beans were then awakened and forced at gunpoint into Stephan's van. Stephan and defendant drove the Beans to several ATM machines, unsuccessfully attempting to withdraw money using the Bean's ATM card. Stephan then drove to a gravel pit where everyone exited the van. According to the testimony at trial, defendant shot Norma Bean at close range, the Stephan shot Robert Bean. Stephan's van became stuck at the gravel pit and he and defendant parted ways. Both defendant and Stephan were charged in connection with the incident.

On appeal, defendant contends that his trial counsel was ineffective by not moving to suppress defendant's statements to Trooper Paul Metiva, Lieutenant Ronald Gates, and Detective

Bryan Muir. We review this unpreserved issue for mistakes apparent in the appellate record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

To prevail on his claim of ineffective assistance of counsel, defendant must meet the two-part test enunciated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). First, defendant must show that his counsel's performance "fell below an objective standard of reasonableness" under prevailing professional norms. *Strickland*, 466 US at 687-688. Second, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Under the *Strickland* test, defendant "bears the burden of establishing the factual predicate for his claim." *Carbin*, 463 Mich at 600.

First, defendant asserts that his statements to Metiva and Gates were inadmissible because neither Metiva nor Gates advised him of his *Miranda* rights; consequently counsel should have moved to suppress them. We disagree.

In *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966), the United States Supreme Court held that the prosecution may not use statements arising from the custodial interrogation of a defendant unless it shows the use of "procedural safeguards effective to secure the privilege against self-incrimination." "The term 'custodial interrogation' means 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). "To determine whether a defendant was in custody at the time of the interrogation, [this Court looks] at the totality of the circumstances, with the key question being whether the accused reasonably could have believed that he was not free to leave." *Id.*

Here, defendant was not in custody when Metiva and Gates questioned him. Before speaking to Metiva, defendant actively sought the assistance of the police by asking bystanders in cars to take him to a state police post, calling or speaking to a 911 operator on two different occasions, and waiting for the police to arrive after the police were contacted. When Metiva first encountered defendant, he ordered defendant to put his hands up but did not draw his firearm. Although Metiva patted down and handcuffed defendant before questioning him, Metiva told defendant that he was not under arrest; Metiva emphasized to defendant that he was being handcuffed for their safety. See *id.* at 450 (defendant not in custody where he was assured that he was not under arrest or in custody). Importantly, Metiva placed defendant in the front passenger seat of his patrol car for questioning, not in the back of the patrol car.

When Gates spoke to defendant, he took defendant to another patrol car, which had non-locking back doors, and removed his handcuffs. According to Gates, defendant was not a suspect at that time, and the purpose of asking defendant questions was to find out what had happened. Given these circumstances, defendant was neither under arrest nor subjected to the functional equivalent of an arrest. *People v Kulpinski*, 243 Mich App 8, 24-25; 620 NW2d 537 (2000). Defendant could not have reasonably believed that he was not free to leave during the questioning. *Zahn*, 234 Mich App at 449. Therefore, neither Metiva nor Gates was required to advise defendant of his *Miranda* rights because they did not subject defendant to custodial

interrogation. *Miranda*, 384 US at 444. Accordingly, defense counsel was not ineffective for failing to file a futile pretrial motion to suppress defendant's statements to Metiva and Gates on the basis of a *Miranda* violation. *People v Brown*, 279 Mich App 116, 142; 755 NW2d 664 (2008).

We also reject defendant's assertion that counsel should have moved to suppress his statements to Muir because Muir did not advise him of his *Miranda* rights before each of his three interrogations, taking place over a several hour period, by Muir. According to the testimony at trial, Muir advised defendant of his *Miranda* rights before the first interrogation. Defendant then signed a *Miranda* rights card and agreed to speak with Muir. "[T]he failure to reread a defendant's *Miranda* rights [before] each interrogation does not render his subsequent statements inadmissible as evidence against him." *People v Godboldo*, 158 Mich App 603, 607; 405 NW2d 114 (1986). Accordingly, counsel was not ineffective for failing to file a futile pretrial motion to suppress defendant's statements to Muir on the basis of Muir's failure to advise defendant of his *Miranda* rights before each interrogation. *Brown*, 279 Mich App at 142.

