STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 1, 2012
v	No. 299269 Oakland Circuit Court
CARLOS ALBERTO SOLERNORONA, Defendant-Appellant.	LC No. 2009-228907-FC

Before: STEPHENS, P.J., and WHITBECK and BECKERING, JJ.

PER CURIAM.

Defendant Carlos Solernorona appeals as of right his jury convictions of conspiracy to commit armed robbery,[1] and conspiracy to commit unlawful imprisonment.[2] The trial court sentenced Solernorona to 210 months to 50 years' imprisonment for the conspiracy to commit armed robbery conviction. The trial court vacated the conspiracy to commit unlawful imprisonment conviction because it found that the convictions merged. We affirm Solernorona's convictions, but we remand for resentencing.

I. FACTS

In December 2008, police arrested James Whittington for home invasion. At the time of his arrest, Whittington had several similar charges pending against him throughout southern Michigan. While in jail, Whittington told the officer assigned to his case, Southfield Police Officer Corey Bauman, that he had information regarding a planned robbery. More specifically, Whittington told Officer Bauman that he and five other men, including Solernorona, Lester Jennings-Bush, Henry Bush, Huley Kennedy, and Julio Licorish, planned to rob the Darakjian Jewelry store in Southfield.

While still in custody, Whittington called Jennings-Bush and asked him if the men still planned to rob the store. Jennings-Bush confirmed that the plan was still in effect, and he told Whittington about a meeting during which the men would further discuss the plan. Whittington

[1] MCL 750.529 and MCL 750.157a.

[2] MCL 750.349b(1)(c) and MCL 750.157a.

agreed to attend the meeting while wearing a remote listening device so that police could hear the discussion. The men planned to meet at Jennings-Bush's house and then go to a restaurant where they would hold the meeting. When it came time to meet, the police followed Whittington to Jennings-Bush's house. However, the restaurant was overcrowded, so the men decided to go to Solernorona's house instead. The police surrounded the house with 40 to 50 officers and waited for the men to begin their meeting.

While monitoring the remote listening device, Officer Bauman heard the men discuss the robbery. The men stated that they planned to take the owner of the jewelry store and his family hostage in their home and that half the men would then escort the jeweler to his store. They would use the jeweler's family as leverage to convince him to open the vault. They agreed that they would torture the jeweler and his family if necessary. The men also stated that they would use weapons in the robbery, including an AK-47 assault rifle and handguns. Officer Bauman heard Solernorona state that he had already obtained the guns and heard Kennedy state that he would rather engage in a shootout with police than go back to jail. After hearing the men make these statements, Officer Bauman decided to enter Solernorona's house and arrest them.

Police later obtained a search warrant to search Solernorona's house. They recovered two handguns, a laptop computer, torn-up note cards, and a Darakjian jeweler's business card. The computer contained data showing that it had recently been used to search for the Darakjian jewelry store and to obtain directions to the store. The note cards contained a checklist, written in Spanish, of things the men would need to do and things that they should avoid during the robbery.

Police also obtained a search warrant to search Jennings-Bush's house. They recovered an assault rifle, a shotgun, and ammunition from his bedroom. Additionally, they found marijuana, packaging material, and scales. They found a white substance that they initially believed to be cocaine, but later testing refuted that initial belief. A computer that the police recovered from Jennings-Bush's house also contained evidence related to the Darakjian jewelry store.

The prosecution charged the men, excluding Whittington, with conspiracy to commit armed robbery and conspiracy to commit unlawful imprisonment. Shortly before trial, all of the men, besides Solernorona and Licorish, agreed to plead guilty to conspiracy to commit armed robbery. Licorish pleaded guilty to conspiracy to commit a misdemeanor. In return, the prosecution dropped the unlawful imprisonment charges against the men and promised to request that the men be sentenced to the minimum term recommended under the sentencing guidelines.

Solernorona contested the charges at trial, and the jury convicted him of both charges. Solernorona now brings this appeal.

II. EVIDENTIARY ISSUES

A. EVIDENCE FOUND IN SOLERNORONA'S HOUSE

1. STANDARD OF REVIEW

Solernorona argues that the trial court improperly admitted evidence found in his house because it should have been excluded[3] as the fruit of an illegal entry in violation of his Fourth Amendment rights.[4] This Court reviews for clear error a trial court's factual findings at a suppression hearing.[5] "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made."[6] This Court reviews de novo the application of constitutional standards to the facts and the court's ultimate ruling at a suppression hearing.[7] In addition, application of the exclusionary rule to a Fourth Amendment violation is a question of law that this Court reviews de novo.[8]

2. LEGAL STANDARDS

The Fourth Amendment generally requires the police to obtain a warrant before entering a dwelling to conduct a search or arrest a suspect.[9] However, exigent circumstances may, in some cases, render a search or seizure reasonable although the police failed to obtain a warrant.[10] To excuse the warrant requirement, the police must first have probable cause to believe "that a crime was recently committed on the premises, and probable cause to believe that the premises

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[3] *People v Cartwright*, 454 Mich 550, 558; 563 NW2d 208 (1997), citing *Weeks v United States*, 232 US 383; 34 S Ct 341; 58 L Ed 652 (1914) (stating that "[t]he remedy for a violation is suppression of the unlawfully obtained evidence").

