STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 24, 2012
v	No. 304998 Oakland Circuit Court
DAJUAN MARTELL GEORGE, Defendant-Appellant.	LC No. 2011-235532-FC

Before: TALBOT, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

Dajuan Martell George appeals as of right his jury trial conviction of armed robbery.[1] We affirm.

On January 13, 2011, at approximately 1:30 p.m., George was with Jonathan Vincent Hunter and Chase Huss near the intersection of Lincoln and Thorpe in the city of Pontiac. Justin Burton, who had not met George, Hunter, or Huss before, was walking alone when George or Hunter called him over. Burton spoke with George and Hunter and understood that they were attempting to sell him drugs. Burton had one $20 bill and two $5 bills at the time. Burton told George and Hunter that he had $30 and he wanted $30 of "blow," meaning heroin. Burton, however, changed his mind and began to leave. When he did, Hunter pulled out a gun and pointed it at Burton, holding it a few inches from Burton's face. George and Hunter both demanded Burton's money. Burton tried to turn away and run, but he was "pistol whipped" twice on the back of the head. These were hard hits and he was bleeding severely. Burton still attempted to run away, and both George and Hunter chased him. George then punched Burton multiple times. Burton believed that at some point George was hitting him with an object, which may have been a necklace. As a result of George's actions, Burton suffered a bloody mouth and nose. George and Hunter took Burton's money and then stopped beating him.

Burton thereafter called 911 and followed George and Hunter from a distance. Burton lost sight of the men briefly when they went behind a garage. Huss thought Hunter went into a house and left the gun there. While Burton was on the telephone with 911, George and Hunter

[1] MCL 750.529.

started coming toward Burton. Police then arrived and arrested George and Hunter. A gun was not found on Hunter or in the area. George had a $20 bill and Hunter had two $5 bills. There was blood on George's coat and there was a belt, without a buckle, in the coat pocket. The blood on George's coat matched Burton's DNA sample. There was also blood on Hunter's sock and the two $5 bills. This blood, however, did not belong to Burton.

When Huss testified, he was asked about the time period when he was with George and Hunter before meeting Burton. Huss testified that they walked by a bank and:

> They [George and Hunter] - - I heard them over talking about trying to take this guy's money out of a truck, or he was - - he was at the pull in thing where you dispense the money from the tubes and they said they'd mentioned, you know, they wanted to do it, and then I just said that's probably not a good idea.

George objected to this testimony[2] and moved for a mistrial. The trial court, however, denied the motion and admitted the evidence.

On appeal, George argues that the trial court erred when it admitted Huss's aforementioned testimony and denied George's motion for a new trial because the probative value was "substantially outweighed by the danger of unfair prejudice."[3] We disagree.[4] When preserved, a trial court's decision to grant or deny a motion for mistrial is reviewed for an abuse of discretion.[5] "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial."[6] A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion.[7] Because George objected to the admission of evidence pursuant to MRE 404(b) and not MRE 403, the issue as presented is not preserved.[8] Unpreserved evidentiary error is reviewed for plain error.[9] Similarly, the unpreserved argument that a mistrial should have been granted pursuant to MRE 403 is reviewed

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[2] MRE 404(b).

[3] MRE 403.

[4] In his statement of the question presented, George states that the testimony "unfairly surprised" him. George, however, fails to mention or argue "unfair surprise" anywhere else in his brief. Thus, any argument in this regard is abandoned. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

[5] *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (1999).

[6] *Id*. at 514.

[7] *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005).

[8] *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

[9] *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

for plain error.[10] To demonstrate plain error, George must establish that error occurred, the error was plain, and that the error affected his substantial rights.[11]

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."[12] Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]"[13] "'Unfair prejudice' does not mean 'damaging.'"[14] "Any relevant testimony will be damaging to some extent."[15] Evidence is unfairly prejudicial when it injects "considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock."[16] Unfair prejudice also exists where "marginally probative evidence will be given undue or preemptive weight by the jury."[17]