Defendant also asserts that counsel should have moved to suppress his statements because neither the waiver of his *Miranda* rights nor his statements to Metiva, Gates, and Muir were voluntary. "A waiver is voluntary if it is the product of a free and deliberate choice rather than intimidation, coercion, or deception." *People v Gipson*, 287 Mich App 261, 264-265; 787 NW2d 126 (2010). A confession is voluntary if it is "the product of an essentially free and unconstrained choice by its maker . . . ." *People v Wells*, 238 Mich App 383, 386; 605 NW2d 374 (1999). When determining whether a waiver of *Miranda* rights and a confession were voluntary, courts consider the following factors: (1) the defendant's age; (2) the defendant's education and intelligence; (3) the defendant's experience with police; (4) the length and nature of the questioning; (5) the length of the detention before the defendant gave the statement; (6) whether the defendant was given advice regarding his constitutional rights; (7) whether there was an unnecessary delay in arraignment; (8) whether the defendant was injured, intoxicated, drugged or in ill health; (9) whether the defendant was deprived of food, sleep, or medical attention; (10) whether the defendant was physically abused; and (11) whether the defendant was threatened with abuse. *People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005); *People v Haywood*, 209 Mich App 217, 226; 530 NW2d 497 (1995). No single factor is determinative. *Tierney*, 266 Mich App at 708.

We find that defendant's waiver of his *Miranda* rights was voluntary, knowing, and intelligent, and his statements to Metiva, Gates, and Muir were voluntary. There is no indication in the record that defendant's age affected his ability to understand his rights; defendant was educated for over 11 years at "Tri-County," where he appeared to be at least an average student. *Tierney*, 266 Mich App at 708. Defendant had previous experience with law enforcement as evidenced by Trooper Christopher Frayre's testimony and defendant's status as a convicted felon at the time of the interrogations. *Id.* Defendant was not detained for a long period of time before the officers interviewed him. *Id.* The record does not indicate that defendant was deprived of food, sleep, or medical attention. *Id.* Defendant was not physically abused or threatened. *Id.* Furthermore, the record illustrates that defendant's capacity for self determination was not critically impaired by drugs or alcohol. *Id.*; *Wells*, 238 Mich App at 386. Metiva testified that defendant was "very evasive" despite appearing to be under the influence of drugs or alcohol. Gates testified that he had a normal conversation with defendant. Muir testified that defendant

was able to sit and speak with him and did not appear to be under the influence of drugs or alcohol. Furthermore, nothing in the record supports defendant's assertion that he was "tricked" into confessing to the murder. Although Muir interviewed defendant for approximately nine hours, the majority of the factors support the conclusion that defendant's confession was voluntary. *Tierney*, 266 Mich App at 708. Accordingly, counsel was not ineffective for failing to file a futile pretrial motion to suppress defendant's statements to Metiva, Gates, and Muir on the basis that defendant's waiver and statements were involuntary. *Brown*, 279 Mich App at 142.

Next, defendant argues that the trial court erred when it failed to instruct the jury on duress concerning the non-homicide offenses. We review jury instructions that involve questions of law de novo and a trial court's determination of whether an instruction is applicable to the facts of a case for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

Duress is an affirmative defense applicable where the crime committed avoids a greater harm. *People v Lemons*, 454 Mich 234, 245-246; 562 NW2d 447 (1997). To be entitled to a jury instruction regarding the defense of duress, a defendant must establish a prima facie case of duress by introducing evidence from which the jury could conclude the following: (1) the threatening conduct was sufficient to create fear of death or serious bodily injury in the mind of a reasonable person; (2) the threatening conduct caused fear of death or serious bodily harm in the mind of the defendant; (3) the fear or duress operated upon the defendant's mind at the time of the alleged act; and (4) the defendant committed the act to avoid the threatened harm. *Id*. at 246-247. Here, defendant has failed to establish these essential elements.