[4] US Const, Am IV. The Fourteenth Amendment Due Process Clause incorporates the Fourth Amendment protections to state proceedings. *Mapp v Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961); *People v Faucett*, 442 Mich 153, 158; 499 NW2d 764 (1993). Const 1963, art 1, § 11, also provides protection against unreasonable governmental searches and seizures. *Faucett*, 442 Mich at 158. But because the Michigan Constitution does not provide more protection than the United States Constitution in the area, federal law controls the constitutional inquiry. *Id.*

[5] *People v Slaughter*, 489 Mich 302, 310; 803 NW2d 171 (2011).

[6] *People v Johnson*, 466 Mich 491, 497-498; 647 NW2d 480 (2002).

[7] *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005).

[8] *People v Custer*, 465 Mich 319, 326; 630 NW2d 870 (2001).

[9] *People v Gillam*, 479 Mich 253, 260-261; 734 NW2d 585 (2007), citing *Payton v New York*, 445 US 573; 100 S Ct 1371; 63 L Ed 2d 639 (1980).

[10] *Id.*

contain evidence or perpetrators of the suspected crime."[11] The police must, additionally, have probable cause to believe that the entry is necessary due to "hot pursuit of a fleeing felon, to prevent the imminent destruction of evidence, to preclude a suspect's escape, [or to prevent] a risk of danger to police or others inside or outside a dwelling."[12] To establish one of these exceptions, the prosecution "must show the existence of an actual emergency and articulate specific and objective facts which reveal a necessity for immediate action."[13]

The validity of a warrantless search ultimately turns on the reasonableness of the search, as perceived by the police.[14] In determining reasonableness, a court must consider the government interest in effectuating a warrantless search and weigh that interest against the level of intrusion into the defendant's Fourth Amendment protected rights.[15] "The invasion of the home, in particular, by unreasonable searches constitutes 'the chief evil' which our constitution sought to prevent."[16] The prosecution bears the burden of establishing that police acted reasonably in conducting the warrantless search and that an exception to the warrant requirement therefore applies.[17]

3. APPLYING THE LEGAL STANDARDS

We hold that the exigent circumstances justified Officer Bauman's decision to enter Solernorona's house without a warrant. Officer Bauman heard the defendants state that they planned to use an AK-47 assault rifle and handguns in the robbery and that Solernorona had already obtained the weapons. It was therefore reasonable to believe that the men in the house were armed and dangerous. Additionally, Officer Bauman heard Kennedy state that he would rather engage in a shootout with police than return to prison, which further increased Officer Bauman's legitimate fears that a violent incident would occur if police confronted the men outside. The search in this case occurred at night in a residential neighborhood. Although the police surrounded the house, bullets fired in the neighborhood might have hit nearby houses and presented a threat to the public. Moreover, besides Whittington, five defendants were in the house, and this high number of potentially hostile men increased the danger to police and the public. And, during the chaos of a firefight, under the cover of night, police could reasonably believe that one or more of the suspects might escape. The grave nature of the planned robbery,

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[11] *In re Forfeiture of $176,598*, 443 Mich 261, 271; 505 NW2d 201 (1993); see also *People v Blasius*, 435 Mich 573, 593; 459 NW2d 906 (1990).

[12] *Cartwright*, 454 Mich at 558, citing *Minnesota v Olson*, 495 US 91; 110 S Ct 1684; 109 L Ed 2d 85 (1990).

[13] *Blasius*, 435 Mich at 594.

[14] *Id.* at 595.

[15] *Cartwright*, 454 Mich at 561.

[16] *Blasius*, 435 Mich at 593.

[17] *Id*.

which included hostages, an assault rifle, and handguns, weighed heavily toward police intervention.

Additionally, the police did not expect to go to Solernorona's house on the night of the arrest, and did not, therefore, have a previous opportunity to obtain a warrant. And, upon entry, the police limited their intrusion as much as practical; the police merely secured the men and performed a protective sweep to ensure that no other suspects remained in the house.[18] The police refrained from searching the house for evidence until they obtained a warrant. The search was therefore reasonable because it presented a minimal intrusion into Solernorona's privacy, and furthered the government's important interest in protecting the police and the public.

However, the other exigent circumstances exceptions to the warrant requirement did not justify the police in entering the house.[19] To justify entry under the destruction of evidence exception, the police must point to "objective and compelling justification [such as] an actual observation of removal or destruction of evidence or such an attempt. Absent such compelling facts, the police must present facts indicating more than a mere possibility that there is a risk of the immediate destruction or removal of evidence."[20] Here, the prosecution has failed to explain exactly what evidence may have been lost and instead attempts to rely on vague assertions. Additionally, the claim that the suspects might have escaped from the house, in the absence of other circumstances, does not rise to an objective and compelling justification. As noted, 40 to 50 officers surrounded the house, and if the police had lacked a reasonable belief that the men were armed and that they planned to engage in a shootout if confronted, the entry would have been unreasonable.

In sum, we conclude that the trial court did not err in finding that entry into Solernorona's house was supported by probable cause and exigent circumstances.