In this case, Huss's testimony was relevant because the prosecution proceeded on a theory of aiding and abetting, which requires a showing that includes that George encouraged or assisted in the commission of the crime and that George intended the commission of the crime.[18] Huss's testimony made it more probable that George and Hunter were acting together or assisting each other in committing the charged crime of armed robbery and that they intended to commit the robbery. This probative value was not outweighed by the danger of unfair prejudice. The testimony was not that George and Hunter actually robbed the bank customer or even took steps to commit the robbery. It was only that they "mentioned" that they wanted to take his money. This testimony was never referred to again during trial. There is no indication that the challenged testimony was unfairly prejudicial by injecting considerations extraneous to the merits of the case or that it was only marginally probative and would be given undue weight.[19] There was no error when the trial court admitted the testimony because the probative value was not substantially outweighed by the danger of unfair prejudice.[20] Accordingly, George has failed

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[10] *People v Nash*, 244 Mich App 93, 96-97; 625 NW2d 87 (2000).

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

[12] MRE 401.

[13] MRE 403.

[14] *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995) (citation and quotation omitted).

[15] *Id*. (citation and quotation omitted).

[16] *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995) (citation and quotation omitted).

[17] *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

[18] *People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001).

[19] *Fisher*, 449 Mich at 452; *Crawford*, 458 Mich at 398.

[20] MRE 403.

to demonstrate plain error that affected his substantial rights with respect to the admission of the testimony or the trial court's denial of George's motion for a new trial.[21]

Next, George argues that OV 7 should not have been scored at 50 points. We disagree. This Court reviews the interpretation and application of the statutory sentencing guidelines de novo.[22] A scoring decision should be upheld if any evidence exists supporting the challenged score.[23]

OV 7 must be scored at 50 points if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense."[24] In overruling George's objection, the trial court stated "the victim was being struck on the top of the head by [Hunter] and [George] was punching him, and then they pursued him down the street. I think that's pretty terrorizing."

This Court recently considered the scoring of OV 7.[25] The *Glenn* decision determined "excessive brutality means savagery or cruelty beyond even the 'usual' brutality of a crime."[26] The decision also determined that the "defendant's conduct would have substantially increased the victims' fear only if the conduct was designed to cause copious or plentiful amounts of additional fear."[27]

When scoring OV 7, "circumstances inherently present in the crime must be discounted . . . ."[28] A person commits armed robbery when, while committing a larceny that person "uses force or violence against any person who is present, or who assaults or puts the person in fear" and "in the course of engaging in that conduct, possesses a dangerous weapon."[29] Thus, using "force or violence against any person" or an assault are "inherently present in the crime and must be discounted for purposes of scoring" OV 7.[30] "OV 7 is designed to respond to particularly heinous instances, in which the criminal acted to increase that fear by a substantial or considerable amount."[31]

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

[22] *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006).

[23] *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

[24] MCL 777.37(1)(a).

[25] *People v Glenn*, 295 Mich App 529; 814 NW2d 686 (2012).

[26] *Id.* at 533.

[27] *Id*. at 533-534.

[28] *Id.* at 535.

[29] *People v Williams*, 288 Mich App 67, 72; 792 NW2d 384 (2010).

[30] *Glenn*, 295 Mich App at 535.

[31] *Id.* at 536.

When scoring OV 7, "only the defendant's actual participation should be scored."[32] In this case, the record supports that after Hunter pointed a gun at Burton, demanded his money, struck him twice in the head, and began chasing him, George joined in, punching Burton over ten times and striking him with an unknown object. The record also supports that George, with Hunter, not only chased Burton when he tried to flee but again moved toward Burton when he was on the telephone with 911. George's conduct supports scoring OV 7 at 50 points, as it was "designed to substantially increase the fear and anxiety a victim suffered during the offense,"[33] and went beyond any force or violence or assault inherently present in the crime.[34] Burton sustained a terrifying beating as he was being chased. A trial court's decision should be upheld if any evidence exists supporting the challenged score.[35] Thus, the trial court did not err in scoring OV 7 at 50 points.

Affirmed.

/s/ Michael J. Talbot
/s/ Deborah A. Servitto
/s/ Michael J. Kelly

[32] *People v Hunt*, 290 Mich App 317, 326; 810 NW2d 588 (2010).

[33] MCL 777.37(1)(a).

[34] *Glenn*, 295 Mich App at 535.

[35] *Hornsby*, 251 Mich App at 468.