First, defendant did not produce evidence that codefendant Timothy Stephan engaged in threatening conduct toward him that was sufficient to create fear of death or serious bodily injury in the mind of a reasonable person. *Id.* Defendant testified that he and Stephan were friends. Defendant testified that when he and Stephen entered the victims' home, he saw Stephan load the rifle and that Stephan told him "[q]uit being a bitch, you're in this shit now." However, Stephan did not point the rifle at defendant at that time, or when they walked the victims to the garage. Defendant testified that while they were in the van Stephan "wasn't really tellin' nobody what to do." Defendant also testified that the rifle was in between the van's seats from the time they entered the van until the time they exited the van at the murder scene. A reasonable person would not fear death or serious bodily injury in those circumstances. *Id.*

Second, although defendant testified that he was afraid that Stephan would shoot him, defendant did not produce evidence that Stephan's conduct caused him to fear death or serious bodily injury at the time of the non-homicide offenses. *Id.* Rather, defendant's testimony illustrates that he became afraid of Stephan after Stephan shot the victims, i.e., after the non-homicide offenses were committed. Specifically, defendant stated that after the Beans were shot he was afraid that Stephan "was gonna shoot me, too" and "I really didn't want to get shot, either."

Finally, defendant did not meet his burden of production regarding the final element of duress: the commission of an illegal act. Indeed, defendant testified that he neither committed the non-homicide offenses nor aided and abetted Stephan in the commission of the offenses.

Although defendant was permitted to advance inconsistent theories in his defense, i.e., the commission of a crime out of duress and the failure to commit any crime at all, defendant was still obligated to meet his burden of production regarding the elements of duress. *Id.* at 251 n 27; see also *People v McKinney*, 258 Mich App 157, 164; 670 NW2d 254 (2003). Defendant did not do so. *Lemons*, 454 Mich at 246-247. Accordingly, there is no error.

Defendant's final argument is that he is entitled to resentencing for the offenses of home invasion, conspiracy to commit home invasion, and possession of a firearm by a felon because his sentences for these convictions exceeded the sentencing guidelines and the trial court failed to articulate a substantial and compelling reason for its upward departure. We disagree.

Where a trial court sentences a defendant for multiple convictions to which concurrent sentencing applies, the probation department prepares a sentencing information report only for the felony conviction of the highest crime class. MCL 771.14(2)(e)(ii)-(iii); *People v Mack*, 265 Mich App 122, 128; 695 NW2d 342 (2005). The felony convictions with the highest crime class in this case were armed robbery and kidnapping, both class A felonies. MCL 777.16q; MCL 777.16y. Therefore, the trial court was not required to score the guidelines for defendant's convictions of home invasion, conspiracy, and possession of a firearm by a felon. *Mack*, 265 Mich App at 125-128; MCL 771.14(2)(e)(ii)-(iii). The trial court did not abuse its discretion by departing from the guidelines range for these convictions; the sentences for these convictions could exceed the minimum sentence range recommended by the guidelines without the trial court having to articulate substantial and compelling reasons for the departure.[1] *Mack*, 265 Mich App at 125-128.

Affirmed.

/s/ Jane E. Markey
/s/ Deborah A. Servitto
/s/ Amy Ronayne Krause

[1] We note that *Mack* was called into question by *People v Johnigan*, 265 Mich App 463, 470-472; 696 NW2d 724 (2005), and that two justices of our Supreme Court noted the inconsistency between *Mack* and *Johnigan* regarding whether a trial court is required to score all felonies or only the highest class felony. See *People v Getscher*, 478 Mich 887, 887-888; 731 NW2d 768 (2007); *People v Smith*, 475 Mich 891, 892; 716 NW2d 273 (2006). Nevertheless, we are required to follow *Mack* because *Mack* has not been reversed or modified by our Supreme Court or a special panel of this Court. MCR 7.215(J)(1). Furthermore, the *Johnigan* Court's criticism of *Mack* is dicta and, therefore, not precedential because it was unnecessary to the Court's decision. *People v James*, 272 Mich App 182, 194; 725 NW2d 71 (2006).