B. EVIDENCE FOUND IN JENNINGS-BUSH'S HOUSE

1. STANDARD OF REVIEW

Solernorona argues that the trial court erred in admitting the evidence found in Jennings-Bush's house. "To preserve an evidentiary issue for appellate review, a party must object timely at trial and specify the same ground for objection as is asserted on appeal."[21] Solernorona did not object to the admission of this evidence at trial and, therefore, failed to preserve this issue.

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[18] See *Cartwright*, 454 Mich at 558.

[19] See *Blasius*, 435 Mich at 594.

[20] *Id*.

[21] *People v Toma*, 462 Mich 281, 323; 613 NW2d 694 (2000).

(Solernorona fails to cite any authority to support his proposition that a pretrial severance motion may preserve an evidentiary issue for appeal.[22])

This Court reviews unpreserved claims for plain error affecting a defendant's substantial rights.[23] Under the plain error rule, the defendant must show that (1) error occurred; (2) the error was plain, that is, clear or obvious; and (3) the plain error affected the defendant's substantial rights.[24] To establish the third element, the defendant must generally show outcome determinative prejudice.[25] Even if the defendant establishes these requirements, this Court "should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings."[26]

2. LEGAL STANDARDS

In general, all relevant evidence is admissible unless the Constitution or an evidentiary rule provides otherwise, and all irrelevant evidence is inadmissible.[27] Evidence is relevant if it has any "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[28]

Despite the general rule, a trial court may exclude relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[29] The trial court should exclude evidence "when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury."[30] Unfair prejudice means more than just damage to a defendant's case.[31] To be unfairly prejudicial, evidence must threaten the accuracy and fairness of the trial, in that the evidence would lead the jury to conclude that the evidence "is more probative of a fact than it actually is" or to decide the case on an improper basis, such as emotion.[32]

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[22] See *People v Hill*, 221 Mich App 391, 397 n 2; 561 NW2d 862 (1997) (a defendant abandons an argument by failing to cite authority in support of his position).

[23] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[24] *Id*.

[25] *Id*.

[26] *People v Breidenbach*, 489 Mich 1, 24; 798 NW2d 738 (2011).

[27] MRE 402.

[28] MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998).

[29] MRE 403.

[30] *Crawford*, 458 Mich at 398.

[31] *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995).

[32] *Id*.

3. APPLYING THE LEGAL STANDARDS

The prosecution charged Solernorona with conspiracy to commit armed robbery. "The elements of armed robbery are: (1) an assault; (2) a felonious taking of property from the victim's presence or person; (3) while the defendant is armed with a weapon."[33] To prove conspiracy to commit armed robbery, the prosecution must prove that two or more people agreed to commit an armed robbery, with the specific intent to accomplish the robbery.[34] "[A]lthough the government need not prove commission of the substantive offense or even that the conspirators knew all the details of the conspiracy, it must prove that the intended future conduct they . . . agreed upon includes all the elements of the substantive crime."[35]

The complained of evidence in this case was relevant to the charges against Solernorona because the prosecution proved a connection between Solernorona and the house, and the evidence found there corroborated the witnesses' testimony. Solernorona had strong connections to Jennings-Bush and his house, as testimony showed that the two men were friends and that they were planning a robbery together. Additionally, Solernorona drove to Jennings-Bush's house on the day of the arrests, showing that he knew both the location of the house and that he had a relationship with Jennings-Bush. Thus, the prosecution proved a strong connection between Solernorona, Jennings-Bush, and his house.

The testimony also showed that the planned conspiracy included use of an assault rifle during the robbery. The fact that police recovered an assault rifle from Jennings-Bush's house therefore strongly corroborated a specific fact regarding the conspiracy. Although Jennings-Bush testified that he did not own the rifle and that the men did not plan to use the rifle in the robbery, this does not undermine the probative value of this evidence. The jury could properly reject Jennings-Bush's self-serving testimony regarding the rifle and conclude that the rifle discovered was, in fact, the rifle the men planned to use in the robbery. The presence of the rifle in Jennings-Bush's house not only showed the men agreed to commit the robbery, but confirmed the defendants' plan to heavily arm themselves to carry it out.

In addition, the risk of unfair prejudice that this evidence presented did not substantially outweigh its probative value. As discussed, Solernorona was charged with conspiracy to commit armed robbery, which requires the prosecution prove that the defendants intended to use a weapon in the course of the robbery. Thus, the recovery of the weapon the men planned to use was extremely probative in proving an element of the crime. Additionally, finding the type of weapon the men discussed during the meeting in the basement showed the men had a genuine agreement to carry out the armed robbery. This evidence was, therefore, highly probative rather than marginally probative.

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[33] *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007).

[34] MCL 750.157a; *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001).

[35] *Mass*, 464 Mich at 629 n 19 (internal citations and quotations omitted).

Further, the jury was already on notice that Solernorona owned guns in light of the guns found in Solernorona's house, and additional evidence regarding firearms would not likely entice the jury to convict Solernorona based on emotion or on other improper bases. Although evidence of the rifle was extremely damaging to Solernorona's theory of the case, it did not present a risk of unfair prejudice that outweighed its probative value.

To the extent that evidence of the computer linked Jennings-Bush to the crime, it tended to prove that the conspiracy existed because the police proved a strong connection between Solernorona and Jennings-Bush. The computer evidence showed that the two men were investigating the store, which tends to show they were working together to commit the crime. Additionally, we cannot conceive of any prejudicial effect that evidence of the computer may have had on Solernorona, and Solernorona has failed to explain this point. The trial court properly admitted the evidence of the computer.

The shotgun and ammunition, on the other hand, present a closer question. The prosecution did not present evidence that the defendants planned to use a shotgun in the robbery. To the contrary, the men stated that they intended to use a rifle and handguns. The shotgun was not, therefore, strictly relevant to the crime charged. However, police recovered the shotgun from under Jennings-Bush's bed, in close proximity to the rifle, indicating that it may have had some connection to the robbery plot. In any event, in light of the other weapons evidence presented, evidence of the shotgun would not significantly add to Solernorona's culpability such that the trial court should have necessarily excluded it. Although the probative nature of the shotgun was marginal, its prejudicial effect was also exceedingly low.

Finally, Solernorona has waived his claim that the trial court improperly admitted the drug evidence. On cross-examination, defense counsel asked the police officer who executed the search warrant in Jennings-Bush's house about the drugs and drug paraphernalia found in Jennings-Bush's house, and has, therefore, waived any claim that admitting the evidence was erroneous. Although the evidence may have been irrelevant to the charges against Solernorona, Solernorona intentionally abandoned his right to challenge this evidence by purposely introducing the evidence to support his theory of the case.[36]

In sum, the trial court did not err in admitting evidence the police recovered from Jennings-Bush's house because the evidence was relevant to the conspiracy charge, and its probative value was not substantially outweighed by the risk of prejudice to Solernorona.

III. EFFECTIVENESS OF COUNSEL

Solernorona argues that his trial counsel was ineffective to the extent that he failed to object to the evidence recovered from Jennings-Bush's house. We disagree. The trial court correctly admitted evidence of the items found in Jennings-Bush's house against Solernorona.

[36] See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Because failure to advance a "futile objection does not constitute ineffective assistance of counsel," Solernorona's ineffective assistance of counsel claim must fail.[37]

IV. SENTENCING GUIDELINES SCORING

A. STANDARD OF REVIEW

Solernorona argues that the trial court erred in scoring 10 points for Offense Variable (OV) 13 because the offense did not consist of three crimes that met the guideline scoring requirement. The sentencing court has discretion in determining the number of points to be scored provided that there is evidence on the record that adequately supports a particular score;[38] thus, this Court reviews the trial court's scoring to determine whether it properly exercised its discretion and whether the evidence adequately supported a particular score.[39] The interpretation and application of the statutory sentencing guidelines are legal questions subject to this Court's de novo review.[40]

B. ANALYSIS

OV 13 considers the "continuing pattern of criminal behavior."[41] A trial court may score 10 points under OV 13 when "[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more violations of section 7401(2)(a)(i) to (iii) or section 7403(2)(a)(i) to (iii) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403[.]"[42]

The jury in this case convicted Solernorona of conspiracy to commit armed robbery and conspiracy to commit unlawful imprisonment. As he points out in his supplemental brief on appeal, Solernorona also had three additional federal convictions for conspiracy to distribute and possess with intent to distribute cocaine,[43] possession with intent to distribute cocaine,[44] and unlawful use of a communication facility.[45] At first glance, it would appear that this case involved a pattern of felonious criminal activity involving a combination of 5 violations. However, under MCL 777.463(2)(e), only one of the two federal drug offenses that arose out of the criminal episode could be counted. Further, in interpreting OV 13, the Michigan Supreme

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[37] *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

[38] *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009).

[39] *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009).

[40] *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

[41] MCL 777.43(1).

[42] MCL 777.43(1)(d).

[43] 21 USC 846 and 21 USC 841(a)(1).

[44] 21 USC 841(a)(1).

[45] 21 USC 843(b).

Court has recently held that "for purposes of scoring OV 13, a 'crime against public safety,' may not be transformed into a 'crime against a person,' in order to establish a continuing pattern of criminal behavior under OV 13."[46] Conspiracy is a crime against public safety.[47] Therefore, none of the conspiracy charges could be counted when scoring OV 13, and thus the statutory scoring requirement of 3 or more crimes was not met.

Without the 10-point score for OV 13, Solernorona's total OV score should have been 30, placing him at OV level II, rather than OV level III.[48] And, having a prior record variable level of C, that meant that the minimum sentence range for his class-A crime level should have been 51 to 85 months, rather than 81 to 135 months.

When a defendant's sentence is based on an error in scoring, a remand for resentencing is required.[49] Therefore, because Solernorona's minimum sentence range was erroneous, he is entitled to resentencing.

V. SENTENCING DEPARTURE

A. STANDARD OF REVIEW

Solernorona argues that the trial court erred in departing from the sentencing guidelines. This Court reviews a trial court's reasons for departing from the guidelines for clear error, but reviews whether the reasons are objective and verifiable as a matter of law.[50] "Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure."[51] This Court reviews questions of law de novo.[52] "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made."[53] The trial court abuses its discretion when it chooses an outcome outside the range of reasonable and principled outcomes.[54]

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[46] *People v Pearson*, 490 Mich 984, 984; 807 NW2d 45 (2012).

[47] *Id.*, citing MCL 777.18.

[48] MCL 777.62.

[49] *People v Jackson*, 487 Mich 783, 792; 790 NW2d 340 (2010).

[50] *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

[51] *Id*.

[52] *People v Grant*, 470 Mich 477, 484-485; 684 NW2d 686 (2004).

[53] *Johnson*, 466 Mich at 497-498.

[54] *Smith*, 482 Mich at 300.

B. LEGAL STANDARDS

The trial court may only depart from the sentencing guidelines if it has a "substantial and compelling reason" to justify the departure.[55] In explaining its departure, the trial court must point to "objective and verifiable" factors.[56] And those factors must "'keenly' and 'irresistibly' grab our attention," and be "'of considerable worth' in deciding the length of the sentence."[57] "[T]he Legislature intended 'substantial and compelling reasons' to exist only in exceptional cases."[58] Finally, the trial court must state the reasons for its departure on the record.[59]

Further, when a trial court deviates from the sentencing guidelines, it must do so in a way that renders the sentence "'proportionate to the seriousness of the circumstances surrounding the offense and the offender.'"[60] In general, "persons whose conduct is more harmful and who have more serious prior criminal records [should] receive greater punishment than those whose criminal behavior and prior record are less threatening to society."[61] In essence, "the more egregious the offense, and the more recidivist the criminal, the greater the punishment."[62]

If the trial court articulates several reasons for a particular departure, and some factors meet the requirements while others do not, this Court must determine whether the trial court would have departed to the same degree on the basis of the legitimate factors.[63] When this Court cannot determine if the trial court would have departed to the same degree absent the erroneous factors, it must remand to the trial court for resentencing or rearticulation of the factors it considered and the sentence it imposed.[64]

C. APPLYING THE LEGAL STANDARDS

The trial court stated that it believed the fact that Solernorona targeted the victims through "extraordinary" predatory conduct justified an upward departure. Solernorona correctly notes that OV 10 considers a defendant's predatory conduct.[65] However, the trial court was

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[55] MCL 769.34(3); *People v Babcock*, 469 Mich 247, 255; 666 NW2d 231 (2003).

[56] *Id*. at 257.

[57] *Id*.

[58] *Id*.

[59] MCL 769.34(3); *Babcock*, 469 Mich at 258.

[60] *Babcock*, 469 Mich at 255, quoting *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

[61] *Id*.

[62] *Id*. at 263.

[63] *Id.* at 260.

[64] *Id*.

[65] MCL 777.40(1)(a).

considering the extent of the predatory conduct in justifying its decision. Although Solernorona did not actually place anyone in physical danger, Solernorona targeted the jeweler's family, including children. Solernorona planned to take the family hostage, and hurt or torture them to secure the valuables. The men had visited the store several times to determine the best way to attack the manager and effect the robbery. As, the trial court stated, "[t]his is something that you [see] in movies . . . and see in the worst circumstances." We hold that this extraordinary conduct "keenly and irresistibly" grabs one's attention, is "objective and verifiable," and is certainly "substantial and compelling." The trial court, therefore, properly considered the fact that the conspiracy used extraordinary predatory conduct to further its objective.

The trial court also articulated an adequate basis in stating that the "heavily armed nature of the conspiracy" justified an upward departure. Although, as Solernorona notes, a person must be armed to commit an armed robbery, the trial court's reasoning relied on the extent of the firepower the men planned to use. Because an armed robbery does not necessarily require an assault rifle and six armed men, the trial court found that the guidelines range inadequately accounted for this fact.[66] The trial court did not abuse its discretion in determining that this factor was substantial and compelling enough to warrant the upward departure, as a large group of armed men presents potentially greater risk of harm than a single armed person, and the guidelines do not account for this.

Finally, the trial court properly considered the value of property that Solernorona and the coconspirators intended to steal. As the trial court stated, the value of the property was "extraordinarily high," as each conspirator was expected to receive hundreds of thousands of dollars. The trial court correctly noted that the guidelines did not adequately account for extent of the value of the property. And we note that Solernorona's reliance on *People v Solmonson*[67] is misplaced. In that drunken driving case, this Court held that the trial court erred in relying on the defendant's potential harm to himself or the public in justifying an upward departure because that consideration was not objective and verifiable, but was mere speculation. But here, the trial court pointed to the value of the property that Solernorona actually planned to steal. This consideration is both objective and verifiable because it can be readily confirmed based on concrete fact, and does not amount to speculation. The trial court properly considered this factor.

Solernorona also argues that the trial court's departure was disproportionate in relation to the factors that the trial court relied on to justify the departure. Solernorona merely argues that the sentence was disproportionate because he had no prior criminal history. However, the trial court properly considered the nature of the offense, as well as Solernorona's history, in determining the extent of its departure. As discussed above, the extraordinary circumstances in this case justified an upward departure. The trial court properly adjusted the variables to reflect the facts that it believed the guidelines failed to consider.[68]

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[66] *Smith*, 482 Mich at 291.

[67] *People v Solmonson*, 261 Mich App 657, 667; 683 NW2d 761 (2004).

[68] See *Smith*, 482 Mich at 307.

In sum, we conclude that the trial court stated on the record rational reasons in support of departing from the sentencing guidelines. However, because Solernorona's correct minimum sentence range should have been 51 to 85 months, rather than 81 to 135 months, he was sentenced on the basis of inaccurate information, and we cannot determine if the trial court would have departed to the same degree absent the erroneous scoring. Therefore, we must remand for the trial court to reconsider the extent of its departure.[69]

VI. SOLERNORONA'S STANDARD 4 BRIEF

Solernorona raises several additional issues in a pro se supplemental brief that he filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, but none of which have merit.

A. WAIVER OF COUNSEL

1. STANDARD OF REVIEW

Solernorona argues that the trial court erred in allowing him to waive his trial counsel and cross-examine one of the witnesses against him. Solernorona failed to raise this issue at the trial court level and has, therefore, failed to preserve this issue.[70] This Court reviews unpreserved issues regarding waiver of trial counsel for plain error affecting defendant's substantial rights.[71]

2. LEGAL STANDARDS

The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right to "the assistance of counsel for his defense."[72] The defendant has a right to counsel at all "critical" stages of the proceedings.[73] A defendant, however, also has the right to waive the assistance of counsel at trial and invoke his right to self-representation.[74] But a defendant's waiver must be knowing, intelligent, and voluntary.[75] Thus, the trial court must find that: (1) the defendant's waiver was unequivocal; (2) the defendant was knowingly asserting his right to self-

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[69] *Jackson*, 478 Mich at 793-794; *Babcock*, 469 Mich at 260.

[70] *People v Metamora Water Serv*, 276 Mich App 376, 382; 741 NW2d 61 (2007) ("For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court.").

[71] *Carines*, 460 Mich at 763.

[72] US Const, Am VI; *Gideon v Wainwright*, 372 US 335, 343; 83 S Ct 792; 9 L Ed 2d 799 (1963).

[73] *People v Frazier*, 478 Mich 231, 244 n 11; 733 NW2d 713 (2007).

[74] *Iowa v Tovar*, 541 US 77, 87; 124 S Ct 1379; 158 L Ed 2d 209 (2004).

[75] *Id*. at 88.

representation; and (3) "the defendant's acting as his own counsel will not disrupt, unduly inconvenience and burden the court and the administration of the court's business."[76]

MCR 6.005(D) sets out additional requirements:

> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first:
>
> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

3. APPLYING THE LEGAL STANDARDS

Here, the trial court examined Solernorona under oath, eliciting the following exchange:

> *The Court*: And you could—how far have you gotten in school?
>
> *The Witness*: I got a Bachelor in sociology.
>
> *The Court*: Okay. And you've also been able to hear and understand your lawyer in connection with this trial, either directly or through your attorney?
>
> *The Witness*: Yes, I do.
>
> *The Court*: Do you understand that you are charged with conspiracy to commit robbery armed, which is a felony for which you could receive up to life in prison and/or a ten thousand dollar fine, as well as conspiracy to commit unlawful imprisonment, which is a felony for which you could receive up to fifteen years of incarceration and/or a thirty thousand dollar fine?
>
> *The Witness*: Yes.
>
> *The Court*: Do you understand there is no minimum sentence?
>
> *The Witness*: I understand.
>
> *The Court*: Do you understand that you have the right to have your own lawyer represent you from the beginning of the proceedings to the end, including whether to accept representation of an attorney at trial, sentence and an

[76] *People v Anderson*, 398 Mich 361, 367; 247 NW2d 857 (1976).

Application for Appeal and that the Court will appoint an attorney if you cannot afford an attorney of your own choice?

The Witness: Yes, I do.

The Court: You understand that even if you are only representing yourself for the purposes of the two witnesses that you've described, that there is serious disadvantages to self[-]representation, do you understand that?

The Witness: I understand.

The Court: You understand that if you proceed that the Prosecutor in this case who will be opposing you has attended law school, passed the Bar and has the trial experience?

The Witness: Yes.

* * *

The Court: In fact, Mr. Pernick, how many cases have you tried?

Mr. Pernick: Well I've been a prosecutor for eighteen years and probably an average of six or eight trials a year while I was assigned to the litigation division, so in excess of a hundred I would say.

The Court: All right. You heard all that right?

The Witness: Yes, I did.

The Court: And you understand that he is going—that if you choose to represent yourself during those two witnesses, that your attorney is not going to be able to raise objections, your attorney is not going to be able to answer—he is not going to act as your attorney at that time, he—he can consult with you, but in the end you're going to be responsible for your own representation, you understand that?

The Witness: Okay. Yes, I do.

The Court: And you understand that I'm going to be in control of the proceedings and that if I find that you cross the line, either legally or otherwise in connection with asking questions, I have the right to stop you or redirect how you're proceeding?

The Witness: I understand that, Sir.

The Court: Okay. And you understand that if that happens I'm not going to then all Mr.—allow Mr. Cripps, your—your lawyer, to then jump up and continue that repr—that witness examination, you understand that?

The Witness: I understand that, Sir.

The Court: Okay. And you understand that the—the Prosecutor is well versed in the criminal law, criminal procedure, the rules of evidence and the technicalities of trying a case, do you understand that?

The Witness: Yes.

* * *

The Court: Okay. And you understand that I'm bound by the parameters of the criminal law, criminal procedure, the rules of evidence and I'm not going to rule in your favor out of sympathy or due to the fact that you're representing yourself at that time?

The Witness: I understand.

The Court: And you understand that you're not entitled to unfettered access to legal resources or research and it's not the job of anyone here to do your work for you?

The Witness: I understand that.

The Court: You understand that the failure to understand the law could result in your failing to make critical arguments, ask critical questions and otherwise place your defense at a serious disadvantage or prejudice your defense or give the Prosecutor a serious advantage?

The Witness: I understand that.

* * *

The Court: Can you tell me what MRE 401 is?

The Witness: 401?

The Court: Yes.

The Witness: Oh yes, it is a—search and seizure, the 401?

The Court: Can you tell me what Michigan Rule of Evidence 401 is?

The Witness: Michigan Rule of Evidence is about the—(undecipherable)—the procedure when you want to do some kind of search and seizing a house.

The Court: Okay. That's not correct. It's about the only relevant—the relevant on this could be admitted. Okay. You understand this is a serious criminal proceeding in which your liberty is at stake, it's not a movie or anything like that, you understand that?

The Witness: I understand.

The Court: And you—have you ever heard the old adage that a lawyer who represents himself has a fool for a client?

The Witness: I heard that a long time ago.

The Court: All right. You still would like to proceed the way that you've asked?

The Witness: Yes, Sir.

The Court: Okay. I find the waiver is knowingly, voluntarily, understandingly and accurately done.

On the basis of this exchange between the trial court and Solernorona, we hold that he knowingly, intelligently, and voluntarily waived his right to counsel when he requested to cross-examine Licorish. The trial court asked Solernorona several times whether he wished to waive his right to counsel and, each time Solernorona unequivocally stated that he did. Solernorona also unequivocally stated that he understood the consequences of his actions and that it would put him at a severe disadvantage at trial. In fact, the trial court went so far as to quiz Solernorona on the rules of evidence in an attempt to make Solernorona realize he should not undertake the cross-examination himself. The trial court also explained that it would control the proceedings and that if Solernorona's questions disrupted the trial, the court would end the cross-examination. Thus, Solernorona knowingly waived his right to counsel at this stage of trial.

Additionally, the trial court complied with the requirements of MCR 6.005(D). The trial court told Solernorona that the maximum sentence for the conspiracy to commit armed robbery was life in prison and/or a $10,000 fine and that the maximum sentence for the conspiracy to commit unlawful imprisonment was fifteen years of incarceration and/or a $30,000 fine. The trial court notified Solernorona that the charges carried no minimum sentence. The trial court explained the risks involved in self-representation at length and notified Solernorona that he had the right to consult with a retained lawyer regarding his decision. Solernorona apparently believes that the trial court should have further instructed him regarding the sentencing guidelines. However, Solernorona has abandoned this argument by failing to cite authority to support it.[77]

In sum, we conclude that the trial court did not err in allowing Solernorona to waive his trial counsel and cross-examine one of the witnesses against him.

[77] *Hill*, 221 Mich App at 397 n 2.

B. CHALLENGES TO THE PROSECUTION'S WITNESSES

1. STANDARD OF REVIEW

This Court reviews for an abuse of discretion a trial court's decision whether to allow a party to amend its witness list.[78] This Court also reviews for an abuse of discretion a trial court's decision to admit evidence.[79] Further, this Court reviews for an abuse of discretion a trial court's determination regarding the qualification of an expert and the admissibility of expert testimony.[80] The trial court does not abuse its discretion so long as it chooses a reasonable and principled outcome.[81]

2. AMENDMENT OF WITNESS LIST

Solernorona argues that the trial court abused its discretion in allowing the prosecutor to amend the witness list the day before trial. However, MCL 767.40a(4) provides that "[t]he prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." This statute "clearly vests the trial courts of this state with the discretion to permit the prosecution to amend its witness list at any time."[82] Thus, we hold that the trial court did not abuse its discretion in holding that codefendants could testify against Solernorona. Up until the day before trial, codefendants maintained their innocence. At the last minute, the other defendants decided to plead guilty and testify against Solernorona. Because the prosecution had good cause for the delay, the trial court did not violate MCL 767.40a(4) in permitting the addition.

3. QUALIFICATION OF EXPERTS

Solernorona objects to the trial court's qualification of two witnesses as experts. "[B]efore permitting expert testimony, the court must find that the evidence is from a recognized discipline, as well as relevant and helpful to the trier of fact, and presented by a witness qualified by 'knowledge, skill, experience, training, or education . . . .'"[83] After the trial court properly qualifies an expert, the jury is free to make credibility determinations in the same manner as for lay witnesses.[84]

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[78] *People v Callon*, 256 Mich App 312, 325-326; 662 NW2d 501 (2003).

[79] *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999).

[80] *Id*.

[81] *Babcock*, 469 Mich at 269.

[82] *Callon*, 256 Mich App at 327.

[83] *People v Yost*, 468 Mich 122, 128 n 9; 659 NW2d 604 (2003), quoting MRE 702 (internal citations omitted).

[84] *Id.* at 128.

We hold that the trial court properly held that witnesses Maria Gialdi and Southfield Police Detective James Dziedzic qualified as experts in their respective fields.

Gialdi testified that she was certified in Spanish translation by the Michigan Supreme Court and that she had testified as an expert in court many times before. Additionally, she attended the University of Arizona, where she completed classes in Spanish. The trial court properly held that her training and experience qualified her as an expert in Spanish to English translation. Solernorona argues that because Gialdi stated that she was not familiar with Cuban dialect and because her statements contradicted each other, the trial court should not have allowed her to testify. However, Gialdi stated that she was familiar with Cuban slang and explained the possible meanings of the slang terms on the note cards to the jury. The trial court then properly allowed the jury to evaluate her testimony and determine its credibility in light of any inconsistencies it may have contained.

Additionally, the trial court properly qualified Officer Dziedzic to testify as an expert in fingerprint analysis. Officer Dziedzic testified that, while he worked as a detective, he collected fingerprints from more than 25 crime scenes. He stated he completed specific training to collect fingerprints. He completed a fingerprint collection course and was certified by an independent company in fingerprint collection. He therefore had the training and skill necessary to aid the jury in understanding the evidence presented.

4. WITNESSES' CRIMINAL HISTORY

Solernorona's accusation that the prosecution did not timely provide codefendants' criminal histories is baseless. The prosecutor told defense counsel that he could not give defense counsel the prosecutor's confidential LEIN reports, but that he would provide the codefendants' criminal histories in an alternative way. Defense counsel stated that this would be satisfactory and indicated that it would provide him adequate time to prepare for cross-examination. Solernorona has, therefore, waived this argument.[85] In any event, defense counsel had the criminal histories during cross-examination, and impeached the witnesses at length regarding their prior convictions. Thus, this argument is meritless.

C. EFFECTIVENESS OF COUNSEL

1. STANDARD OF REVIEW

To preserve an ineffective assistance of counsel issue, a defendant must move for a new trial or request a *Ginther*[86] hearing in the court below.[87] Solernorona did not move for a new

[85] *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011) ("When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver.").

[86] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[87] *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

trial or request a *Ginther* hearing; therefore, he failed to preserve this issue. Because it is unpreserved, we will only consider Solernorona's claim to the extent that defense counsel's claimed mistakes are apparent on the record.[88]

2. LEGAL STANDARDS

"To establish ineffective assistance of counsel, defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different."[89] In establishing deficient performance, the defendant must overcome the strong presumption that defense counsel's decisions constituted sound trial strategy.[90] The defendant bears the burden of establishing both deficient performance and prejudice, and bears the burden of establishing the factual predicate for the claim.[91]

3. CONFLICT OF INTEREST

Solernorona argues that his trial counsel committed errors and acted under a conflict of interest such that he was deprived of effective assistance of counsel. Solernorona's claim fails because he has neglected to cite any evidence showing that his defense counsel labored under an actual conflict of interest. He therefore necessarily failed to show that any conflict adversely affected his defense counsel's performance. Because Solernorona has failed to show that his counsel previously represented Jennings-Bush, he has failed to establish a factual predicate for his claim, and it must fail.[92]

4. FAILURES TO OBJECT AND INVESTIGATE

Solernorona argues that defense counsel's failure to object to the witnesses added the day before trial, and counsel's failure to investigate codefendants' criminal histories, rendered defense counsel constitutionally ineffective. As we discussed previously, the trial court properly allowed the witnesses to testify and defense counsel adequately cross-examined the witnesses regarding their prior convictions. Because defense counsel need not advocate a meritless position, his failure to further object to the witnesses' testimony did not constitute ineffective assistance of counsel.[93]

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[88] *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

[89] *People v Uphaus*, 278 Mich App 174, 185; 748 NW2d 899 (2008).

[90] *People v Hill*, 257 Mich App 126, 138-139; 667 NW2d 78 (2003).

[91] *Id*.

[92] *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

[93] *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

VII. CONCLUSION

The trial court did not err in admitting the evidence found in Solernorona's home or the evidence of the items found in Jennings-Bush's house. The trial court properly held that Solernorona knowingly, intelligently, and voluntarily waived his right to counsel in cross-examining Licorish. And the trial court did not abuse its discretion in allowing the prosecution to amend its witness list or in allowing the witnesses' testimony. Moreover, Solernorona failed to establish that his trial counsel was constitutionally ineffective for the reasons alleged both in his brief on appeal and his Standard 4 brief. However, because the trial court erred in scoring 10 points for OV 13, and we cannot determine whether the trial court would have departed from the sentencing guidelines absent this error, we must remand for resentencing.

We affirm Solernorona's convictions, but we remand for resentencing. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ William C. Whitbeck
/s/ Jane M. Beckering